HOW TO ACHIEVE MEANINGFUL CONSULTATION/ACCOMMODATION WITH FIRST NATION COMMUNITIES: THE NEED/BENEFITS FOR COMMUNITY-LED FOREST MANAGEMENT PLANS IN ONTARIO'S FOREST INDUSTRY

by

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ABSTRACT

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The inherent Aboriginal and treaty rights of First Nations people continue to be infringed upon in Ontario's forest industry. The province of Ontario continues to abuse its colonially obtained Section 92 powers and has supported its forestry practices under the *Crown Forest Sustainability Act* 1994 regardless of those practices violating the constitutionally protected rights of First Nations people under Section 35 of the Constitution. This thesis's objective was to investigate how the implementation of community-led forest management plans can assist the province of Ontario to achieve its constitutional obligations under Section 35 by providing meaningful consultation and accommodation to First Nation communities affected by forest operations in Ontario. An analysis of the different perspectives of meaningful consultation and accommodation, current policies and legislation and examples of pre-existing community-led forest management plans was conducted to explore how a community-led forest management plan can satisfy the requirements of meaningful consultation and accommodation and the additional benefits that implementing community-led forest management plans can have in Ontario's forest industry. It was concluded that implementing community-led forest management plans in Ontario's forest industry can allow the province to achieve its constitutional obligations to provide meaningful consultation and accommodation to First Nation communities and that there is a great need for implementing these plans as they benefit all parties involved. Although the conclusion of this thesis presents a great opportunity for First Nation communities, there is still the realization that First Nations must work within the colonial system. This emphasizes the importance of reconciling Section 92 with Section 35 of the Constitution and ensuring that the never extinguished Aboriginal title of First Nation communities is respected.

CONTENTS

TABLES

FIGURES

ACKNOWLEDGEMENTS

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1.0.INTRODUCTION

First Nation communities have been living as sovereign nations for millennia. They have continued to hold and assert their rights and title to the land. Aboriginal Title originates from natural law given to First Nations people by the Creator, which is the source of Indigenous culture and traditions (McNeil 2007). First Nation communities have a deep connection to the land base. Much of their knowledge systems and land management practices originate from environmental and spiritual interactions that the Creator has provided (Hart 2010). This relationship has allowed First Nation people to use these land management practices to contribute to the sustainability of their territories (Berkes and Davidson-Hunt 2006). In today's colonized society, First Nation communities have had their traditional ways of land management displaced and have had their territories managed under provincial jurisdiction. Since Confederation in 1867, powers to manage natural resources have been delegated to the provinces where they have complete control under Section 92 of the Constitution Act, 1867. During this distribution of power to the provinces, Ontario has developed its forest management systems and policies across First Nation territories. However, the province of Ontario has excluded First Nation communities from the majority of forest management decisions and has not provided meaningful consultation and accommodation in their development (Ross and Smith 2002). Forestry in Ontario is currently governed under the Crown Forest Sustainability Act (CFSA). Under the CFSA, there are various manuals and guides to direct how forest management will occur. The guide that deals directly with First Nation consultation is the Forest Management Planning Manual (FMPM) which commonly lists First Nation communities as “participants” in the planning process. Section 92 powers were reaffirmed to the province of Ontario in

St. Catharines Milling and Lumber Co. v. R, (1887) 13 S.C.R. 577. At that time, it was determined that First Nations people had no interests in the land and it can be argued that the Crown continues to act on these decisions to justify its minimal efforts to include First Nation communities in the forest management planning process.

Aboriginal and treaty rights were recognized and affirmed in Section 35 of the Constitution Act, 1982. These rights have been defined further in court cases, including *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005) 3 S.C.R. 388, 2005 SCC 69 and *Haida Nation v. British Columbia (Minister of Forests)* (2004) 3 S.C.R. 511, 2004 SCC 73. These court cases have made it clear that for the Crown to meet its "honour of the Crown", the Crown must provide meaningful consultation and accommodation and act on good faith negotiations. The Federal government has also adopted the United Nations Declaration on the Rights of Indigenous People (UNDRIP), which further outlines that the Crown must provide consultation to any community affected by development and obtain their free prior and informed consent (Brideau 2019). The Crown's requirements to satisfy its constitutional obligations have been made very clear, which leaves no excuse for the Crown not to honour those obligations.

Throughout history, there have been many pieces of legislation that have violated First Nations people's rights. Canadian law continues to be based on the principles in the Doctrine of Discovery 1493 (ITC 2020; Drake 2018). Moving ahead 270 years, the Royal Proclamation 1763 recognized Aboriginal title and sovereignty, which would have eliminated the possibility of the Doctrine of Discovery applying in Canada, as confirmed in *Tsilhqot'in Nation v. British Columbia* (2014) SCC 442 S.C.R. 256. Both the Crown and the Supreme Court understand that underlying Crown title is fiction and should be removed; however, the prejudice towards

Indigenous people in law making continues today (Borrows 2015). Under this logic, the Dominion of Canada would have had no authority to delegate Section 92 Powers to the province of Ontario because it did not follow the processes for acquiring sovereignty outlined in the Royal Proclamation. If the Crown is going to continue to act on a document that should have never been applied in Canada, it creates much doubt that the Crown will act honourably when working with First Nation communities moving forward.

