Rejecting the “False Choice”: Foregrounding Indigenous Sovereignty in Planning Theory and Practice

by

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Abstract

During the latter half of the 20th century, the term *sovereignty* has become a pivotal concept for describing the political goals of Indigenous movements. The term has come to stand for the general rights of Indigenous peoples to be self-governing and describe efforts to reverse and resist processes of ongoing colonization, dispossession and assimilation.

The purpose of this dissertation is two-fold. First, it explores the role of planning in the erosion of Indigenous sovereignty and the creation of conflicts over urban land use and development. More specifically, it examines the role of planning in the project of securing, aggrandizing and normalizing Canada’s sovereignty claims, and illustrates how the idea of sovereignty influences the configuration of relations between Canada and Indigenous peoples. While the concept of sovereignty is not commonly discussed in planning literature or planning policy, it is argued that concepts such as property, jurisdiction, and Aboriginal rights serve as a cipher for sovereignty in the context of planning. This dissertation research finds that the practices and principles of planning
aid in the narration of a political imaginary and the creation of a legal geography which affirms Canada’s territorial and moral coherence. This examination of planning was placed against the backdrop of broader historical tendencies in Canadian Aboriginal policy.

The second purpose of this dissertation is to consider how taking Indigenous political authority seriously can present new ways of thinking about both planning and sovereignty. It is argued in this dissertation that Indigenous understandings of sovereignty originating in Indigenous law and Indigenous interpretations of Canadian law must be placed in the foreground in planning theory and practice. In the past, the interventions and alternatives advocated by planning both theorists and policy makers to improve the position of Indigenous peoples in planning processes have largely emphasized the recognition and inclusion of Indigenous peoples and reduced Indigenous struggles over territory to the realm of identity politics. As an alternative, foregrounding Indigenous political authority can present new ways of thinking about both planning and sovereignty.
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Chapter 1: Introduction

When we express the notion of sovereignty or sovereign title to our lands we emphasize that, prior to 1763, at 1763, and up to today, the chain of sovereign existence of our peoples has been unbroken; it comes to us from the past and it will continue in the future. The intervention of settlement in this country these past three to four centuries has not broken that sovereign existence of our peoples. Our point of departure lies in our basic understanding that we have no other way to relate to Canada except as sovereign peoples. That is where we start from; that is what we intend to protect; that is what we intend to exercise for all time.

(Chief Joe Matthias, First Ministers Meeting, July 1986)

1. Introduction

During the latter half of the 20th century, the term *sovereignty* has been a focal point for Indigenous movements in describing their political goals and strategies of resistance (Barker 2005). The term has come to stand for the general rights of Indigenous peoples to function as self-governing people and the effort to reverse and resist processes of ongoing colonization, dispossession and assimilation. This dissertation begins with the basic assumption that Indigenous peoples in Canada have an inherent right to self-determination. This inherent right was established long ago.

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2 I use the term Indigenous to refer to the various sovereign nations who have inhabited North America for millennia. Following Johnson et al (2007), I use the word Indigenous when not referring to specific peoples, and this word is capitalized in the same manner that words such as “European” and “American” are capitalized. I also acknowledge the deep imperfection of this term. As Bonita Lawrence reminds us, “for indigenous people, to be defined as a race is synonymous with having our Nations dismembered” (Lawrence 2003, 5). Where it has been appropriate, I have used the specific names of Nations rather than more generic terms. I use the words “Aboriginal”, “Indian” and “First Nations” when discussing specific legal categorizations, such as Aboriginal, Métis and Inuit people as recognized under S.35 of the *Constitution Act, 1982.* In this context, I use the terms “Aboriginal” and “Indian” interchangeably when writing about Canadian policies dealing with Aboriginal or Indian peoples, to reflect the changing use of these terms in policy contexts over time.
before the arrival of European settlers and is derived from the fact that Indigenous peoples were sovereign before European settlers arrived. As Squamish Chief Joe Matthias stated at a meeting of First Ministers in 1986, settlement has not changed that fact. Yet, the process of settlement is often understood as adequate for the erasure of Indigenous political authority, and its replacement by non-Indigenous sources of power and authority. The arrival of settlers has thus set up competing sovereignty claims.

Over the last 200 years, of relations between Indigenous and non-Indigenous peoples have often been characterized as filled with conflict (Miller 2004). Because Indigenous peoples and the Canada government claim territorial and decision-making authority within a shared space, the question of land rights has been the focus of much of this conflict (Notzke 1994). Justice Sidney Linden, Commissioner of the Ipperwash Inquiry\(^3\), stressed in his final report that the potential for conflict has increased in recent times, and noted the role of the government in creating the conditions for “crises”:

My analysis has convinced me that Aboriginal occupations and protests are not inevitable, nor are they inevitably violent. If I could sum up this report in a single thought, it would be this: The provincial government and other institutions must redouble their efforts to build successful, peaceful relations with Aboriginal peoples in Ontario so that we can all live together peacefully and productively….We must move beyond conflict resolution by crisis management. And we cannot be passive; inaction will only increase the considerable tensions that already exist between Aboriginal and non-Aboriginal citizens in this

\(^3\) The Ipperwash Inquiry was a public inquiry launched by the Government of Ontario in November 2003. The mandate of the inquiry was to inquire and report on the death of Dudley George, an Ojibwe man who was shot and killed by Ontario Provincial Police during a standoff in Ipperwash Provincial Park in 1995.
province. Research in the course of the Inquiry showed that the flashpoints for Aboriginal protests and occupations are very likely as intense today as they were during Ipperwash, Oka, Burnt Church, or Gustafsen Lake. No one can predict where protests and occupations will occur, but I am convinced that the fundamental conditions and catalysts sparking such protests continue to exist in Ontario, more than a decade after Ipperwash. Indeed, it appears that the flashpoints for Aboriginal protests and occupations may be intensifying. (Linden 2007, Vol. 2, 2)

Many of the major flashpoints in Canadian-Indigenous relations have been precipitated by municipal planning decisions. For example, in 1990, 3500 troops were deployed at Oka, Quebec to end a Mohawk land reclamation. This military intervention—at the time the largest deployment of the Canadian military since the Korean War, and the largest deployment of force by a settler state since the “Indian Wars” (Simpson 2011)—was the result of a decision taken at the municipal level to turn sacred Mohawk land into a 9-hole golf course. This event highlighted the need for the resolution of long-standing land claims (Gabriel 1992; Green 1995; Hill 2009; McGregor 2009). While this event was cast as an ahistorical occurrence of civil disobedience (Green 1995), it is symptomatic of several hundred years of conflict and failed negotiations between the Mohawks and the Crown over the use and access of land resources in the traditional territories of Mohawk peoples (Green 1995; McGregor 2009).

In addition to such occupations, the federal land claims process is one space where competing claims to territory are visible. There are over 900 unresolved land claims in Canada today (INAC 2007) and current policies guiding the resolution of land claims are not capable of resolving the majority of claims in a timely way (Coyle 2005). In the mean time, the integrity of lands and resources claimed by Indigenous
peoples is threatened by development. Although the recent *Haida* and *Taku River Tlingit* decisions of the Supreme Court of Canada affirmed that resource development can ultimately regulate or nullify Indigenous land rights (Tzimas 2005), these decisions have focused on defining the role of the provincial and federal governments. Thus, while federal and provincial governments have a duty to consult and accommodate Indigenous peoples before approving development that may infringe upon Aboriginal rights (Jacobs 2006), the role of municipalities remains undefined.

The settlement and management of territory through the creation of land use and settlement plans is today largely the domain of municipal planners. The unilateral right asserted by the government to administer property rights, determine land use, and control development is contested by Indigenous peoples, who assert that they have never given up their sovereign lands (Weaver 1996; LaDuke 1999). Planning in Canada is conducted primarily on a regulatory basis. While landowners generally have a right to develop their land, this right is constrained and regulated by provincial policy as administered by municipalities. Thus, municipal planners have considerable power to influence urban land development by creating land use plans and approving development applications (Makuch et al 2004). However, the role of local planning in the dispossession of Indigenous peoples and the regulation of Indigenous rights is a topic that has been largely ignored in the field of planning (Borrows 1997a).

Borrows (2005) lists a number of mechanisms that determine the allocation, ownership, occupancy, use and enjoyment of land in Canada, including: treaties, executive proclamations, scrip, unilateral legislation, reserve and royal commissions,
segregation, assimilation, litigation and land claims processes, expropriation, and war (Borrows 2005, 15-16). Like the processes listed by Borrows, planning is one mechanism by which land in Canada was settled, and continues to be a key mechanism in the development and management of land today (Porter 2010). Land use planning is a vehicle for determining land occupancy, use and enjoyment, and hinges on principles such as ownership and the efficient allocation of resources. Indigenous peoples have always asserted their right to use, occupy and access their traditional lands. Yet, the regulatory regime does not take this right into account (Teillet 2005).

2. Research Questions and Framework

The purpose of this research is to explore the role of planning in the erosion of Indigenous sovereignty and the creation of conflicts over urban land use and development. It will examine the ways in which land use planning has played a role in the dispossession of Indigenous peoples. More specifically, it will examine the ways that understandings of jurisdiction, property, and consultation, which are central to planning activities, are informed by colonial legal knowledge which is based on the assumption of Canadian sovereignty and the denial of Indigenous sovereignty.

Stanger-Ross (2008) has coined the term municipal colonialism to describe the role of urban planning in the erasure of Indigenous peoples from the urban landscape and establishing settler presence. Stanger-Ross (2008) argues that municipal colonialism takes a distinct form, different from the forms of colonialism
exercised, for example, by the federal government. Taking the reverse position, I shall argue that the practices of urban planning must be viewed in the context of broader national policies and political projects. While the management and development of land at the municipal level is central to this research, it is important to consider the broader political contexts in which local land use planning is located. Thus, while this research will focus on examples taken from southern Ontario, it will also take into consideration national policies and programs dealing with Aboriginal peoples. This research is guided by three sets of related research questions:

**Regimes of Planning Practice**

What formal institutions and practices currently govern urban land use planning in Ontario? How do the official contexts created by laws governing land use and ownership limit the strategic room for maneuver for Indigenous peoples when it comes to contesting imposed regimes of land use planning? How does planning discipline the rights claims of Indigenous peoples? Does the introduction of consultation requirements in planning represent real progress in the recognition of Indigenous rights, or simply reflect the expanding capacity of the state to rule Indigenous life?

**Planning and Sovereignty**

What is the relation of planning to the project of securing and aggrandizing Canada’s sovereignty claims? How do the practices of planning normalize Canada’s sovereignty claims? How does the juridical model of sovereignty influence the configuration of relations between Canada and Indigenous peoples?
The Potential of Planning

What possibilities do the instruments of planning offer to the goal of reconciliation? Can planning support the aims of Indigenous self-determination?

2.1 Regimes of Practice

This dissertation examines the institutions and practices of planning and their role in shaping relations between Indigenous peoples the state. One purpose of this investigation is to understand how planning creates the context within which disputes over land ownership and development take place. In this dissertation I follow Yiftachel’s definition of planning as the “formulation, content, and implementation of spatial public policies” (Yiftachel 1988, 395). Yiftachel’s definition includes a broad variety of activities which have the effect of producing and ordering space, including: the creation and implementation of urban and regional development policies and plans, zoning by-laws, consultation plans, land use plans, cultural heritage plans, etc. Planning thus encompasses strategic spatial policies and practices carried out at the urban, regional, and national level (Friedmann 1979). By this definition treaties, Indian land policies, and other documents that determine land use (e.g. “land reserved for Indians”) must also be considered part of a broad planning framework, as they also strategically produce and order space.

In Foucault’s terms, I want to locate planning within a “regime of practice” which takes into account “programmes of conduct which have both prescriptive effects regarding what is to be done (effects of ‘jurisdiction’), and codifying effects regarding what is to be known (effects of ‘veridication’)” (Foucault 1991, 75). Thus, the study of the statutory planning framework serves as a point of entry for
examining how local planning can be viewed as part of broader projects aimed at securing claims to territory and sovereign power. Identifying the knowledges and assumptions upon which the planning framework is based will enable me to challenge those assumptions, and understand how planning is implicated in the generation of political legitimacy by using and producing knowledge about ownership and authority.

2.2 Sovereignty and Planning

While I have sought to draw upon Indigenous authors and perspectives in this research, I also draw upon western political theory. In particular, I rely on Foucault’s treatment of sovereignty in *Society Must Be Defended* (1997) to develop a vocabulary that captures the political nature of struggles over land and authority as they arise in the planning process. Sovereignty, understood as a “claim to final and ultimate authority over political community” is a foundational concept in western political theory, and underlies the modern state system (Flint 2009, 706). Foucault noted that since the Middle Ages, the “premier instrument” of sovereign power has been the law, and has centered on the monarch. Thus, the “juridical” model of sovereignty seeks to establish the legitimacy of the power exercised by the monarch, and is primarily concerned with the political and moral coherence of sovereign power (Foucault 1997, 24).

In his 1975-1976 lectures, now collected under the title *Society Must be Defended*, Foucault challenged this juridical model of sovereignty and advocated a mode of inquiry which focuses on the constitution of subjects through power, rather than the
constitution of power through subjects. He cautioned against a binary model of power, which views power in terms of those who have it and those who do not (Foucault 1997, 26), and argued that the study of sovereignty should begin with an investigation of its local mechanisms:

…rather than asking ourselves what the sovereign looks like from on high, we should be trying to discover how multiple bodies, forces, energies, matters, desires, thoughts, and so on are gradually, progressively, actually and materially constituted as subjects, or as the subject. To grasp the material agency of subjugation insofar as it constitutes subjects would, if you like, be to do precisely the opposite of what Hobbes was trying to do in *Leviathan*. Ultimately, I think that all jurists try to do the same thing, as their problem is to discover how a multiplicity of individuals and wills can be shaped into a single will or even a single body that is supposedly animated by a soul known as sovereignty. (Foucault 1997, 28)

Foucault’s interventions against the juridical model of sovereignty and his emphasis of the micro-politics of power are of strategic significance because they serve to “de-emphasize[s] the state and to show that the exercise of power is dispersed throughout the social order” (Baxter 1996, 476). At the same time, the state is not completely bracketed, rather the approach assumes that the power is not located or concentrated in the state, but rather is constituted and produced at multiple sites. Although Foucault does not extend his analysis of sovereignty to colonial contexts, there are many similarities between the theoretical challenges Foucault raises with regards to the juridical model of sovereignty, and the strategic challenges the juridical model raises in struggles for Indigenous sovereignty.

Much of the Indigenous political discourse in the last 60 years has focused on constructing legal arguments for sovereignty and demonstrating that the idea of self-determination of Indigenous peoples is fundamental to the existing legal and
political order in Canada (Henderson 2002). For instance federal and international law is often looked to as sources which legitimize Indigenous self-determination. A frequently cited example is the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada in 2010, which affirms the right of self-determination: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (Article 3, UN Declaration on the Rights of Indigenous Peoples, 2007). Similarly, sections 35(1) and 91(24) of the Constitution Act (1982) acknowledge that Aboriginal peoples enjoy a unique relationship with the Canadian state. The interpretation of the scope and content of the “Aboriginal and Treaty rights” protected by section 35 (1) of the Constitution has been the focus of a significant volume of scholarly writing and the focus of numerous cases of the Supreme Court of Canada (see: Macklem 1997, Borrows 1999).

Although international law and specific interpretations of Canadian law provide significant support for the argument that Indigenous peoples have an inherent but unrecognized right to sovereignty which includes the right to govern themselves, the notion of sovereignty as it is understood in the context of law also poses a problem. Numerous Indigenous scholars have underlined the fact that Indigenous understandings of sovereignty are based on relationships to land, an understanding of sovereignty which is often underemphasized in legal contexts (Montour-Angus 1995). Likewise, Alfred (2005) has argued that the concept of sovereignty has been over-determined by western juridical terms. Corntassel (2008) further advances this argument, suggesting that a rights-based discourse has not
been effective in fulfilling Indigenous aspirations to political self-determination. Rather, the rights-based discourse has separated questions of access to land and natural resources from those of political autonomy. Thus, Corntassel rejects an understanding of self-determination that relies on the state as the source of political power because it limits the potential for communities to determine the content of self-determination for themselves, based on community culture, values and political systems. He argues "the pursuit of a political/legal rights-based discourse leads indigenous peoples to frame their goals/issues in a state-centered (rather than community-centered) way" (Corntassel 2008, 115).

The orientation towards juridical models of sovereignty poses a strategic challenge for Indigenous struggles. Cassidy (1998) has argued that this orientation towards western law and notions of sovereignty presents a “false choice” between the “acknowledgement of Indigenous sovereignty and the consequent destruction of the ‘occupying’ state’s sovereignty” or the “continuation of the past denial of Aboriginal sovereignty” (Cassidy 1988, 99; see also Bruyneel 2007). The emphasis on rights within a legal framework limits the possibilities for decolonization to the legal remedies offered by the western legal system. Aileen Moreton-Robinson (2006) has summarized the challenges of the literature on Indigenous sovereignty in which rights are often viewed as productive and enabling. She points out that this reliance on rights is also on one of the weaknesses of this approach to analyzing sovereignty, because it relies on notions of law and state power as the primary sources of both power and Indigenous identity. She writes:
The limitation of this literature lies in the reliance on ‘rights’ as the cipher for analysing Indigenous sovereignty. It does not reorient our conceptualizations of power outside of a law, right, and sovereignty paradigm to think about Indigenous power and sovereignty in different ways. (Moreton-Robinson 2006, 385)

In this dissertation, I will argue that the legislative, legal and policy models which currently configure relations between Indigenous peoples and Canada reflect a juridical model of sovereignty, and place discussions of Indigenous politics within a ‘rights’ framework which limits understandings of Indigenous power and sovereignty to those understandings which can be read through the Canadian legal framework. While these models of rights in Canadian law provide some protection for and acknowledgement of Indigenous rights, they fail to reflect sovereignty as it is understood by Indigenous peoples.

As an alternative, in this dissertation I look to Indigenous law and Indigenous re-interpretations of treaties signed between Indigenous peoples and the Crown for alternative models of political power and relationships. Early relationships between Indigenous and non-Indigenous peoples have been characterized as co-operative relationships between sovereign peoples (Canada 1996). These relationships were often formalized through wampum belts, which served as visual memory devices for oral agreements made (Borrows 2007). For example, the Kahswentha’ belt (also known as the Two-Row Wampum) is the symbol of a 17th Century treaty relationship formed between the Haudenosaunee Confederacy and Dutch settlers in eastern New York. The belt consists of alternating rows of purple and white beads running the length of the belt. The meaning of the belt is found in the symbolism of
the rows of beads. The two rows of purple beads represent two vessels travelling side-by-side on the river of life: one row represents the Dutch settlers, while the other represents the Haudenosaunee.

Figure 1: Two Row Wampum—This copy hangs in the University of Toronto Law School

The rows of white beads, which separate the purple rows, represent the Haudenosaunee principles of skennen (peace), kariwiio (good mind), and kasastensera (strength) (Ransom & Ettenger 2001; Hill 2008). The treaty belt is symbolic of the mutual recognition and independence of distinct European and Indigenous societies. It represents the nature of the nation-to-nation relationship that was envisaged by Haudenosaunee people (Hill 2008). While each travels separately, they are nevertheless joined by the principles of peace, understanding and strength. The Kaswentha’ thus calls for cooperation, the recognition of common interests, mutual respect—including respect for different systems of knowledge. Today, these two systems represented by the Kaswentha’ persist. However, today the existence of an independent and sovereign Haudenosaunee society is not recognized by Canada.
Similarly, treaties are looked to as affirming the right of Indigenous peoples to use their traditional lands and resources for their own benefit and to make decisions about how their traditional territories are used by others. Treaties also grant the right to use the land to non-Indigenous people (Turner 2006). Many treaties serve to legitimize British presence in Indigenous territories. While almost every treaty negotiation contained elements of “dishonesty, trickery, deception, fraud, prevarication, and unconscionable behaviour on the part of the Crown” (Borrows 2002, 113), the value of treaties as expressions of Indigenous political authority, and guarantors of Indigenous land rights means that treaties continue to play an important role in arguments advocating Indigenous self-determination and restoration of political authority (Turner 2006). It has been argued that the authority of the Crown is derived from treaties, and it has been proposed that treaties should form the foundation for provincial and federal authority through the establishment of “treaty federalism” (RCAP 1996 Vol. 2(1), 194; Henderson 2002, 426). Finally, treaties set out the rights of both Europeans and Indigenous peoples to live in Canada as self-governing peoples, and contain numerous models for co-existence and sharing of land, including nation-to-nation relationships. These treaties thus apply to both Indigenous and non-Indigenous peoples. As Sidney Linden reminds us “we are all treaty people” (Linden 2007 Vol. 2, 157). Thus, in this dissertation I also consider how these sources of law might provide alternative understandings of political authority, and consider their relevance for the planning process.

Considering the strategic limitations of the juridical model sovereignty, and its lack of prominence in planning literature, sovereignty is perhaps not the most
obvious starting point for a normative framework of analysis for a planning dissertation. Indeed, the question of sovereignty did not explicitly arise as I conducted my field research. Rather, when it comes to discussing the nature of the relationship between the Crown and Indigenous peoples, or between municipalities and First Nations communities, questions of rights and jurisdiction loom much larger. As I will discuss in greater detail in Chapter 5, provincial policy dealing with Aboriginal relations is largely driven by narrow legalistic understandings of concepts such as “Aboriginal and treaty rights,” and the “duty to consult.” Hence, while planning is not usually understood in terms of its capacity to mediate sovereignty claims, in this dissertation I will argue that the discourse of Aboriginal rights and the concept of jurisdiction serve as a cipher for sovereignty in the context of local planning regimes. In other words, although the notion of rights shapes and the nature of interaction between municipalities and First Nations, fundamentally, the nature of the relationship between Indigenous peoples and the Canadian state, and the status of their competing sovereignty assertions, are at stake.

This dissertation will provide a survey of current practices of planning, which I argue, are fundamental to aggrandizing and securing Canada’s sovereignty claims. My objective is not to merely to demonstrate that planning is arbitrary, or an unwitting partner in the circulation of colonial sovereignty claims, or to locate racist elements in planning rationality. Rather, my purpose is to make legible the conditions which make the practices of planning a necessary and acceptable element in the establishment of sovereignty by the settler state. A critical analysis of planning through the lens of sovereignty will allow me to highlight how planning is implicated not only in ongoing processes of dispossession, but also in the
normalization of non-Indigenous land occupation, and the circulation and expansion of racist planning knowledges. Thus, I rely on an analysis of the ways in which the idea of sovereignty is produced in the planning process through discussions of jurisdiction and rights, and demonstrate how planning in mobilized in the settler-state’s exertion of a monopoly on the production of political legitimacy. Moreover, I will consider how juridical models of sovereignty shape the nature of relations between Indigenous peoples and Canada, and ask how such understandings of sovereignty limit possibilities to imagine new kinds of relationships.

2.3 The Potential of Planning?

The final questions I wish to address concern the potential of planning to support Indigenous sovereignty. I do not devote a lot of space to this question, yet it is one of the questions that motivates this research in the first place. The literature on positionality dictates that I clearly identify the position I occupy because it shapes both my research question and outcomes in untold ways (Cahill 2007), and although I do not believe the complex power relations associated with research can be adequately captured or addressed through admissions of perceived power associated with race, class or educational status, this research is clearly motivated by my position as a future planning educator and planning theorist. I feel confident in my ability to make an argument about the role of planning in historic and ongoing colonialism, and I am certain of the claims regarding Indigenous sovereignty I make here. Yet, I fear that inevitable question from the earnest planning student: if what you have said is true, then what are we supposed to do now?

It seems that planners have always been faced with a “dilemma of praxis”
(Roy 2006), arising from the recognition of the complicity and participation of planning in strategies of domination, planning’s commitment to action, and driven by the question “what is to be done?” (Fainstein 2000). The connection between planning theory and practice and colonialism has been well established (see: Jacobs 1996, Harris 2004, Porter 2006, Porter 2010), and planning theorists have called for the de-colonization of planning (Peters 2005; Porter 2006, 2010), and the injection of “south-eastern” (Yiftachel 2006) and post-colonial perspectives into planning theory (Roy 2006, Rankin 2010). Yet, the question of how to orient praxis remains unresolved and planning theorists continue to struggle with the question of how to “disentangle themselves from the instrumentalism of responsibility” and “confront questions of expertise, privilege and benevolence” (Roy 2006, 25).

In the context of planning with Indigenous peoples, Libby Porter (2010) focuses on the development of an ethics of love in planning practice and rejects the notion that planning can be improved through improved planning techniques. Instead, she advocates that planners turn their attention towards their own affective positions, and plan with a spirit of love, for “to ignore the presence of love is surely to disavow our own humanity. Equally, to ignore the possibility, agency and power of love is to fail liberation” (Porter 2010, 158). She continues:

An ethic of service can humble arrogance, and orient care and attention to where injustice exists. It would unsettle divisions by placing people in a different relation with each other: one of service, not of ‘winning’ the argument...The stance of service acknowledges who we are, our position in the relationship Indigenous-non-Indigenous, but reminds us that we are always more than this, because we are in service to each other. Compassion invites connection with suffering and injustice at a level other than the analytical. It orients the energy of our care and attention, and is supple
enough to operate anywhere, in any circumstances. Insight re-places the importance of understanding and analysis, and reminds us that any practice must be self-aware as well as world-aware. It must challenge us intellectually as well as move our hearts. The critical stance of analysis that is so necessary to the work of the decolonization of planning must take place within a spirit of love. That is where we will be moved. (Porter 2010, 158).

While I admire Porter’s willingness to take a risky stance requiring not only dedication and honesty, but also self-transformation, I fear that this spirit of love and service, rather than orienting our care, may serve to bracket difference while continuing to position Indigenous peoples as objects of planning’s responsibility (see: Roy 2006). This is why I have placed the questions of the procedural and structural elements of planning in the foreground, and seek to politically engage these basic elements of planning in this dissertation. At the same time, I want to consider how planners might think differently about planning with Indigenous peoples, in a way that does not cast relations with Indigenous peoples as a problem to be solved.

James Tully observed “Indigenous claims to sovereignty create a practical problem [that] is the relation between the establishment and development of western societies and the preexistence and continuing resistance of indigenous societies on the same territory” (Tully 2001, 37). However, I want to challenge the idea that Indigenous people are merely a problem for the establishment of western society. In this dissertation, I want to consider how taking Indigenous political authority seriously can present new ways of thinking about both planning and sovereignty.
3. Structure of the Dissertation

In Chapter 2, I conduct a review of the literature on Indigenous peoples and planning. I note that literature emphasizes improving the position of Indigenous peoples in the planning process through innovation in planning techniques. I argue that this literature fails to address Indigenous sovereignty, rights, history, or participation in a way that reflects Indigenous perspectives on these issues. In this chapter, I propose an alternative approach to planning theory that begins with historicizing planning practices and challenges the assumptions about Indigenous knowledge, status and history which define planning. In this chapter, I also outline the procedures and methods that inform this dissertation.

Chapter 3 confronts the jurisdictional logic that organizes the planning system in Ontario. In the context of planning decision-making in Ontario, arguments for and against engaging with First Nations are clearly centered on issues of jurisdiction and rights. I argue that a narrow, administrative understanding of jurisdiction and rights has served to exclude Indigenous peoples from the planning process. Exclusion, and the work it does in creating spheres of jurisdictional authority, is a powerful tool for the maintenance of Canada’s sovereignty claims. Planning, as a tool of exclusion, has an important role to play in the circulation of a race-neutral discourse of jurisdiction which serve to re-produce Canada’s sovereignty claims. Through arguments about jurisdiction, and the discussion of what properly constitutes the sphere of planning, planning serves to normalize non-Indigenous property claims while dismissing Indigenous claims to territory and to decision-making authority.
In Chapter 4 I discuss how planning is organized around the management of property ownership. I demonstrate how non-Indigenous property ownership is naturalized in a planning process that views the management of property as a race-neutral, technical activity. Through an examination of a series of by-laws created by the City of Brantford, I explore how ideas of property ownership also support a discourse of law and order that mask state violence and extend the jurisdictional argument deployed by planning to exclude Indigenous peoples from planning, and allows Indigenous sovereignty to be located outside of the legal order of the state.

In Chapter 5, I examine how the “duty to consult” is interpreted and applied by the Ontario provincial government and by municipalities in the context of local land use planning. The recognition of this duty is heralded by the government as a symbol of great progress towards reconciling relations between Indigenous peoples and the government. While the duty to consult is relatively new, my field research indicates that the implementation of consultation policy represents an expanding capacity of the government to rule over Indigenous life by interpreting the duty within the framework of liberal-multicultural understandings of “recognition.”

Finally, Chapter 6 provides a summary of the dissertation, and some concluding comments. Considering Joe Mathias’ instruction that the point of departure for Indigenous politics lies in the understanding that Indigenous peoples have no other way to relate to Canada except as sovereign peoples, I will consider how foregrounding Indigenous political authority might suggest different ways of approaching planning theory and practice.
Chapter 2: Literature Review and Methods

1. Introduction

Planning is a broad field that has been informed by numerous theories and produced a variety of approaches to practice. Despite the varying approaches that planning theorists have taken to planning problems, the idea that planning serves a normative function unifies planning theory (Forester 1987, Rankin 2010). Rankin (2010) argues that it is this drive towards improvement that often produces an orientation towards the future in planning, in which history is reduced to a “functionalist and politically decontextualized ‘lessoned learned’ or ‘best practices’” (Rankin 2010, 182). Beyond focusing on future outcomes, planners have often explicitly avoided placing politics in the foreground by explicitly avoiding questions of power in order to privilege questions of practice.

For example, in the introduction to Planning in the Face of Power (1989), in which John Forester outlines a communicative approach to planning, Forester notes that his discussion entirely brackets the question of power. He explains:

[The] structural political-economic forces that stage day-to-day practice are often referred to, but they are not systematically assessed in the chapters that follow; these forces also demand more attention. Thus, while this book provides an analysis of practice that is both general in its reach and practical in its focus, it does not present comparative analyses of different domains of planning and administrative practice. (Forester 1989, 13)
As I will explain in this chapter, this broad tendency in planning to ignore questions of power and politics while emphasizing practice is also apparent in the literature on Indigenous peoples and planning. Yet, if this relationship is both historically rooted and political in nature it is difficult to imagine what contributions planning can make without placing questions of history and politics at the forefront of the research agenda.

My purpose in this chapter is two-fold. First, I will provide an outline of the current literature on Indigenous peoples and planning, and highlight the ways that this literature has dealt with issues of history, sovereignty, rights, and Indigenous participation in planning. This dissertation emphasizes relations between Indigenous peoples and Canada as a relationship shaped by competing sovereignty claims. Moreover, this political relationship often coalesces around issues of land access and use. In this dissertation, I want to highlight the role of planning in the configuration of relations between Indigenous peoples and Canada, and in the aggrandizement or denial of these competing sovereignty claims. As such, I want to foreground the inherently political nature of planning given its function in managing land use and development.

Second, I will outline the approaches and methods which inform this research and which are designed to re-contextualize planning practice in Ontario and highlight how planning is a powerful mediator in relations between Indigenous peoples and the Crown. This dissertation begins with the assumption that Indigenous peoples in Canada are sovereign peoples and have an inherent right to self-determination. Thus, beyond creating a framework for critically examining planning, my goal is to propose a mode of inquiry that will lend itself to thinking
about planning in the context of acknowledging and supporting Indigenous political aspirations.

2. Literature Review

In reviewing the current literature, I examined articles that were concerned with the practice of planning. There is a relatively small body of literature that has as its main focus the relationship between planning and Indigenous peoples. Most of this literature focuses on the situation of Indigenous peoples in the settler-colonial states such as Australia, Canada, Aotearoa-New Zealand and the United States. Most of this literature is based on case-studies which examine instances of resource co-management in wilderness areas, or conflicts over industrial resource extraction. There is also small body of literature that discusses the use of western planning techniques within the borders of American Indian reservations (Jojola 1998; Zafeteros 1998; Zafeteros 2004; Hibbard 2006).

While the literature on struggles over resource management offers a great deal of insight into the practical and political challenges of establishing co-management regimes, the omission of issues of urban land development and urban land management is startling. The avoidance of this issue in both the scholarly literature and the policy arena suggests a lack of will by planning theorists to fully engage with settler-Indigenous relations. Urban land development not only leads to radical changes in the landscape, and drastically alters the kinds of uses for which land is available, it introduces a new and multi-layered set of property and jurisdictional interests. Urban development often involves the expansion or establishment of urban boundaries, bringing with it new, municipal forms of governance. More importantly, urban land development generally involves the
introduction of new property interests through sub-division and sale of property, potentially introducing hundreds, if not thousands of new landowners to an area.

My approach in analyzing this body of literature is inspired by Turner (2006). Turner (2006) provides a survey of major currents in Aboriginal policy, and Indigenous responses to those policies in Canada. Based on this research, he deftly outlines four mains reasons why Aboriginal policies proposed by the federal government have largely failed to gain the support of Indigenous peoples in Canada:

1. They do not adequately address the legacy of colonialism.

2. They do not represent the sui generis nature of Indigenous rights as a class of political rights that flow out of Indigenous nationhood and that are not bestowed by the Canadian state.

3. They do not question the legitimacy of the Canadian state’s unilateral claim of sovereignty over Aboriginal lands and people.

4. Most importantly, they do not recognize that a meaningful theory of Aboriginal rights is impossible without Aboriginal participation. (Turner 2006, 7)

Turner’s outline of key failures of liberal rights discourses in Canada serves as an outline against which an adequate theory of Indigenous rights can be imagined. Turner (2006) argues that an adequate theory of Indigenous rights must address the legacy of colonialism, it must represent Indigenous rights as flowing from Indigenous sovereignty, it must question the legitimacy of Canada’s unilateral claim
of sovereignty over Indigenous peoples, and must provide an account for how Indigenous participation will be secured. Thus, this literature review focuses on the small body of literature which considers the role of planners in mediating Indigenous-government relations in resource management planning, as well as the even small body of planning theory which considers how planning has affected Indigenous peoples. In reviewing this literature, I follow Turner (2006) in paying particular attention to how the literature dealt with the themes of history, participation, recognition, and sovereignty.

2.1 History

Despite the variety of geographic locations this literature is drawn from, this literature is relatively homogenous when it comes to dealing with history. Most of this literature begins with the premise that indigenous people have suffered historic injustices (Memon 1991; Berke et al 2002; Porter 2004; Sandercock 2004; Hibbard et al 2008). For example, Hibbard et al. (2008) comment

> post-settler states have achieved statehood by, *inter alia*, systemically dispossessing and subjugating indigenous populations. This involved, first, attempts to physically remove indigenous groups through relations and/or (formal or informal) policies of extermination, followed by programs of social and political assimilation.  

(Hibbard et al. 2008, 137)

Similarly, Sandercock (2004) argues

> the process of city-building required an ordering of urban and regional space by a whole range of spatial technologies of power such as the laws of private property, the practices of surveying, naming and mapping and the procedures of urban and regional planning. The effects of these various sorts of legal and/or violent arrangements and appropriations were the effective dispossession and exclusion of
indigenous peoples, the original inhabitants of these lands.” (Sandercock 2004, 118)

However, such claims regarding the impact of colonialism on Indigenous peoples, and the role of planning in colonial dispossession are largely asserted, and are not the focus of inquiry. Thus, dispossession is presented as a historical fact and not interrogated as an ongoing process.

Planning has often been characterized as an idealistic, progressive profession (Davidoff 1973; Hall 1988; Friedmann 1987; Hibbard & Lane 2004) that promotes democratic processes (Forester 1990; Healey 1992). In this literature, the acknowledgement of the historic injustices which have been done to Indigenous peoples as a result of colonialism offers an opportunity for planning theorists to re-affirm idealist understandings of planning by positing the tools of planning as a solution to colonial dispossession. For example, as Hibbard et al (2008) argue

Because the fundamental concerns of planning include the organization and management of land and resources, the importance of place and support for democracy…planning is a very pertinent lens through which to address state responses to indigenous claims. More broadly, planning is concerned with mediating between diverse claimants, especially in the use of urban and rural landscapes, it has a problem solving focus; it has a future-seeking dimension that is concerned with improving the circumstances of human existence, commonly expressed as equality and sustainability. **Most importantly, it has an emancipatory role; it has the potential to transform the structural dimensions of oppression...** (Hibbard et al. 2008, 138. Emphasis added.)

The issue of historic injustice is not addressed for the purpose of better understanding the ways in which planning is implicated in colonial projects. Rather, the acknowledgement of historic injustice is presented in order to assert the role that
planners can play in rectifying the negative effects of colonialism. Divorcing planning from history allows planning to be presented unproblematically as a solution to colonialism. Moreover, sidestepping the issue of planning’s historic role in colonialism allows commonly held beliefs about the ability of planning to address social ills and improve human welfare to remain unchallenged, preserving planning’s identity as a progressive practice.

This approach to planning history provides a good example of what Dean (1994) has labeled a “progressivist” approach to history and theory. A progressivist approach “proposes a model of social progress through the teleology of reason, technology, production, and so on…(it) is exemplified by the narratives of the Enlightenment...[and] seeks to adopt the prestige of the natural sciences…” (Dean 1994, 3). According to a progressivist model of history, then, future success is guaranteed once the correct sources of knowledge and correct methods can be found and applied to a given situation. In the context of planning, the failures of past practice are not viewed in terms of the harm they have caused. Rather, the failure of past planning practice to address the situation of Indigenous peoples is viewed as an opportunity to improve planning practice in the future. In planning, the progressivist teleology is evident in the way in which the discipline relies on past failure to affirm the identity of the discipline as a progressive practice.

2.2 Participation

In the literature on planning and Indigenous peoples, it is argued that progress can be achieved through the improvement and application of existing planning to the situations of Indigenous peoples. The literature focuses on improving Indigenous participation in pre-established planning processes, and often draws inspiration
from the literature on communicative and participatory planning.

The literature identifies two primary reasons why Indigenous peoples are excluded from the planning activities of the state. First, many planners argue that Indigenous peoples have been excluded from planning activities as a result of a variety of social, economic and political barriers. These barriers include language and cultural barriers (Lane & Hibbard 2005; Hibbard 2008), geographic isolation (Hibbard 2008), and lack of familiarity with planning decision making processes and limited organizational capacity of Indigenous governments. Thus, these barriers largely hinge on cultural miscommunication and cultural misunderstandings. Overall, these arguments seem to suggest that Indigenous people need to get better at “playing the game” of planning.

As a solution to the exclusion of Indigenous peoples from planning processes, many planners propose the tools of communicative planning and participatory planning (Dale 1999; Lane & Hibbard 2005; Lane 2006). Lane (2006) advocates for increased Indigenous participation in planning processes, as participation will determine the extent to which planning outcomes reflect Indigenous priorities. On the basis of this assumption, he sets out a planning agenda for Indigenous communities that entails

(i) protesting their interests by engaging with the planning activities of the state, (ii) using planning to help their successful acquisition of lands through legal land claim processes, and (iii) using community-based planning to help realize community-development goals. (Lane 2006, 388)

The literature also identifies a second reason why Indigenous peoples are excluded from planning activities. It is argued that the rational-comprehensive
approach to planning discards Indigenous knowledge as ‘irrational’ (Sandercock 1998; Lane 2003; Lane and Hibbard 2005; Porter 2006). Leonie Sandercock has been a vocal critic of the ways in which western science and knowledge have served as models for and a basis for decision-making in the rational-comprehensive planning paradigm. Sandercock critiques the scientific approach to planning that emphasizes observation, the formulation of hypotheses and experimentation as key to the discovery of truth and distinguished between reason and emotion. As a way of combating the scientization of planning, Sandercock calls for the inclusion of multiple ways of knowing in planning as part of what she calls an “epistemology of multiplicity.” She advocates knowing through dialogue, experiential knowledge, local knowledge, symbolic knowledge and evidence, and contemplation as ways of knowing that are not usually viewed as valid sources or forms of knowledge in the planning process (Sandercock 1998, 78-82).

Libby Porter (2010) has taken up this critique of western forms of rationality and knowledge, and applied it to her analysis of the “colonial culture” of planning. Porter argues that planning is a “culturally positioned subject” (Porter 2010, 3) that produces space in ways “quite different from Indigenous productions of space” (Porter 2010, 17). Specifically, she emphasizes the application of knowledge in the techniques and practices, regulatory methods, and desired outcomes that planning deploys to produce fundamentally different “ontological and epistemological philosophies of place” (Porter 2010, 17). As a solution, Porter challenges planners to “unlearn” the assumptions that define colonial planning cultures by deconstructing the kinds of knowledge upon which planning has historically relied. Thus, Porter argues that the recognition of cultural difference is the key to unlocking planning’s
colonial culture. For instance, Porter advocates resisting planning’s commitment to Lockean theories of property in order to “make room” for Indigenous understandings of space and place.

### 2.3 Rights and Recognition

These two arguments—that the ability of Indigenous peoples to participate in planning activities is the result of cultural misunderstanding, and that rational planning excludes Indigenous knowledge due to ‘irrationality’—share in common the assumption that Indigenous and Western forms of knowledge and modes of communication are so different as to be irreconcilable. In other words, both communicative and knowledge-based barriers to Indigenous participation can be understood as problems of misunderstanding that are rooted in culture. As Howitt and Lunkapis (2010) state

> One of the key challenges for planning theory...is to acknowledge and address the coexistence of people with very different sort of claims to, relationships with and understandings of place—and each other—and its implications for just, equitable and sustainable decision-making in planning systems. (Howitt & Lunkapis 2010, 110)

The emphasis on difference as a product of culture locks planners to politics of cultural recognition, and places the question of Indigenous rights within a discourse of liberal tolerance, in which Indigenous knowledge is understood as something which can be recognized, invited into, and tolerated within an existing planning framework. Cultural recognition thus not only sidesteps questions of political difference, which stem from the fact of prior Indigenous sovereignty, but also places planners in the powerful position of recognizing and tolerating Indigenous knowledge.
Recognition, as a means of advancing Indigenous claims has been subject to significant criticism from Indigenous studies scholars. For instance, Glen Coulthard (2007) has criticized recognition as affirming the projects of liberal pluralism while subordinating Indigenous claims to nationhood to the authority of Crown sovereignty. Within a recognition framework, the government retains the power to recognize Indigenous rights. As such, recognition prefigures a “failure to significantly modify, let alone transcend, the breadth of power at play in colonial relationships.” (Coulthard 2007, 443) Similarly, Rifkin (2009) has commented that “culture” often serves as a heuristic device for understanding the ways in which Indigenous governance fails to conform of the dominant political structure. Thus, Indigenous political difference is recognized against the normalizing backdrop of Western culture and political institutions, allowing the state to passively participate in the production of legitimacy.

When the recognition of cultural difference is cast as the problem, then the extent to which racism within the planning system can be identified and addressed is limited. In a framework emphasizing recognition and tolerance, racism is understood as a cultural problem that can be addressed through improved respect for cultural difference. This approach thus masks the forms of structural and legal violence embedded in the planning process and which produce particular forms of structural racism. In analyzing the policy responses to water quality problems on First Nations reserves, Murdocca (2010) has noted that emphasis on cultural difference “obscures the very conditions of ongoing colonialism in favour of a language of cultural specificity and cultural difference that exists outside of the very historical and colonial conditions that produced” (Murdocca 2010, 387). This
approach does not lead to the structural re-alignment of planning processes that takes Indigenous political difference as a starting point for praxis.

Ultimately, the possibility that the exclusion of Indigenous peoples from planning processes might be attributed to more than simple oversight or imperfect planning tools is not considered in the planning literature. There is little acknowledgement of the possibility that Indigenous people may be systemically excluded from planning and other governance processes. There is a growing body of literature that outlines the ways in which people of colour and other minority groups are systematically excluded from a variety of governance processes (Pulido 1996; Pulido 2000; Teelucksingh 2007; Westra 2007). Given the history of racially-based discrimination in liberal democracies, it would not be surprising to learn that Indigenous peoples, too, are subject to race-based and institutionalized forms of discrimination. However, considering the possibility that Indigenous peoples might be subjected to systemic racism in planning would jeopardize the integrity of the guiding premise of this planning literature, which is that planning can solve the problems of Indigenous peoples.

2.4 Sovereignty
In planning theory, analysis of Indigenous peoples and planning has focused on issues of culture and largely ignored issues of politics. As a result, planning theory has not adequately dealt with the notion of Indigenous sovereignty. While there is general acknowledgement that Indigenous people assert sovereignty, sovereignty assertions are largely treated as a strategy of contestation. Furthermore, sovereignty claims contain a theory of relations between Indigenous peoples and the state. In the literature on Indigenous peoples and planning, the position and composition of the
state and relations between Indigenous peoples and the state are insufficiently theorized. Generally, it can be said that planning theory has not dealt adequately with the role of the state. This becomes evident through the analysis of conflicting arguments within the literature on Indigenous peoples and planning.

For instance, Lane and Cowell (2001) pose the question: Do planners simply reproduce inequality in the ownership and use of land and resource in Australia, or can planners work to overcome existing social relations? Their answer to this question is based on their study of the use of participatory and community-based planning approaches in response to mining development in northern Australia. Lane and Cowell contrast the effectiveness of community-based approaches with state-based approaches. This comparative approach hinges on a clear separation of community and state-based planning activities, and requires them to view the relationship between the state and its constituents—in this case community-based planning organizations—as dialectical. The dialectical view implies an understanding of “local” organizations and the state not merely as separate categories of analysis, but rather as ontologically different entities. It is this clear separation of “community” and “state” based planning activities that allows them to pose the question—which is most effective?—in the first place.

On the other hand, Lane (2006) argues for the participation of Indigenous peoples in the planning activities of the state, suggesting that effective participation in state planning activities is an effective way of securing Indigenous land rights. Thus, he argues that the state can provide a forum for Indigenous struggles. This argument is premised on the notion that the actions of the state can improve the situation of Indigenous peoples because the state and society are mutually
constitutive. Thus, he views Indigenous participation in planning as a means of gaining access to state power. This allows him to argue: “indigenous justice might be won through state action and not in spite of it” (Lane 2006, 386). The role of planners, then, is to intervene in the state’s policy formation process, and work to develop processes that will expedite the resolution of Indigenous land claims.

These conflicting ways in which the state and relations between Indigenous peoples and the state is presented is symptomatic of a general reluctance in planning to deal with questions of broad questions of power, or more specifically, take into consideration how the localized exercise of power through planning activities might be connected to broader political projects.

A further reason why the sovereignty claims of the state are not challenged in this literature is that planning has long been informed by a utilitarian ethics. Planners thus seek to balance the concerns of one group of stakeholders against the “greater good.” When it comes to addressing Indigenous rights, then, emphasis is often placed on improving planning mechanisms rather than taking the concerns of Indigenous peoples as a starting point for re-formulating action. For instance Low et al (2010), in their study of the incorporation of Indigenous landscape in regional planning processes in Australia, maintain that "respecting and maintaining the value of [indigenous] culture is as important as producing an actionable and sustainable process that fits within existing regional planning processes" (Low et al 2010, 82). Thus, Indigenous concerns will not be addressed at the cost of neglecting settler goals.
2.5 Summary
In summary, planning theory currently fails to provide an adequate theory of Indigenous engagement. First, planning theory does not engage with the historical dimensions of planning, or sufficiently address the legacy of planning and its effects on Indigenous communities. Moreover, planning history continues to be told such as to preserve planning’s identity as a tool of “improvement.” Second, those planning theories which treat Indigenous difference as a product of culture lock planners to a politics of cultural recognition, and place the question of Indigenous rights within a discourse of liberal tolerance, in which Indigenous knowledge is understood as something which can be recognized, invited into, and tolerated within an existing colonial planning framework. Third, while planning theorists recognize the importance of sovereignty claims for Indigenous peoples, planning theorists do not challenge the sovereignty claims of colonial states. More importantly, they fail to adequately theorize the state or the relationship between Indigenous peoples and the state as concepts fundamental to an understanding of sovereignty. Finally, planning theory prescribes a framework for Indigenous participation that preserves pre-existing planning frameworks, without imagining mechanisms by which Indigenous peoples might lead a process of bringing fundamental change to those frameworks.

3. Alternative Approaches to Planning History and Theory
The approaches to post-colonial planning outlined above stressed the importance of communication and participation in addressing indigenous rights. In this dissertation, I will argue that exclusion from planning activities is not merely a product of different interpretations of landscape, or fundamentally differing worldviews. Instead, a governmental analysis of planning will reveal that
Indigenous people are systemically excluded from processes of policy formulation and local procedures of implementation. Furthermore, the attempts of Indigenous peoples to influence the planning process are criminalized by the planning system. This systemic exclusion and criminalization is not the result of an oversight or miscommunication, but is a requirement of reinforcing the sovereignty claims of Canada in the face of contrary claims by Indigenous peoples.

In this section I propose a historical and structural framework for studying planning that will make visible the power relations, tactics, and strategies that are present in planning and constitutive of colonialism. In the remainder of this dissertation I will demonstrate how these methods can enable an analysis of planning that will render legible the ways in which planning disrupts Indigenous sovereignty claims and Indigenous self-determination, but which also demonstrate where greater room for maneuver in for achieving self-determination might be achieved in the planning process.

3.1 Critical and Effective Planning Histories
Planning is understood as a future-oriented practice. Historical narrative has been used in planning theory for the purposes of preserving planning’s identity as a progressive force, and not for the purposes of undermining or challenging the assumptions upon which planning practice is founded.

As an alternative, “critical and effective histories” (Foucault 1986, 1988; see also: Dean 1994; Huxley 2010) present a method for questioning notions of progress and destabilizing the truth-claims that drive planning’s narrative of progress. Founded on Foucault’s genealogy, this historical approach
establishes an analysis of the trajectory of the historical forms of truth and knowledge without origin or end. This form of practice has the effect of the disturbance of narratives of both progress and reconciliation, finding questions where others have located answers. It seeks to remain open to the dispersion of historical transformation, the rapid mutation of events, the multiplicity of temporalities, the differential forms of the timing and spacing of activities, and the possibility of invasion and even reversal of historical pathways. It seeks to problematize those versions of history which regard as the resting place of identity of an ahistorical subject, and the scene of a final reconciliation of humanity with nature, reason or itself. Such a discourse remains critical as it is unwilling to accept the taken-for-granted components of our reality and the ‘official’ accounts of how they came to be the way they are. (Dean 1994, 4)

Applied to planning, critical histories question assumptions about the purpose and content of planning. The idea of an “effective” history is useful for this study of planning for both strategic and methodological reasons. Strategically, from the perspective of indigenizing planning theory and practice, this approach offers an opportunity to deconstruct colonial planning narratives without imposing an alternate or western theory of planning. Rather, the approach provides the tools with which to reject those dominant histories which have neglected Indigenous perspectives. Much more than simply creating an opportunity to “insert” Indigenous histories, this approach allows me to take Indigenous politics as a starting point for creating an alternative approach to viewing planning history and theory.

Methodologically, this approach demands placing the rationalities, technologies, statuses, and objectives of planning which are normally taken for granted in planning practice in the foreground. By problematizing these aspects of planning, it will be possible to understand planning as a regime of practice which is connected to and productive of, rather than divorced from, broader political projects.
Problematizing these elements of planning rather than accepting them as fixed elements also provides an escape from the progressive narrative in planning, in which improvement is a fixed outcome.

Problematization provides a good starting point for beginning a historical analysis of the forms of rationality, ethics, and governance that are implicit in planning theory and practice. Further, it provides an opportunity to understand how these aspects of planning are inter-related. Considering the critical and effective uses of planning history, planners may be in a better position to create and accept transformation approaches to planning practice. As Dean (1994) argues:

an effective history historicizes that which is thought to be transhistorical, grasps rather than effaces the singularity of events and processes, and defines levels of analysis that are proper to its objects. An effective history both refuses to use history to assure us of our own identity and the necessity of the present, and also problematizes the imposition of a suprahistorical or global theory. (Dean 1994, 18)

The re-articulation and reframing of history has been at the forefront of Indigenous research methods and approaches. Linda Tuhiwai Smith reminds us that “imperialism has been perpetuated through the ways in which knowledge about indigenous peoples was collected, classified and then represented in various ways back to the West, and then, through the eyes of the West, back to those who have been colonized” (Smith 1999, 1). Smith’s work also emphasizes the importance of rejecting those “concepts” and “forms of classification” which serve to “shape relations between imperial powers and indigenous societies” (Smith 1999, 25). Furthermore, she explains the strategic importance of rejecting the ways in which Indigenous identities and polities as they have been cast through colonialism:
While rhetorically the indigenous movement may be encapsulated within the politics of self-determination, it is a much more dynamic and complex movement which incorporates many dimensions, some of which are still unfolding. It involves a revitalization and reformulation of culture and tradition, an increased participation in articulate rejection of Western institutions, a focus on strategic relations and alliances with non-Indigenous groups. (Smith 1999, 110)

Again, I rely on Foucault’s contributions to develop a language for discussing Indigenous identities and knowledge in way that captures both their dynamic nature, and the ways in which Western institutions have classified and constructed Indigenous identities and ignored Indigenous knowledge for the purpose of advancing imperial projects. While Foucault did not deal with issues of race and colonialism, bringing Foucault into conversation with critical literature on race and Indigenous studies is useful for uncovering the colonial genealogy of planning, and can reveal how planning operates to disrupt sovereignty claims through the producing and circulation of seemingly race-neutral discourses (see: Moreton-Robinson 2006).

In particular, Foucault’s writing on governmentality “provides a language and framework for thinking about the link between government, authority, and politics and questions of identity, self and person” (Dean 1999, 13). This approach implies a non-reductionist approach towards planning. In other words, it resists the temptation to reduce planning to a singular activity, mode of reason, technology, or domain of a particular set of individuals, and offers an opportunity to challenge the assumptions upon which planning is based.

Foucault’s interest in governmentality stems from his overarching project of
constructing a “genealogy of the state.” He uses the term governmentality to describe the link between modes of governing employed by the state, and the mode of thought—or political rationality—that form the basis for state action (Foucault 1991). At the core of his argument is the idea that it is impossible to understand the technologies of power without also interrogating their underlying political rationalities:

Perhaps, too, we should abandon a whole tradition that allows us to imagine that knowledge can exist only where the power relations are suspended and that knowledge can develop only outside its injunctions, its demands and its interests…We should admit rather that power produces knowledge…that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations. (Foucault 1975, 27)

Scott (1995) has applied this analysis of power/knowledge to colonialism, writing

In order to understand the project of colonial power at any given historical moment one has to understand the character of the political rationality that constituted it. And what is crucial to such an understanding is not what the attitude of the colonizer was toward the colonized, nor whether colonialism excluded or included natives as such. Rather, what is crucial is trying to discern colonial power’s point of application, its target, and the discursive and nondiscursive fields it sought to encompass. (Scott 1995, 204)

Foucault (1975) reminds us that knowledge presupposes a field of power relations. Scott (1995) applies this argument to the colonial context to argue that the nature of colonial power can only be understood in relation to the forms of knowledge deployed in its service. In the context of planning, revealing the contingency of the objects and changing subject positions against which planning measures progress requires understanding planning as located within a broader
field of power. Yet, it seems that planning theorists, whenever possible, have dodged the question of power when considering the development and application of new modes of practice. Or, if they have dealt with the question of power, they have focused on how planning is productive of power, rather than illuminating how planning deploys knowledge already constituted as a product of power.

I reject the premise that an analysis of planning can be separated from broader political forces. Moreover, it seems that an analysis of the “day-to-day” aspects of planning practice divorced from an understanding of the political forces which render planning powerful would provide little strategic information, particularly when it comes to refusing the ways that planning has scripted Indigenous identity or political authority, or to refuting the assumptions on which such modes of planning are based. Thus, in this dissertation I will place the day-to-day knowledge, techniques, and assumptions which inform planning within a critical assessment of the political forces which structure planning by supplying planning with knowledge about the jurisdictional extent of its power, knowledge about the subjects and objects of its focus, and by defining the tools at its disposal. In the next section I explain how I intend to accomplish this task.

4. Procedural Description

This research is informed by a mixed-methods approach, including discursive policy analysis, short interviews and key-informant interview. The mixed-methods approach provides a way to develop new theories and approaches (Denzin 1989). The use of different methods to study the same phenomenon may reveal areas
where the findings revealed by different methods do not converge. When this happens, it is possible for the researcher to propose new explanations, theories, or approaches that account for the discrepancies revealed by the research methods (Gaber & Gaber 1997). In this research, there was a discrepancy between the ways in which planning theory accounted for and dealt with the issue of Indigenous sovereignty, and the ways in which Indigenous sovereignty and rights are discussed in planning policy and practice. Thus, the mixed methods approach is useful in building theory that accounted for the relationship between planning practice and assertions of sovereignty.

4.1 Policy Analysis

In theorizing relationships between Indigenous peoples and planning, planning theorists have largely focused on the techniques which planning can bring to the table in the advancement of Indigenous rights claims. However, planning theorists have not been inattentive to how these procedural elements of planning interact with and take place within the context of pre-existing statutory frameworks, and have not considered how these same planning frameworks might then work to subvert Indigenous interests. In this research, discursive policy analysis served a useful tool for identifying the strategic room for maneuver currently afforded to Indigenous peoples when dealing with issues related to urban development planning, environmental management and land claims in Ontario.

Huberman and Miles (2002) outline a number of possible outcomes of policy analysis, and discuss the ways that policy analysis can meet a variety of contextual,
diagnostic, evaluative and strategic research objectives. Thus, policy analysis can go beyond providing an understanding of the context created by existing policy frameworks, and an explanation of the reasons for existing policies; it can also include an evaluation of the effectiveness of these policies, and help the researcher to identify strategies for correcting deficiencies. The discursive turn in policy analysis (Fischer & Forester 1993) recognizes that policy creation deploys language and argumentation in the construction of notions of truth and power. Discursive policy analysis explores how policy discourse produces and constructs political actors as well as non-actors (Fischer 1993). An assessment of how policy problems and their solutions are discursively constructed can lead to a better “understanding of which groups or categories are supported through particular projects and which are disadvantaged or disempowered” (Mathur 2007).

In Canada, the relationship between planning and policy is hierarchical. In Ontario, land use and planning policies are created by provincial and municipal governments and must conform to provincial laws such as the Planning Act. On the other hand, the relationship between Canadian Aboriginal policy and law is not as clear. While many policies take their direction from legal documents such as the Constitution Act, treaties, or from decisions of the Supreme Court of Canada, the lack of clarity in many of the terms used in these documents means that not all policies answer to a corresponding legal framework. For example, while “Aboriginal Rights” are protected under the Constitution Act (1982), the scope and content of these rights have not been clearly defined by either the government or the courts (Asch, 1997).
Thus, discursive policy analysis was applied to a number of provincial and federal laws and policies, for the purposes understanding how actors in the planning process are identified and constructed. Documents analyzed included:

- The Indian Act
- The Government of Ontario’s Draft Guidelines on Consultation
- Final Report and submissions to The Ipperwash Inquiry
- The Planning Act
- The Municipal Act
- The Places to Grow Act
- The Greenbelt Act
- Decisions of the Ontario Municipal Board
- The Growth Plan for the Greater Golden Horseshoe
- The Grand River Notification Agreement
- Zoning By-laws

This analysis was useful for uncovering not only the actors with standing or “status” in the planning process. It also made clear the role of various levels of government in planning, and highlighted the methods employed by the government in planning to disrupt Indigenous claims to land. In other studies, this method of policy analysis has been applied to planning policy in order to demonstrate how planning mechanisms such as zoning have been deployed as “part of the state’s involvement in the creation and control of citizens/subjects and the discipline of bodies” (Huxley 1994, 150). Thus, this approach re-politicizes land use planning in instances which has often been de-politicized and viewed as merely a technical activity. Highlighting the political dimensions of land use planning is crucial when it comes to understanding the relationship between planning and Indigenous political struggles, in reconfiguring current approaches to planning, and in understanding the possibilities which planning can offer to improve relations between Indigenous
peoples and Canada and towards realizing the goal of Indigenous self-determination.

Alfred (1999) has described the acceptance of Indigenous ‘rights’ that are not sui generis, but rather have their origin in the sovereignty and authority of the colonial state as representing the culmination of settler society’s efforts to assimilate Indigenous peoples. It is important to consider how planning responses presuppose the legitimacy of and serve to reinforce the jurisdiction of the settler state. In this research, the exploration of the modes and techniques of governance that are expressed in both the formal planning system is further complicated by an exploration of how planning is symptomatic of and serves to expand settler sovereignty.

4.2 Interviews
While policy analysis provided a picture of the legal and political frameworks in which planning takes place, it is also important to understand how these policies shape everyday planning practice. To this end, I conducted interviews planners and other municipal staff in single and upper-tier municipalities, as well as with provincial policy experts. I chose to focus on single and upper-tier municipalities to the exclusion of lower-tier municipalities due to the planning authority they possess. Under the Planning Act, single and upper-tier municipalities bear responsibility for creating and approving official plans and are also responsible for providing local services to their residents. Thus, planners located in single and upper-tier municipalities are more likely to be involved in decision making that will affect
In conducting these interviews, I was interested in understanding how planners and policy experts interpreted and applied laws and provincial policies relating to Aboriginal rights—such as the duty to consult—in their daily work. Following Forester (1989), focusing on the work of planners allowed me to understand planners as situated in the world, or in this case in a specific policy context as shaped by the edicts of higher levels of government, rather than extracted from reality as neutral observers and experts. I conducted a total of 49 interviews, including both short interviews and longer key-informant interviews, with municipal planners and policy makers. All interview partners were selected using purposeful sampling (Patton 2002).

Short Interviews with Municipal Planners

I conducted short telephone interviews with planners and other municipal staff (n=35). I attempted to speak to staff from all 55 upper- and single tier municipalities in Southern Ontario, and received responses from representatives of 35 municipalities. These short interviews were conducted according to an interview guide (Appendix 1). While I did not record the interviews, I took detailed notes during and after the interviews.

The objective of these short interviews was to reveal the extent to which municipal planners confront Indigenous issues in their daily work and to identify important issues to be covered in in-depth interviews (Baxter, Eyles & Elliot 1999). I had originally anticipated that land-use planners would be the primary respondents.
However, the task of locating a staff person knowledgeable about the extent of the municipality’s interactions with First Nations was more difficult than I had anticipated. My telephone conversations revealed that planners were not always the most appropriate staff members to provide such information. Rather, I found that a multiplicity of staff members were involved with First Nations, including municipal legal council, intergovernmental affairs officers, heritage planners, community development officials and engineers. On the other hand, in some municipalities it was difficult to find anyone with expertise or experience in working with First Nations. Thus, the conversations I had suggested that knowledge and experience working with First Nations or Aboriginal issues is somewhat haphazard and situational, and municipal staff develop knowledge and experience in this area as the need arises.

Key-Informant Interviews with Municipal Planners
Semi-structured interviews with municipal planners (n=7) provided an opportunity to gain a deeper understanding of the ways that Indigenous issues are taken into consideration in the planning process. Drawing from the information provided in the short interviews, purposeful sampling (Patton 2002) allowed me to identify and interview planners who had encountered Aboriginal land claims or related issues in their daily work. For example, I was particularly interested in hearing from planners who had experience developing or using consultation protocols. Interviews were conducted according to an interview guide, including a list of important questions to be covered in the interview (Appendix 2). I recorded interview using a digital audio
recording device. The interviews were conducted over the phone.

**Key-Informant Interviews with Policy Experts**

Key informant interviews with provincial policy makers (n=7) allowed me to understand the broader policy context in which Aboriginal and planning policy is created. Purposeful sampling (Patton 2002) allowed me to identify senior civil servants with experience and expertise in this area, such as Aboriginal Policy Advisors in land and resources ministries such as the Ministry of Environment, The Ministry of Northern Development and Mines, and of course the Ministry of Municipal Affairs and Housing. The interviews were conducted according to an interview guide (Appendix 3) and recorded using a digital audio recording device.