From the First Nation perspective, the Crown has not acted honourably and has continued to act on bad faith negotiations despite clear requirements set out by the Supreme Court. With the removal of Declaration Order MNR-75, the environmental assessment mechanism for forestry practices on Crown lands were removed, eliminating the monitoring of First Nation consultation and removing the requirement to provide accommodation to communities affected by forest operations (McIntosh 2021; MOE 2021). The Crown viewed these extra measures as "reducing duplication and administrative burden for the forest sector" (Cross 2020). In other words, the Crown is saying that First Nation consultation and accommodation is Red Tape and is a burden for Ontario's forest sector. Multiple First Nation communities have brought the province to court over this issue (Anishinabek News 2021) which signifies a poor relationship between the Crown and First Nations. However, even with ongoing litigation, the Crown has said that the relationship with First Nation communities is in a good state.

There is a significant problem in Ontario's forest industry. First Nation communities feel like their Aboriginal and treaty rights are not being respected. They are not receiving meaningful consultation and accommodation, which is a guaranteed right to their communities. This thesis will look at how the province of Ontario can achieve meaningful consultation and accommodation with First Nation communities in Ontario's forest industry.

1.1. Objective:

The objective of this thesis is to investigate on how First Nations/Community-led forest management plans can be part of the requirements to achieve meaningful consultation/accommodation in Ontario's forest industry. This thesis will look at forest policy in Ontario and determine where the province is failing to meet its constitutional obligations and then take that information to show how community led forest management plans can meet those requirements based on the wants and needs of First Nation communities. This study will focus on defining meaningful consultation/accommodation and what it means for Ontario's forest industry along with determining what a community lead forest management plan is.

1.2. Hypothesis:

The implementation of community-led forest management plans would greatly assist the province of Ontario to achieve its Constitutional obligations and provide meaningful consultation/accommodation to First Nations communities that are affected by forestry operations. Alternatively, community led forest management plans can assist the province in determining how it wants to achieve meaningful consultation/accommodation by acting as a framework developed by First Nations.

2.0. LITERATURE REVIEW

2.1. HISTORY OF FIRST NATIONS IN NATURAL RESOURCES MANAGEMENT

2.1.1 Caretakers of the Land

First Nations in Ontario have been occupying the Land base for millennia and throughout that time frame have been sustainably managing the lands they inhabited (AFN 2015). The First Nations perspective of land management and systems of knowledge were created based on their interactions with the land including the customs and traditions that arose from those interactions (Hart 2010). First Nations follow a holistic approach in land management and believe the Creator

put humans and nature together to coexist peacefully on the land (AFN 2015). Much of the knowledge regarding First Nations is passed down orally, making it challenging to piece together a historical timeline of events; however, what is always central to the topic for First Nations and natural resources management is that the Creator plays a significant role in guiding how the lands will be managed (Flood 2020). The way in which First Nations governed its natural resources is a form of natural law created by the Creator, which outlined the rights and responsibilities for First Nations people (AFN 2015). Natural law from the creator gave the First Nations jurisdiction and allowed them to form their own governments and cultural systems that guided how communities would interact with the environment (McNeil 2007). The most significant aspects of First Nation land management consist of lands, authority, values and community well-being. These four aspects combined have been the basis for First Nations throughout history and are still practiced today by many communities (National Council First Nations Forestry Program2011). The forest region that encompasses most First Nation communities in Ontario is the Boreal forest region which is often central to traditional land use in Ontario. Many of the communities in this forest region define themselves as Cree and Anishinaabe. They have a lengthy history of using traditional and cultural practices at the landscape level to conserve the landscape and contribute to long-term sustainability of their use of the land (Berkes and Davidson-Hunt 2006).

2.1.2 First Nation Involvement in Forestry Today

Provincial governments in Canada have excluded First Nation communities when natural resource development occurs within their territories. This continues today, with many communities still being excluded from significant management decisions (Ross and Smith 2002). However, there has been a significant change in First Nations involvement in the forest industry

over the past few decades by moving away from complete exclusion to increased participation. Much of this increased participation comes in the form of agreements between First Nation communities, governments and forest companies themselves (Wyatt et al. 2013). In Ontario's forest industry today, First Nations are only considered participants in the forest management planning process and "can review and comment on the FMP while it is being prepared" (MNDMNRF 2021a). Further to this, Ontario's Crown Forest Sustainability Act (CFSA) states that "The minister may enter into agreements with First Nations for the joint exercise of any authority" (OMNRF 1994), which further emphasizes that First Nations do not have authority over the land in Ontario. More often than not, increasing First Nation participation and providing increased control over natural resources management is not done voluntarily from the province but is often imposed through political negotiations and going to the courts. The Supreme Court of Canada has been at the center of any case involving First Nations rights and title to land use and has set definitions and guidelines as to how to approach the issue moving forward (Wyatt 2008).

2.1.3 Conflict between the Crown and First Nations

The commercial forests in Ontario are situated in areas where treaties were signed between the Federal government and First Nations which include treaties 3, 5, 9, Robinson Huron, Robinson Superior, the Williams treaties and Pre-Confederation treaties in southern Ontario. The purpose of these treaties is to serve as a nation to nation agreement where both the Canadian government and treaty signatories would remain sovereign nations and would coexist on the land together (MacLean 2022). The treaties also granted certain rights to First Nations however the issue at question is the Crown’s accountability when honouring the treaties. All levels of government and First Nation groups have different interpretations of the meaning

behind the treaties (Ross and Smith 2002). Because of the differing interpretations, the Crown assumes complete jurisdiction and control over treaty lands because of their Section 92 powers whereas the First Nations argue that the lands are meant to be shared from their understanding of the treaties (MacLean 2022). The Crowns position on the meaning of the treaties has created many conflicts since the treaties were established leading to distrust and poor relationships between First Nations, different levels of government and the forest companies themselves (Wyatt et al. 2013). It is important to note that in 1982, Aboriginal rights were recognized and affirmed under Section 35 in the Constitution Act, 1982, however, these rights are not defined in the Constitution (Ross and Smith 2002). The passing into law of Section 35 laid the foundation to guarantee the rights of First Nation people, especially concerning natural resources management. To protect these rights in the context of natural resource management, the Canadian courts in *Delgamuukw v. British Columbia, Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) and Haida Nation v. British Columbia (Minister of Forests)* have ordered that legislation regarding the duty to consult and providing accommodation where appropriate be created to ensure that Aboriginal and treaty rights are respected (Brideau 2019). Further, the Federal government-endorsed UNDRIP (United Nations Declaration of the Rights of Indigenous Peoples), which states that governments must consult and work with Indigenous peoples and ultimately gain their free prior and informed consent (Brideau 2019).

Even with the rights of First Nations people being recognized and reaffirmed by Supreme Court, the Crown has continued to bypass its obligations to provide consultation and accommodation in a meaningful manner. In two key court cases where the Crown attempted to infringe on the rights of First Nations, the Supreme Court of Canada has ruled that the Crown must act in good faith when negotiating and consulting with First Nation communities to

ultimately achieve its requirement to be honourable "honour of the Crown". This can be seen in the *Delgamuukw* decision, where the Supreme Court ruled that before the Crown takes up land in the traditional territory of a First Nations community, it must provide a consultation process based on "good faith negotiation" (Dawn Mills n.d.). In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* the Supreme Court ruled that in the process of taking up land, the province must consult with the First Nation and provide accommodation where appropriate (Mandell 2014). With clear requirements from the Supreme Court, the Crown can now be held accountable when it attempts to infringe on First Nations rights.

In today's modern times and having clear definitions of what is expected of the Crown in its attempts to develop land on First Nation traditional territories, the Crown continues to and knowingly attempts to avoid those requirements. For example, in Ontario's recent passing of Bill 197 through Covid emergency measures, Ontario's environmental assessment of forestry in the province was removed and its requirement for First Nations consultation. The most significant part of this bill is that there was no First Nation consultation in the first place in its passing (McIntosh 2021). Another example of wrongdoing by the Crown is the recent decision in *Ginoogaming First Nation v. Her Majesty The Queen In Right of Ontario et al.* 2021 ONSC 5866. The court ruled that the province failed to achieve its constitutional duty to consult. In response, the judge ordered an injunction on all mining-related activities until meaningful consultation could occur between the two parties. Based on these court cases, it is clear that the province of Ontario will continue down the path of not practicing good faith negotiations and opt for a more confrontational approach in Ontario's natural resource development with First Nations.

2.2. FORESTRY GOVERNANCE IN ONTARIO AFFECTING FIRST NATIONS

2.2.1. How Forestry is Governed in Ontario

The basis for Ontario's forestry system is characterized by Section 92 of the Canadian Constitution 1982, which reaffirmed all provinces and territories constitutional rights to manage and develop natural resources within their jurisdictions (Government of Canada 2017). Because of Section 92, Ontario's provincial government or, more specifically, Ontario's Ministry of Natural Resources and Forestry (OMNRF), is responsible for managing forests situated within Crown land (OMNRF 2021a). For managing forestry on Crown land in Ontario, the Crown land is divided into 39 Forest Management Units (FMU) that the OMNRF then grants to a Sustainable Forest License (SFL) holder to carry out all forest management activities (Bisschop et al. 2003; MNDMNRF 2021b). The *Crown Forest Sustainability Act* (1994) outlines the forest management policies that the OMNRF and SFL holder must follow. This act regulates how forest management occurs in the province and provides direction on the various forest management planning manuals that the OMNRF creates to guide forestry activities in the province which include the Forest Management Planning Manual (FMPM), the Forest Information Manual (FIM), the Forest Operations and Silviculture Manual (FSOM) and the Scaling Manual (SM) (OMNRF 2021b). The common trend throughout Ontario's various documents that govern forestry is that First Nations are only listed as participants and ultimately do not have control over the final word from the Crown.