**Theory Building**

The methods of data collection and analysis in this dissertation borrow elements from grounded theory (Glaser 1992). Following the approach described by Glaser, data was gathered and analyzed throughout the research process. According to Glaser, a subjective understanding of the research field emerges through an alternative pattern of data collection and analysis. This pattern continues until a state of “theoretical saturation” is reached, at which no new insights can be gathered using the chosen methods of data collection.

To summarize, the process of data analysis followed two main steps:

1. **Data Collection**: I collected data using the methods of policy analysis and interview. Field notes, transcriptions, and other materials formed the data set, and served as a basis for theory building (Glaser 1992). Audio data was transcribed for
the purposes of content analysis (Cope 2005). I coded paper copies of the transcriptions and used NVivo as a tool for storing, organizing, and retrieving information rather than as tool for developing codes or quantifying patterns (Peace 2000).

2. Theory Building: Coding, the identification of key concepts emergent in the data, constituted the first step in the process of data reduction and analysis. It is also the first step in theory building. Through the process of developing descriptive and analytic codes, I identified key patterns in the themes and relations emerging from the data (Huberman & Miles 2004; Clifford & Valentine 2004; Cope 2005). Memoing, or writing notes that reflected upon and explained emergent concept and connections between concepts formed the basis of theory building (Glaser 1992). A daily writing or memoing habit through the research process was integral to my process of theory building. This analysis brought me to the themes of jurisdiction, property and reconciliation that will be the focus of the remaining chapters in this dissertation. The analysis suggested that these were key themes around which planning was organized and served to justify a great deal of planning activity in Ontario. These themes have therefore been the focus of this work.

Literature
This research draws on a wide variety of literature from the fields of planning, law, human geography, critical race studies and Indigenous studies. Where possible, I have sought to privilege Indigenous authors and perspectives. Thus, my research could be described as following an indigenous or “indigenist” research paradigm
Martin (2001) describes an indigenist research as one which acknowledges Indigenous worldviews, honours indigenous values, emphasizes Indigenous social, historical, and political contexts, privileges Indigenous voices and identifies and addresses issues of importance to Indigenous people (Smith 1999; Weber-Pillax 2001). Sinclair (2003) has argues that indigenist research has great political significance in the context of de-colonization and defines an indigenist researcher as someone who “actively strives to hold the rights of Indigenous people as his or her primary political goal.”

The indigenist research paradigm also demands that research be relevant to and measured by the political objectives expressed by Indigenous communities. Thus, beyond simply serving as a platform from which to launch a critique of planning, the indigenist perspective also demands that I consider how Indigenous knowledges and political goals might be put into productive conversation with legal and political discourses of the dominant culture (Turner 2004). Therefore, in addition to interrogating the dominant planning framework, I have sought to present Indigenous perspectives on planning and highlight documents and positions which present alternatives to the planning framework as imagined by Indigenous peoples.

5. Conclusion

Most planning theory, while acknowledging a variety of approaches, knowledges and purpose available to planners, tends to privilege one aspect of planning while viewing the others as epiphenomenal. Many planning theorists have taken an
apolitical view of planning in which planning is cast as an administrative or technical activity, and questions of power are explained by structure. On the other hand, many planning theorists have taken a view of planning which emphasizes the political capability of individual planners while bracketing questions of power and reduced questions of difference to an issue of cultural identity politics. These approaches fall short when it comes to accounting for the way in which planners have dealt with and managed competing sovereignty claims.

The theoretical and methodological orientation I have proposed here is an attempt to capture the multiple strategies, forms of knowledge, statuses, and techniques that are produced and circulated in planning. Moreover, by destabilizing the assumptions upon which planning is based, I also want to draw attention to the ways that Indigenous peoples have challenged and refused these assumptions.
Chapter 3: Jurisdiction and the Normalization of Canada’s Sovereignty Claims

Our understanding of law is not represented within the structure of the Canadian legal system... We, as individuals, did not participate in the process whereby the legal system was formed. We did not participate in the process of agreeing to the assumptions and values reflected in the system. Further, we have been excluded as peoples in participating in the formation of that system. More importantly, First Nations Peoples have not consented to the application of the Canadian legal system to any aspect of our lives. (Montour-Angus 1995, 35)

1. Introduction

The above epigraph from legal scholar Patricia Montour-Angus captures the frustration of Indigenous peoples with the Canadian legal system. As Montour-Angus suggests, the Canadian legal system, which is a powerful organizer of relations between Indigenous peoples and the Crown, was largely created and is applied without the consent of Indigenous peoples. Thus, the problem of the exclusion of Indigenous peoples from the creation of laws and policies, and the demand for inclusion in the process of policy planning and lawmaking has been a structuring theme in relations between Indigenous peoples and the Canadian state.

For example, the exclusion of Indigenous peoples from the drafting of the White Paper in 1968—the Trudeau government’s plan to bring Indigenous peoples into the “just society”—has been associated with the birth of the Indigenous rights movement in Canada (Turner 2004). The White Paper, which was drafted without
any input from Indigenous peoples, planned for the elimination of the Department of Indian Affairs, and the gradual dismantling of the system which manages Indian affairs. This plan hinged on a politics of recognition, and sought to “recognize” Indigenous peoples as equal to other Canadians, a move that would also conveniently extricate Canada from its treaty commitments.

In his cogent response to the White Paper, *The Unjust Society*, Harold Cardinal advocated for increased Indian involvement in policy making in all areas. He defined involvement as the right of Indigenous peoples to “set their own goals, determine their own priorities, create and stimulate their own opportunities and development” (Cardinal 1969, 64). He also conveyed great concern about attempts made by the government to involve Indigenous peoples. He wrote:

Government people, some of them admittedly with the best of intentions, continue to create their own pet projects for Indians, projects they argue earnestly are best for the Indian. They say, ‘Now, here’s what we [meaning the government and the Indian] are going to do,’ and then wonder why we aren’t interested. They even say, lately, ‘We will consult you and involve you,’ but then they turn away in the presence of an Indian while they are doing the planning. When the plans are drawn up, they assume that because an Indian was in the room, or the building or in the vicinity, has been consulted and involved. They are indignant and bewildered when the Indian not only refuses to accept it as ‘his’ plan but emphatically tells the white man what he can do with it. They say, ‘What is the use of trying to do anything for the Indian? He isn’t interested. (Cardinal 1969, 65)

The deep frustration with feeble government attempts to “consult” Indian peoples expressed by Cardinal persists to this day. The notion that Indigenous peoples be “consulted” in planning—whether it be policy planning, economic development, or resource management—is met by Indigenous peoples with
skepticism because history has shown that the interests of Indigenous peoples has so often merely been paid lip-service rather than given due consideration. Yet, stakeholder consultation remains one of the primary mechanisms through which Indigenous peoples are brought into the planning process. As I will demonstrate in this chapter, the strategies proposed by planners aimed at including Indigenous peoples in the planning process often hinge on a politics of recognition, which like the Trudeau government’s White Paper, subordinate Indigenous political participation to the authority of the Crown, while failing to address the factors which structure the exclusion of Indigenous peoples and the denial of Indigenous political authority in the first place.

As I explored in the previous chapter, most planning theory that deals with the situation of Indigenous people provides many proposals for improving the position of Indigenous peoples in the planning process. However these proposals often fail to adequately account for the ways in which the legal framework structures the strategies available to Indigenous peoples in improving their position in planning.

The notion of jurisdiction often serves to restrict the extent to which Indigenous peoples can participate in shaping planning decision-making. Borrows argues that First Nations occupy a "space between the borders of competing jurisdictions" (Borrows 1997). The legal framework is thus unable to accommodate Indigenous peoples’ cultures, rights, and foremost, Indigenous assertions of sovereignty. I understand Borrows to mean that according to the ways in which the jurisdictional lines have been drawn in Canada, little space is afforded to Indigenous
to exercise political authority. Instead, jurisdiction often serves to exclude Indigenous peoples from the planning process.

Rifkin (2009) puts forward a similar argument, writing that Indigenous peoples occupy a "gap" in the legal imagination of colonial nations, and suggests that this gap is the product of the continual identification of Indigenous difference, and exclusion from the legal imagination on the basis of this difference. Drawing on Agamben, Rifkin comments that the process of exclusion does important work in affirming the sovereignty claims of the settler-state. In his words, “[t]hose political collectivities whose occupancy does not fit the geopolitical ideal/imaginary” of the state are left abandoned by it, “exposed and threatened on the threshold” of the juridical order that is made possible and validated by their exception (Rifkin 2009, 98). Thus:

settler-state sovereignty can be viewed less as an expression of the nation’s rightful control over the land within its boundaries than the topological production of the impression of boundedness by banning—rendering “peculiar,” “anomalous,” “unique,” “special”—competing claims to place and collectivity. (Rifkin 2009, 98)

In this chapter, I challenge the assumption that planning is always in a position to “help” Indigenous peoples by demonstrating that Indigenous peoples are systematically excluded from the planning process in Ontario. Through a close examination of planning law, and its interpretation in practice by the Ontario Municipal Board, I argue that this exclusion can be accounted for by the way in which planning produces and imposes a category of “Indian” status for the purposes
of reinforcing a jurisdictional mapping that excludes Indigenous sovereignty by rendering Indigenous status anomalous within the planning process.

2. Planning’s Jurisdiction

2.1 The Necessity of Jurisdiction

The idea of sovereignty permeates planning through the language of jurisdiction. Jurisdiction can be broadly understood as the extent of sovereign authority. Bloom (2008-2009) confirms that the idea of jurisdiction is the basis for two fundamental principles of public law: 1) that “every state possesses exclusive jurisdiction over the persons and property within its territory” and 2) that no state may exercise jurisdiction on persons or property outside of its territory (Bloom 2008-2009, 981). In other words, the delineation of a sphere of jurisdiction requires both the identification of that which lies within its territory, and that which lies beyond its territory.

In practical terms, according to this definition, the exercise of sovereign authority requires and is enabled by both the delineation of the geographic extent of that authority, as well as the production of subjects belonging to that territory. It also crucially requires the identification of a ruling authority. Thus, each area of jurisdiction must have its own scope, its own logic, and its own criteria for what is to be governed (Valverde 2009, 141). As a result of this ordering function of jurisdiction, the concept of jurisdiction serves as an important heuristic for understanding the relationship between various components of the body politic and the extent of their powers.
In Canada the division of powers between the federal and provincial governments is set out in the Constitution Act. The Constitution Act (1867) allocates responsibility for municipal institutions to provincial governments, and confers upon the legislature of each province the power to make laws in relation to municipal institutions (Rust-D’Eye & Bar-Moshe 2010). Thus, municipalities are not recognized as an order of government. Rather, the constitution recognizes municipalities as institutions of the provinces, hence the long-worn phrase “municipalities are creatures of the provinces.” In Ontario, the Municipal Act confers upon municipalities the power to govern, and accords to them a number of rights and responsibilities. The Municipal Act also confers “natural person” powers to municipalities. This includes the power to: enter into agreements, purchase land and equipment, hire employees, and delegate administrative responsibilities to committees, staff members or other bodies.

When it comes to the affairs of Indigenous peoples in Canada, the Constitution is again a primary source of defining jurisdiction. Section 91(24) of the Constitution Act, 1867, gave the federal government jurisdiction over “Indians, and lands reserved for Indians.” This section of the Constitution Act is regarded as entrenching the special status of Indigenous peoples within Canada and the unique relationship that Indigenous peoples have with the Crown. However, it also serves to create and affirm jurisdictional boundaries. Together, section 91(24) of the Constitution Act and section 88 of the Indian Act function to create watertight jurisdictional boundaries that expand the power of the Crown to all areas of Indian
life (Boldt & Long 1988). Section 91(24) of the Constitution Act gives the federal government jurisdiction over Indian lands and peoples while section 88 of the Indian Act subjects Indians to all provincially enacted laws of “general application” except where such laws contradict the Indian Act or conflict with the Charter of Rights and Freedoms. The principle of “incorporation by reference” captured by section 88 thus serves as a mechanism by which provincial laws are incorporated into federal law. This enables the federal government to make provincial laws apply to Indians where they otherwise would not apply. For example, it is by this principle that the federal government has incorporated provincial traffic legislation into the Indian Act (Boldt & Long 1988).

Section 88 of the Indian Act has also served as a device for expanding provincial jurisdiction over Indians and transferring the responsibilities of the federal government granted under section 91(24) (Boldt & Long 1988). Ultimately, in the negotiation of federal-provincial boundaries, both the federal and provincial governments have been careful not to leave a “legislative vacuum that Indians might seek to occupy” (Boldt & Long 1988, 7). Thus, while the jurisdictional framework reinforces and reaffirms the ability of the provincial and federal governments to rule over Indian affairs, it also diminishes the domains in which Indigenous peoples might assert the right to self-determination or exercise self-government.

As Bloom (2008-2009) points out, the identification of a sphere of jurisdiction relies not only the identification of a territory of jurisdiction, but also requires the identification of persons belonging to the field of jurisdiction. Section 91(24) of the
Constitution is thus expanded by section 2(1) of the *Indian Act*, which defines an Indian as: “a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.” In fact, the primary power of the *Indian Act* lies in its ability to legislate Indian status (Palmater 2011).

Bonita Lawrence (2003) has demonstrated the ways in which Indigenous peoples in Canada have been subjected to forms of racial management through the vehicle of the *Indian Act*. She notes that while many aspects of the Act began as arbitrary measures designed to increase the legibility of the native population, over time its power has evolved such that it now creates reality much more that it reflects it. Moreover, designation as Indian or Non-Indian by the government was intrinsically linked to the acquisition of land. For example, Indigenous people defined as ‘half-breeds’ were systemically excluded from the process of treaty negotiations; this often happened in instances where the land they occupied was particularly desirable. Lawrence (2003) also argues that such arbitrary and opportunistic legal distinctions between Indian and non-Indian once created in order to facilitate land transfers and resource extraction now dictate the ability of people to participate in Indigenous political life, live on reserve or exercise treaty rights.

### 2.2 Planning’s Jurisdiction and the Scripting of Identity

The legal categories of “Indian” and the delineation of Indian and non-Indian land that were created during the colonial period continue to be mobilized today for the purposes of directing control over Indigenous territories. These legal distinctions, together with the concept of jurisdiction are institutionalized in Ontario’s planning
framework to exclude Indigenous peoples from the planning process. The limited inclusion of Indigenous peoples in the planning process is largely a product of the way Indigenous identities have been scripted and managed by the federal government. Thus, the legal scripting of identity determines what kinds of subjects have access to the field of planning. Rather than facilitating Indigenous participation, the planning framework is structured to preserve the lines of jurisdiction drawn by the constitution, and serves to preserve the authority of the Crown, while diminishing the ability of Indigenous peoples to exercise political authority in planning.

Ontario’s statutory planning framework does not provide much space for consultation with Indigenous peoples. The Planning Act does not require that Indigenous people be extensively consulted about development that may affect their interests. Rather, the Planning Act merely prescribes that First Nations be notified of planning activities occurring within very close proximity to reserve territory. In this way, the Planning Act provides for the very limited inclusion of the interests of First Nations.

Proposed changes to the Planning Act in 1994 attempted to confer upon First Nations personhood status, for the purposes of providing First Nations with standing in the planning process. Conferring upon First Nations the same standing given to “natural persons” under the Act would have meant that First Nations would have the ability to appeal planning decisions of an approval authority, or to receive notice of planning activities. While this proposed wording inserted the
interests of First Nations into the planning process for the first time, it did so in a way that placed the onus for participation on First Nations, and did not recognize the special status of First Nations. Moreover, the legal maneuvering that is required to bring First Nations into the planning process, without at the same time violating the jurisdiction of the federal government becomes clear in this excerpt from the hearings to amend the Planning Act. Here, a solicitor for the Ministry of Municipal Affairs and Housing responds to concerns raised by a delegation from Six Nations, who suggested that the language in the planning act is reminiscent of the offensive language of the Indian Act:

Ms. Perron: Okay. Now, the Planning Act, in section 1, goes through this exercise of deeming an Indian band to be a person for the purpose of the act. That is not in any way to redefine or try to change the status of what is an Indian band, but it’s trying to incorporate an Indian band, which is a body. But as we know from statutory interpretation of the term, it is in fact not a corporation. So you’re not a full corporate entity, which would make you an artificial person in law, and you’re not a natural person.

In order to make sure that the band as an entity was given rights under the Planning Act, we went through, I guess, the legal fiction of deeming you to be a person. So subsequently, in the act when we say that “persons” can appeal a decision of an approval authority, therefore that means that a band, as an entity, has those rights. It was to give you appeal rights under the Planning Act. A person, in the Planning Act, is given different rights, i.e. rights of appeal, rights of referral and also the right to receive notice in certain circumstances, so again, this was a mechanism to allow the service of notice to be made an your representations to be heard as an entity.

(Linda Perron, Solicitor, Legal Branch, Ministry of Municipal Affairs and Housing, Hearings on the Planning and Municipal Statute Amendment Act, 1994, Bill 163; Hansard, Tuesday 30 August 1994.)
In this excerpt, the ways in which First Nations are caught “between the borders of competing jurisdictions” (Borrows, 1997) becomes clear. In this space, the Canadian legal system provides no sensible language to describe the position of First Nations in the planning framework. Rather, the limits of the Canada’s sovereignty claims become apparent as the solicitor strains to stretch the jurisdiction of planning beyond its prescribed boundaries.

Ultimately, the Planning Act was not amended to include the proposed wording on “personhood”. Rather, a regulation was introduced which required First Nations to be notified of any planning projects within 1km of a reserve. This notification requirement was first introduced in 1996, through Ontario Regulation 200/96. The regulation stipulates that:

(9) Notice of a hearing on an application for a minor variance or permission under subsection 45 (5) of the Act shall be given by personal service, prepaid first class mail or telephone transmission of a facsimile of the notice to all of the following persons and public bodies except those who have notified the committee that they do not wish to receive notice:

...  

7. The chief of every First Nation council, if the First Nation is located on a reserve any part of which is within one kilometre of the subject land.

O. Reg. 200/96, s. 3 (9); O. Reg. 508/98, s. 1 (4); O. Reg. 471/09, ss. 3, 4.

In this regulation, the Planning Act contains a very narrow understanding of what constitutes an Indigenous interest in planning. Rather than recognizing the broad territorial claims that Indigenous peoples have throughout Ontario, the
Planning Act only recognizes the space of the reserve territory as a space which Indigenous peoples might have legitimate claims or interest. Thus, the Planning Act merely requires that First Nations with a 1km meter radius of a planned developed are notified of planning activities. This notification requirement is limited to development within 1km of reserve land, and does not apply to development on traditional territories, areas where land use is guaranteed by treaty, or lands claimed by First Nations as part of a land claim.

Furthermore, it is important to note that this language in the Planning Act stipulates that municipalities only have a duty to notify First Nations. This obligation can be met simply by sending a letter. There is no obligation on the part of municipalities to take into consideration any responses that may be presented by First Nations. This means that if decisions might affect the Aboriginal or Treaty Rights of a First Nation, the First Nation has little recourse, beyond appealing the decision to the Ontario Municipal Board or staging some form of protest, if the municipality is unwilling to take those concerns into account.

Not only is the language regarding notification weak, the Planning Act presents an opportunity for this requirement to be further weakened. The Planning Act, in section 62.1, presents a provision for the notice requirement to be waived with the consent of the Band:

62.1 The Minister, the council of a municipality or a planning board may by agreement with a First Nation vary or waive the prescribed notice requirements to a band in respect of an official plan, a zoning by-law or any application under this Act. 1994, c. 23, s. 37.
Thus, the Act only provides for the weakening of notification requirements, but does not provide any mechanisms through which First Nations participation might be increased. This weak language in the Planning Act regarding First Nations consultation means that First Nations have few opportunities to make their concerns heard when it comes to planning decision making, or have their opinions taken into consideration in the formation of provincial planning policy. The Final Report of the Ipperwash Inquiry noted that lack of opportunities for First Nations to formally influence planning decision making in a meaningful way in the formal planning framework. As a result, protest and other forms of “civil disobedience” are often the only means of having their voices heard (Linden 2007).

Despite the weakness of these provisions of the Planning Act, the Act is in fact one of the only places where First Nations are explicitly acknowledged with regards to planning. First Nations interests are also routinely ignored in the creation of provincial planning policy. Major provincial land use policies such as The Places to Grow Act, the Greenbelt Plan, and the Growth Plan for the Greater Golden Horseshoe, which determine patterns of land use and urban development in southern Ontario, are developed without significant input from First Nations. In the creation of such plans, First Nations are given the same opportunity to provide input as other stakeholders. However, the process through which stakeholder consultation is conducted in Ontario does not hold the government accountable for addressing concerns raised during consultation. Although stakeholder consultation is often an extensive process, no repercussions arise in the event that the government ignores
issues raised by stakeholders, and there is little communication once stakeholder submissions are collected.

More importantly, the Crown and First Nations have very different ideas about what constitutes consultation. Stakeholder consultation, as imagined by the Crown, does not recognize the specific status or authority of Indigenous peoples to make decisions regarding land use in their territory. McDermott and Wilson (2010) note that from an Algonquin perspective, the Crown’s obligation to consult arises from both treaties signed with the Crown, and from Algonquin sacred law. From this perspective, consultation is about nurturing a complex set of relations between peoples, and between people and the environment. On the other hand, the Crown tends to view notification as an adequate form of consultation. The Chippewas of Nawash raised the problem of notification in their submission to the Ipperwash Inquiry:

Source water protection, the Annex, the new Farm Nutrient Act, policies on stocking exotic species, policies on stocking any species, amendments to the Niagara Escarpment Plan, Ontario’s Class EA for Municipal Projects. These are just some of recent policy and legislative initiatives which will impact First Nations rights and claims (certainly the extensive rights and claims of Nawash and Saugeen).

Yet, if our opinion is asked at all, it is asked after the strategic planning phase and it is lumped with all the other “special interest groups” who comment on government policies and practices. This too shows contempt for First Nations and discounts the unique constitutional position aboriginal people have in Canada. (Chippewas of Nawash 2005, 89)

Thus, in addition to the lack of accountability inherent in the process of stakeholder consultation, Indigenous peoples object to being treated as mere
stakeholders, because stakeholder consultation does not recognize the source of Indigenous authority. The Assembly of First Nations has stated a position similar to the position articulated by the Chippewas of Nawash:

First Nations must not be viewed as interest groups. First Nations have an inherent duty and responsibility to protect and care for the environment and have contributions to make in terms of policy and economic development impacting on traditional lands and economies. First Nations must be involved in the conceptualization stages and pre-planning stages to set the appropriate policy direction for any activity which may impact on First Nations. (AFN 1993)

Indigenous peoples have been scripted as “stakeholders” in the planning process. The scripting of identity in this way is a product of the ways in which the lines of jurisdiction have been drawn in Canada. Because planning is the jurisdiction of the provincial government, and it is the federal government which has claimed authority over First Nations, there is no other space afforded to First Nations in the planning process, other than as stakeholders. Moreover, this jurisdictional logic limits Indigenous interests to those of federally recognized “First Nations” and the space of the reserve. Localizing indigenous peoples in this way is one further way in which the logic of jurisdiction serves to circumscribe Indigenous political authority. The inclusion of “First Nations” as stakeholders fails to recognize the larger Indigenous political entities, and instead replicates colonial political identities by relying on the racial infrastructure created by the Indian Act. In this way, planning relies on and is part of, the circulation of colonial knowledge.
2.3 Exclusion and the Production of Jurisdiction

The provisions of Ontario’s planning framework not only limit the space of Indigenous participation in the planning process, they also work to exclude Indigenous peoples in very specific ways. In particular, an understanding of jurisdiction is mobilized in planning decision making to exclude Indigenous understandings of environment, history, and law from the planning process. This is illustrated in the decision making process of the Ontario Municipal Board (OMB).

The decisions of the Ontario Municipal Board offer a unique opportunity to observe the interpretation and application of planning law in Ontario. The OMB is an independent tribunal that hears applications and appeals related to planning and municipal issues. The decisions of the OMB provide a good indication of how planning experts interpret and apply planning law and procedures to real planning problems (Makuch 2004). I present the following example to demonstrate how the notion of jurisdiction is mobilized for the purposes of excluding Indigenous interests from the planning process.

In 2001, Couchiching First Nation appealed to the OMB a zoning by-law passed by the Town of Fort Frances. The by-law rezoned a property from a “Resource Development (RD) Zone” to a “Seasonal Residential (SR) Zone,” which would legally enable a cottage to be built on the property. The First Nation appealed the by-law on the grounds that the property was part of their reserve territory, and argued the Town had no authority to pass such a by-law. The First Nation called on the terms of Treaty 3, made between the Crown and the First Nation signed in 1873,
which recognized the jurisdiction and ownership of the First Nations over a large land base, including the land in question.

According to the decision rendered by the OMB, the property in question was alienated from the band by the issuing of a Crown Patent in 1908, and annexed by the municipality in 1957. The land was purchased by a lumber company in 1969, and it was the lumber company that proposed the rezoning in order to pave the way for its resale and use for residential purposes. The OMB ruled in favour of the Municipality and dismissed the appeal of the First Nation. In its decision, the OMB argued:

The issues raised by the appellant do not constitute valid land use planning ground and cannot be resolved within the context of an appeal under Subsection 34(19) of the Planning Act. Those issues should be resolved in another forum such as the Superior Court of the province or by using the dispute resolution process established by the federal government for such cases. The municipality has exercised jurisdiction over these lands for many years by enacting zoning regulations, which were never challenged by Couchiching First Nation. The existence of a zoning by-law regulating uses on the property will not affect title. The record before the Board indicated that the subject lands are situated within the Town’s boundaries are therefore it has jurisdiction to enact zoning regulations restricting uses. (Ontario Municipal Board File No. R010127, 3)

The argument advanced by Couchiching First Nation rests on their understanding of the treaty made with the Crown. According to this argument, the treaty ensured that their land interests would be protected by the Crown. The planning decision to re-zone the land for residential uses harms the interests of the First Nation. However, the OMB does not view the interpretation of the Treaty as a
“valid land use planning issue.” Rather, the OMB argues that this issue should be resolved by the Supreme Court or through the federal treaty claims process. Thus, the Board is suggesting that it is not within their jurisdiction to rule on the issue of Aboriginal treaty rights. However, in the mean time, the decision of the OMB allows planning activity on the land to continue, thus denying Indigenous authority. The OMB justifies this action by submitting the tautological argument that because the municipality has exercised jurisdiction by conducting planning activities for many years without the objection of the First Nation, the jurisdiction of the municipality over the land is affirmed. The OMB frames its decision as stemming from a technical decision based on questions of jurisdiction and the “proper” content of planning. In effect, although presenting jurisdiction as a neutral terrain upon which to render planning decisions, in its application the logic of jurisdiction is far from neutral. Here, by applying the logic of jurisdiction, the OMB recognizes the authority of the municipality, but denies the authority and jurisdiction of Couchiching First Nation and Treaty 3.4

Finally, in its decision, the OMB also agreed with the assertion of the Town that the appeal was “frivolous” and “vexatious”, thus fully dismissing the concerns

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4 The Grand Council of Treaty #3, of which Couchiching First Nation is a part of, maintains its jurisdiction and authority “despite illegal and oppressive tactics by conservation officers, Indian Agents and other external government official in the 135 years after Treaty #3 was signed” (Grand Council of Treaty 3, 2011). The Council draws on Treaty 3 as evidence of its continued authority, but also as evidence that the Nation shared its duties and responsibilities with the Crown. The duties and obligations arising from this treaty relationship are outlined in the Great Law of Treaty #3. Furthermore, the Grant Council of Treaty #3 outlines the requirements of the Crown regarding consultation stemming from Treaty #3. Here, it would appear that the OMB and the provincial Crown is acting contrary to this law. See Chapter 5 for further discussion.
of the First Nation from the realm of planning. Here, the Board relies on section 34(19) of the Planning Act, which identifies those planning interests granted power of appeal to the OMB. The Board is able to dismiss the concerns raised by Couchiching First Nation, because First Nations interests are not identified as having the protection of appeal. Thus, because they are not identified in section 34(19) of the Planning Act, the Board considers First Nations interests to be outside of its sphere of jurisdiction. This does not change the fact that the interests of Couchiching First Nation are negatively affected by the planning decisions of the Town. However, once their interests are dismissed from the realm of planning, the opportunities for recourse in the planning process are limited.

In the sphere of law, jurisdiction is an important organizing principle. The arguments rehearsed in the planning process to exclude Indigenous participation often reflect these principles. In the examples I have cited, municipal governments and the Ontario Municipal Board argue that it is not within their jurisdiction to deal with concerns raised by First Nations. Thus, the idea of jurisdiction is used to exclude Aboriginal and Treaty Rights from being taken into consideration in the planning process. As a result, the ability of First Nations to influence planning decision-making is limited, even where planning decision might affect their rights or ability to use the land. However, according to the logic of jurisdiction, decision makers to do not need to consider how planning decisions might affect First Nations communities because First Nations do not fall outside the sphere of the provincial planning process.
2.4 The Problem with Jurisdiction

Indigenous peoples have challenged the authority of successive governments—French, British, Canadian—to claim jurisdiction over Indigenous lands and peoples (Ladner 2005). Indigenous peoples assert that they have not rescinded the sovereignty held prior to the arrival of Europeans. Thus, rather than looking to the constitution as defining the relationship between Indigenous peoples and the Crown, the pre- and post-confederation treaties are seen as documents which express the nature of the nation-to-nation relationship between Indigenous peoples and the Canadian government. However, successive governments have sought to alter the terms of that relation between sovereign nations by shifting responsibility for “Indians” to lower levels of government (Boldt & Long 1988).

The unilateral shifting of responsibility and redefining of relations between the Crown and Indigenous peoples from one of relations between sovereigns to a relationship of domination has characterized the management of Indian affairs for the past 200 years (RCAP 1996). Since confederation, the government has sought to shift stewardship of Indigenous relations from the Crown to the provinces. For example, in 1946, the Joint Committee of the Senate and the House of Commons recommended greater provincial involvement in providing services to Indians. Following this, in 1964 the federal government proposed that provinces extend social services to Indians, with the federal government assuming most of the costs (Boldt & Long 1988). Similarly, the Trudeau government’s White Paper advocated for the complete dissolution of the Department of Indian Affairs, and suggested that
all of the affairs of Indigenous people be turned over to provincial responsibility.

While this devolution of responsibility is often presented by the government as a step towards dismantling the colonial apparatus, it is usually received by Indigenous peoples as an attempt by the Crown to distance itself from its duties and responsibilities towards Indigenous peoples. Boldt and Long (1988) have characterized this approach to federal Indian policy as “institutional assimilation.” This kind of assimilation is achieved through shifting responsibility for Indian affairs from the federal to provincial governments, and involves the phasing out of administrative, legal and economic boundaries between Indigenous peoples and other Canadians. In other words, it has the effect of minimizing the status and content of Aboriginal and treaty rights, and minimizes the responsibilities of the Crown towards Indigenous peoples. Furthermore, the transferring of responsibility for Indian affairs to the provinces has also served as an opportunity for the Crown to expand the extent of its authority over Indian affairs by closing “jurisdictional vacuums” (Boldt & Long 1988) and reducing the areas where Indigenous people might exercise inherent jurisdiction arising from prior sovereignty. This is accomplished through the legal mechanisms that define the extent of provincial and federal authority in the first place.

In short, the principle of jurisdiction allows for a rigid separation of municipal, provincial and federal spheres of governance. The same jurisdictional logic allows Indigenous politics to be separated from the sphere of local land use planning. In practical terms, as the example of the OMB demonstrated, this
separation enables the disavowal of Indigenous rights in the planning process. Thus, the ways in which the jurisdictional lines have been drawn exclude Indigenous peoples from participation in the planning process in Ontario and from the enjoyment of certain rights granted to persons as part of the planning framework.