2.2.2. Third Party Certifications

In recent decades, Ontario's forest industry has seen a significant change in how its forests are governed. In a shift from the government making all forest management decisions to a shift in governance with increased participation from various parties, including society and First Nations, independent forest certification has become prominent in Ontario's forest

management regime (Hackett 2013). The basis behind independent forest certification is to allow independent organizations to assess forest management practices concerning sustainable forest management. This effectively adds an extra means to ensure that forest companies and the Crown conduct forest operations in a sustainable and compliant manner to the laws (Government of Canada 2021). In Ontario, there are currently three forms of independent forest certification, including the Canadian Standards Association (CSA), Forest Stewardship Council (FSC) and Sustainable Forestry Initiative (SFI). Each forest certification has its own set of criteria and requirements that deem a particular forest as a well-managed area (OMNR 2014). The FSC forest certification system is considered the pioneer for forest certification in Ontario. It allowed for the shift from total government control to increased participation of stakeholders. Currently, FSC holds the most certified forests (Hackett 2013; OMNR 2014). Regarding including First Nations and recognizing their rights, FSC has one the most progressive standards specifically related to its Principle 3 on Indigenous people's rights (Teitelbaum and Wyatt 2013; FSC 1996). Although forest certification such as FSC is a significant step forward in recognizing the rights of First Nations people, it cannot be treated as a substitution for Aboriginal and Treaty rights as defined by Section 35 of the Canadian Constitution, but it can be seen as an effort by the forest industry practice sustainable forest management (Teitelbaum and Wyatt 2013; Collier et al. 2002).

2.3 LEGISLATION VIOLATING THE RIGHTS OF FIRST NATIONS

2.3.1. Extinguishment of Aboriginal Title

The main argument that is used in natural resources management decisions form the Crown's perspective is that Aboriginal Title has been extinguished. The Crown's basis for maintaining ultimate Title and sovereignty to lands within Ontario begins with the Doctrine of

Discovery 1493 which is still the basis for all Canadian law. The Doctrine of Discovery is a form of international law that allowed nations to claim land considered to be *terra nullius* and gave them the authority to claim sovereignty of the discovered lands. In the Doctrine of Discovery, *terra nullius* means lands unoccupied by Christian people or lands that were not occupied by a community with a political structure (ITC 2020; Drake 2018). For the purpose of the Doctrine, European Nations considered Indigenous people inferior which gave them reason to assume sovereignty over the newly discovered lands despite Indigenous occupation (Drake 2018). Within the Doctrine of Discovery, all rights and Title to the land that Indigenous people had pre-contact were effectively removed and all Indigenous people could do was occupy the land. In the recent *Tsilhqot'in Nation v. British Columbia,* a case dealing with Aboriginal Title, the Supreme Court recognized that *terra nullius* could have never existed, "The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation of 1763*" (Tsilhqot'in v. British Columbia 2014: Para 69). This recognition by the Supreme Court is monumental because it establishes that Crown sovereignty can only be asserted through treaties between the Crown and Aboriginal people instead of solely through the Doctrine of Discovery (Drake 2018).

The Royal Proclamation 1763 is considered the Indian Magna Carta and recognizes Aboriginal Title and sovereignty to the land. The Proclamation sets the framework for treaty negotiations between the Crown and First Nations people and in this process, the Crown acknowledges that Aboriginal Title can only be extinguished through treaty (Hall 2020). The extinguishment of Aboriginal Title through treaty is the Crown's perspective whereas First Nations communities continue to assert that their Aboriginal Title was never extinguished when it comes to land title and jurisdictional disputes (Irwin 2019). As John Borrows in explained in

Asch (1997:155-172), the correct way to interpret the Royal Proclamation is with the Treaty of Niagara 1764 because it represents the best way to understand the relationship between the First Nations and the Crown at the time. By putting the Royal Proclamation and the Treaty of Niagara together, it clearly recognizes that the First Nations were sovereign Nations and that the purpose of the treaty was to have a peaceful co-existence. The question that arises in today's debates surrounding Aboriginal Title is whether or not the Crown could in fact extinguish Aboriginal Title either through treaty, legislation or judicial decisions.

Going back to Pre-Confederation, it was the British Imperial Parliament that had legislative authority over its sovereign territory in North America acquired through the Doctrine of Discovery. Under the Imperial Parliament, legislative authorities were delegated to the British colonies but what remained unclear is whether or not the Imperial Parliament granted the legislative bodies of the colonies authority to extinguish Aboriginal Title (McNeil 2002). The Royal Proclamation was considered to be Imperial Law at the time giving any of the legislative bodies of colonies the ability to extinguish Aboriginal Title however, the Crown must prove that it exercised that authority and had a clear intent to extinguish the Aboriginal Title (McNeil 2002). The subsequent issue to this is that under Canadian law, extinguishment of Aboriginal Title is valid but under Aboriginal law, this may not be the case. The Aboriginal interpretation of the of treaties needs to be done in accordance with Aboriginal law and oral traditions. Under those laws and traditions, voluntary extinguishment of title would not have been included which brings questions towards the validity of the treaties as they are supposed to represent a mutual agreement (McNeil 2002).

Since the time of Confederation, the Crown did not have complete authority to extinguish Aboriginal Title but it could do so with clear intentions or through judicial decisions where the

Crown could justify the extinguishment (McNeil 2002). Since the enactment of section 35 in the Constitution Act, 1982, Aboriginal Title was protected and could not be extinguished through legislation however it could be extinguished through an agreement (Delgamuukw v. British Columbia 1997). From the First Nations perspective in the Royal Commission on Aboriginal People 1996, it was concluded that Aboriginal Title does not allow for it to be alienated or to be sold to outsiders therefore making the First Nations interpretation of the numbered treaties as an agreement to share the land rather than an extinguishment of title (Irwin 2019). As previously mentioned, if Aboriginal law does not allow for the extinguishment of Aboriginal Title, then the validity of that argument from the Crown's perspective will remain in question.

Despite the questions surrounding legislative authority to extinguish Aboriginal Title and decisions like *Tsilhqot'in v. British Columbia* that do not recognize the Doctrine of Discovery as a way for the Crown asserting sovereignty over Indigenous lands, the Crown continues to assume underlying title and creates modern day laws based on *terra nullius* that ultimately puts Indigenous people at a disadvantage (Borrows 2015). As Borrows (2015) further explains, "So-called underlying Crown title is a fiction. It is a burden on Aboriginal title that must be removed". The Supreme Court and the Crown understand this very well (Tsilhqot'in v. British Columbia 2015) but have continued to act with a prejudice towards Indigenous people when it comes to law making in Canada (Borrows 2015). In Ontario's forest industry, this prejudice begins with its Section 92 powers and ability to legislate how forest practices on Aboriginal lands takes place.

2.3.2. Section 92 of the *Constitution Act, 1867*

The first piece of legislation that violated the rights of First Nations was section 92 of the Canadian Constitution Act, 1867. Section 92 granted the provinces complete control over natural

resources and gave them the right to develop within their jurisdiction. The Constitution Act, 1867, was created without the involvement or consultation of First Nations people due to the fact that First Nations people had very few rights and were not recognized in society which was later reaffirmed in the Indian Act 1876. In addition to this, Section 92 arguably violates the Royal Proclamation 1763 which has laid the foundations for determining the appropriate negotiating methods with Aboriginal people (Aldridge and Fenge 2015:33). This Proclamation recognized Aboriginal rights and title and the sovereignty of the First Nations people occupying those lands and is considered the foundation that allowed for Aboriginal rights to be recognized at the constitutional level (Government of Canada 2016). The Proclamation states explicitly that the land cannot be claimed from the Aboriginal people but can only be bought by the Crown or disposed through treaty at a public meeting (Indigenous Foundations UBC 2009). If the land is not purchased by the Crown or negotiated trough treaty, then under the Royal Proclamation, the Aboriginal people maintain their sovereignty as it was recognized. In the Constitution Act, 1867, there is no evidence of compensation being provided to the First Nations people for the Crown taking the land, assuming sovereignty of said lands and removing all Aboriginal sovereignty. Therefore, the Crown effectively violated its own Proclamation with the enactment of Section 92 and assuming ultimate title over said lands.

All of Ontario's commercial forest landscape lays within multiple treaties negotiated between the First Nations and the Federal government. These Treaties are meant to serve as an agreement that allows for coexistence and for the lands and resources to be shared (Government of Canada 2020). In the Constitution Act 1982, Section 35 states that Aboriginal and Treaty rights are recognized and affirmed, meaning that those rights shall not be infringed upon. It is well established that the provincial government holds jurisdiction over natural resources as

defined by section 92. However, it is doing so while violating Aboriginal Title and the treaties. Most recently, in *Grassy Narrows First Nation v. Ontario (Natural Resources),* 2014 SCC 48, Grassy Narrows First Nation argued that since the Treaty was signed with the Federal government, the provincial government must undergo negotiations with Canada and the First Nations before taking lands within Treaty 3 area. The judge ruled that because of Section 92, Ontario still holds jurisdiction over natural resources, but in doing so, it must take responsibility and provide consultation and accommodation if Treaty rights are violated (Mandell 2014). In *Grassy Narrows v Ontario (Natural Resources)*, the judge further concluded that the province can infringe on Section 35 rights. However, the Crown must justify its reasoning for doing so. The reaffirming that Section 92 powers to the provinces can in fact violate Section 35 rights for the benefit of the Crown is further proof that the province of Ontario will continue to act on bad faith negotiations and continue to violate Aboriginal and Treaty rights. The root cause of this is the instatement of Section 92 of the Canadian Constitution Act, 1867, the Royal Proclamation 1763 and the deliberate mis appropriation of the treaties by the Crown.

2.3.3. Removal of Declaration Order MNR 75

The province of Ontario has a history of failing to meet its constitutional obligations and provide meaningful consultation and accommodation to First Nations communities that are affected by natural resources development. In Ontario's most recent attempt to undermine the rights of First Nations, the province effectively removed the mechanism for environmental assessment on forestry practices carried out on Crown lands through the emergency passing of Bill 197 (McIntosh 2021; MOE 2021). The bill was passed with no First Nation consultation. What is most concerning about the removal of Declaration Order MNR 75 is that forestry operations affecting First Nations are not monitored for their consultation processes, and the

requirement to negotiate accommodation is completely removed (Anishinabek News 2021). Because of this bill being passed, Ontario's forest industry is currently operating with no environmental assessment and the concerns of First Nations communities are not being adequately heard. As a result, multiple First Nations communities and environmental groups have brought this issue to the courts and it is still an ongoing dispute (Anishinabek News 2021; MOE 2021). The decision by the Ministry of the Environment, Conservation and Parks to remove the environmental assessment on forestry practices was based on "reducing duplication and administrative burden for the forest sector" (Cross 2020). This decision confirms that the Crown is content with its current consultation policies and environmental assessment as defined in its Forest Management Planning Manual (FMPM), which is regulated by the CFSA (Cross 2020).