Chipman (2002) notes that in the absence of substantive legislation in many areas, the OMB functions as a “law unto itself” by developing policies that extend beyond the procedural statutory directives. Hence, the relative silence of planning law on the status of Indigenous people in the planning process serves to re-affirm non-Indigenous property claims. The OMB decision to dismiss the case was presented as a product of jurisdiction and therefore the Board did not explicitly deal with issues of Aboriginal status. Thus, the decision appears to technical, rather than a decision based on racial status. Yet, the decision used jurisdiction to privilege non-Indigenous property interests and thus naturalized non-Indigenous property claims in the planning process. Ultimately, the OMB used and validated colonial racial knowledge in its decision making process.

Jurisdiction, as it is applied in the planning process, appears as the neutral application of constitutional legal knowledge. However, as Marianne Valverde (2009) reminds us, jurisdictional categories are not naturally occurring, rather these categories are the product of governance. She writes: “legal powers and legal knowledges appear to us as always already distinguished by scale. Legal governance, in other words, is always already itself governed: and the governance of legal governance is the work of jurisdiction” (Valverde 2009, 141). I understand
Valverde to be saying that jurisdiction requires an exclusionary mechanism, and hinges on the identification and exclusion of things which do not belong. Furthermore, jurisdiction hinges on the delineation of subjects and objects of governance and their acceptance as naturally existing categories. Aileen Moreton-Robinson has commented:

The possessive logic of patriarchal white sovereignty is predicated on exclusion; that is, it denies and refuses what it does not own—the sovereignty of the Indigenous other. Here I use the concept ‘possessive logic’ to denote a mode of rationalization, rather than a set of positions that produce a more or less inevitable answer that is underpinned by an excessive desire to invest in reproducing and re-affirming the nation-state’s ownership, control and domination. As such it is operationalised to circulate sets of meaning about white ownership of a nation, as part of common sense knowledge, decision making and socially produced convention. (Moreton-Robinson 2004, 5)

While jurisdiction is a powerful concept in the organization of government and the delineation of sovereign power, the language of jurisdiction suggests a false rigidity (Bloom 2008-2009) that naturalizes the spaces and identities produced and required by jurisdictional logic through the exercise of authority. However, it is this perception of rigidity that gives the notion of jurisdiction its force in a juridical model of sovereignty.

A juridical understanding of sovereignty relies on the idea of hierarchy to explain relations of contestation and domination between sovereign and subjects. Isin writes, hierarchy “makes us believe that the state is always the upper scale with the sovereign right to create other scales including the city” (Isin 2007, 215). Thus, the sovereignty of the state is understood as territorial sovereignty, “like a container
which excludes the possibility of any other container with identical sovereign rights” (Isin 2007, 215). In the context of municipal law, Magnusson argues that the doctrine of municipal subordination “flows from an absolutist conception of sovereignty” (Magnusson 2005, 6). According to the absolutist view, all political authority is contained within the state. The absolutist view of political authority therefore also precludes the possibility of an alternate of competing sphere of sovereign authority, such as represented by Indigenous peoples.

It is important to keep in mind that Indigenous peoples have expressed radically different understandings of governance and jurisdiction, resulting in a very different vision of relations with the Crown. For example, the Assembly of First Nations Joint Committee of Chiefs on the Recognition and Implementation of First Nations governments has emphasized nation-to-nation relationships, premised on: First Nations consent, Aboriginal and Treaty rights, traditional forms of governance and knowledge, and the underlying right to self-determination (AFN 2005). This implies rejecting the state of current relations based on the assumption of Crown jurisdiction over First Nations and requires recognizing the artificial nature of terms such as “First Nations.” Finally, the terms jurisdiction and sovereignty, while crucial to the organization of Canadian governance, are themselves imperfect terms for describing Indigenous visions of governance and authority:

Our peoples are saying to us that, at no point in time, was there ever any First Nation leader since the settlement of this great country who relinquished what we hold to be our very essence. We use the word “sovereignty” because it is an English word that we find to best describe our very existence on our land. It means that we exist, we
survive, we have our own cultures, we have our own languages, we have our own religions. It also means that we related to our neighbours, our other nations, and that we strike arrangement with them. So when we advance the word, we are using a foreign language to describe our notion of where we are coming from, that prior to settlement by Europeans, we did own the land, we did exercise jurisdiction over the land. (AFN 1990, 4)

In the rest of this chapter, I will turn my attention to the emergence of jurisdiction as a structuring principle of governance in Canada. By historicizing the emergence of a jurisdiction as a political concept that organizes relations between Indigenous peoples and the Crown, I highlight the fragility of this jurisdictional logic while also pointing towards alternatives.

3. The Colonial Production of Jurisdiction

3.1 The Royal Proclamation

Historians of Canadian planning are fond of arguing that planning in Canada began in the late 1800s. For example, Gerald Hodge (1998) looks to the period of 1890-1930 as a formative period for the practice of planning in Canada, as it was during this period that institutions were put into place to “facilitate community planning” (Hodge 1998, 456). Similarly, while Jeanne Wolf’s periodization of planning history in Canada includes a nod to the Dominion land surveys of the confederation period, like Hodge she locates the origins of planning as an organized practice as beginning around the turn of the 20th century, and the beginning of the urban reform movement (Wolfe 2004). Hodge and Wolfe are both considered authorities in the field of Canadian planning, and their analyses of planning history share in common an orientation towards the creation of the institutions—both legal and conceptual—
that have enabled planning to be recognized as a localized governmental practice. However, if I am to take seriously Yiftachel’s definition of planning as the “formulation, content, and implementation of spatial public policies” (Yiftachel 1988, 395), it would be fair to assume that the practice of planning in Canada began well before 1900. In fact, I will argue here that Canada’s founding legal documents should also be regarded as planning documents.

The Royal Proclamation of 1763 is frequently considered to be an important event because it marks the first broad declaration of sovereignty by the British Crown over its North American provinces. The Royal Proclamation also garners much attention as a document that safeguards Aboriginal land rights and provides the basis for the assertion of contemporary land claims (Macklem 2001). The Supreme Court of Canada has affirmed the importance of the Proclamation, and ruled that it has the force of Statute. The Canadian Charter of Rights and Freedoms also recognizes the Royal Proclamation as affirming Aboriginal rights.

While the Royal Proclamation contributes to the establishment of the federal legal framework for understanding Aboriginal rights, I would like to consider the ways in which the Royal Proclamation might be viewed as a planning document, which, as it has typically been interpreted, served to undermine those rights and facilitate the dispossession of Indigenous lands rather than supporting Aboriginal territorial rights. In particular, the dispossession of Indigenous peoples was largely a product of the jurisdictional effects of the Royal Proclamation. In other words, the Royal Proclamation facilitated dispossession through the bifurcation of what was
once the territory of Indigenous peoples into “Indian” and “settler” land, and the establishment of “Indian” as a legal categories which aided in the administration and planning of the territory. Thus, the Royal Proclamation, as a performative declaration of sovereignty, realized the control of territory through the drawing of jurisdictional boundaries. However, moving beyond standard interpretations of the meaning of the Royal Proclamation, I would like to consider how Indigenous interpretations of the Royal Proclamation, such as those suggested by Borrows (1994), might point towards alternate paths in planning.

3.2 The Royal Proclamation and the Assertion of Crown Sovereignty

The Royal Proclamation is conventionally regarded as born out of a set of international imperatives and objectives related to the assertion of British territorial sovereignty in North America. In 1763, through the Treaty of Paris, the British Crown claimed sovereignty over territory that is today part of Canada. The Royal Proclamation signaled a turning point in the nature of Indigenous-European relations. It was also the beginning of an era of smooth relations between the United States and Great Britain.

Standard interpretations also suggest that this era of good relations between these two colonial powers meant that the United States no longer threatened Britain’s colonial interests (Miller 1989). In the eyes of the British government, this new relationship with the United States contributed to the diminished military significance of the Indian nations. This period was also defined by the presence of increasing numbers of Anglo-American British colonists. As a result, the British
approach to forming relationships with the Indian population during this period reflected the fact that the Indigenous population was no longer viewed as a military ally, but rather as an impediment to peace and settlement (Slattery 1979b). Furthermore, as the number of settlers increased, the relative military power of the Indians decreased, and along with it British desire and necessity to maintain peaceful relationships with the Indian tribes. Consequently, the emphasis of colonial policy shifted, and began to emphasize the assimilation of rather than cooperation with the Indigenous population (Miller 1989, Canada 1996).

The prevailing historical interpretation of the reasons for the Royal Proclamation suggest that with Britain’s newly affirmed position in North America, and with the American military threat removed, two new matters occupied British attention. First, the British needed to provide for the governance of the colonies. Second, the British had a vested interest in maintaining peaceful relations with the Indians who reside within these territories (Slattery 1979b). Pontiac’s uprising in 1763 drew attention to the continued military might of the Indian nations. Thus, Britain realized that the intrusion of settlers upon traditional lands would have to be controlled in order to stem the tide of Indian discontent (Miller 1989). The Royal Proclamation addressed both of these issues, through four distinct measures that are outlined in the four sections of the Proclamation.

The first section addresses the governance of the newly acquired colonies by delineating four distinct territories within the holdings of British North America. The second section formalizes the terms under which these territories would be
governed. The third section of the Proclamation outlined provisions for the settlement of these territories, including the allotment of land for soldiers who had served for the British.

The delineation of territories in these first two sections was an attempt to secure British sovereignty in North America by stifling the expansionist policies in the thirteen colonies. Similarly, the establishment of a system of governance was widely regarded as necessary for ensuring the peace and security of both the population of settlers and the economic potential of the colonies, not only as a source of raw materials, but more importantly, as a captive market for goods produced in Britain (Slattery 1979b).

The fourth section provided for the protection of Indian lands, and made a series of statements about the preservation and protection of so-called Indian lands. In fact, when it comes to Indigenous land interests, what is most notable about the Royal Proclamation is that it reserves a significant amount of land as “Indian Territory.”

Darlene Johnston has argued that the purchase provisions were the “most significant element of the Indian lands policy articulated by the Royal Proclamation” (Johnston 1989, 6). She argues the Royal Proclamation established two basic principles that were intended to apply to Indian land policy throughout all unceded Indian lands. The first principle established by the Proclamation was the principle of Crown monopoly over the acquisition of Indian lands. Johnston (1989) understands
the Royal Proclamation as providing the legal basis for the principle of voluntary succession. However she also demonstrates how this principle of voluntary succession was not uniformly understood or applied across the colonial territories. Thus, “although the early treaty activity was governed by the exigency created by the influx of Loyalists and was accompanied with much untidiness and some irregularity, it developed into a comprehensive, formalized process of land alienation” (Johnston 1989, 48).

In short, traditional interpretations of the Royal Proclamation emphasize the ways in which the British Crown secured its sovereignty claims in North America through the declaration of sovereignty and the land provisions of the Royal Proclamation. Thus, the main concern of the British with the land provisions was the indiscriminate settlement of the American interior. The provisions for settlement and alienation, and the creation of a protected category of “Indian lands” was a means of sealing off areas to settlement. In broad terms, the Royal Proclamation served to direct settlement by defining areas where settlement was permitted, and establishing a mechanism through which settlers could obtain property. Moreover, the document roughly outlined land uses by determining which areas were suitable for settlement, and which were to be the exclusive “hunting grounds” of the Indians.

3.3 The Royal Proclamation as a Planning Document

The provisions of the Proclamation laid the foundation for the settlement and colonization of Upper Canada, and hence formed a crucial planning document. As a document that describes a mechanism for settlement as well as land use and
allotment, its function as a territorial planning document is worth some consideration.

Based on the conventional interpretation of the Royal Proclamation I have outlined above, it is possible to view the Royal Proclamation as a document that formulates a very specific spatial public policy. In other words, it is possible to view the Proclamation as both a foundational legal document and as a planning document. Beyond charting a path for growth in the territory, it purports to manage territory through the management and delineation of land uses. It outlines areas of settlement and encompasses a plan for growth. It is designed to ensure the economic security of the Crown and its citizens, and is premised on the territorial integrity of the planned area. Viewing the Royal Proclamation as a planning document underlines the ways in which planning is highly connected to the project of nation building as well as the process of legitimizing and realizing the Crown’s unilateral sovereignty claims. In demonstrating how colonial Indian policy arises out of colonial assertions of sovereignty, planning becomes visible as integral to rather than merely incidental to settlement and colonization.

The connection between careful settlement planning and colonial assertions of sovereignty is not merely coincidental. Legal scholar Brian Slattery (1979b) has identified four main methods—conquest, cession, annexation, and settlement—by which the Crown could obtain title to a colonial territory in common law, at least according to the common law of the 17th and 18th centuries. First, according to Slattery (1979b), conquest involves the military subjugation of territory. However,
conquest in itself does not render the territory part of the Sovereign’s domains. Rather, a clear expression of the Crown’s intent to assume sovereignty on a permanent basis is required, for example, through the establishment of a civil government to replace military rule. Second, cession is the formal transfer of territory by treaty from one independent political entity to another. Third, annexation occurs through a unilateral act such as an Order in Council that is not challenged by a domestic court. Fourth, settlement is considered adequate for establishing sovereignty, provided the land is uninhabited and not recognized as the dominion of another state, and the sovereign has authorized settlement as a clear expression of intent to gain sovereignty.

Slattery (1979b) notes that settlement aids in the colonial assertion of sovereignty in a very different way from conquest, cession or annexation. Settlement does not revolve around the immediate and forceful replacement of Indigenous laws with colonial laws and legal structures. Rather, settlement first requires the establishment of a competent authority and then only applies within the settler community. Establishing sovereignty through settlement requires physical settlement, immigration, and the establishment of a system of governance that is capable of exercising authority over a settler community (Slattery 1979b). Thus, the jurisprudence on settlement as a means of acquiring sovereignty can help to explain the governmental logic that defined processes of colonization and settlement in Upper Canada following the Royal Proclamation.

In the time following the Royal Proclamation, encouraging settlement,
immigration and the establishment of a system of local government was the main preoccupation of the colonial authorities (Shortt 1903; Gates, 1968). By the 1790s, John Graves Simcoe, then Lieutenant Governor of Upper Canada, made a series of proclamations declaring Upper Canada open for settlement. These proclamations had the force of law and had several functions. Besides declaring Upper Canada available for settlement, the proclamations promised free land to United Empire loyalists in an active attempt to control both the volume and moral quality of immigrants to Upper Canada. Furthermore, the surveys and plans that accompanied the proclamations were crucial in determining land use and encouraging a particular kind of civic organization. The plans set aside land in each township for Anglican clergy, farmland, and transportation corridors in addition to parceling property (Gates 1968). The plans of survey not only enabled the beginnings of a system of allocating and managing property, they also reflected a particular imagining of local government, which would be founded on individualized property ownership, with the township as the basic political unit. In short, the proclamations of settlement were an important ritual in the process through which the Crown gained possession of and settled land they had long regarded as Indian territory.

The process of extinguishment is implied in the delineation of “Indian territory” and “settlement areas” demonstrated in the Royal Proclamation and through the early settlement process is one that is repeated today in the Comprehensive land claims process and echoed in the planning process. For instance, the comprehensive claims process involves the identification of a territory
that is to be the exclusive domain of Indigenous peoples. This is intended to secure Indigenous rights in that area, and yet it requires that rights to other territories be surrendered.

Rynard (2000) demonstrates this point in his examination of the Nisga’a Final Agreement, and adds that such agreements “demand that the lands of Aboriginal peoples be brought into the familiar and predictable reach of crown sovereignty and Canadian property law” (Rynard 2000, 241). Thus, in such processes governed by juridical understandings of sovereignty and reliant solely on Western legal structures, the “recognition” of Aboriginal title does little to advance Indigenous sovereignty when the recognition is based on the assumption of Crown jurisdiction. Instead, this recognition leads to the paradoxical situation in which the Crown recognizes Aboriginal title, only to then extinguish it. This process is mirrored in the planning process. In the previous example, which highlighted how Indigenous interests were handled by the Ontario Municipal Board, Indigenous interests were recognized as legitimate and yet this recognition did not lead to their increased protection. Instead, jurisdictional arguments were advanced to exclude those interests from consideration in the planning process, and ultimately contributed to the undermining of Indigenous interests.

3.4 Indigenous Interpretations of the Royal Proclamation

The long history of colonial dispossession in Canada is reflected in the founding documents of the country, and its logic is entrenched in the institutions of local governance that define Canadian democracy. This examination of how the
establishment of Canadian sovereignty claims was connected to the creation of a territorial plan bring into focus the manner in which planning is intimately connected to historic and ongoing colonial dispossession in Canada. The production of subjects and the bifurcation of territories, which in turn enables a jurisdictional logic to operate as a rationality of governance, has been essential for the settlement of Canada and crucially, for the maintenance of assertions of sovereignty. And yet, this assertion of sovereignty upon which Canada’s authority to rule over Indigenous land, and enabling a system of territorial planning is a fantasy built upon the willful exclusion of Indigenous history and denial of Indigenous sovereignty.

The Royal Proclamation is frequently interpreted as a unilateral declaration of the Crown’s will. This interpretation does not reflect that the consensus of the parties involved was required, nor does it reflect the conditions under which First Nations accepted the terms of the Proclamation (Borrows 1994, 1997b). Borrows seeks to advance an Indigenous reading of the Royal Proclamation by placing it in the context of broader Indigenous-European diplomatic relations at the time. Borrows argues that the Royal Proclamation must be understood in relation to the Treaty at Niagara (1764) and the Two-Row-Wampum. These treaties are emblematic of Indigenous understandings of the Royal Proclamation, and were made with significant Indigenous input. In the context of these treaties, the Royal Proclamation must be understood as gaining its force not from its appearance as a unilateral declaration of the Crown, but rather from the fact that it was received by and created with the consent of Indigenous peoples.
While the narrative of settlement as conquest detailed by Slattery (1979a) supports the conclusion that Indigenous peoples were conquered, the historical documentation which Borrows relies upon reveals that Indigenous peoples did not view themselves as conquered. Rather, Indigenous peoples regarded themselves as having a diplomatic relationship with the Crown. Borrows (1994) points to the high status accorded to both meetings with the Crown and its representatives, and treaties made with the Crown as evidence of diplomatic relations between sovereign entities.

Borrows argues that the Royal Proclamation became a treaty when it was presented to Indigenous peoples for confirmation by the colonists at Niagara in 1764. There, the principles of the two-row-wampum were also re-affirmed. The Royal Proclamation, then, read in conjunction with the two-row wampum, demonstrate[s] that the connection between the nations spoken of in the proclamation is one that mandates colonial non-interference in the land use and governments of first Nations. Therefore, First Nations regarded the agreement, represented by the Proclamation and the two-row wampum, as one that affirmed their powers of self-determination in, among other things, allocating land. This agreement, at the start of the formal relationship between the British and the First Nations of Canada, demonstrates the foundation-building principles of peace, friendship and respect between the two parties. (Borrows 1997b, 165).

Borrows (1994, 1997b) argues that the formation of the proclamation, and First Nations input and understanding of the proclamation, provides a legal basis for First Nations’ self-government in Canada, such that self-government can be understood as a presently existing right that does not require a further constitutional
amendment. In the context of exercising jurisdiction over land, he suggests that “native consent is required to any alteration of First Nation land use and governance” (Borrows 1997b, 168).

Montour-Angus (1995) suggests that the laws of Canada have been created and imposed without Indigenous input. In many cases, this is true. Certainly, the planning laws of Ontario are created and applied without Indigenous participation. Moreover, these laws often work to thwart Indigenous participation in the planning process, and consequently have the effect of diminishing Indigenous assertions of sovereignty. However, this does not mean that the law must be abandoned. Borrows argues that Canada “cannot presently, historically, legally, or morally claim to be built upon European derived law alone” (Borrows 2010, 15). Instead, Indigenous law must be recognized as a source of jurisdictional rights and obligations. Thus:

a repudiation of these damaging doctrines could be found by further developing at least one strand of Canadian law. Working out the fuller implication of treaties between the Crown is a way out of the impasse created by the rejection of other legal theories... (Borrows 2010, 20).

Borrows points towards a reinterpretation of the Royal Proclamation from a perspective grounded in Indigenous law. I suggest that such reinterpretations can also form a solid ground from which to reinterpret planning doctrine. Understanding the Royal Proclamation as a land use planning document and from an Indigenous perspective serves not only to underscore the fact that Indigenous consent is required in planning, it also emphasizes the role of planning as a vehicle for the negotiation of diplomatic relations between Indigenous peoples and the
Crown. From this perspective, the assertion that the concerns of Indigenous peoples are unrelated to planning seems absurd.

4. Conclusion
In the context of planning decision-making in Ontario, arguments for and against engaging with First Nations are clearly centered on issues of jurisdiction and rights. However, a narrow administrative understanding of jurisdiction and rights has served to exclude Indigenous peoples from the planning process. In addition, in the examples examined here, the recognition of Aboriginal rights is elaborated in the planning process by administrative knowledge for the purposes of excluding Indigenous people from planning decision-making. Thus, recognition serves to identify who can participate in the planning process and who is excluded.

The power that is invested in the planning bodies through recognition is clear in the examples presented in this chapter. While municipalities and planning bodies deny their responsibility to speak on Indigenous issues, they do not deny the claims made by First Nations. Rather, in these examples, planners and politicians recognize the existence of Aboriginal and treaty rights, but view these issues as the responsibility of other levels of government. Thus, the recognition of Indigenous people as part of a different legal order is the basis for the disavowal of Aboriginal and treaty rights in the planning process rather than their affirmation. In other words, in the context of jurisdictional understandings of governance, planning does recognize Indigenous difference, however this difference is based on colonial understandings of law and history that deny Indigenous sovereignty. In this way,
planning becomes part of the circulation of racial knowledge, as it renders decisions about the status of Indigenous peoples in the planning process on the basis of racial and jurisdictional lines drawn in the Constitution and the Indian Act. Planning thus reinforces the legitimacy of Canada’s sovereignty claims and the superiority of Canada in relations to Indigenous peoples. From this perspective, it would be worthwhile to further consider the political implications of subscribing wholesale to a politics of recognition and rights as the basis for planning practice.

In this chapter I demonstrated the role of planning in the process of rendering “anomalous” (Rifkin 2009) the presence of Indigenous peoples in the space of planning. I argued that planning accomplishes this crucial differentiation of Indigenous peoples through the creation of status identities and the application of the language of jurisdiction. Furthermore, the exclusion of Indigenous peoples from the local planning framework is not an end in itself. Rather, systemic exclusion is just one of the ways in which planning reinforces a jurisdictional imaginary which excludes and denies Indigenous sovereignty. The language of jurisdiction performs the important work of describing Canada’s sovereignty, and rests on the assumption of Canada’s territorial and jurisdictional cohesion. Specifically, planning relies on an understanding of the property in question as situated within the geographic limits of planning’s jurisdiction, and locates the question Indigenous land rights beyond the scope of its jurisdiction. In other words, jurisdictional boundaries define the limits of political community, and rely on the affirmation of arbitrary borders. Finally, I have
shown that jurisdictional arguments are tautological and self-validating, and function as totalizing discourse while enabling the spatialization of governance.

However, following Borrows, I also argued that alternate understandings of planning predicated on the recognition of Indigenous political legitimacy are possible. This requires not only the re-interpretation of planning law from an Indigenous perspective, but also requires that planning practice be historically situated to highlight the ways in which planning, as a tool of governance, structures relations between peoples and between people and territory.
Chapter 4: Planning and the Authorization of Dispossession

Private land sale cannot ordinarily divest a government of jurisdiction. If a citizen of Arizona sells his estate to a citizen of New York the territory of Arizona is not diminished, nor is the territory of New York enlarged. We have never, however, overcome the convenient pretense that sales of Indian land imply cessions of sovereignty. (Barsh & Henderson 1980, 177)

1. Introduction

The sale and settlement of Indian land is a critical step in the dispossession of Indigenous peoples. As Barsh and Henderson (1980) point out, the sale of Indian land has often been accompanied by the assumption that such sales of land constitute cessions of sovereignty. The expansion and defense of the property regime is thus closely linked to the denial of Indigenous sovereignty. In the previous chapter, I argued that planning deploys jurisdiction as a modality of power. I demonstrated how the exclusionary logic of jurisdiction enables the exclusion of Indigenous peoples from the planning process and thus denies Indigenous claims to territory and authority. Furthermore, I argued that these arguments are tautological and self-validating, and have as their objective the negation of the authority of Indigenous peoples to decide for themselves how they will be governed.

In this chapter, I extend this argument by demonstrating that planning not only excludes Indigenous peoples from the planning framework, but that this exclusion is further enabled by the assumption that sales of Indian land and the establishment of a property regime provides adequate proof that Indigenous land
interests have been voided by settlement, and thus mask the tautological sovereignty claims advanced by the state. The First Nations Policy and related by-laws passed by the City of Brantford in 2008 and the legal actions against Indigenous peoples enabled by this policy will provide evidence of how this logic of property is deployed in the planning process. Finally, in this chapter I also demonstrate how the regulatory and enforcement powers of municipal planning also serve to authorize Euro-Canadian claims to property, and confer upon municipalities the power to criminalize Indigenous claims to territory. As a result, the planning powers vested in municipalities play an important role in affirming the sovereignty claims of the state, while diminishing the sovereignty claims of Indigenous peoples.

2. Planning and the Management of Property Relations
2.1 Municipal Planning and the Regulation of Property
In Ontario, planning is conducted under a policy-led planning system (Ontario 2010). The Ontario Provincial Policy Statement is created by the provincial Ministry of Municipal Affairs and Housing and provides direction on matters related to land use planning and development across the province. The policy has the force of statute, and land-use decisions must be consistent with the goals outlined in the Provincial Policy Statement. Ontario’s 2005 Provincial Policy Statement describes the goal of planning as the creation of “strong communities and a strong economy” (Ontario 2005). Thus, the Provincial Policy Statement is an expression of social and economic policy goals. These goals in turn are supported by the land use and development planning objectives also outlined in the policy statement.
Under the *Planning Act*, the Ministry of Municipal Affairs and Housing has extensive jurisdiction over the field of planning. Although the provincial government is responsible for creating policies that guide land-use and development, the task of regulating land-use is delegated to municipalities. The *Municipal Act* delegates the authority to plan, while the *Planning Act* creates a system for the regulation of land use and outlines the mechanisms available to municipalities for the regulation of land uses (Chipman 2002). Municipal governments have considerable power to influence urban land development through the creation of official plans and the approval of development applications. All land use decision-making at the local level is directed by the content of Official Plans. Local Official Plans represent a statement of intent regarding future decision-making and together provide description of all the types of allowable development within a municipality. In addition, municipalities are given the power to create written ordinances and zoning by-laws.

Beyond the Official Plan, there are four main mechanisms for the regulation of land uses: zoning, variances, sub-divisions and severances. All of these mechanisms are oriented towards the control of development by placing limits on the types of uses permitted on land, and the types of structures that owners are allowed to erect on their properties. Zoning, for example, operates through the regulation of land uses, permitted densities, building heights, and also outlines the size of permitted lot sizes, lot frontages and set backs. Variances, on the other hand, may be requested by property owners to allow the development of property in a
manner that is otherwise not permitted by the zoning by-law. Sub-divisions and severance regulations are designed to regulate the subdivision and sale of property.

Zoning and the other controls available to municipalities for the regulation of land uses function by placing limits on the use of private property. By extension, the policy statements to which zoning by-laws must conform are also statements about acceptable and desirable uses of private property. While these regulatory mechanisms and policies apply equally to public property, the authority of planning to restrict private land use has been the subject of some debate.

In the United States, where property rights are constitutionally protected, the case of *Euclid v. Ambler* is often held up as affirming the constitutionality of local planning authorities to restrict private property uses through zoning by-laws (Wolf 2008). There, the United States Supreme Court reasoned that because the zoning by-law was in the greater public interest, it did not amount to a “taking” of land (Wolf 2008; Longo 2010). In Canada, private property rights are not constitutionally protected. Rather, the Crown is understood to have underlying title to all land in Canada. Yet, the authority of municipalities to infringe on the rights of private property owners has been similarly challenged. Longo (2010) outlines a number of Canadian cases, which parallel to *Euclid* have affirmed the right of municipalities to regulate private property. Longo finds that, as in *Euclid*, the authority of municipalities to infringe on the property rights of owners is found by the courts to be justified and necessary when it is done for the benefit of the larger community. For example, Longo cites one of the earliest instances in which a by-law was
challenged on the grounds that it unfairly limited the rights of a property owner. In this example, the Divisional Court for Ontario heard the case in which a landowner challenged the right of the City of Toronto to prohibit the location of apartment buildings on certain streets. The Court reasoned:

\[
\text{We cannot mistake the policy of the Legislature; the plaintiffs, as a public body, are called on to enforce it in proper residential neighbourhoods. While it may bear hardly on the individual owner, who is hampered in the free enjoyment of his property, still it is one of the effects of advancing civic life and amenity that, for the sake of preponderating advantages to the whole locality, one proprietor may have to suffer deprivation.}
\]

This is said to be a test case, involving a score of other permits; and, this being so, and the point being without authority, it seems fitting, while we reverse the decision in appeal, to do so without costs.

(Toronto (City) v. Williams (1912), 27 O.L.R. 186 (Ont. C.A.) at pp. 190-191. Emphasis added. Cited in: Longo 2010, 76)

The rationality of limiting individual freedoms by limiting the use of private property has not only be accepted by the judiciary, it is accepted by and advocated by liberal public-choice theorists as received wisdom. The public choice theory of planning describes the type of planning to emerge in the context of systems of multi-level democratic governance. The theory is aimed at explaining the types of governance models chosen for planning, and focuses on the role of zoning and development control as a fundamental regulatory tool in planning. According to Poulton (1991), from the perspective of a public choice model, zoning is provided as a public service in order to secure and increase real-estate values, while minimizing the externalities that might arise from the existence of competing land uses in close
proximity. Thus, planning “protects property from the actions of neighbours, but also restricts the freedom of owners to do what they wish with their property” (Poulton 1991, 267).

This approach to planning is also consistent with a property rights theory of planning that emphasizes the importance of securing relations for the purpose of stabilizing economic transactions while minimizing transaction costs (Lai 1997). Sager explains:

Public land use planning and its system design follow as a consequence of the efficiency and equity goals via the system of property rights. When regulative planning instruments can improve the attainment of social goals, there is a basis for a property rights justification of land use planning (Sager 2001, 632).

2.2 The Uses of Property in Planning

Together the policy-led and regulatory approach to municipal power and the regulation of private property gives rise to several modes of rationalizing planning activities. As I will demonstrate later in this chapter, the assumptions about property that underlie these rationalities have significant affects on the status conferred upon Indigenous property and authority in the planning process.

Power is Dispersed to Individuals Through Property

First, although the constitution does not guarantee property rights, substantial power to police property is dispersed from the state to individuals (Brisbin & Hunter 2006). This dispersal of power is evident in the planning process. For example, in
Ontario, this power is manifested through an as-of-right approach to planning in which private property owners have the right to dispose of their land as they see fit, as long as the use conforms to established land-use regulations (Makuch et al 2004). Thus, planning has an important function in delineating the rights of property owners.

While property rights in Canada are not absolute, landowners have the right to develop their lands “as-of-right,” and this right is regulated by provincial policy as administered by municipalities. This approach to the regulation of private property also takes for granted that ownership is singular, and assumes a “unitary, solitary, and identifiable owner” (Blomley 2004, 2).

This model of property also determines when and how individuals mobilize the power of the state to recognize or affirm property claims (Blomley 2004). Property owners also rely on the state to sanction and protect property interests. The regulatory powers of the state as expressed in planning are designed not only to make public goals legible, but also have the effect of protecting property values by preventing conflicting uses. Furthermore, the enforcement powers of the state protect property by prohibiting and punishing trespass and other violations of property rights.

The state’s monopoly on violence sustains the property regime (Blomley 2004, 2007). Elden (2009) argues that “creating a bounded space is already a violent act of exclusion and inclusion; maintaining it as such requires a constant vigilance and the
mobilization of threat; and challenging it entails a transgression” (Elden 2009, xxx). However, although the state must wield the threat of violence in the defense of property, Blomley (2003) argues that liberalism is able to posit its own violence as a force that creates law and order through the maintenance of propertied relations rather than as a force that creates disorder through dispossession. Thus, relations between individuals and the states become legible through the institution of property, while the defense or property rights enables the state to delineate its sphere of jurisdiction and extent of the rule of law.

Public Goals are Made Legible in Private Property

Second, the limits placed on the use and development of private property by planning are justified by the idea that policy objectives designed to benefit the welfare of society as a collective can be obtained by putting restraints on private property (Huxley 1997). The utility of private property is limited by land use regulations that are designed to ensure that certain democratically defined public goals are met. These goals are expressed in official plans as well as accompanying by-laws and land use regulations. Such regulations thus ensure that land is put to uses that can be understood as moral (advantageous to the social welfare of the community) or productive (advantageous to the economic welfare of the community).

A property regime thus entails a specific set of spatial assertions, and moral beliefs. For example, the idea of highest-and-best-use, which originated in the jurisprudence dealing with the necessity of providing compensation to owners of
property that had been expropriated, has now come to represent expectations of growth and market stability, and acts as a moral imperative for land use planning. The term “best use” implies that there are ‘good’ and ‘bad’ uses of property. As Blomley argues, those uses which are considered to be bad are usually those which disrupt the “natural telos of development” (Blomley 2004, 84). Highest and best use is thus also an ethical judgment based in the expectation of a linear progression and demonstrates that in a western paradigm, property has its own teleology that is led by progress, growth and improvement.

**Possession is Signaled Through Land Use**

Third, the uses to which property is put not only signal growth and development, land use also functions as an important marker of possession. Legal scholar Carol Rose argues that property begins with possession. Possession, in turn, she defines as “a clear act, whereby all the world understands that the pursuer has an unequivocal intention of appropriating [something] to his individual use” (Rose 1994, 12). She bases her argument on her interpretation of *Pierson v Post*, a key legal decision that is often held up as establishing the foundational concepts of property law. According to *Pierson v Post*, possession requires giving notice to the world through a clear act. Rose’s theory of property combines both a labour theory of property, which holds that individuals appropriate objects to themselves by investing labour in the object, and a consent theory of property, which suggests that possession requires a statement of intent. Rose further argues that suitable use is a form of notice (Rose 1994).
This notion of use as a form of notice of possession can be found in planning. For example, planners Wachsmuth and Pasternak (2008) address the problem of property abandonment in Toronto by arguing that when property owners abandon their properties—in other words fail to give notice of possession through proper use—they should lose their property rights. This line of argumentation is the basis for their proposed “use-it-or-lose-it” by-law that would empower the City of Toronto to take over abandoned properties for the purposes of using the property for affordable housing. Proper use is thus not only key to ensuring public goals are met, use is an important signal of possession and integral to the functioning of the property regime.

Property Enables Planning’s Instrumental Rationality

Fourth and finally, the regulatory approach to development control means that the process of planning is often viewed as an administrative matter as the process of granting development approval or severance becomes a matter of confirming that a development application conforms to established regulations. Friedman (1987) argues that in a policy led approach to planning, planners often regard themselves as “technicians” or “technocrats” who serve the existing structure of power, and “believe that by using appropriate scientific theories and mathematical techniques, they can, at least in principle, identify and precisely calculate the best solutions” (Friedmann 1987, 79). This approach to planning is based on the assumption that planning is focused on the technical manipulation of space, and further assumes that space is nothing more than a surface, which can be apprehended according to the
laws of Euclidean geometry.

Graham and Healey (1999) point out that the use of object-oriented and Euclidean depictions of cities often implicitly supports the idea that “single, unbiased representations of places are possible” (Graham & Healy 1999, 625). Furthermore, “space, distance and the city, are reified as automatic and determining forces directly shaping the social and economic world in a linear, cause-and-effect way” (Graham & Healy 1999, 624). Finally, Harvey has noted that “[t]he scientization of social science seems to have been accompanied by masking real social relationships—by representing the social relations between people and groups of people as relations between things” (Harvey 1985, 167). Thus, the social relations underlying the institution of property are ultimately obscured by the administrative structure that creates and manages them. As a result, planning is imagined as a practice concerning land use, rather than property rights, obscuring the political nature of planning.

2.3 Interrogating Property

Challenging the Ownership Paradigm

While property is an important organizing concept in planning practice, theories of property are relatively underdeveloped in planning literature (Krueckebberg 1995). Thus, questions related to the role of the state in curtailing property rights are treated at length without attending to the question, what is property? Rather, the concept of property is most often reified as a natural concept, while the social processes that produce propertied relations remain obscured by legal and technical
approaches to property.

The shortcomings of the regulatory approach to planning have been well documented (Huxley 1994; Sandercock 1998, 2003). Planning’s tendency to be viewed as a technocratic, apolitical, and administrative activity, is a product of the assumptions made about property in the planning process (Krueckeberg 1995, Blomley 2004). Thus, it should not be surprising that some planning theorists and critical urban geographers have sought to overcome the technocratic approach to planning by highlighting the socially constructed nature of property. Many scholars have begun the work of deconstructing the role of property in planning by interrogating the political theories that underlie the ownership model of property.

For instance, much attention has been paid to the role of Lockean theories of property in spatial planning. Krueckeberg (1995) begins his discussion with the significance of Lockean theories of property. Similarly, in her book Unlearning the Colonial Cultures of Planning, Libby Porter (2010) explains that Locke’s theory of property—characterized by an emphasis on the significance of labour for appropriation and the centrality of property to the foundation of civil society—is a cornerstone of the “colonial culture” of planning. She argues that the primacy given to Lockean understandings of property in western planning models is responsible for the way in which Indigenous understandings of property, and thus Indigenous peoples, are marginalized in the planning process. Thus, she makes a strong connection between Locke’s theory of property and colonial dispossession:
Such a [Lockean] theorization of property had very specific implications for colonialism. Sovereignty, in western terms, exists over land, it becomes recognizable, through specific land use, the improvement of land...this notion of improvement is in the continual process of creating and asserting sovereignty through colonialism, and how it underpins modern land use planning. It has also been important to the justification of colonialism in settler states, where land has been stolen from Indigenous peoples. Locke’s property discourse—of sovereignty existing only where use and improvement can be measurable and recognized—linked to the intrinsic racism and violence of colonialism, was one of the mechanisms of securing imperial power over territory. Indigenous peoples were not recognizable ‘improving’ their territory and therefore could not be recognized as sovereign rulers of that territory (or indeed as owners of property). Indigenous land politics is all about exposing the racialized hierarchies embedded within this notion of property and its application in colonialism, and asserting the recognition of their notion of sovereignty expressed differently over territory. Indigenous land claims, then, are fundamentally contests about identity, sovereignty and the recognition that Western/colonial approaches to property are one cultural expression of the sovereignty-territory relationship. (Porter 2010, 26. Emphasis added)

Porter emphasizes that cultural differences account for the ways in which property claims are asserted and communicated. She interprets Indigenous claims as primarily attempts to renegotiate “the multiple fields of recognition and governance between Indigenous peoples and settler states” (Porter 2010, 26). Thus, she reduces Indigenous political struggles to struggles of cultural identity, writing that Indigenous claims are based on their “unique status as original inhabitants who are the custodians of particular cultural, economic and religious traditions” (Porter 2010, 33). As a result, planning is positioned as mediator of difference, in a contest between competing cultural practices and identity claims, and the future of planning practice is once again rescued by the potential for planning to recognize and validate Indigenous difference:
My argument...is that western settler states, and their planning systems especially, have a particular way of seeing space, and that this is quite distinct from Indigenous ways of seeing space. Moreover, this produces manifestly unjust outcomes, oppression and marginalization. Once again, while this argument rests on the establishment of difference, the ‘problem’ of difference is not difference itself. It is acknowledging that difference is materially relevant to our social practices and relations, because it constitutes and re-constitutes colonial power relations and injustices. These must occupy our critical attention. (Porter 2010, 40)

Blomley similarly argues that the hegemony of the ownership model of planning played an important role in the dispossession of Indigenous peoples through colonization. Indigenous institutions of property, he argues, “have long been overlooked and misunderstood partly, perhaps, because they do not conform to the ownership model. Thus, in deciding whether Indigenous claims to land constitute a proprietary relation, courts have tended to adopt a categorization compares them with the assumed substance of English concepts of property” (Blomely 2004, 112). As a result, Indigenous property claims are illegible “if they fail to adopt to the geography of the ownership model” (Blomley 2004, 9).

Recognizing Cultural Difference?
The acknowledgement of the fact that property is a product of social relations and that can be constituted and understood in many different ways is somewhat limiting in the possibilities it offers for contesting property regimes. The emphasis on recognizing the different forms that property might take only brings us to asking the question, how can competing property claims exist simultaneously? Thus, at the end of Unsettling The City, Blomley asks:
What would the city look like if these multiple and overlapping property claims were formally acknowledged? What would urban planning look like? How would official discourse on gentrification or native claims, for example, change? How would the settler-society re-imagine the security of “its” entitlements? How would my understandings of “my” property change to acknowledge other? Put more bluntly, could the city change, given the hegemony of the ownership model? (Blomley 2004, 155)

This question highlights the fact that property is a social construction, rather than a thing in itself. As such, Blomley reminds us not only that multiple, competing property claims are not only possible, but that many forms of property claims can be valid. However, in applying this analysis to the question of Indigenous property claims, he seems to be suggesting that solution to the hegemony of the ownership model of property is to acknowledge Indigenous property claims. In other words, like Porter, Blomley’s response to Indigenous sovereignty claims hinges on (once again) a politics of recognition and the instance that cultural difference accounts for conflict between Indigenous and non-Indigenous peoples.

The approach taken by Porter and Blomley has been replicated by numerous other scholars from the fields of anthropology, political science and law, who have been fascinated by the differences between western and Indigenous concepts related to property (Collins 1998; Banner 1999; Bryan 2000; McLaren, Buck & Wright 2005; Banner 2007). These studies provided various explanations for socio-cultural factors that account for differences in western and Indigenous understandings of property. These ethnographic studies also reveal much about the way in which property is understood in different cultural contexts, and have underlined the fact that property must be understood as a set of social relations, rather than as a “thing.” However,
the cultural and discursive practices which produce property and which are emphasized in the cataloguing of difference cannot fully explain how or why planning institutions take up and reflect particular understandings of property discourse in its legal and regulatory practices. Nor do they get at the question how it is that colonial states such as Canada employ and continue to employ legal categories of race and gender in the systemic dispossession of Indigenous peoples. This focus on cultural difference is therefore inadequate for addressing the sovereignty claims at stake when it comes to relations between Indigenous peoples and Canada.

The fact that property is a product of social relations, rather than a thing has long been established. While the hegemony of the ownership model is clearly symptomatic of the nature of relations between Indigenous peoples and the Canadian state, it is not the only obstacle that must be overcome to realize Indigenous sovereignty. A more compelling question is how is it that certain conceptions of property are privileged as such, while others are discounted? By making visible the process through which property is reified, the possibilities for challenging the property regime are multiplied. Thus, I advocate that attending more closely to the technologies and rationalities that reinforce the system of private property in planning will open more space for contesting the denial of Indigenous sovereignty.

The Co-Production of Race and Property in Law
The recognition of Indigenous property interests as equal to Euro-Canadian
property interests has been posited as the solution to colonial dispossession. However, as Cheryl Harris (1993) has brilliantly demonstrated, settler property regimes are founded on the denial of Indigenous sovereignty and forms of property. Thus, the notion that both forms of property can be recognized as equal is an illogical proposition. Instead seeking to identify elements Indigenous territorial authority that are analogous to Western concepts of property, it is more important to ask what fundamental assumptions about property allow and make acceptable the denial of Indigenous sovereignty. As Alfred states “without a fundamental questioning of the assumptions that underlie the state’s approach to power, the bad assumptions of colonialism will continue to structure the relationship” (Alfred 2005, 43). Thus, a critical analysis of planning should be oriented towards questioning the assumptions that underlie the “ownership” model of property and more importantly, how those assumptions structure relations between Indigenous peoples and the state.

Aileen Moreton-Robinson has argued that critical race theory applied to analyses of Indigenous dispossession has the potential to “produce a new understanding of how whiteness operates through the racialized application of disciplinary knowledges and regulatory mechanisms, which function together to preclude recognition of Indigenous sovereignty” (Moreton-Robinson 2006, 387). Cheryl Harris considers how racist knowledge is deployed in law for the purposes of affirming white ownership and possession in her landmark review article *Whiteness as Property* (1993). In this paper, Harris powerfully demonstrates how racial identity
and property claims are co-produced in law. Through a genealogy of law starting with American slave law, Harris reveals how whiteness has evolved from a form of racial identity into a legally acknowledged and protected form of property. She points out that racial forms of domination include racially contingent sets of property rights, which in turn allocate social benefits. This allows her to argue that racial identity has a distributive function that operates through the institution of property, which in turn plays a “critical role in establishing and maintaining racial and economic subordination” (Harris 1993, 1716). She writes:

Slavery linked the privilege of whites to the subordination of Blacks through a legal regime that attempted the conversion of Blacks into objects of property. Similarly, the settlement and seizure of Native American land supported white privilege through a system of property rights in land in which the “race” of the Native Americans rendered their first possession rights invisible and justified conquest. The racist formulation embedded the fact of white privilege into the very definition of property, marking another stage in the evolution of the property interest in whiteness. Possession—the act necessary to lay the basis for rights in property—was defined to include only the cultural practices of whites. This definition laid the foundation for the idea that whiteness—that which whites alone possess—is valuable and is property. (Harris 1993, 1721)

Through her study of American slave and property law, Harris demonstrates that “race and property are conflated when a system of property is established that is contingent on race...the conquest removal, and extermination of Native American life and culture were ratified by conferring and acknowledging the property of white in Native American land” (Harris 1993, 1716). While her argument draws on American law, its applicability to Canada becomes clear when examining the origin and evolution of the Indian Act.
Throughout its many iterations, the purpose of the Indian Act has been to assimilate Indigenous peoples to the body politic through a process of enfranchisement (Cannon 2007). The first iteration of what is today known as the Indian Act appeared in 1850 with the Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by them From Trespass and Injury. This Act was replaced in 1856 by the Gradual Civilization Act. Following confederation, it appeared as the Act for the Gradual Enfranchisement and Assimilation of Indian People in 1868.

While the Act has seen numerous iterations since its inception, what has remained consistent over the past 161 years is the way in which it has conflated race and property for the purpose of dispossessing Indigenous peoples of their sovereign territories. For example, the Gradual Enfranchisement Act provided for voluntary enfranchisement by stipulating that Indians of “good character” — exemplified through regular church attendance and the ability to read and write English — could relinquish Indian status, and was accompanied by a promise of fee simple title to 20 hectares of land in addition to a cash payment equal to his equal share of annuities (Canon 2007). Similarly, the Gradual Civilization Act expanded the definition of “Indian” to differentiate between “status” and “non-status” Indians. This distinction was important not only because it created a racialized legal category or persons with a specific and limited set of rights and entitlements (Canon 2007), but it also solidified the authority of the Crown to define the rights of Indians and non-Indians by bringing “status Indians” under its exclusive jurisdiction.
Samson has noted that citizenship rights are often given in exchange for “simulated cultural sameness” (Samson 2003). Thus, Indigenous peoples are expected to take on the characteristics of white euro-Canadians before being granted any recognition of property or other citizenship rights. Similarly, Dua (2003) has pointed out that through the differential application of citizenship rights, the Indian Act has treated Indigenous peoples “as if they were incoming migrants moving on to uninhabited soil already occupied by British settlers” (Dua 2003, 45). In this way, the Indian Act, in all its iterations, has established settler property regimes and systems of authority as the baseline for the measurement and recognition of political legitimacy, with assimilation serving as the only ticket to Indigenous inclusion and recognition. As Harris reasons, the law functions such that “only white possession and occupation of land [is] validated and therefore privileged as a basis for property rights” (Harris 1993, 1716).

The analysis of race as a form of property, or property right, enables a detailed analysis of how race and property are conflated in legal and administrative frameworks with the effect of excluding certain racialized groups. Understanding how race and property are co-produced in law makes clear that the challenge posed by the difference between the western, “ownership” model of property and Indigenous understandings of property is far more than a cultural or epistemological problem. Rather, it becomes clear that the Canadian system of property is predicated on the denial and exclusion of Indigenous political authority. When applied to the realm of planning, it brings to light how race neutrality might be produced through
the circulation of a race-neutral discourse of jurisdiction and the technocratic management of property relations. Thus, examining race as property is one way to make clearer elements of systemic racism in planning, and the role of property as a mode of exclusion.

Understanding that the defense of property rights relies on the state’s monopoly on violence also allows me to draw a clearer connection between planning and colonial dispossession. Planning is one aspect of state violence that results in the dispossession of Indigenous people. In locating planning within the relationship between law and violence, I am not speaking of violence merely as the unlawful use of physical force with the intention of causing harm. Rather, I am interested in planning as a manifestation of structural violence that is inherent in the law.\(^5\) Nancy Fraser (1991-1992) discusses the concept of “masked structural violence” which includes “a range of deadly systemic social processes, responsibility for which cannot easily be attributed to identifiable individual agents, but which culminate in massive harms such as malnutrition, medical neglect, and environmental toxicity.” (Fraser 1991-1992, 1328) Structural violence, while masked or invisible in the moment of its deployment, becomes visible through the effects on the people or objects towards which it is directed. Thus, the discourse of law and order that frames the state’s sanctioned use of violence and criminalizes Indigenous occupation also

\(^5\) However, it must be noted that Canada has used physical violence against Indigenous peoples with the intention of causing harm. For example, the Ipperwash Inquiry was established as a response to the shooting death of Dudley George by the Ontario Provincial Police. Similarly, Gabriel (2010) documents the physical harm which occurred when the Surete du Quebec blocked delivery of food and medical supplies to the Mohawk community during the 1990 standoff at Oka.
validates non-Indigenous possession and ownership of land.


3.1 Introduction

Unfortunately, there are many examples of poor relations between municipalities and First Nations. Perhaps the most striking and most public example of an acrimonious relationship between a municipality and a group of Indigenous people can be found in Brantford, Ontario. Between the years of 2005 and 2010, relations between the City and Indigenous people from the Six Nations of the Grand River have deteriorated. These poor relations are reflected in a Court case brought to the Ontario Superior Court in 2009-2010, in which the City of Brantford brought an injunction against Ruby and Floyd Montour and a number of other members of Six Nations and representatives of the Haudenosaunee Development Institute (HDI) who had been blocking construction sites around the City of Brantford on a regular basis.

Blomley (2003) notes that the violence inherent in the law reveals itself when threatened, producing a “crisis of legitimation” (Blomley 2003, 196). A crisis of legitimation occurs when reason alone fails to support the appearance of law’s legitimacy. Extending Blomley’s analysis, I suggest that Brantford’s First Nations Policy and related by-laws indicate such a crisis of legitimation. In this case example, the legitimacy of Brantford to exercise planning authority is challenged. As a result, the force of the law is brought down. The violence of the law is revealed in the
actions. Beyond court action, the City also requested that the Military be placed on notice.

In taking Brantford’s First Nations Policy and by-laws as an example, I am not interested in evaluating the strengths or weaknesses of the arguments brought forward by the City of Brantford or by the Haudenosaunee Development Institute. Rather, I am interested in the extent to which planning emerges as a form of governmental rationality. In other words, I want to examine how planning is used as a tool by the HDI and by the City in the assertion of their claim to authority. Who claims the authority to plan, and on what basis? To what extent is the claim of an exclusive authority to plan also a claim to sovereignty?

3.2 The Haudenosaunee Development Institute

The Haudenosaunee Development Institute (HDI) asserts the right to approve and thereby direct development in the Grant River area. This authority for the right to manage development is based on the Haldimand Proclamation of 1784. Prior to European settlement, the people of the Six Nations occupied an area that covered most of the land surrounding the Great Lakes. Contemporary land claims have their roots in historical treaties made between the Haudenosaunee and various European settlers (Keefer 2008, Hill 2009). At the root of the Douglas Creek Estates controversy is the Haldimand Land Grant of 1784.

The Haldimand Proclamation authorized the Six Nations to possess all of the land six miles on each side of the Grand River from its mouth to the source. These
lands were granted in recognition of the loss of the traditional territory of the Six Nations as a result of the American War of Independence. The land grant established that the Crown would hold the land in trust, and protect the lands in order to ensure that Six Nations would have sole use of the land (Six Nations 2010). Rather than ensuring that Six Nations would have sole use of the land, over the past 200 years the Crown has actively encouraged settlement upon these lands (Six Nations 2010).

The activities of the HDI are based both on the fact that the Haudenosaunee never relinquished their sovereignty or territory, and on the fact that the Haldimand Proclamation recognizes their authority in the Haldimand Tract. The activities of the HDI thus reflect their understanding of historical events.

The Haudenosaunee Confederacy Council had created a process that would allow developers who want to develop within their territory to be dealt with expeditiously and effectively. The process for exercising Haudenosaunee jurisdiction over their lands in the Haldimand Tract will be known as the Haudenosaunee Development Institute. The HDI will identify, register and regulate development ... (Haudenosaunee Development Institute, Terms of Reference, September 2007)

Throughout 2007 and 2008 the HDI began to solicit development fees and demand development applications from developers in the Haldimand Tract. When developers did not comply with the instructions of the HDI, the HDI blocked access to the development site, for example by blocking the road or by blocking construction equipment from accessing construction sites. According to documents filed in Court by the City of Brantford, by April 2008 development sites were being blocked on an almost daily basis. While many developers resisted the developed
protocol laid out by the HDI, many others recognize the HDI and now include the HDI on notices regarding development. For example, the HDI is included on all correspondence for the Capital Power Corporation’s Nanticoke and Port Dover wind projects (Stantec 2010).

The HDI can be understood as an attempt by Haudenosaunee people to play a role in the development approval process by soliciting development fees from developers proposing development in their traditional territory. The assertion of the authority to control development within the Haldimand Tract hinges on the assertion by the HDI that the Six Nations continue to exercise jurisdiction over the land, and that the presence of the competing sources represented by the province or the federal government do not alter the continued sovereignty of the Six Nations. Indeed, as Chief Allan MacNaughton told The Sachem newspaper on October 26, 2007: ”The confederacy has no issue with how Canada or Ontario in right of the Crown administers its development decisions along the Grand River, as long as it has had prior approval by the Confederacy” (Dawson 2007). Thus, Six Nations acknowledges the ability and authority of these governments to plan and develop land in the traditional territory of the Haudenosaunee, however they also assert the right to ultimately decide what happens in that territory by granting final approval for development. Keefer (2008) notes:

In many ways, the strategy of the HDI appears to mark a return to 19th-century war chief Joseph Brant’s original plan for providing for the Six Nations community. In Brant’s vision, much of the Haldimand tract would be leased to non-natives, and the revenues would be administered for the “perpetual care and maintenance” of the
community as a whole. In at least one instance, this does indeed seem to be what HDI is proposing. A sworn affidavit by Parminder Bawa, director and manager of the Bawa hotel development in Brantford, states that HDI would only let the development go ahead if “the title in the land was assigned to HDI in exchange for a 50 year lease” on the property. Annual development fees and lease payments would also have to be made to the HDI. The HDI thus represents a very different approach to handling land claims than elsewhere in Canada, where the balance of power is significantly less favorable to indigenous communities. As a wing of the Haudenosaunee Confederacy Council, the HDI has not waited for the federal or provincial government to resolve land claims. Because of this, the HDI has also faced the fundamental question that all sovereign powers confront: how can it physically enforce power over the territory it claims?

In signing treaties, Indigenous peoples usually assumed that they could continue to use off-reserve lands for sustenance. The prospect of an ability to continue to rely on the land for gaining a livelihood is one reason lands were ceded to the Crown in treaty negotiations for relatively little compensation (Macklem 1997; Asch 1997; Coyle 2007). The fact that some of the ceded land was eventually urbanized may change the way in which the land can be used for sustenance, but does not change the fact that Indigenous people continue to have a valid economic claim on the land. The *Final Report of the Royal Commission on Aboriginal Peoples* (1996) made several recommendations regarding the ability of Indigenous peoples to reap economic benefits from development occurring on their traditional territories:

2.4.3

The goal of negotiations be to ensure that Aboriginal nations, within their traditional territories, have

(a) exclusive or preferential access to certain renewable and non-renewable resources, including water, or to a guaranteed share of them;
(b) a guaranteed share of the revenues flowing from resources development; and

c) specified preferential guarantees or priorities to the economic benefits and opportunities flowing from development projects (for example, negotiated community benefits packages and rights of first refusal). (RCAP 1996)

Indigenous people have been systemically prevented from sharing in the economic wealth of Ontario. As Ipperwash Inquiry Commissioner Sidney Linden (2007) points out in his Final Report, Ontario is one of the strongest economies in the world and yet “economic policies and priorities in the province have neither protected the traditional Aboriginal economies nor enabled First Nations to participate in the industrial economy built on their traditional lands” (Linden 2007, Vol. 2, 59). Rather, there has been minimal acknowledgement of Indigenous interests in the regulatory regime in the province for managing natural resources.

Teillet (2007) notes that Indigenous peoples have tended to suffer as a result of rather than reap the benefits of resources extraction on their territories. Recent attempts to ensure that Indigenous communities are able to benefit from such resource extraction have focused on natural resource development. No studies have been undertaken to detail the economic benefits that have been derived from urban land development on the traditional territories of Indigenous people, and there has been little discussion of how Indigenous peoples might benefit from or influence urban land development. While impact benefit agreements or revenue sharing
arrangements are acceptable in the context of resource extraction, similar approaches in the urban land development sector seem more likely to be met with resistance.\footnote{In Western Canada, discussions around the creation of “urban reserves” are plagued by racism (Wilmot 2003). While the Treaty land entitlement process has created economic development opportunities through the creation of “urban reserves” for First Nations in Western Canada, there are no urban reserves in Ontario (see: Peters 2007).} Indeed, attempts by the Haudenosaunee Development Institute to reap benefits from urban development by soliciting development fees were deemed evidence of a “criminal conspiracy” and of “extortion” by the City of Brantford’s lawyer (Legall 2008).

3.3 Brantford First Nations Policy

The response by the City of Brantford suggests that the City does not share the same view regarding the authority of the HDI to plan and approve development in the region. Rather, the City views the activities of the HDI as criminal activities that pose a threat to the economic stability of the City, to law and order, and to the authority of the City. Thus, over a period of a few months the City took steps to criminalize the activities of the HDI.

On March 25, 2008, the City of Brantford passed an official First Nations Policy. Not only does the policy reference the HDI directly, it also makes several general statements regarding jurisdiction for First Nations and the authority of First Nations to influence planning in Brantford:
WHEREAS property owners and developers within the city of Brantford have come under increasing attention from certain members of First Nations through protests;

AND WHEREAS these protests cause great disruption to the economic health and vitality of the city of Brantford, and also represent a danger to the safety and security of many groups and individuals;

AND WHEREAS such disruptions will impact city residents,

NOW THEREFORE BE IT RESOLVED:

1. The upper levels of Government should establish a specific timeframe for negotiation processes to be conducted in good faith that shall lead to the payment of appropriate compensation.

2. It is the position of the City of Brantford that the negotiations with the First Nations and the resolution of their claims for compensation are the constitutional jurisdiction of the federal and provincial governments. Although the City of Brantford remains sympathetic to the aspirations of the First Nations to obtain redress for any past wrongs that can be proven, the City of Brantford has no role in the resolution of any such claims.

3. The City agrees with the provincial and federal position that the resolution of claims of First Nations will not be achieved by dispossessing property owners of their lands or other properties, either through expropriation or otherwise.

4. The City agrees with the provincial position that private property owners have valid titles to their properties and that citizens may continue to have reliance on the provincial land titles system as the means to determine the ownership of land.

5. The City agrees with the provincial position that developers are not required to pay licensing fees or taxes to the Haudenosaunee Development Institute.

6. The City agrees with the provincial and federal position that the Crown must comply with its consultation obligations as identified by the Supreme Court of Canada but that these consultation obligations do not give the First Nations a veto power over development or any other government action.
7. The City agrees with the comments from the Prime Minister’s Office in which it was stated that incidents aimed at intimidation or coercion of developers are of great concern and the laws of both the Province of Ontario and of Canada must be respected so that economic development may flourish in an atmosphere of law and order. The City particularly agrees with the comment that local police forces and the courts have the responsibility to ensure that the laws of the municipality, the province and Canada are enforced.

8. The City recognizes that pursuant to the Police Services Act, decision-making powers in relation to policing issues are vested in autonomous Police Services Boards, and that operational decisions in respect of policing matters are vested in the Chief of Police, so that there is no role for the City in the direction of the police in the performance of their duties.

9. The City remains prepared to work with its neighbours and to cooperate with the upper levels of government to solve problems and offer assistance where it can. If requested, the City will appoint a team to accompany First Nations leaders to travel to Toronto and Ottawa in order to meet with responsible ministers.

10. This resolution shall be forwarded to the Prime Minister, the Premier, the Provincial Minister of Municipal Affairs, the Federal Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians, the Provincial Minister of Aboriginal Affairs, the Brantford Homebuilders Association, and shall also be distributed to the First Nations in the same manner as notifications are distributed pursuant to the Grand River Notification Agreement. The text of this resolution shall also be placed upon the City’s website.


Like most policies, this policy outlines a vision for a particular state of affairs. In particular, this policy lays out the fundamental objectives and beliefs of the City in regards to its relations with First Nations.

The first set of statements made in the policy concern jurisdiction. With these statements about jurisdiction, the City outlines the extent of its authority, and also makes a statement about how it sees itself in relation to other spheres of authority.
According to the policy, the City claims no jurisdiction for First Nations issues. As a result, it does not see itself as having any direct relation to, or responsibility to take into consideration First Nations interests. Rather, it regards First Nations issues as the jurisdiction of higher levels of government. However, the City does not deny the validity of the First Nations’ claims. Rather, the policy states that Brantford is “sympathetic to the aspirations of the First Nations to obtain redress for any past wrongs”. However, Brantford asserts that it has “no role in the resolution” of such claims. Thus, the City begins the policy by making a jurisdictional claim, placing all responsibility for First Nations issues with higher levels of government.

The second set of statements in the policy are fundamentally about property ownership. The policy affirms the property claims of the “citizens” of Brantford, and relies on the authority of provincial property registry to assert the validity of the established property regime.

The third set of statements affirm the authority of the City and deny the authority of the HDI to collect development fees or otherwise assert authority. The 6th clause also attempts to further limit the authority of the HDI and of First Nations in general, by claiming that Canada’s consultation obligations “do not give First Nations a veto power over development.”

On the one hand, the City seeks to extract itself from responsibility for Indigenous affairs. It accomplishes this by appealing to jurisdictional arguments. However, on the other hand, the City also appeals to the authority of higher levels of
government to affirm its own authority. In placing responsibility for First Nations firmly in the hands of higher levels of government, while also tightly connecting its own authority to these higher levels of government, the City is quite firmly placing itself in the centre of Indigenous politics. In this policy, it becomes clear that municipalities, and the powers they wield, are not only representative of relations between the state and Indigenous peoples, but are at the frontlines of those relations. Moreover, while the City attempts to extract itself from this position, it also has significant power to alter the nature of those relations.

3.4 By-laws 63-2008 and 64-2008

In May 2008, less than two months after passing the First Nations Policy, the City of Brantford unanimously passed two by-laws aimed at curbing the activities of the HDI. By-law 63-2008 had the specific aim of prohibiting “Interference with Development, Construction and Access to Property” and By-law 64-2008 was intended to “Prohibit unauthorized Fees, Charges, Levies, Taxes, Requirements and conditions Respecting Development and Construction.”

By-law 63-2008 focuses on the regulation of the uses of public property for the purposes of protecting private property. Specifically, it targets the circulation of persons and vehicles around a number of “affected properties” and “designated streets” listed in the by-law. The properties listed are development sites targeted by the HDI. Thus, the by-law has as its primary feature the prohibition of: “the erection of tents and other structures” which would facilitate HDI protestors by offering shelter in poor weather; “standing and loitering” and other movements that would
hinder the flow of traffic, in particular traffic to and from development sites; and finally, otherwise “hindering and impeding” access to the named properties.