2.4. OUTLOOK OF CONSULTATION IN THE FOREST INDUSTRY

2.4.1. The Crown's Approach

The consultation approach dictated by the OMNRF originates from the FMPM. The manual guides how consultation between the OMNRF, SFL holders and First Nation communities will take place. The process begins with the OMNRF notifying affected First Nation communities of the start of the planning process and offering an invitation to participate (Wilson and Graham 2005). The method of consultation depends on how the forest management plan is developed. For any Forest Management Plan (FMP) that is created using the 1996 FMPM, First Nations can either join the public consultation process or request a separate form of consultation. For any FMP created using the 2004 revised FMPM, district OMNRF managers have the option to provide a Customized Consultation Approach (CCA) that will not restrain the implementation of the FMP (Wilson and Graham 2005). In addition to these consultation

measures, the FMPM requires that the OMNRF and First Nation communities affected by the FMP create a Native Background Information Report that will outline First Nation communities concerns on a values map (Ross and Smith 2003). Throughout the changes in the FMPM, the OMNRF has attempted to alter its approach to First Nations consultation by making a "reasonable effort to meet with individual Aboriginal communities to develop an appropriate approach for Aboriginal consultation" (Ross and Smith 2003). However, despite such reasonable efforts, they do not meet requirements for consultation from a legal perspective (Ross and Smith 2003). In the most recent 2017 FMPM under section 3.4 Part A "Development of a Customized Consultation Approach for Forest Management Planning", there is no clear definition of what constitutes a CCA, and the OMNRF leads its development. The creation of a CCA must follow the development process as described in section 3.4 Part A of the 2017 FMPM. The province of Ontario has acknowledged that it must meet its Honour of the Crown by conducting its consultation processes and providing accommodation to First Nations with integrity however, with the removal of Declaration Order MNR 75 in 2020, the consultation process between the OMNRF and First Nations communities is directed solely on the FMPM, a framework that is considered to not meet the standard of meaningful consultation (Ministry of Indigenous Affairs 2021).

3.0. MATERIALS AND METHODS

3.1. POLICY AND LEGISLATION

The policy and legislation will be used to assist with the analysis (Table 4) and will assist in determining the perspective of meaningful consultation/accommodation from the Crown’s perspective. The forest management policy for Ontario came from the Ontario Ministry of Natural Resources and Forestry (OMNRF) and the Ministry of Environment, Conservation and Parks. Federal legislation used was obtained directly from the Government of Canada. For third

party certifications, FSC is used as it is the most evolved pertaining to the rights of First Nations (Teitelbaum and Wyatt 2013; FSC 1996). The most significant polices and pieces of legislation that affect the rights of First Nations relating to forestry are outlined in Table 1. All policy and legislation are public and available online.

Table 1: Policies and legislation with jurisdiction for analysis.

Policy/Legislation	Jurisdiction
Royal Proclamation 1763	Federal
Sec 35 Canadian Constitution	Federal
CFSA	Provincial
FMPM	Provincial
SFL	Provincial
Declaration Order MNR-75	Provincial
FSC	3rd Party

3.2. COMMUNITY-LED FOREST MANAGEMENT PLANS

Examples of established community led forest management plans (Table 2) are going to be used to determine what meaningful consultation/accommodation is from a First Nation perspective. These community forest management plans are public and available to access online.

Table 2: Community forest management plan examples (Supplemental Sources: Ecotrust Canada 2016 and Lachance 2016).

Group	Province
Nawiinginokiima Forest Management Corporation	Ontario
Northeast Superior Enhanced Sustainable Forest Licence	Ontario
Whitefeather Forest Initiative	Ontario

For reference, the map of Ontario's current forest management plans can be seen below in Figure 1. This map shows the proportion of Ontario's FMP's that deviate from the standardized forest management planning process and includes FMP's that have more community participation in their developments.