While By-law 63-2008 regulates circulation and use of public properties, By-law 64-2008 is constructed as a nuisance by-law prohibiting individuals or other corporations from requesting applications for development, or the levying of development charges. Thus:

4. Any request, demand, invitation, coercion, stipulation or requirement that contravenes this by-law is a matter that, in the opinion of Council, is or could become a cause or public nuisance and is hereby prohibited. (City of Brantford By-law 64-2008)

Although these by-laws are couched in the technical language of circulation and nuisance, they are designed to defend the exclusive right of the City to carry out planning activities by prohibiting other sources of planning authority. While By-law 63-2008 prohibits the physical enactment of HDI’s authority by prohibiting the physical activities related to HDI’s actions, By-law 64-2008 effectively denies HDI’s authority to collect fees and otherwise direct development, and affirms the authority of the City. Thus, By-law 64-2008 describes the HDI’s activities as “unauthorized” system that threatens the authority of the City:

[T]he creation of such a parallel, unauthorized and uncontrolled system undermines and hinders the role of the municipality to develop and implement policies, plans, and zoning by-laws and to regulate and control development and construction under the legally-established system, undermines and puts at risk the ability of the City to impose the conditions it is lawfully entitled to impose, undermines and interferes with the relations between the City and owners of lands on which development and construction has been approved, is causing
and may require the City to forego or defer benefits and entitlements to keep or attract investment in and construction on property within the City, and will cause the City irreparable harm. (City of Brantford, By-law 64-2008)

3.5 Notice of Motion

On May 23, 2008, less than two weeks after passing the by-laws, the City filed a notice of motion with the Ontario Superior Court to seek an injunction against the activities of the HDI. The notice of motion specifically names eight individuals, the Haudenosaunee Development Institute, as well as Jane Doe, John Doe, and Persons Unknown. The City alleges that these individuals have violated By-law 63-2008 by interfering with public rights of way, and violated By-law 64-2008 by disrupting and hindering the lawful activities of “ratepayers” in the City of Brantford. In its claim, the City sought $100 million in general damages and $10 million in specific damages. The City also sought a declaration

that the Six Nations of the Grand River Band of Indians, The Six Nations Council, the Six Nations Confederacy Council and the Haudenosaunee Development Institute, have no claim or colour of right permitting them to obstruct or interfere with access to, interfere with or prevent development of or request or require development or other fees or charges of any kind in relation to, land situated in the City of Brantford and that such activities are unlawful and of no force and effect whatsoever;...[and] have not right, title or interest in any lands situate [sic] within the City of Brantford other than land recognized as a reserve by Indian and Northern Affairs Canada...(1.d., Notice of Motion, 5)

Analysis

Competing claims to planning authority are at the heart of this dispute. Both the
Haudenosaunee Development Institute and the City of Brantford claim the authority to direct planning in the area. Not only do both claim authority to plan, they also both jockey to have their asserted authority to direct development in the area recognized by developers and by the broader public. The argument launched in the City by-laws and in the notice of motion hinges on the assertion that the HDI, by asserting the authority to collect development charges and to make decisions about what can be built in its asserted territory, poses a threat to the authority to the City, and thereby to the rule of law. What is significant about the arguments put forward by the City is that they rely on a specific set of understanding regarding the role of planning, and construe the authority of the City to plan as connected to a broader set of citizenship rights, including the right to growth, development, and economic security. Finally, the arguments of the City are embedded in a discourse about the rule of law. The appeal to the authority of the law—specifically laws related to property and planning—is a convenient way of excluding Indigenous laws and interests from planning.

Protecting Law and Order

The City argues that the activities of the HDI pose a threat to law and order and public safety within the City:

Over the past three months, the City has faced an escalation in the number and frequency of Aboriginal disturbances at development sites in the city. This conduct has prevented construction and other activities on the land from taking place both by way of obstruction of public roads, trespass on private property, blockades of entrances to property and intimidation/threats to continue those activities unless and until
the developer/contractor engages in a full dialogue with the Haudenosaunne Development Institute ("HDI")...

....

The unlawful activities of the HDI and its agents are causing grave harm to the City and its residents. Many developers are not prepared to capitulate to the demands of HDI. Anger and frustration is mounting. Brantford does not want to be another Caledonia. As a result of these activities, the City is suffering, and will continue to suffer, incalculable and irreparable harm. (Affidavit of John Brown, City Manager, May 20 2008, 1-4)

The motion expresses great concern for law and order. The motion also serves a notification to the Attorney General of Ontario that “the services of the Canadian Forces are required in the aid of the civil power because a disturbance of the peace or riot is occurring or likely to occur” (Notice of Motion, 4). In other words, the presence of Indigenous peoples is construed as being of such a significant threat that the assistance of the military is required to maintain the rule of law.

The attempts of Indigenous peoples to make their concerns heard through the vehicle of protest are often criminalized through a discourse of law and order. The systemic exclusion of Indigenous peoples from the land use planning system in Ontario contributes to protest. The final report of the Ipperwash Inquiry argued that

7 Here, the City is relying upon the authority bestowed by the National Defense Act, which states: The Canadian Forces, any unit or other element thereof and any officer or non-commissioned member, with materiel, are liable to be called out for service in aid of the civil power in any case in which a riot or disturbance of the peace, beyond the powers of the civil authorities to suppress, prevent or deal with and requiring that service, occurs or is, in the opinion of an attorney general, considered as likely to occur. (Section 275, National Defense Act).
the “law and order” approach to Indigenous issues taken by the Harris government at Ipperwash “created an atmosphere that unduly narrowed the scope of the government’s response to the aboriginal occupation ... (and) closed off many options endorsed by civil servants,” including the appointment of a mediator and opening up of communications with Indigenous peoples (Linden 2007, Vol. 1, 405). Despite the recommendations made in the report, the provincial and local governments and the press alike continue to emphasize law and order. In her analysis of media coverage of the Caledonia Reclamation in 2005, Jennifer Adese found:

The Canadian media has actively crafted the image of indigenous peoples as internal terrorist threats, not only offering images that are seen as legitimating state action, but far too frequently encouraging it. The land claim actions of indigenous peoples consistently denied voice regarding ownership, usage, and preservation of their traditional lands, are essential and constant targets. Trapped in an enduring struggle for sovereignty, Aboriginal peoples are depicted as the quintessential “homegrown terrorist,” internal threat to the Canadian state. (Adese 2009, 283)

By focusing on issues related to law and order and the security of private property, the City fails to recognize the ways in which it may have helped to produce the “protests” by failing to engage First Nations in the planning process in the first place. Moreover, the lawlessness represented by Indigenous “protest” provides a convenient backdrop against which the City can advance an argument regarding the need to preserve law and order as represented by the attainment of planning objectives and the exercise of planning authority.

**Protecting Property and the Right to Growth**

The City also asserts that the activities of the HDI threaten the economic
stability of the City and poses a threat to economic development:

Although Council understands that members of the Haudenosaunee community have serious concerns and issues with the Provincial and Federal Governments, you must understand that the kind of unilateral activity you are engaging in outside the framework of the rule of law is causing, and will continue to cause, incalculable damage to the City through the destruction of its tax base, and more importantly, will irreparably damage the City's reputation as a place where law-abiding citizens can live, work, and other go about their activities in peace. This, in turn, will lead to untold losses to the City and its ratepayers. (Letter to HDI from Neal Smitheman, Lawyer for the City of Brantford, May 14, 2008. Emphasis added)

It is clear from the letter that the City regards the actions of the HDI as a threat to its municipal right to rule. Thus, the assertions of the HDI are understood in terms of a set of competing claims to authority. As a result, the City expands the idea of “law and order” from being simply related to peaceful relations among citizens and respect for criminal law to include relations between the City and landowners, and the ability of the City to govern its resources and manage property according to municipal law. In other words, laws related to property and planning are held up here as central to the notion of law and order.

In the documents the City provided in the injunction against the HDI, the City repeatedly calls upon the authority to plan bestowed upon the municipality by the province through provincial planning policy. For instance, in his Affidavit, Brantford City Manager John Brown cites the Places to Grow Act as conferring upon Brantford a right to economic development and growth:
It is also worth noting, that pursuant to the Places to Grow Act, the province designated Brantford as an urban growth center. This designation is critical to the long term economic health of the City. Among other things, the activities of the HDI and its agents are significantly undermining the City's and the Province's efforts under the provincial growth plan.

(John Brown, Brantford City Manager. May 20 2008. Emphasis added)

The affidavit of a planner called as an expert witness makes a similar case regarding the right of the City to benefit from Ontario’s growth policies:

It is not just the private sector that may alter investment decisions due to local disputes about land ownership. In the recent Places to Grow Act, the Province of Ontario has identified Brantford as an urban growth centre. The Province is suggesting that significant growth in both population and employment should occur in the City of Brantford. One of the major purposes of identifying growth centres was to focus infrastructure investment on these communities. The identification of Brantford as a growth centre is very important to the long-term economic health of the City. Concerns about land claims in the Brantford area may result in delay or lack of infrastructure investment as senior governments seek to avoid conflict. This will have further negative economic impacts on the City of Brantford.


In this context, the HDI is construed as threatening the ability of the City and the Province to grow according to the Places to Grow Act. The arguments present the right of the City to grow and to reap the economic benefits of growth. Moreover, the appeal to planning policy, such as the Growth Plan, allows the City to cite not only an imperative to growth, but also allows the City to bolster its claims regarding the sphere of its jurisdiction. It then occupies the space created by planning policy through it’s own planning activity.

As a consequence, according to the rationale provided by the City, the real
threat posed by the HDI stems from the way in which the HDI interferes with the relationship of the City to landowners within the City. In these arguments, planning serves two separate but inter-related functions. On the one hand, the City uses its authority to create by-laws expressly prohibiting alternate systems of development management and thus criminalizes the activities of the HDI. At the same time, the City advances a tautological argument in which the *assertion* of this planning authority also serves as *proof* of its authority.

Finally, authority of the City to plan is also held up as authorizing non-Indigenous property claims:

> It has always been Ontario's position that private property owners have valid titles to their properties even if there are disagreements between the Haudenosaunee/Six Nations and Canada about the surrenders of land in the past. *Any attempt by the Haudenosaunee/Six Nations to extract concessions or payments from private landowners as a condition for allowing development to continue on private property has no basis in Ontario's land use planning system.* (Murray Coolican, representing the Government of Ontario at the Six Nations lands resolution side table, speaking notes October added)

The arguments advanced by the City and the provincial government focus on the authority of the City to plan, and treat planning as an activity divorced from issues of Indigenous authority and sovereignty. Although planning is fundamentally about the management of property rights, in this example the validity of non-Indigenous property rights are simply assumed, thus allowing the City to focus its argument on its jurisdiction in planning matters. Both this statement by a provincial
government official and the final judgment of the Superior Court cast the issue of property rights as a merely incidental to the ability of the City to plan. Thus, the validating and authorizing function of municipal and planning law allows these claims to authority advanced by the City to appear coherent and logically consistent.

4. Conclusion: Planning and the “Crystallization” of Sovereignty

In November 2010, the Superior Court of Ontario brought down a judgment which affirmed the arguments brought forward by the City. The Court ruled that the activities of the HDI did indeed have a significant negative impact on the City, and denied the authority of the HDI to control development or collect development fees.

35. In my view the City will suffer irreparable harm, if that has not already occurred, if this situation is allowed to continue. I find as a fact, on the evidence before me, that the economy of this small city is at risk; the employment of members of the community are likewise at risk; the reputation of the City as a place to live, work and invest is at risk; the tax base is at risk; all as a result of the City being unable to regulate development, provide a conflict free environment for investment, employment and the raising of families, and the inability of the City to ensure to local residents and the investment community that the rule of law prevails. (Brantford (City) v. Montour, Paragraph 35)

These have been privately titled lands for almost 150 years and within the city limits of Brantford. The respondents’ assertion that the lands are theirs, with nothing more: is far from sufficient for a finding that the by-laws are dealing with "lands reserved for Indians". The pith and substance of these by-laws are dealing with property and civil rights within the city limits. (Brantford (City) v. Montour, Paragraph 85)

It is important to point out that some municipalities have taken pro-active steps to establish better relationships with neighbouring Indigenous communities. Susan Hill (2008) holds up agreements negotiated between the Six Nations of the Grand River and the City of Hamilton as examples of how municipal development
planning can be guided by Haudenosaunee ethics and treaty principles. Yet, at the same time, the kind of antagonistic relationships that were produced in Brantford were not only made possible by, but also ultimately sanctioned by the planning and legal frameworks of the province.

Although Canada’s key legal documents—from the Royal Proclamation to the Constitution—recognize and affirm the Aboriginal rights and promise to protect Indigenous property interests, in practice, Canadian jurisprudence and policy has served to undermine Indigenous authority and territorial claims. The development of a governmental apparatus with the power to manage private property has occurred in tandem with the devaluing of Aboriginal proprietary interests. In this way, the laws of Canada have failed to protect Indigenous territory from settler incursion and exploitation, despite the various legal provisions made for this purpose. As Patrick Macklem notes:

> Despite Canadian law’s acceptance of Aboriginal title, the law of Aboriginal title historically failed to protect ancestral territories from non-Aboriginal incursion and exploitation. This failure was in part a function of broader social and economic development associated with colonial expansion and Canada’s emergence as a nation state. But it was also the result of a judicial devaluation of the legal significance of Aboriginal prior occupancy, which occurred through an unwillingness to regard Aboriginal territorial interests as worthy of at least the same level of legal protection that the law accords non-Aboriginal proprietary interests. (Macklem 2001, 77)

The rehearsal of Canada’s sovereignty claims and the denial of Indigenous claims to authority and political legitimacy are not limited to the national political sphere, but are enacted in local planning practices. Many of the key tools available to
planning centre on the administration and management of property relations. Property, as an institution of social relations, is one place where Canada’s sovereignty claims become legible in the planning process.

Brantford’s by-laws and its First Nations Policy clearly demonstrate how planning in this instance is about much more than the rational management of territory. Although its source of authority is drawn from the provincial government, through its ability to exercise planning power through the creation of by-laws and other policies the act of municipal planning renders the municipality knowable and recognizable as an order of government and as a source of authority. The authority to plan confers upon the municipality an identity as an independent political agent. From the perspective of the municipality then, the HDI poses more than an economic threat, and is construed as more than a mere nuisance. Instead, the municipality understands the HDI as calling into question the authority of the City to plan, and thus also the authority and legitimacy of the City as an autonomous political entity. In this example, planning is far more than a technical activity. Rather, it is the terrain on which assertions of jurisdiction are established. It is the asserted ability to plan that makes the authority of the municipality not only visible, it also depends on the recognition of authority by private developers, land owners, and the broader public.

This recognition in turn hinges on an affirmation of established regimes of private property. In many ways, the HDI is successful in calling into question both the authority of the City of Brantford to plan, and the stability of property rights in
the City of Brantford, producing a “crisis of legitimacy.” In this context, the First Nations Policy and by-laws enacted by the City are more than a public disavowal of the HDI’s assertion of authority. Beyond denying the authority of the HDI, the First Nations Policy and the laws it supports criminalizes the HDI, allowing the full extent of the state’s authority—including the military—to be called into action. However, rather than appearing as violence, the actions of the city appear as activities which restore the rule of law. Such assertions of authority are characteristic of colonialism and colonial dispossession. As Cheryl Harris argues:

The conquest and occupation of Indian land was wrapped in the rule of law. The law provided no only a defense of conquest and colonization, but also naturalized a regime of rights and disabilities, power and disadvantage that flowed from it, so that no further justifications or rationalizations were required. (Harris 1993, 1723)

Like Harris, Borrows has explored the tautological arguments advanced in the context of assertions of authority over Indigenous peoples. He writes:

Sovereignty’s incantation is like magic. Its mantra is “Aboriginal title is a burden on the Crown’s underlying title.” This mere assertion is said to displace previous Indigenous titles by making them subject to, and a burden on, another’s higher legal claims. Contemporary Canadian jurisprudence has been susceptible to this artifice… the Supreme Court declared that the Crown gained “underlying title” when “it asserted sovereignty over the land in question.” This announcement illustrates that, as in past centuries, sovereignty heralds the diminishment of another’s possessions. In this respect, the decision echoes ancient discourses of conquest. (Borrows 1999, 563)

The ability of the Court—or in this case the City—to pass judgment on the validity of Indigenous property claims rests on a tautological argument regarding Crown sovereignty. In essence, the Crown argues because it is sovereign it has the
right to place limits on the rights of others, with the act of limiting itself constituting proof of sovereignty. This argument is reproduced in the planning process, and serves to undermine Indigenous sovereignty and land interests.

Planning enables the naturalization of non-Indigenous property ownership by circulating and legitimizing a planning system that assumes the legitimacy of non-Indigenous property ownership, while criminalizing Indigenous assertions of authority. The jurisdictional arguments advanced in the planning process are amplified by ideas about the rule of law that are also circulated in the defense of planning. The discourse of law and order in turn relies on ideas of property ownership that mask state violence and extends the jurisdictional argument deployed by planning to exclude Indigenous peoples from planning decision making, and which also allows Indigenous authority to be located outside of the legal order of the state.

Once Indigenous peoples are located as fully outside the space of Canadian law, it becomes possible for Canada to posit its own territorial and legal coherence and enables Canada’s sovereignty claims to be received as a totalizing force. From this position, it becomes easy to maintain the convenient pretense that sales of Indian land imply cessions of sovereignty, and allows planning to play a critical role in the authorization of dispossession.
Chapter 5: Planning and Reconciliation: A Critique of The Duty to Consult as Communicative Practice

1. State Apologies and the Goal of Reconciliation
On June 11, 2008, Prime Minister Stephen Harper stood in the House of Commons and offered an apology to the victims of Canada’s residential school system. The statement read by the Prime Minister recognized “that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.”

On the same day, Ontario Premier Dalton McGuinty stood in the Ontario legislature and commented on the significance of the apology for relations between Indigenous peoples and the Government of Ontario. He said:

[The Prime Minister] is going to offer a very important apology on behalf of the people of Canada for a painful period in our history which we must acknowledge and come to grips with. This apology, I hope, will serve as part of an ongoing effort to reconcile ourselves to our past, to our present, and to lay the foundation for a stronger future, especially for our aboriginal community. ...

There is undoubtedly more work to be done here in Ontario. I look forward to building on the foundation of reconciliation that will be further strengthened by the Prime Minister this afternoon.

But I'd like to think we have moved somewhat here in Ontario. I think, in comparison to the previous decades, we've moved at a rather fast pace. We've got a new ministry; we have a minister. We have a budget devoted to aboriginal issues. We've resolved the Ipperwash matter. We have a new gaming revenue sharing agreement. We have a new partnership fund that we put in place. I think those are significant milestones that we have just put in place ourselves.

In this statement, the Premier not only affirms the apology and stresses its significance for laying a foundation for reconciliation, he also suggests that Ontario has already begun to move in the direction of reconciliation through the creation of a new Ministry of Aboriginal Affairs, the appointment of a minister, and the creation of several new Aboriginal policies and programs. Premier McGuinty does not mention the fact that the creation of these new policies and programs was not simply the result of a goodwill gesture on the part of the province. Rather, the introduction of several new Supreme Court decisions confirming a legal “Duty to Consult” and the tabling of the final report of the Ipperwash Inquiry together provided a legal and political imperative for a “new” approach to Aboriginal affairs in Ontario.

The previous two chapters explored the issue of the systemic exclusion of Indigenous peoples from the planning process. In this chapter, I discuss how the new approach to Aboriginal affairs in Ontario is shaping approaches to municipal planning by explicitly requiring the inclusion of Indigenous peoples in the planning process. In particular, I focus on how the province’s attempt to respond to the duty to consult re-orient local land-use planning practice to include more consultation with First Nations. If, as I have demonstrated in the previous chapters, municipal land use planning is a powerful force in the configuration of relations between Indigenous peoples and Canada, then the extent to which consultation can re-configure colonial relations to bring about reconciliation must be taken seriously. I examine the extent to which consultation can be seen to strengthen the position of Indigenous peoples, and expand their ability to intervene in the planning decision
making process. From the perspective of communicative planning, which emphasizes relationship building and communication, consultation should offer new opportunities for Indigenous peoples to influence the planning process. This situation thus presents an opportunity to test the limits and opportunities offered by the tools of planning to advancing the goal of reconciliation and to supporting Indigenous sovereignty.

2. Reconciliation as Communicative Practice
Over the last 20 years, the idea of ‘reconciliation’ has been an important concept in the rhetoric surrounding the negotiation of relations between Indigenous peoples and Canada (Johnson 2011). The Royal Commission on Aboriginal Peoples (RCAP) declared that reconciliation was one of the core sentiments of its work. In it’s final report, the Royal Commission described reconciliation as a “new relationship between Aboriginal and non-Aboriginal peoples in Canada” which might emerge based on principles of “mutual recognition, mutual respect, sharing, and mutual responsibility” (RCAP 1996, Vol. 1, 694).

The challenge of achieving the goals described in the RCAP report lie in the translation of these goals into practice. The statements of reconciliation made by the Premier of Ontario and by the Prime Minister emphasize reconciliation and the renewal of relationships, but also point towards the mechanisms by which reconciliation is understood and how it might be implemented in a policy context. These speeches mobilize the language of mutual understanding, for example through the development of a common understanding of Canadian history, and also
stress the importance of open lines of communication as mechanisms for avoiding conflict. In other words, the process of reconciliation is imagined as a form of communicative practice. Thus, Premier McGuinty describes the new relationship between First Nations and the Government of Ontario as “a relationship that is sustained by mutual respect and a sincere effort to **better understand one another**” (Dalton McGuinty, May 31, 2007). The attitudes and measures he proposes should form the cornerstone in the forging of these new relationships will also rely on communication and discussion. Referring to the Final Report of the Ipperwash Inquiry, he said:

> Guided by Justice Linden's report, our government will continue to work in partnership with the aboriginal leadership to chart a new course for a constructive and co-operative relationship. That relationship will be based on respect and responsibility. I believe this is key to building a better future for all aboriginal people, and indeed all Ontarians, as is open, **two-way communication**. Our government is committed to **meaningful discussions** with aboriginal leaders, because we believe it is vital for both sides to have a forum to **discuss opportunities and overcome challenges together**. Our government will work closely with the aboriginal leadership and the federal government to review the Ipperwash Inquiry Report and develop an action plan for carrying out the report's recommendations.  
> (Dalton McGuinty, May 31, 2007)

The apology for the residential schools offered by Prime Minister Stephen Harper similarly emphasized that a new relationship would be built on a common understanding of history enabled by new opportunities for learning. Thus, in his apology, the Prime Minister also announced the establishment of a truth and reconciliation commission, which would offer opportunities for education, and provide the basis for creating a shared knowledge base. In the final portion of the
apology, he declared:

...a cornerstone of the settlement agreement is the Indian residential schools truth and reconciliation commission. This commission represents a unique opportunity to educate all Canadians on the Indian residential schools system. It will be a positive step in forging a new relationship between aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.

God bless all of you. God bless our land.

(Stephen Harper, June 11 2008. Emphasis added)

At the very end of the speech, Stephen Harper’s attention turns attention away from the act of apologizing and of describing the ways in which the federal government will encourage the formation of new relationships. Here, he shifts focus to emphasize the collective benefits that will accrue to the nation as a result of reconciliation, as realized through communicative practices such as learning and truth-telling that will be at the core of the truth and reconciliation commission. He promises that this process will result in “a stronger Canada for all of us,” finally declaring “God bless our land.” Thus, the process of reconciliation, as imagined here, affirms the coherence of the nation. In this context, the ways in which reconciliation can be a tool for securing the sovereignty claims of state becomes clear. As a communicative process, reconciliation not only affirms the sovereignty of the state, the processes of education and truth telling that motivate reconciliation are an important step in including Indigenous peoples in the state on terms which are
acceptable to the colonizer. If “sovereignty only reigns over what it is capable of internalizing” (Deleuze and Guattari 1987, 360), then reconciliation as communication must be understood as a set of practices oriented towards locating or including of Indigenous peoples within the framework of the state.

2.1 Reconciliation, The Duty to Consult, and the Rule of Law

The communicative practices that will form basis for the new relationship between First Nations and the Crown have already been determined by the Supreme Court of Canada. Reflecting on the Sparrow decision, Lawrence and Macklem (2000) forecast the emergence of a “jurisprudence of reconciliation” which would have at its core the goal of reconciliation, to be met through communicative practices. They predicted that the duty to consult would emerge as “an instrument that fosters reconciliation between First Nations and the Crown” by encouraging parties to negotiate settlements without resorting to litigation (Lawrence & Macklem 2000, 267).

Indeed, the duty to consult is one of the key ideas that has preoccupied government attention and shaped Canadian Aboriginal policy over the past few years. While the concept of the duty to consult was introduced into the legal imagination by the Supreme Court of Canada’s Sparrow decision (Newman 2009), the scope and content of the duty to consult has been more fully explicated three further decisions: the *Haida, Taku River Tlingit* and *Mikisew* cases (see: Morelatto 2008, Newman 2009)

The 2004 *Haida* decision is the first in a trilogy of decisions of the Supreme
Court of Canada that define the concept of the duty to consult. The case was brought forward by the Haida Nation against the Government of British Columbia. The Haida challenged the decision of the Minister of Forests to issue a Tree Farm License (TFL) on the traditional land base of the Haida. The lands were claimed by the Haida in a land claim at the time the TFL was issued. The Supreme Court ruled in favour of the Haida, saying that logging activity would negatively affect the Haida and the outcome of the land claim. Therefore, the Court decided the provincial Crown had a duty to consult and accommodate the needs of the Haida before issuing a TFL (see: McNeil 2005, Slattery 2007, Newman 2009).

The *Haida* decision affirmed the duty of the Crown to consult Aboriginal peoples and established the duty of the Crown to accommodate Aboriginal rights, even where those rights have not yet been established in the Canadian law. Specifically, the Court ordered that the provinces must consult with First Nations regarding the potential impact on Aboriginal rights that had been asserted, but not yet recognized in Canadian law, whether through a land claim settlement or other legal instrument. Thus, while Aboriginal peoples may assert inherent rights by virtue of their continued sovereignty, from the perspective of the settler legal apparatus, these asserted rights must be made legible through recognition in the Canadian legal system before they are afforded the full protection of Canadian law.

As Newman (2009) notes, there are five fundamental elements of the duty to consult which arise from this trilogy of cases:

1. The duty to consult arises prior to proof of an Aboriginal rights or title claim or in the context of uncertain effects on a treaty right;
2. The duty to consult is triggered relatively easily, based on a minimal level of knowledge on the part of the Crown concerning a possible claim with which government action potentially interferes;

3. The strength or scope of the duty to consult in particular circumstances lies along a spectrum of possibilities, with a richer consultation requirement arising from a stronger prima facie Aboriginal claim and/or a more serious impact on the underlying Aboriginal right of treaty right;

4. Within this spectrum, the duty ranges from a minimal notice requirement to a duty to carry out some degree of accommodation of the Aboriginal interests but it does not include an Aboriginal veto power over any particular decision; and

5. Failure to meet a duty to consult can lead to a range of remedies, from an injunction against a particular government action altogether (or, in some instance, damages) but commonly an order to carry out the consultation prior to the proceeding. (Newman 2009, 16)

At its core, the duty to consult prescribes a set of communicative practices that are designed to re-configure relations between Indigenous peoples and the Crown by offering an opportunity to reach a consensus. The duty to consult is triggered once the Crown has knowledge of an Aboriginal rights or title claim. Presumably, this knowledge would be generated once a First Nation had notified or communicated the assertion of such a claim. Similarly, the type of consultation which is required by the Crown is imagined as existing along a spectrum of communicative activities, ranging from written “notice” to granting Aboriginal peoples formal participation in the decision making process. The *Haida* case is explicit about the communicative nature of the consultation process:

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for enfringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the
notice. ‘[C]onsultation’ in its least technical definition is talking together for mutual understanding.

... At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage 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. (Haida, Paragraphs 43-44)

The moral imperative for the duty to consult is expressed in the notion of the honour of the Crown, which underlies the duty to consult. In simple terms, the honour of the Crown is the obligation of the Crown to act honourably in its dealings with Indigenous peoples. Newman (2009) notes:

There is a legal obligation on governments arising from the principle that the Crown must act in accordance with a particular virtue—namely honour. The concept of the Crown, of course, is symbolic, with the underlying foundation amounting to a claim that a settler people in an ongoing encounter with Indigenous peoples must deal honourably with them and, more generally, act in accordance with the virtue of honour. (Newman 2009, 17)

As such, the term reconciliation refers not only to a process, but also to the desired end-goal of better relations. However, there are multiple possible ways that reconciliation can be understood. Furthermore, not all interpretations of reconciliation have the same political meaning.

Walters (2008) argues the term reconciliation can have three meanings, each of
which can produce different outcomes for Indigenous peoples. First, reconciliation can be understood in a relational sense. In a relationship, two parties can be considered to have reconciled once they have resolved any differences to form an amicable relationship. Walters calls this “reconciliation as relationship” because it emphasizes the quality of the relationship between two parties. Following Walters, if reconciliation between Indigenous peoples and Canada is understood as “reconciliation as relationship”, it can be expected that the focus will be on activities that foster relationship building.

Second, Walters (2008) argues that reconciliation can also be understood as a form of “resignation”. The term resignation refers to the fact that one accepts the current state of affairs and no longer attempts to change the relationship. Unlike reconciliation as relationship, reconciliation as resignation is often a one-sided process. Thus, following Walters’ definition, “reconciliation as resignation” might be expressed as Indigenous acceptance of the state’s assertions of sovereignty. Understood from this perspective, the goal of reconciliation would be to produce Indigenous acceptance of the Crown’s authority, and might be expressed in reduced instances of crises or conflict over land.

Finally, Walters (2008) points to a third way of understanding reconciliation, which he calls “reconciliation as consistency.” Following Dworkin and Rawls, this form of reconciliation emphasizes the development of a degree of political-moral coherence “between one’s specific opinions and commitments on the one hand and the more abstract moral principles that they presuppose on the other hand, so that together they represent a coherent body of moral thought” (Walters 2008, 167). In the
context of relations between Indigenous peoples and the Canadian state, this form of reconciliation focuses on the ways in which the state attempts to overcome the contradiction between the belief that the Crown must act honourably in its commitments to Indigenous peoples, and the fact that it often fails to do so.

Reconciliation as consistency is also closely related to establishing a moral basis for the rule of law. The significance and necessity of creating this political-moral coherence arises from the principle of the rule of law. The concept of the ‘rule of law’ “seeks to encapsulate a body of principles that aim to prevent, through law, the arbitrary or tyrannical exercise of state power and to enhance thereby society’s faith in government” (Manderson 2008, 222).

In the political speeches and legal case I have discussed, the term reconciliation is used as a general label for the process of redefining and improving relations between Indigenous peoples and Canada. However, Walters (2008) argues that Canadian law and policy reflects elements of all approaches to reconciliation, but notes that reconciliation as consistency is the approach to reconciliation most commonly reflected in the Canadian aboriginal rights jurisprudence. The centrality of reconciling Crown sovereignty with Indigenous assertions of authority in order to preserve the honour of the Crown is clear in the *Haida* decision. In the following passage, consultation as communicative practice is not incidental to, but is the way in which the Crown performs sovereignty by fulfilling the imperative to engage honourably with Indigenous peoples:

**Honourable negotiation implies a duty to consult** with Aboriginal claimants and conclude an honourable agreement reflecting the
claimants’ inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interest under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the aboriginal claim to that resource, may be to deprive the aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

(Haida, Paragraphs 26-27. Emphasis added)

The idea of reconciliation is often used as a general term for expressing the desire of politicians and Indigenous political leaders to move towards a different kind of political relationship. However, in legal and policy contexts, the term can be interpreted and applied in different ways, and suggest radically different political relationships. Nevertheless, the notion of improved relations, achieved through communication, remains not only a powerful discursive strategy, but has also been taken up in the field of planning.
3. Communicative Rationality and Communicative Practice

3.1 Building Political Community Through Communicative Practice

The relationship between communicative practice and the entrenchment of liberal-democratic forms of rule have been articulated by Habermas. Habermas has contributed to the social sciences a theory of communicative rationality that centres on interpreting the role of communication in establishing civil society. Habermas argues that every speech act involves a speaker undertaking to provide a hearer with good reasons for accepting whatever assertion, command, etc. made by the speaker. Understanding consists of the hearer’s acceptance of the validity of the claims being made by the speaker. Communication, as a practice, is always oriented towards achieving consensus within a group, and is the basis for the coordination of action. Communication is thus also the foundation for civil society, and both the objective of and the medium through which civil society is formed.

Language is a means of communication which serves mutual understanding, whereas actors, in coming to an understanding with one another so as to coordinate their actions, pursue their particular aims...Concepts of social action are distinguished by how they specify this coordination among the goal-directed actions of different participants—as the interlacing of egocentric calculations of utility, as a socially integrating consensus about norms and values instilled through cultural tradition and socialization, or as reaching understanding in the sense of a cooperative process of interpretation...The interpretative accomplishments on which cooperative processes [of situation definition] are based represent the mechanism for coordinating action; communicative action is not exhausted by the act of reaching understanding...(Habermas 1984, 101)

This theory of communicative rationality was eagerly taken up in the field of planning beginning in the 1980s. In particular, communicative planning theory has
emphasized the notion of communication as a form of social action, and cast the planner in the role of coordinating communication, or “eliminating distortion” to achieve the goal of building consensus (Forester 1989).

Communicative rationality provides both a theoretical alternative to the instrumental/technical rationality that had defined planning theory until that point, as well as a practical set of tasks around which planning practice could be oriented. Thus, communicative planning emphasizes the role of the planner as facilitator of communicative practices. Furthermore, communicative planning highlights the political nature of planning, and provides a standpoint from which to launch a critique of positivist science and neo-Marxist structural theory, and technocratic and instrumental rationality (Healey 1992). It does this by emphasizing inter-subjective communication as the basis for social transformation. As such, communicative planning introduces an ethical element to planning. It acknowledges the political dimensions of the way that certain types of knowledge are mobilized in the planning process. Thus, it raises the questions such as: “how should a planner frame planning issues? What issues should a planner call attention to?” (Innes 1995).

Communicative planning suggests that planning must respond to difference by creating participatory and deliberative contexts that reduce inequalities in power and knowledge. This can be achieved through a nuanced understanding of the actual process and work of planners (Huxley 2000).

In addition to highlighting the significance of the production and incorporation of knowledge in the planning process, communicative action also emphasizes the power of the planner to influence the ways in which knowledge is
circulated in planning processes. While rational-comprehensive approaches to planning viewed planners as simply as a hand-maiden of power or neutral advisory, communicative planning identifies the potential of planners to wield greater power in the planning process as brokers of information and mediators in the circulation of planning knowledge (Forester 1989).

The idea of planners as brokers of knowledge has been taken up to illustrate how planners might be able to address Indigenous concerns under circumstances where they might otherwise have been rendered voiceless by rational approaches to planning. For example, planner Norman Dale (1999) describes being hired to serve as a “community liaison” in the creation of a Regional Economic Development Initiative for the Queen Charlotte Islands (British Columbia). In an area where Indigenous people of the Haida nation form the majority of the population, Dale notes that at the outset, the project was constructed as a top-down processes that would not empower community members to make decisions about plans that would affect their livelihoods. Thus, while Dale was critical of the process, he chose not to “wear this perspective” in plain sight of the client, but rather preferred to work as a “covert change agent” (Dale 1999). In this way, Dale relied on communicative planning in order to allow members of the Haida to voice their concerns about the planning process. In a situation where the division and lack of trust between the Indigenous and non-Indigenous community was great, Dale emphasizes the importance of telling stories and developing a common version of the past as a basis for negotiation and planning and navigating through cross-cultural conflict. As he describes it, communicative planning was able to deal with competing versions of
history that were the root of community conflict. As a planner, he was able to employ these techniques to transcend rational planning processes.

Although Dale emphasizes the significance that different versions of history can have on planning processes, he does not acknowledge that the Haida may have a different version of the future. The aims of economic development are the only aims discussed. Dale does not reveal what political, cultural, social, or environmental aims the Haida might wish to pursue. Thus, his account of this process demonstrates the limits of top-down planning processes, in which Indigenous people are consulted as stakeholders, but do not have a significant say in the structure and purpose of the planning process. Although Dale worked with the intention of creating a process in which the Haida could express their interests, the overall objective of the project was nevertheless determined by outside interests, and thus undermined the Haida’s quest for self-determination. (See: Gill 2009).

3.2 Critiques of Communicative Practice
This example highlights several of the main objections raised towards communicative planning. Although communicative rationality might be applied to participatory planning frameworks, it is not always clear how these planning activities connect to wider processes of social transformation. Furthermore, this approach to planning does not contain a critical analysis of existing power relations (Huxley, 2000; Huxley and Yiftachel 2000). Thus, while communicative planning may be a way to bridge planning theory of planning practice and practice itself, it does not enable a theory of planning for social change. Finally, the example brought
forward by Dale (1999) is an approach which separates the public into interest groups or “stakeholders” and it is unclear how or why people might participate in planning or communicative practice when their interests or positions are not directly threatened.

**Communicative Planning Brackets Power**

Indigenous peoples have frequently stated that they do not want to be consulted as “stakeholders” in the planning process (Borrows 1997). While stakeholder consultation is one way of opening a conversation between Indigenous peoples and planning institutions, it is a model that presumes it is enough to include Indigenous perspectives, but does not take Indigenous law or political authority into account (McDermott & Wilson 2010). While Indigenous peoples might be consulted as stakeholders, this type of consultation does not imply that Indigenous peoples will have an increased ability to shape decision-making.

The construction of an appropriate Indigenous voice and the site of its inclusion in planning processes is inextricably linked with the production of Indigenous peoples as the ‘Other’ of the modern West (Porter 2006). Including Indigenous perspectives by simply inserting Indigenous perspectives into established regimes of planning can reflect the discursive production of an Indigenous ‘other’ while failing to affirm Indigenous political projects. Stakeholder consultation can thus serve to undermine Indigenous authority.

The strongest critiques of communicative planning have come from those sources that take into consideration the ways in which power is conceived in this
paradigm. As Porter (2006) points out, communicative planning attempts to transform planning practices in order to acknowledge the non-rational, contextual nature of planning knowledge, while also engaging with the consequences of planning activity. At the same time, communicative planning fails to place planning within a broader framework of social and political-economic forces that limit the strategic room for maneuver afforded to planners in their day-to-day work. While accounts of planning practice in the context of communicative planning theory suggest that the work of planners consists primarily of attending public meetings and mediating encounters between competing interests groups (Forester 1989; Healy 1992), communicative planning presents an incomplete view of planning because it fails to acknowledge the social geography of communicative action. Rather, it focuses on the social “public sphere” in which communication it believed to take place. Thus, communicative planning brackets the political and economic contexts that shape planning (Huxley and Yiftachel 2000). Communicative planning’s analytic separation of state, society and economy overlooks the fact that both economic and societal structures and spatializations are the result of state interventions. According to the critics, communicative planning proposes a mode of action that will always be incomplete, always reacting to the structures of power rather than actively changing them.

**Communicative Planning Brackets Difference**

Habermas’ conception of communicative rationality, upon which communicative planning is based, has been broadly criticized for the assumptions it makes about the
nature of the public sphere. Habermas sees the public sphere as a place that emphasizes consensus over divergence. As a result, for Habermas, the presence of a multiplicity of competing publics is a step away from, rather than toward greater democracy. Because consensus is not only the goal but also a pre-condition for public debate, the framework of the public sphere must be seen as an attempt to reduce difference. Thus, the purpose of communication in the public sphere is to achieve what Nancy Fraser has called “discursive assimilation” (Fraser 1992).

Fraser (1992) views Habermas’s vision of society as contrary to an “egalitarian, multicultural society.” She asserts that while Habermas’ conception of the public sphere represents an attempt to unify all discourse in one public arena, a multi-cultural vision of society “only makes sense if we pre-suppose a plurality of public arenas” (Fraser 1992, 127). Moreover, Fraser has also suggested that ‘subordinated groups’ have often found it advantageous to create “alternative publics” or “subaltern counterpublics” that serve as a space for the invention and circulation of counter discourses, and formulate oppositional interpretations of their identities, needs and interests.

Both the apology for the residential school system and the Premier’s speech at the introduction of the final report of the Ipperwash Inquiry emphasize the creation of a common ground. This common ground takes the form of common understandings of the history, and emphasizes our “common humanity” and thus effectively sidesteps the question of Indigenous political difference. Veracini argues that the politics of reconciliation “institute a framework designed to manage and neutralize indigenous difference, the new dispensation primarily promotes the
domestication of indigenous sovereignties for the benefit of the settler state" (Veracini 2011, 8). Similarly, Hage (1998) argues “the voice of the ‘ethnic other’ is made passive not only by those who want to eradicate it, but also by those who are happy to welcome it under some conditions they feel entitled to set...” This, he says, is part of a “fantasy of a nation governed by white people, a fantasy of white supremacy.” (Hage 1998, 17-18) Thus, in the context of reconciliation as communicative practice, the goal of eliminating difference for the purpose of reaching a consensus has the added effect of “domesticating” or neutralizing Indigenous sovereignty claims while affirming the political legitimacy asserted by the state.

This neutralization of Indigenous political positions is evident in the speech made by Dalton McGuinty in the Ontario legislature when he presented the final report of the Ipperwash Inquiry. According to him, the report signaled the start of a new relationship between First Nations and the Government of Ontario. The new relationship declared by Dalton McGuinty was to be built on the acknowledgement of a “common humanity” shared by First Nations and the government. McGuinty stated:

That truth is this: When it comes to people, what matters most is not the colour of our skin; it's not the language we speak; it's not the culture we embrace; it's not the traditions we cherish; it's not the faith that we practise; it's not the power we wield or the wealth that we accumulate. **What matters most is our common humanity**, that sense that we're all in this together and that **real progress means we must all move forward together**. That sentiment, that value, is the foundation of a strong partnership.
This formation of a consensus is then made the starting point for a telos of development described as “moving forward together.” The trajectory of development is a driving force in the process of reconciliation. The common humanity as described in the speeches of both the Prime Minister and the Premier render Indigenous cultural difference, and more significantly, political difference (captured by McGuinty as “power”), as insignificant facts. Rather, in emphasizing the creation of a common humanity, these points of difference are cast as barriers to the process of reconciliation. Thus, reconciliation as communicative practice in Ontario is premised on the bracketing of Indigenous difference, rather than its affirmation.

Although communicative practice in planning has multiple shortcomings, Indigenous peoples have not rejected the notion of improved communication. Rather, they have stressed that this communication must take place on their terms and support their political goals. Thus, in the context of consultation, First Nations have formulated consultation protocols, which clearly express the terms under which Indigenous people want and require consultation with various governments.

4. Indigenous Law and First Nations Consultation Protocols
The duty to consult as it has been interpreted by the government and by the courts affirms the sovereignty claims of the state while neutralizing the sovereignty claims of Indigenous peoples. In the context of reconciliation, Indigenous sovereignty claims become legible as “Aboriginal rights” claims. The purpose of reconciliation, as it has most often been interpreted by the courts, is about rendering these rights
claims consistent with the asserted authority of the Crown (Walters 2008). The imperative for consultation is understood as flowing from the sovereignty claims of the Crown and consultation processes are largely oriented towards advancing the interests of the Crown. As a result, many Indigenous communities have been wary of participating in consultation processes because they did not see the process as offering a forum to advance their interests, but rather have viewed engaging in consultation as a risk that might produce few benefits (Nahwehgabo 2007). At the same time, as the consultation processes represents one of the few opportunities for Indigenous peoples to participate in decision making or to make their concerns heard, and as one, albeit limited, mechanism for protecting Indigenous rights (Szatylo 2002; Jacobs 2006).

Borrows (1994) has presented a strong case for the integration of Indigenous law and knowledge in planning decision-making. He argues that Indigenous environmental knowledge presents an opportunity to challenge the assumptions that underpin the procedural and substantive planning framework and can provide a pathway for introducing a new legal discourse which not only recognizes, but which is based upon Indigenous political authority.

When it comes to consultation, Indigenous peoples have very clearly stated in the terms upon which they would like to be consulted. Numerous individual First Nations and Indigenous nations across Ontario have created consultation protocols
which reflect their visions for consultation. These protocols vary in their format and the degree to which they outline procedural requirements, they share in common the message that consultation must be premised on ongoing Indigenous sovereignty and based in Indigenous law. While the Crown emphasizes the importance of consultation as a mechanism for preserving the honour of the Crown and legitimating Crown sovereignty by preserving the rule of law, Indigenous understandings of the purpose of consultation stress ongoing Indigenous sovereignty and the importance of Indigenous law. From an Indigenous perspective, respect for Indigenous law leads to the imperative for consultation (McDermott and Wilson 2010). Thus, while consultation, as it has been imagined by the Crown, serves to undermine Indigenous sovereignty, from these Indigenous perspectives consultation is an important element of realizing Indigenous sovereignty and as an opportunity to emphasize Indigenous knowledge and values.

For example, the Walpole Island First Nations (WIFN) Consultation and Accommodation Protocol stresses the centrality of Indigenous knowledge and

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8 The most recent such example is the Water Declaration and Consultation Protocol created by Kitchenuhmaykoosib Inninuwug (K) First Nation in July 2011. (http://www.scribd.com/doc/60050046/Ki-Protocols). In 2007, Serpent River and the City of Elliot Lake entered signed a Memorandum of Understanding outlining the terms of collaboration between the two entities on a variety of issues including planning (Ontario 2009). The Metis Nation of Ontario has also published several consultation protocols (http://www.metisnation.org/programs/lands,-resources--consultations/duty-to-consult/engaging-metis-on-the-duty.aspx). Some First Nations have entered into project-specific consultation agreements initiated by project proponents, and which contain detailed procedural descriptions for notification. This seems common when it comes to Environmental Assessment. For example, York and Durham Regions have created detailed consultation protocols for the Southeast Collector Trunk Sewer EA (http://sectrunksewer.ca/images/uploads/First_Nation_Protocol_Report.pdf), signed by several affected First Nations. However, First Nations remain adamant that such protocols do not discharge the Crown of its consultation obligations.
environmental values:

8. In addition to aboriginal title, WIFN’s rights in its Reserve and Traditional Territory include rights to hunt, fish and trap, to harvest plants for food and medicine, to protect and honour burial sites and other sacred and culturally significant sites, to sustain and strengthen its spiritual and cultural connection to the land, to protect the Environment that supports its survival, to govern itself, and to participate in all governance and operational decisions about how the land and resources will be managed, used and protected.

9. WIFN’s laws require WIFN to preserve and even enhance a mutually respectful relationship with the Environment, to co-exist with Mother Earth and protect this relationship. WIFN under its laws has the responsibility to care for its Traditional Territory for future generations, to preserve and protect wildlife, lands, waters, air and resources. WIFN relies on the health of the Environment in its Traditional Territory for its survival. (WIFN 2009, 4)

The Grand Council of Treaty #3 consultation protocol provides a further example. This protocol emphasizes Anishnabek law, and states that consultation must be framed in accordance with the Manito Aki Inakonigaawin or Great Earth Law. According to the law, the Grand Council of Treaty #3 is “is prepared to offer any proponent the opportunity to take advantage of specific Treaty # 3 authorizations that will provide clear authority to conduct their business ventures and create legal certainty to legitimize these developments in Treaty # 3 Territory” (Grand Council of Treaty #3). The consultation protocol outlined by the Great Law lays out a set of principles which contrast significantly with the principles established by the Haida case. For instance, this protocol includes provisions for the withholding of consent; this power arises from the fact that ultimate decision-making authority is assumed to rest with the Anishaabe Nation:
5. In negotiating consultation and partnership agreements with proponents and/or Crown parties, communities within the Anishnaabe Nation Treaty #3 shall seek to include provisions that address the following:

a) The recognition of the ability of the Anishnaabe Nation in Treaty #3 to grant or withhold consent to continued development on certain terms;

b) The role of the community as a business partner of shareholder in the proposed development;

c) The role of the Anishnaabe Nation in Treat #3 as a decision-making authority in the proposed development;

d) The nature and extent of continued environmental monitoring through the life of the project until decommissioning;

e) The nature and extent of continued information exchange between specified Treaty #3 communities, the proponent and/or Crown party through the life of the project until decommissioning.

(Grand Council of Treaty #3, Regulation 2010-01)

The duty to consult is based on interpretations of the constitution and other Canadian laws that were created long after the treaties were signed. In general, the laws and legal decisions upon which the duty to consult is based show a disregard for Indigenous laws and knowledge. In contrast, Indigenous law is considered to be the basis for the consultation protocols that have been proposed by Indigenous nations. The consultation regulation put forward by the Grand Council of Treaty #3 casts the treaty as the basis for its relationship with the Crown. This nature of this relationship was also described in their submission to the Ipperwash Inquiry:

When the document known as Treaty No. 3 was signed October 3, 1873, our ancestors signed an agreement with the Crown on behalf of the Queen to share our land and resources, and ensure peace with the new settlers coming into our territory.
We, the people of Treaty #3 nation, maintain that that relationship with the Crown has not been changed with our consent. Meaning that we have yet to define how the relationship with the federal government on behalf of the Crown, and the province and its own ‘Crown’ fits in. You will have to understand we are a sovereign nation, we have never given up our sovereignty and never will, and it is the federal and provincial government’s responsibility to respect and learn how to deal with us as a nation.

(Grand Council of Treaty #3, 2005)

It is important to note that Indigenous peoples have not rejected the notion of the duty to consult, rather they have presented a vision of the duty which is based on Indigenous law and rooted in Indigenous sovereignty. Similarly, the discourse of reconciliation and relationship building has not been rejected by Indigenous peoples, but has been re-framed to emphasize Indigenous visions of political relations. While the duty to consult often emphasizes legal interpretations of laws and treaties giving rise to Aboriginal and treaty rights, many Indigenous leaders stress the importance of negotiating relationships, rather than the litigated relations emphasized in an adversarial legal system.

The relationship building process must also recognize that it is not individual judges or Courts but political leaders, First Nation and non-First Nation, who have the capacity and legitimacy to forge new government-to-government relationships. New relationships cannot be resolved through the courtroom. Recent Canadian jurisprudence directs that reconciliation be achieved through negotiations with First Nations and not through unilaterally achieved legislative Crown action. It is important that relationship building be done together.

(Chief Stan Beardy, Presentation to Ipperwash Inquiry Hearing, March 2, 2006)

The duty to consult, as it has been construed by the courts and interpreted by the Crown, focuses on protecting Aboriginal and Treaty rights. However, many
Indigenous peoples believe their rights extend beyond those recognized by the Constitution or by treaty (Szatylo 2002). While the duty to consult is viewed by Indigenous peoples as an important mechanism for protecting Indigenous rights, Indigenous peoples also emphasize the importance of Indigenous law, which emphasizes Indigenous political authority and Indigenous knowledge. Yet, the approach taken by the province does not acknowledge Indigenous law or consultation protocols, but rather places its focus on Canadian law. As Walters (2008) points out, the duty to consult often emphasizes upholding the moral and legal consistency of Canadian law. If reconciliation is not also rooted in Indigenous law, it is difficult to imagine how “reconciliation as relationship” might be achieved. Instead, the province would appear to be on a path of achieving “reconciliation as consistency”.

5. Implementing Provincial Consultation Policy

The Government of Ontario has recognized that the duty to consult should influence provincial policy. The Government of Ontario’s consultation policy was drafted in 2004, and continues to exist today in a draft format. These guidelines recommend that the Government of Ontario accommodate Aboriginal and treaty rights, and suggest that ministries take steps “to avoid irreparable harm or to minimize the adverse effects of a proposed government action or decision on Aboriginal or treaty rights” (Ontario, 2006). The guidelines identify several questions designed to help ministries to identify the potential effect of an action on Aboriginal peoples.

The consultation guidelines, as they currently exist, have three major
weaknesses. First, the guidelines are not specific to the obligations and duties of different ministries. The draft guidelines do not provide guidance for ministries that may be in a position to delegate procedural aspects of the duty to consult to third parties, such as municipalities or crown corporations. Second, the impetus for the creation of these draft guidelines arises out of the recognition of the legal obligation to consult, and is not the result of the recognition of sui generis rights or acknowledgement of Indigenous worldviews. Third, the guidelines define the role of Indigenous people in contributing to a successful relationship. However, these guidelines were developed without the input of Indigenous peoples in Ontario. The guidelines place the onus on Indigenous communities to: “make their concerns known to ministries; respond to ministries’ attempts to meet their concerns and suggestions; and attempt to reach some mutually satisfactory solution” (Ontario, 2006). Ironically, Indigenous peoples were not given the opportunity to “make their concerns known to ministries” in the creation of these consultation guidelines. Thus, the implementation and creation of consultation policy by the province proceeds without significant Indigenous input.

5.1 Consultation: Procedures, Rationales, and Constraints

Ministerial Reorganization
The implementation of the duty to consult at the provincial level has required the government to reorganize its ministries to respond to this duty. Since 2004, individual ministries have identified personnel or created positions to ensure that the duty to consult is fulfilled. For example, in 2006, the Ministry of Municipal
Affairs and Housing created the position of an Aboriginal Policy Specialist, the first such position within the ministry (Interview, Policy Expert, January 27 2010). Those ministries which already saw engagement with Aboriginal people as part of their “core business” moved those portfolios from the field branches to the policy branch. For example, the Ministry of Natural Resources (MNR) as a regulatory ministry has long been an important point of contact between Indigenous peoples and the province. The Ministry has seen the creation of a separate Aboriginal policy branch. Where Aboriginal relations had previously been primarily the business of MNR field staff and thus concerned with the day-to-day implementation of policy, the creation of an Aboriginal policy branch elevates the task of maintaining and monitoring the relations of the Crown with Indigenous peoples. Similarly, the Ministry of Environment (2007) and the Ministry of Northern Development and Mines (MNDM), have moved the portfolio of Aboriginal affairs to their respective corporate policy branches. The Ministry of Energy and Infrastructure (MEI) has created an office responsible for First Nations and Metis Policy and Partnerships. The mandate of this office is to oversee the consultation obligations of the Crown and consultation initiatives of proponents, and to ensure they are meeting delegated obligations.

Staff Education

Almost all of the people I interviewed talked about the opportunities for learning about Indigenous history and culture as being one of the greatest changes in the provincial government that has come about in the past few years. Most provincial
ministries now offer or require training for staff on issues related to Indigenous history and culture. These opportunities have been positively received by staff, and are widely viewed as a necessary step in changing the practices of the provincial government.

I don’t think I’ve ever come away from a course where people aren’t raving about the nature of that experience. And the way that they had their eyes opened because so much of what they learned that day is stuff that you never learned in high school. Right? And I think that is one of our biggest challenges in this province right now is that you’re seeing, 9 times out of 10, one side of the story. The media is taking things like Ipperwash and Caledonia, and other conflicts, and making them just that—conflicts. Without putting them into the context of how we got here over the last 250-500 years. I don’t think the public has a good understanding of what Aboriginal and treaty rights are, and how our relationship with Aboriginal people, which started out as one of nation-to-nation and very close and harmonious, has evolved to where it is today. (Policy Expert, Interview, January 23, 2010)

Young has explored the necessity of the social therapy of “consciousness raising” that occurs when people engage in process of politicized personal discussion regarding those cultural habits, behaviors, stereotypes, etc. that are emblematic of oppression (Young 1990, 155). She argues that changing cultural habits can only occur when individuals become aware of and change their individual habits. Education is necessary not only for members of oppressed groups to define and articulate the conditions of oppression, but must also involve “making the privileged aware of how their habitual actions, reactions, images and stereotypes contribute to oppression” (Young 1990, 154). Consciousness raising and inter-group dialogue emphasize that resistant to the macro-structures of power cannot be successful without a serious consideration of individual politics and identity, and
the ways that knowledge, language history, etc. influence the creation of those identities. The interviews suggest that the opportunities to learn about Indigenous culture and history are viewed as a necessary requirement for positively changing Aboriginal policy and improving relationships between the Crown and First Nations.

At the same time, it is important to note that individual education is only a starting point, rather than an ending point when it comes to changing the laws and policies which perpetuate structural racism. Critical race scholars have argued that the idea that learning or education is adequate for overcoming racism is a “fantasy” (Hage 1998; Nicoll 2002). Ahmed (2006) points out “racism is not simply about ‘ignorance’, or stereotypical knowledge” (Ahmed 2006, 40). Ahmed further argues if learning about racism becomes a “subject skill” then those with knowledge may be “given privilege” over others. When it comes to creating and applying policy in a bureaucratic context, the creation of specialized sets of knowledge about Indigenous people may also contribute to the rationalization of consultation policy and practices. Indeed, the reorganization of government departments and the creation of positions for “Aboriginal policy specialists” suggests that efforts to educate and reorganize the public service to enable the delivery consultation policy is creating “knowing subjects” (Ahmed 2006) responsible for consultation.

Thus, education as an aspect of communicative practice cannot be the only measurement of its success, but rather must be evaluated in terms of how education might change the balance of power between interlocutors in communicative processes. Moreover, introducing knowledge about Indigenous peoples as a “skill-
set” of certain trained policy advisors. Unless the process of reconciliation is not accompanied by significant changes to the planning process, education will only produce a better understanding of current colonial relationships without providing an opportunity to change those relationships. This would be an indication that the province is on a path towards reconciliation that does not emphasize “reconciliation as relationship” as its main goal.

Coordination: Moving as One Crown
While changing the practices of the provincial government begins with education, practically, the work of the government focuses on the creation and implementation of policy. The coordination of consultation activities presents a significant practical challenge for the implementation of consultation policy. Newman (2009) notes that that the consultation duty is “owed by a undivided Crown”:

The Crown can fail to meet its constitutional duties through problematic division of information within government as surely as through more deliberate failures to consult. If some departments are not well acquainted with consultation requirements, they must seek advice from other departments. There must also be a sharing of information within government in respect of likely Aboriginal title, Aboriginal rights, and treaty rights claims. (Newman 2009, 36-37).

In practical terms, the imperative to act as an undivided Crown is often understood as a task oriented towards avoiding the situation where one ministry might offer compensation or enter into other agreements that would increase the expectations of First Nations for their interactions with the provincial government. In other words, coordination prevents ministries from “being out in left field”: 
And every ministry does not want to be out there in left field compared to the other ones, because we’re all one Crown, we have to move as one. That’s where the Crown is going to create creative policy. (Policy Expert, Interview, January 11, 2010)

The ability of the Crown to fulfill its duty to consult and thus maintain the honour of the Crown hinges on the ability of the Crown to proceed as a unified Crown. In practical terms, the need for coordination arises from the problems that are caused when ministries take different approaches to consultation. Staff I interviewed indicated that problems might arise when project proponents are provided with conflicting or incomplete advice from ministries. However, policy experts tended to view the necessity of coordination as stemming from the need to manage the expectations of First Nations and project proponents, rather than as a matter of fulfilling consultation duties. In the following example, a policy expert describes the confusion that arose when a proponent was provided with conflicting and incomplete information by ministries.

The reason it didn’t get resolved, just to highlight the problem, is that the developer, when they were told by MNR who to work with, started working with this community and entered into a commercial relationship. They entered into a partnership, started working on commercial terms, and they entered into an agreement and were going to build the project together as co-proponents. When the other ministry identified different communities, the proponent said “Hold on. We’ve already put our eggs in this one basket. We’ve got our commercial relationship, what do you want us to do with these other communities? Why do we need to consult with them?” It was in a general context of, they may have some rights, we don’t know. So the proponent started having discussions with these other communities, and all the other communities said, “we don’t have capacity to talk to you, you have to fund us.” And the proponent said, “well, we gave all our money to the one community that was originally identified to us. We don’t have any money to consult with all of these other communities, how do we move this [project] forward?” There had been quite a long delay on this
As a result of these experiences, the co-ordination of consultation activities emerged as a strategy of managing risk, rather than as a strategy of ensuring the interests of Indigenous peoples were heard in the process. The provincial government has taken several steps to coordination consultation activities, including the creation of inter-ministerial planning committees, and construction of a GIS-system for collecting and synthesizing information. The creation of inter-ministry committees has, in the opinion of the staff, greatly increased the Crown’s capacity to coordinate consultation activities. For instance, one committee comprised of directors from all the resource development ministries meets monthly to share information and flag emerging issues (Interview, Policy Expert, May 5 2010). The sharing of information also has practical advantages, such as facilitating the coordination of visits to First Nations.

In addition to informal and formal meetings, technology also plays a role in coordinating the consultation activities of the provincial Crown. The Ministry of Aboriginal Affairs has spearheaded the creation of the Aboriginal Consultation and Information System (ACIS), a formal electronic consultation tracking system for use by provincial government employees. The system contains geo-coded information including: current consultation activities, treaty areas, traditional areas, amount of money being spent, land claims, briefings, backgrounders, and other relevant documents. ACIS also includes confidential information related to current litigation
available only to government lawyers. Interview partners indicated that they expect the ACIS system to become a powerful tool for coordinating the government’s consultation activities.

From the perspective of the government, the coordination of consultation activities ensures the consistent interpretation and application of consultation law and policy. Although the Crown is composed of many ministries with varying powers and responsibilities that can potentially affect First Nations, the coordination of consultation allows the government to function as one coherent actor within a field of multiple claims originating from numerous individual First Nations:

A combination of having in-person meetings, regular committee meetings, fairly regular policy discussions on emerging issues, formal electronic consultation tracking, and coming to a better understanding...I can’t believe the progress that I’ve seen in the ministries over the last years, [it] is really phenomenal, in terms of where ministries are now in sitting down and doing that horizontal planning across government. (Policy Expert, Interview, May 5, 2010)

**Balancing Economic Interests**

In addition to acting as one Crown, the idea of an economic imperative underlying the need for the coordination of consultation activities was also raised in interviews. The coordination consultation activities was seen by provincial policy experts as a way for the government to minimize the cost of consultation, while also ensuring that consultation was conducted in a timely manner to avoid projects being delayed:

It’s important because if you don’t [consult], you run the risk of huge delays on projects. On the one hand, you have the importance of the protection of Aboriginal and Treaty Rights, on the other hand you’ve
got economic development and investment in the province. The province is on hard times, and you need to entice investment. But if investors are coming here and all their projects are getting delayed, because we can’t get our shit together on the duty to consult, which is really our responsibility as the Crown, then they’re going to leave. The investors aren’t going to stick around, and that’s not good for anybody, not for Aboriginal communities either because it’s the future wealth, future jobs and future opportunities for everybody. It’s a balancing act. (Policy Expert, Interview, March 23, 2010)

In other words, the consultation process is understood as a rational process of balancing Aboriginal rights against broader economic interests. The goals of the greater good—economic development and jobs—must be balanced again “competing” Indigenous interests. Thus, Indigenous rights are cast as being contrary to the interests of the Ontario public. Furthermore, Indigenous interests are narrowly understood as Aboriginal and Treaty rights as defined by section 35(1) of the constitution.

Walters (2008) has commented that the balancing of competing interests is a feature of “reconciliation as consistency,” which is oriented towards affirming the authority of the Crown, rather than improving relationships:

…balancing majority and minority interests in relation to scarce resources is always a complex matter that implicates questions of justice, equality and fairness. But unless the richness of reconciliation as relationship is inserted into this interpretive process to affect the outcome, to speak of reconciling interests is simply a different way of speaking of balancing interests – it is to adopt a form of reconciliation as consistency that is detached from the objectives of reconciliation as relationship. (Walters 2008, 182)

When it comes to the provincial interpretation and application of consultation policy, the province has chosen an approach emphasizing the economic outcomes
and expedient response to business interests. Questions of justice are narrowly interpreted through the lens of Aboriginal and treaty rights. Thus, reconciliation is oriented towards satisfying the economic interests of the province at the expense of the political interests of Indigenous peoples.