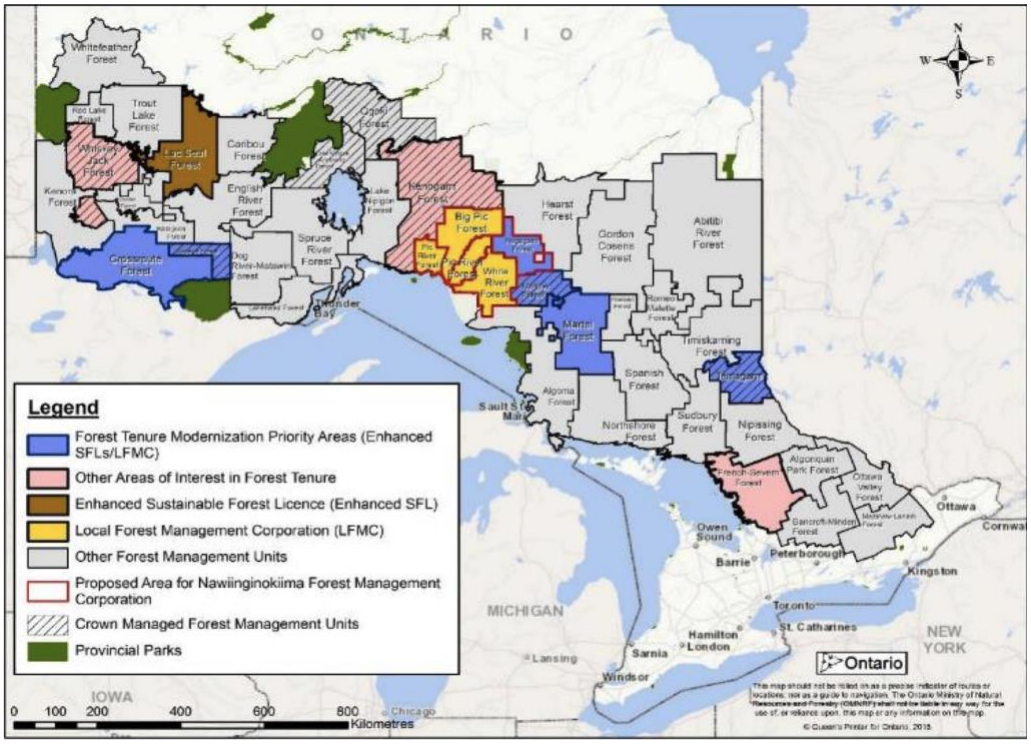

Figure 1: Map of Ontario's forest tenures as of 2018 (Source: King 2019).

3.3. COURT CASES

Several key court cases (Table 3) regarding the rights of First Nations are examined to assist in the policy examination and to determine what constitutes meaningful consultation and accommodation. The court cases were selected based on their significance to First Nations rights and title and their relationship to First Nations and natural resource management. All court cases are public and can be accessed online.

Table 3: List of relevant court cases deciding on the rights of First Nations in natural resources management.

Case Name	Court
Delgamuukw v. British Columbia	Federal
Ginoogaming First Nation v. Her Majesty The Queen In Right of Ontario et al.	Provincial
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)	Federal
Grassy Narrows First Nation v. Ontario (Natural Resources)	Federal
Haida Nation v. British Columbia (Minister of Forests)	Federal

3.4. ANALYSIS

To complete the analysis of policies and legislation, community forest management plans and court cases, an approach with five key steps (Table 4) was designed to assist in answering the research question. This research approach was selected as it will be looking at the views of First Nations, the Crown and the courts which will provide multiple perspectives when attempting to answer the research question.

Table 4: Summary of steps for policy analysis.

Steps	Description
1	Define meaningful consultation/accommodation from the First Nations perspective
2	Determine the Crown's interpretation of meaningful consultation/accommodation
3	Determine what a community forest management plan is
4	Examine how a community forest management plan can meet meaningful consultation/accommodation based on steps 1 and 2
5	Examine the benefits and need of implementing community led forest management plans

4.0. RESULTS

4.1. STEP 1 - DEFINE MEANINGFUL CONSULTATION/ACCOMMODATION FROM THE FIRST NATIONS PERSPECTIVE

4.1.1. First Nations Perspective

The First Nation perspective of meaningful consultation and accommodation from the communities associated with Table 2 originates from Natural Law and cultural practices like the seven grandfather teachings that are most commonly used by the Cree and Anishinaabe. These teachings include Humility, Bravery, Honesty, Wisdom, Truth, Respect and Love. For Crown-Indigenous relations, First Nations people view meaningful consultation and accommodation as a form of reconciliation, acting on good faith negotiations and for the Crown to uphold its "Honour of the Crown" when concerning Section 35 rights. In the forest industry context, these guiding principles translate into a distinct set of criteria that satisfy the First Nations view of what constitutes meaningful consultation and accommodation.

4.1.2. First Nations Definition in the Forestry Context

The basic criteria that would satisfy the First Nations perspective of meaningful consultation and accommodation can be seen below in Table 5. These results are based on inputs from communities that are involved with the community forest management plans in Table 2. The general consensus from the First Nations communities associated with Table 2 is that the communities want more control over the direction of the FMP and that they don't want to just be considered as "participants".

Table 5: Criteria to satisfy the First Nations perspective of meaningful consultation/accommodation (Source: Table 2).

Criteria	Description
1	Ensure that Sec 92 powers do not infringe on Sec 35 rights
2	Equal participation in the development of the FMP. Includes equal input as the Crown
3	Full participation in the implementation and monitoring of the FMP
4	Full participation in distributing forest benefits (SFL Section 20)
5	Opportunity for direct agreements with forest companies

4.2. THE CROWN'S INTERPRETATION OF MEANINGFUL CONSULTATION/ACCOMMODATION

4.2.1. The Crown's Perspective

The Crown has established that it maintains jurisdiction over natural resources through Section 92 powers and that the Crown ultimately holds the power over any decision-making process regarding natural resources. Its perspective of meaningful consultation and accommodation originates from Supreme Court decisions which have determined that the Crown has a legal obligation to consult, act on good faith and provide accommodation where appropriate to First Nation communities. Within the various pieces of legislation and documents that govern forestry in Ontario, the Crown states that meaningful consultation is to be led and determined by the Crown and that accommodation can only be granted if the Crown deems it is necessary (Table 1).