Summary

I can say there’s been a huge shift. It’s a change management process to some extent. This is how we’ve been doing things for a while. Now we have to consult and engage. Part of that is raising awareness and providing people with education. Maybe we don’t need to engage on every issue, but we need to develop a rational approach to determining on which issues we should. (Policy Expert, Interview, May 7, 2010)

The duty to consult, as framed by the discourse of reconciliation, has led to some changes in the way that the province interacts with Indigenous peoples, and contributes to the formulation of strategies and policies for implementing consultation. However, reconciliation, as it is translated in to the policy arena, largely focuses on reconciling the honour of the Crown with crown sovereignty. This particular vision of reconciliation does not take Indigenous sovereignty into consideration, but rather relies on narrow understandings of section 35 to determine the strength of consultation requirements. Dawnis Kennedy (2009) has noted the challenges of relying on section 35 to understand the scope and content of Aboriginal rights:

Section 35, even when understood as a site of interaction between indigenous and Canadian law or as informed by intersocietal law, is still but one such site which exists within Canadian law. It is the vehicle through which Canadian law contemplates its understanding of the state of indigenous peoples, settler societies, the Canadian state, indigenous law, Canadian law, intersocietal law and the myriad of
relations that exist among them. Aboriginal rights provide a ‘recognition space’ that exists within Canadian law, but I do not believe it is the only such space relevant to the governing of relations between indigenous and Canadian legal orders, nor do I believe it is the only one relevant to determining what constitutes respectful, just, or lawful relations between indigenous peoples and the Canadian state. I believe there are corresponding recognition spaces that exist within each indigenous legal order. (Kennedy 2009, 73)

Reliance on section 35 rights thus serves to entrench the authority of Canadian law. However, without acknowledge the relevance or authority of Indigenous law, it also serves to undermine Indigenous law.

Beyond working with a narrow understanding of section 35 rights, the honour of the Crown is an important concept motivating consultation policy. However, in the discourse on consultation and reconciliation, the honour of the Crown is treated as a pre-existing moral justification for action rather than as the product of a set of power relations which the Crown itself has helped to construct. In this set of power relations, which reduces Indigenous sovereignty claims to a narrowly defined set of section 35 rights, Indigenous peoples are at a significant disadvantage. This disadvantage becomes amplified once it is routinized as part of the policy regime.

Miraftab (2009) cautions that the “routinization” of participation can contribute to the de-politicization of community struggles thereby extending state control while at the same time legitimating its dominance. The de-politicization of Indigenous struggles and the legitimation of the state’s asserted authority occurs in the context of consultation through the coordination of consultation activities. The coordination and rationalization of consultation activities establishes consultation as
the domain of expert knowledge. Thus, as bureaucrats become more aware of both
the importance of consultation and develop techniques and strategies for conducting
consultation, the practice of consultation is increasingly understood as a rational
practice, turning away from the principles of communicative practice and
relationship building that originally motivated consultation. Instead, my interviews
suggest that the duty to consult is becoming entrenched as a practice oriented
towards ensuring development and protecting the economic interests of the
province, rather than protecting Indigenous interests or acknowledging the
legitimacy of Indigenous political authority as a basis for planning decision making.
The extent to which the goal of reconciliation is transformed or weakened as it is
transposed from a judicial concept, to a political device, to the basis for a policy
framework becomes even clearer in the examination of how the duty to consult it
transferred from the province to municipalities.

5.2 Delegation of the Duty to Consult from the Province To
Municipalities
In the final report of the Ipperwash Inquiry, commissioner Sidney Linden
recommended “the provincial government should promote respect and
understanding of the duty to consult and accommodate within relevant provincial
agencies and Ontario municipalities” (Linden 2007, Vol. 2, 123). At the time
Ontario’s consultation policy was drafted, there had been no clear legal
interpretation of the role of municipalities in consultation processes. Furthermore,
case law on the role of municipalities in the consultation process is inconsistent
(Newman 2009). Nevertheless, when it comes to the administration of municipal
powers, the province is encouraging municipalities to build relationships with neighbouring First Nations, and suggests that municipalities have a duty to consult First Nations in some circumstances (Ontario 2009). The Ministry of Municipal Affairs and Housing has created a handbook for municipalities outlining the position of the provincial government regarding the role of municipalities in consultation. This document emphasizes the importance of building relationships with First Nations through communicative practices:

Local governments’ relationships with Aboriginal peoples are changing. Across Canada, municipal governments and neighbouring Aboriginal communities are developing stronger relationships. Together, they are creating opportunities to improve the quality of life for their residents.

Establishing and maintaining respectful relationships between all parties is essential to good municipal-Aboriginal relationships and is a basic principle of good municipal governance. By respecting each other’s perspectives and developing relationships, municipalities and Aboriginal communities can build trust, address potentially challenging issues, and act collaboratively to achieve social and economic well-being for all residents. (Ontario 2009, 1)

However, there have been no significant legislative changes that either clearly outline the role of municipalities in Ontario vis-a-vis consultation, or that give the province the power to force municipalities to consult. The existing requirement in the Planning Act that municipalities must notify First Nations of planning activities occurring within 1km of a reserve remains the only formal guideline. The province encourages municipalities to consult First Nations as part of the official plan 5-year review process, or in creating new official plans. If municipalities fail to consult First Nations, the province conducts consultation itself. The time that adds to the
approval process is perhaps the only real consequence of failing to consult:

If they [municipalities] don’t undertake the appropriate engagement and consultation, then we [the province] will have to, and that will only serve to add time to the approval process. So, there is a little bit of incentive in there, if they don’t do it, we have to, it just lengthens the process in getting our approval. (Policy Expert, Interview, May 3, 2010)

In addition to pointing out the time delays that might result from not consulting, the province presents the idea of consultation not only as an aspect of “good governance” but also a “good practice.” The handbook prepared by the MMAH for municipalities suggests “engaging Aboriginal peoples should be part of a municipality’s regular business practices.” (Ontario 2009, 1) One provincial policy expert explained:

Because if I were laying odds on things, and I was thinking I want to put this new development up and there’s a First Nation that borders on that land, I can either consult with them now and work through some of the issues, or I can risk having my development halted for good. So, in terms of risk management, what’s the best business practice there? And I think the best business practice is just to consult with the First Nation, regardless of whether or not you feel you have a section 35 duty to consult with the First Nation. (Policy Expert, Interview, April 28, 2010)

In other words, consultation is understood as ensuring that First Nations will not blockade development projects. Consultation is thus understood as a mechanism for ensuring the stability of property ownership by limiting the likelihood that First Nations will challenge property claims. Consultation is a means for rendering potentially antagonistic relations predictable.

In addition to being a good business practice, the province also advances a
moral argument in trying to convince municipalities that they should consult with First Nations. This moral argument is usually framed in terms of “friendship.” Thus, municipalities are encouraged to become “friends with their neighbours.” From the perspective of communicative planning, planners are encouraged to act as “critical friends” (Healey 1997), acting not only as expert advisors, but also allies who facilitate and advance communicative processes. Huxley (2000) however points out this stance of critical friendship “ignores questions about the legitimate basis for such a role, the unequal and involuntary nature of many planning forums” and “the possibility that planners are not able to act as disinterested mediators; exactly by virtue of their roles in relations to the state.” (Huxley 2000, 375).

The significance of Huxley’s objection becomes clear in the context of relations between Indigenous peoples and the state. Moreover, the framework in which planners find themselves is built on the assumption of Canadian sovereignty and the denial of Indigenous sovereignty. Given the polarized nature of these positions, it is difficult to imagine how planners might divorce themselves from political circumstance, in order to act as “critical friends.” The allegiance of planners becomes clear, when friendship is also cast as a business practice. As one policy advisor explained: “If for no other reason, it’s a good business practice. Don’t you want to be friends with your neighbours?” (Policy Expert, Interview, April 28, 2010). Beyond casting consultation as a good business practice, this formulation—“friends with your neighbours” suggests that consultation is necessitated by physical proximity, rather than the appreciation for Indigenous political authority.

In this context, the trope of friendship might be better viewed from a Kantian
perspective. According to Kant’s proximity principle, neighbours, or those who live “unavoidably side by side” are under obligation to join in political community. However, the basis for this moral imperative is not to achieve friendship, but rather to avoid the threat of violence. Thus, according to the proximity principle “people should join in political community with those they are most likely to fight” (Waldron 2011, 1). This is clear when “friendship” is cast not only as a sign of neighbourly relations, but also understood as a “business practice.” Thus, friendship is in fact just another form of risk management, where friendship ensures that the economic objectives of the municipality, province or private project proponent, are met.

6. Municipal Responses

6.1 “It is unreasonable for the province to expect municipalities to take the lead on something that is not within our jurisdiction”

Although a few planners indicated a strong willingness within their municipality to engage with First Nations, and were actively seeking to build relationships with neighbouring First Nations, the majority indicated that First Nations were not a priority for their municipality. Furthermore, several indicated frustration with the directions of the provincial government and insisted that First Nations issues are the responsibility of the federal government, and that establishing relationships with First Nations is the business of the provincial government. As one planner put it to me: “to expect municipalities to take the lead on something that is not within our jurisdiction is unreasonable.” A policy advisor with the provincial Ministry of Municipal Affairs and Housing explained the different positions taken by municipalities towards consultation:
There are those that for whatever reason feel adamant that it [consultation] is not their role. They will always exist. But there are some that maybe want to, or would like to, but whether it’s because they don’t have enough resources, or not enough time or knowledge, or just being afraid to go into it because they haven’t experienced it, there’s an apprehension or reluctance to go into something new. As with any other kind of change, it takes time and experience for those municipalities to then become comfortable with that kind of idea. And then there are those who understand why they should or might want to, but either don’t have the resources or they feel a little overwhelmed in going into something like that. (Policy Expert, Interview, May 3 2010)

The work of planners is shaped in large part by the official planning policy framework and by direction from local councils. Although the efforts of the province have focused on encouraging municipal planners to engage with First Nations, this new direction has not been supported by changes to the Municipal Act, the Planning Act, or any other elements of the framework governing planning in the province. Thus, if and how municipalities engage with First Nations in relation to planning matters is left entirely to the discretion of the municipalities. As a result, municipal planning authorities have responded differently to provincial suggestions that municipal governments should engage with First Nations. While the Ministry of Municipal Affairs and Housing facilitates workshops to provide municipalities with information on the consultation process, these workshops are not always well received by municipalities:

The Province put on the meetings, and they invited representatives from all of the municipalities, and there were one or two municipalities who didn’t send anyone. There was at least one municipality that didn’t... there was one where council instructed staff not to go. (Planner, Interview, May 26 2010)
In the absence of strong provincial policy or laws explicitly outlining the duties of municipalities regarding consultation, consultation by municipalities is ultimately reliant upon the will of both local planners and local councils to engage in consultation. Many of the planners I spoke to were sympathetic to the goals of consultation, and wanted to build better working relationships with First Nations on planning issues, and also indicated that support for such activities from council was not always strong:

It's been very much staff driven. I've identified it as something that we're going to have to address if we're going to do our due diligence. There's been some political recognition. Obviously, Caledonia is a bit of a stick for the political side, to offer an example of how not to do things...but its very much staff driven... (Planner, Interview, May 21, 2010)

I think the province wouldn't be able to force a municipality to do any more than the minimum requirements of the Planning Act. So, if the municipality was reluctant to do any more than that, I don't think the Province would be able to do anything about it. And yes, I can imagine a municipality would be reluctant to get into consultation. It was a bit of a sensitive issue here as well. And frankly staff had conducted the First Nations consultation without consulting council about it either. It was a staff level decision, and not all councilors were too enamored of the idea. I think part of it is a fear of the unknown as well. Our neighbours have had some fairly significant issues with development because of land claims in Haldimand, and I think a lot of them were suspecting that if we raised flags we could cause similar problems over here. (Planner, Interview, May 26, 2010)

The lack of a clear policy statement or changes in the Planning Act or Municipal Act on the role of municipalities in the consultation process means that municipalities have no obligation to participate in consultation beyond what is
already set out in the law. Moreover, it means that events such as Caledonia continue to be held up as an example of what can go wrong in the absence of consultation. This in turn re-enforces the notion that Indigenous peoples represent a threat to the rule of law and the economic and social stability of non-Indigenous communities.

6.2 Realizing Communicative Practice?
Almost all of the planners I spoke to said that they did not feel that they received adequate guidance from the province regarding how to conduct consultation. Some planners also discussed an attitude of skepticism towards overly formalized approaches to consultation, and viewed the duty to consult as potentially constraining the types of relationships that might develop, due to the focus on section 35 rights and legal requirements that define the duty to consult. The planners I spoke with who were receptive of the notion of consultation stressed the importance of building positive relationships. In this way, the work of planners in the implementation of consultation reflects the principles of communicative planning:

People are always concerned and apprehensive when they look at the word consultation. But planners do consultation all the time. Planners consult with neighbourhood associations, ratepayer groups, environmental groups, economic development interests; all sorts of communities of interest are out there that planners consult with. A large part of what planners do is consultation to understand what are the varying interests out there, how they can be addressed, and what is the greatest public interest. Well, we deal with consultation all the time. But when people talk about consultation in the duty to consult context, they always get a little bit uneasy, and they think about it in a more formalized context, and the jurisdictional issues under the constitution. And I think where some of that comes from, there are
some very specific consultation process and practices out there for major projects. (Policy Expert, Interview, May 3 2010)

Typical of planners to love their checklists. I like checklists too, sometimes, but I don’t think this is a place where checklists really give you a lot of value. Its important to have protocols and know who you should talk to. But I prefer more informal discussion and interactive type consultation. Rather than just checking a box that you sent a letter at the prescribed time. (Planner, Interview, May 21 2010)

The duty to consult identifies a need...but it's critical that you establish a long-term relationship. First Nations aren't that receptive to consultants doing consultation for governments. So, the legal requirements that are set out as a legal minimum, and its not very high. It is in the interest of the municipality to go above and beyond that to build up general relations and partnerships, and to establish the regular to-and-fro rather than just communicating when issues are arising...that doesn't necessarily lead to a comfortable relationship, when you're only talking about problems when they arise...I think there's a recognition that there should be much more effort in building the everyday relationships. (Planner, Interview, May 26, 2010)

While municipal planners have might have the will and the tools to foster relationships with Indigenous peoples, and have some ability to engage with First Nations even without the support of their councils, the ability of communication to fundamentally change the extent to which Indigenous peoples have an opportunity to influence the outcome of the planning process, or to have their concerns taken into consideration in the planning process is very limited. While communicative planning, as applied in the context of a discourse of reconciliation in Ontario, may very well have the potential to lead to better day-to-day relationships between First Nations and municipalities, the formal structure of the planning process in Ontario
has not changed to allow for Indigenous peoples to exercise greater authority in the planning process.

For example, the capacity of First Nations governments to respond to consultation requests within the time frame established by the Planning Act is a major challenge. In the face of scores of notifications of planning activities, many First Nations simply cannot review or respond to every notification that arrives, not just from municipalities, but also from numerous government and corporate project proponents.

We don't often hear comments from First Nations. Whether or not that indicates that they don't have issues with them, I don't know. I think it's rather the case that they don't have the capacity to deal with the applications and review them. So, it's more of a capacity issue. From a funding standpoint, the county doesn't have any funds to help them with that capacity issue. That's where we would be looking at the province, saying, listen if this duty to consult is required by the Crown, the Crown should be helping First Nations to review the capacity so that they can review those applications in a timely manner. Until then, we will process those applications, because what happens is, if we don't process the applications in a timely manner, in the time frame [set out by the Planning Act], there is the ability of the applicants to appeal to the Ontario Municipal Board. So, we want to process the applications in a timely manner. But at the same time, we will circulate to First Nations, and if they have concerns they can identify them to us. That's all we can do at this standpoint until there is something formal in place. (Planner, Interview, June 23 2010)

Many planners I contacted declined to participate in the project. The planners who agreed to participate in the short interviews and volunteered to participate in the long interviews expressed the view that building better relations with First Nations was an important task, but also expressed some frustration with the type of guidance they received from the province. While all agreed that some form of
consultation is important, many seemed unsure of what was required or appropriate. The degree of engagement with First Nations seemed to hinge on the willingness of individual planners to building connections with their counterparts in First Nations governments, even without specific guidance from the province or the permission of their council.

In this context, planners do have some ability to influence relations between First Nations and municipalities, and have a great deal of leeway when it comes to taking steps to build connections and communicate information. Planners can also play a role in advocating that their councils follow existing consultation protocols. At the same time, if higher levels of government are not willing to follow the lead of First Nations and follow existing protocols, honour treaties, or make substantive changes in the planning regime to reflect Indigenous law, the effect of this consultation policy and the realization of “reconciliation” will be limited. As long as the formal planning process remains oriented towards the timely processing of applications, and continues to be based on non-Indigenous understandings of jurisdiction, property, and political authority, Indigenous peoples will continue to be systematically excluded from the planning process.

7. Conclusion
Politicians and jurists alike have promised that reconciliation will not only improve relations between Indigenous peoples and the state, but also to improve economic and social conditions for everyone. Moreover, reconciliation promises to achieve better relationships not through radical political changes, but rather through better
communication and a spirit of friendship.

Most of the policy experts I interviewed viewed the consultation measures introduced by the province in a positive light. In particular, the Final Report of the Ipperwash Inquiry was viewed as providing a solid framework for guiding the work of policy makers and provincial employees in their interactions with First Nations. The steps taken to educate staff across ministries were also seen as a positive step, as was the increased capacity that resulted from hiring new staff dedicated to First Nations policy and as demonstrated in the creation of the Ministry for Aboriginal Affairs:

The new approach to Aboriginal Affairs, which is the policy framework under which Ontario currently works was tabled in 2006, and we’ve been working through that. It has a great set of principles. It kind of established a road map for going forward. The Ipperwash Inquiry and the release of the report in terms of MAA being born as a result of a recommendation in the Ipperwash report, we didn’t exist before that, we were a secretariat under MNR. So now we’re a ministry, and we went from when I first started working here we were 40 people, and now we’re 140 people. If there’s a change in government, a change in approach, who knows what’s going to happen. But I think there’s a distinct willingness to go beyond the legal requirements of the law, and go beyond, towards reconciliation. (Policy Expert, Interview, May 5 2010)

Consultation has been envisioned by Indigenous peoples as fundamental to realizing Indigenous sovereignty. In its bureaucratized form, reconciliation has the tendency to become a form of risk management, designed to protect the interests of the province. Once rationalized as a planning practice, it becomes the domain of expert knowledge. In some cases, consultation opens lines of communication and contributes to relationship building, but this seems to be the exception, rather than
Premier McGuinty has cast the movement towards reconciliation in Ontario as moving “at a rather fast pace.” Yet, the changes to planning policy and practice that have come about as a result of the duty to consult and the government’s consultation have some significant flaws. The creation and implementation of consultation policy has not been on terms determined by Indigenous peoples. Furthermore, the overall planning policy and legal framework has not been changed to reflect the duty to consult or principles of reconciliation. Without such fundamental changes, one must ask the extent to which the rhetoric of reconciliation is merely symbolic.

The political reaction has not met the First Nation political rhetoric. The political rhetoric [of First Nations] is now talking about treaty re-interpretation, taking over sovereignty, taking over control of land. The expectations now are very very high, and the political reaction that has happened, positively, is not meeting those expectations. So now, you have a mixed bag where First Nations are saying ‘yeah, you actually are doing stuff, but you know, we’ve positioned ourselves to be here’ [motions high with hand] and the Crown is not prepared to do that. We’ve already come really far, but we’re nowhere near where First Nations want to be. (Policy Expert, Interview, January 11 2010)

Advocates of communicative planning would argue that despite these shortcomings, the real potential of communicative planning lies at the local level where planners are in the position to facilitate relationship building. On the terms set by communicative planning, the actions of the local planner—attending meetings, talking with stakeholders and politicians—are at the core of communicative activity and represent the occasions where the planner can intervene on behalf of stakeholders or ensure that stakeholders have an opportunity to speak for themselves.

While the previous two chapters dealt with the ways in which planning...
explicitly and systematically *excludes* Indigenous peoples from the planning process, and denies Indigenous political authority while affirming the sovereignty claims of the state, advocates of communicative planning would point to local level planning as exemplified through the consultation process as an instance where interests of Indigenous peoples would be explicitly *included*. However, despite the best intentions of planners, in the context of reconciliation and consultation, communicative planning is a weak tool for improving relations between Indigenous peoples and the state. This failure has been anticipated by critics of communicative planning, who have noted that this approach to planning fails to address questions of power. As I have demonstrated here, the outcomes of communication are largely pre-determined by the formal mechanisms that structure planning. Despite the strength of the discourse of reconciliation in Ontario, Indigenous peoples continue to be systemically excluded from the planning process.

The Prime Minister’s apology, the statement by the Premier of Ontario, and the jurisprudence on the duty to consult all express lofty goals regarding the reconciliation of Indigenous peoples and Canada. Indigenous peoples have to some extent embraced this goal, and have provided clearly articulated visions of the ways in which they would like to exercise political authority and participate in planning decision-making. However, the implementation and translation of this goal into policy and planning practice has not served to improve the position of Indigenous peoples. Rather, the focus on overcoming contradictions in the Crown’s stated goal of acting honorably in its dealings with Indigenous peoples and maintaining the rule of *Canadian* law has provided little space for the flourishing of *Indigenous* law as a
basis for planning decision-making. Without procedural changes to the planning process, the language of reconciliation has little power to change this reality. Instead, the duty to consult serves to strengthen sovereignty claims of the state by affirming the rule of law and actualizing a vision of reconciliation that brackets Indigenous political authority and naturalizes the authority of the Crown.
Conclusion: Rejecting the False Choice

This dissertation began with the assumption that Indigenous peoples in what is now known as Canada have an inherent right to self-determination. This right is rooted in the fact of prior sovereignty, that is, that Indigenous peoples were sovereign peoples before the arrival of European settlers. However, Indigenous prior sovereignty is not reflected in the ways in which Canadian governments conduct themselves in relation to Indigenous peoples. In this dissertation, I argued that land use planning plays a significant but under-examined role in the erosion of Indigenous sovereignty, and contributes to conflict over Indigenous rights and lands in Canada. Moreover, I argued that the perceived separation between local land use planning and questions of national sovereignty is a product of and productive of the assertion and amplification of Canada’s sovereignty claims. In order to counteract these assumptions, I have examined how local planning processes undermine, disrupt, and criminalize Indigenous sovereignty and facilitate the dispossession of Indigenous peoples.

In Chapters 3 and 4, I explored the institutional and political framework governing land use planning in Ontario. In Chapter 3, I argued that the language of jurisdiction is deployed to systemically exclude Indigenous peoples from the planning process.

In Chapter 4, I demonstrated how the regulatory regime and discretionary powers of municipalities governing planning activities in Ontario not only exclude
Indigenous peoples, but also criminalize Indigenous occupation of territory by mobilizing the enforcement power of the state. I also demonstrated how Indigenous law and knowledge can be applied in the re-interpretation of Canadian law to emphasize the legitimacy of Indigenous jurisdiction and political power.

In Chapter 5, I examined how the implementation and development of consultation policy is changing the planning process in Ontario, and questioned the potential of planning to support the aim of reconciliation. I argued that while Indigenous rights have gained prominence in provincial and municipal policy agendas as a result of the duty to consult, the way in which consultation has been routinized has expanded the capacity of the Crown to rule over Indigenous life. Furthermore, the discourse of ‘reconciliation’ has not been accompanied by procedural changes in the planning process that would extend the ability of Indigenous peoples to intervene in the planning process. As an alternative, I also suggested the ways in which Indigenous law might serve as the basis for consultation practices in ways that would affirm Indigenous political authority.

In this dissertation, I have shown how the practices and principles of planning aid in the narration of a political imaginary and the creation of a legal geography which affirms Canada’s territorial and moral coherence. This examination of planning was placed against the backdrop of broader historical tendencies in Canadian Aboriginal policy, bringing into relief the role of planning in reinforcing, enacting, and enabling Canada’s sovereignty claims. Specifically, the examination of planning and its relation to Canadian Aboriginal policy makes clear
the relationship between spatial planning and policy and ongoing and historic processes of dispossession and assimilation. This research also made clear the precarious nature of Canada’s sovereignty claims, and the ways in which Indigenous sovereignty claims call into question and expose the tautological nature of the arguments undergirding Canada’s sovereignty claims. Furthermore, this research revealed that planning’s current approach to power reflects the assumptions inherent in a juridical model of power, in which planning serve to replicate a juridical model of sovereignty predicated on the denial of Indigenous sovereignty.

While my research contributes to a better understanding of the role of planning in colonialism, it also paints a bleak picture of planning. This research suggests that even in its best moments, when planning strives to be part of processes of reconciliation and relationship building, planners have little power to adequately respond to the political aspirations of Indigenous peoples, and instead bolster processes that undermine Indigenous political authority. In this context, one might be tempted to pose the question: “is there any hope for planning?”

Radical planners of the 1970s, confronted with the reality that all too often planning serves to promote capital accumulation, came to the conclusion that planning could never have a role other than a servant of capital. For this reason they did not provide an alternative vision of planning. However, I suggest that this conclusion rests on a “false choice” between participating in planning activities and bolstering a social and economic system which produces and prolongs inequality, and refusing to participate in such processes by abandoning planning altogether.
When it comes to planning with Indigenous peoples, I believe that planners are once again faced with a “false choice” between participating in a planning process deeply connected to colonialism and dispossession, and the disavowal of planning. If this is a false choice, then the question “is there hope for planning?” is the wrong question. Rather, this question seems destined to lead to, once again, the invention of approaches designed to preserve planning’s progressive identity. Moreover, it relies on a juridical conception of sovereignty which limits the scope for action to a choice between the recognition of Indigenous sovereignty and the destruction of the Canadian state, or the continued denial of Indigenous sovereignty and the preservation of the state. Therefore, not only does this choice limit the possibilities for the decolonization of planning to the legal remedies offered by the Canadian legal system, or to the creativity of (mostly) non-Indigenous planners, it reifies the state as a monolithic entity, and requires a denial of both the multiple ways the state’s sovereignty claims are bolstered and the role of planning in fortifying those claims.

However, in this dissertation I have not only argued that Indigenous peoples are systemically excluded from the planning process, I have also presented a variety of substantive and procedural approaches that have been proposed by Indigenous peoples for the purposes of fundamentally changing the planning process, and Canada’s claims to political dominion. Thus, instead of looking to innovations in planning theory, or designing minor adjustments in planning law to accommodate Indigenous rights, I have argued that the reinterpretation of Canadian law and treaties between the Crown and Indigenous peoples from an Indigenous perspective
can provide a solid basis from which to re-imagine planning doctrine. Moreover, the legal knowledge presented by Indigenous peoples also suggests that Canada’s sovereignty claims draw their legitimacy from Indigenous authorization, and demand a fundamental realignment of relations between Indigenous peoples and Canada. By placing Indigenous political authority in the foreground, it is possible to reconfigure planning theory and practice in a way which emphasizes and supports Indigenous sovereignty rather than abrogating it.

In conclusion, I take the position that it is not up to me, or to planning theorists in general, to determine the terms on which planning should engage with Indigenous peoples, or to answer the inevitable question *what is to be done?* Indigenous peoples have taken pains to express the terms under which they are willing to enter into political relationship with Canada. Thus, rather than looking to planning theory for guidance, we must begin with the agenda that is set by Indigenous peoples. Working in the context of anti-racist organizing, Lawrence and Dua argue:

> Aboriginal sovereignty is a reality that is on the table. Antiracist theorists must begin to talk about how they are going to place antiracist agendas within the context of sovereignty and restoration of land...Starting with the agenda of sovereignty and taking colonization seriously will change the anti-racist agenda. Rather than aiming to produce better research methods and agendas for the sake of improving research, it means that writing, research and teaching must begin with Indigenous realities. This means that race and racism need to be understood from the perspective of ongoing colonization, dispossession and genocide. (Lawrence & Dua 2005, 137)

Applied to the context of planning theory, this means that rather than trying to
bring planning theory to bear on Indigenous politics, Indigenous politics must be brought to bear on planning theory. In the past, the interventions and alternatives advocated by both planning theorists and policy makers largely emphasize changing ‘planning culture’ to enable the recognition and inclusion of Indigenous peoples in planning processes by encouraging the development of novel planning practices. These interventions largely reduced Indigenous struggles over territory to the realm of identity politics, and rely on the ‘recognition’ of Indigenous peoples by the state. Thus, the approach offered by planning theorists, or by planning policy in Ontario, does not provide a basis from which to engage the demands of Indigenous peoples. Addressing the role of planning in the dispossession of Indigenous peoples might be better served by placing the political nature of planning in the foreground. Furthermore, taking assertions of self-determination as a starting point provides a more fruitful opportunity to de-colonize planning practice while avoiding the pitfalls of a politics of recognition inherent in planning processes that emphasize cultural difference while denying Indigenous self-determination.

This does not mean that planners are off the hook. Instead, it means that rather than seeking piecemeal ways to reform planning practice, it is the responsibility of planning theorists to challenge the fundamental assumptions upon which planning practices are built. Where the naturalization of the assumptions of planning contributes to the destabilization and denial of Indigenous political authority, it should be the role of planning theorists to challenge those assumptions. For example, the discourses of jurisdiction, property, and reconciliation, which drive
planning in Ontario, fail to take into consideration Indigenous perspectives, knowledge and laws. Planning theorists should seek not only to understand and challenge those false assumptions, but also look towards alternative sources of power and authority, beginning with those sources identified by Indigenous peoples. In other words, planning theory must look beyond the realm of planning, as it is traditionally defined, for the power to change its practices. Resisting the ways in which planning presently configures Indigenous life and aggrandizes the presumed sovereignty of Canada must be found in the refusal of the categories and knowledge which planning too often presupposes and which contribute to ongoing colonization and dispossession. Whether planning practice is then defined by ‘love’ or ‘reconciliation’ or some other ideal is a decision that must be made by Indigenous peoples themselves.
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Appendix 1: Interview Guide Short Telephone Interviews: Municipal Planners

1. Are you aware of any First Nations communities/reserves located within or adjacent to your municipality?

2. Are you aware of or do you interact with First Nations on issues related to (check all that apply):
   - [ ] Land claims
   - [ ] Aboriginal Archaeological sites
   - [ ] Land-Use Planning activities on adjacent reserves
   - [ ] Land development
   - [ ] Environmental protection
   - [ ] Delivery of municipal services (e.g. wastewater treatment) to reserves
   - [ ] Please specify: ________________________________
   - [ ] Other
     Please specify: ________________________________

3. In your municipality, are there any protocols (e.g. communications protocols) in place when it comes to dealing with First Nations?

4. Are you aware of any unresolved Aboriginal land claims within your municipality?

5. Are there any other issues in your work related to First Nations that you feel are relevant? Please describe.

6. Would you be willing to participate in a longer, follow-up interview on the topic of planning with First Nations communities?
Appendix 2: Interview Guide Key-Informant Interviews: Planners

(This guide is only an example of a possible interview guide.)

**General**

Can you tell me a little bit about your position and work in the municipality?

How long have you worked for the municipality?

**Relationships and Contacts**

In the telephone interview, you mentioned that your municipality follows a consultation protocol. How did this come about?

How has the municipality’s relationship with (First Nation) changed since the protocol was developed?

Do you have a regular contact person there?

How did this person come to be a contact?

In what circumstances would you contact this person?

**Planning Framework**

Have you received instructions from your political leadership (council) on how to deal with these issues?

Do you feel that the provincial government, through the Planning Act or other legislation provides enough guidance to planners when it comes to consultation?

In what ways could the province help to make your work easier when it comes to dealing with First Nations communities?

Is there anything else you would like to discuss?
Appendix 3: Interview Guide Key Informant Interviews: Policy Experts

Can you tell me about your role in the ministry?
What prompted the creation of this position within the ministry?
Can you tell me a little bit more about a typical consultation in this ministry?
How do you know if consultation is required?
How do you identify which communities should be consulted?
How do you evaluate if the accommodation is appropriate?
It sounds like this Ministry moving from stakeholder consultation to section 35 consultation. How does this change your work?
How much interaction do you have with other ministries?
How do you coordinate consultation activities with other ministries?
What’s the most difficult thing about your role?