4.2.2. The Crown's Definition

The Crown's definition and interpretation of meaningful consultation and accommodation can be seen below in Table 6. These results come from the analysis of the policies and legislation in Table 1. In comparison to the First Nation interpretation in Table 5, the Crown has demonstrated that it is only willing to provide the bare minimum consultation and accommodation processes that will satisfy their obligations as defined under Section 35 and in court decisions.

Table 6: The Crown's definition of meaningful consultation and accommodation (Source: Table 1).

Number	Description
1	First Nations can participate in the FMP, includes review and commenting
2	First Nations can identify values and request for them to be protected
3	FMP development and implementation are separate processes
4	Resource revenue sharing agreements are case by case and are directed by the Minister
5	Standardized consultation procedure for every community with an option for a customized consultation approach (no definition)

4.3. DETERMINE WHAT IS A COMMUNITY FOREST MANAGEMENT PLAN

4.3.1. Community Forest Management Plan Examples

Three key forest management plans and planning processes were analyzed to determine what is a community forest management plan. The Nawiinginokiima Forest Management Corporation (NFMC) encompasses the Pic Forest and White River Forest SFL's and is Ontario's first local forest management corporation under the Ontario Forest Tenure Modernization Act

(OFTMA 2011) and represents the potential of what can come from allowing First Nations to have equal participation in both the development and implementation of the FMP. The Northeast Superior Enhanced Sustainable Forest Licence (NS-ESFL) encompasses the Magpie and Martel SFL's and is part of the new Enhanced Sustainable Forest License (eSFL) pilot project that is designed to increase First Nations participation and benefits across the FMP. The Whitefeather Forest Initiative encompasses the Whitefeather Forest and is the provinces first approved community land-based plan. This initiative is monumental in that it shows that it is possible for First Nations communities in the province of Ontario to have their forests managed based on traditional values and practices.

4.3.1. Characteristics of a Community Forest Management Plan

It was determined that a community forest management plan is a plan that is focused on incorporating First Nation traditional values and increasing the influence of First Nation input. Increased input gives communities the ability for economic development and resource revenue sharing agreements to be made so that affected communities will benefit more from forestry activities. A community forest management is consisted of First Nations communities but also encompasses municipalities and other stakeholder groups that would be affected by the FMP. The overall goal of a community forest management plan is to work together with the OMNRF in equal participation to ensure that everyone can benefit from the forest industry. The main characteristics of a community forest management pan can be seen in Table 7.

Table 7: Main characteristics of a community forest management plan (Source: Table 2)

Characteristic	Description
1	Restore First Nations Culture by Incorporating Traditional Values in the FMP
2	Increased Governance
3	Protect the Environment
4	Economic and Social Development
5	Joint Planning Process With all Stakeholders

4.4. CAN A COMMUNITY FOREST MANAGEMENT PLAN MEET MEANINGFUL CONSULTATION AND ACCOMODATION?

The results of step 3 shows that a community forest management plan can meet the requirements of meaningful consultation and accommodation based on steps 1 and 2. The different interpretations of consultation and accommodation and how they relate to community forest management plans will be expanded on further in the discussion section.

4.5. BENEFITS AND NEED OF IMPLEMENTING COMMUNITY-LED FOREST MANAGEMENT PLANS

The main need for implementing community led forest management plans is that these types of plans can ensure First Nations communities are properly consulted and accommodated which ensures Section 35 rights are upheld and honoured. It was determined that these plans are preferred over the standardized FMP planning process and that communities strongly advocate for such planning processes. The most significant benefits that come from implementing these plans can be seen below in Table 8.

Table 8: Benefits of implementing community-led forest management plans (Source: Table 2)

Benefit	Description
1	Allows communities to dictate the management direction of the forests within their traditional territories
2	Revenue injected into the communities
3	Gives communities the opportunity to be self-sufficient and prosper
4	Allows communities to monitor activities on their territory and enforce policy and legislation
5	Re connects First Nations people to the land through forestry initiatives, a form of reconciliation through land-based education

5.0. DISCUSSION

The results from the policy analysis show that community led forest management plans can meet the requirement for Ontario's forest industry to achieve meaningful consultation/accommodation and its implementation would benefit all stakeholders involved in the FMP planning process. However, has been identified that the perspectives and interpretation of what constitutes meaningful consultation/accommodation differ between First Nations and the Crown, which creates issues surrounding the development of a standardized FMP and community-led forest management plans. In Ontario's current state of forestry, the Crown has acknowledged it must uphold its constitutional obligations and meet its "honour of the Crown" when consulting First Nation communities. Despite the Crown's acknowledgement, the results have reaffirmed that the province of Ontario continues to fall short and not honour its constitutional obligations when it comes to consulting communities affected by forest

management practices. This further emphasizes the need to convince the Crown to adopt the community led forest management approach across all forests in Ontario.

The inherent right of the land held by First Nation people has been recognized by the Royal Proclamation 1763 which eliminated the Doctrine of Discovery that assumed the Crown's sovereignty over Aboriginal Lands (Tsilhqot'in Nation v. British Columbia 2015). The notion that Aboriginal Title was extinguished by any legislation has proven to be fiction (Borrows 2015). The inherent rights of First Nations people and further rights established by treaties in the province are guaranteed and protected by Section 35 of the Constitution Act 1982 meaning that they shall not be infringed upon. The law clearly states that if the Crown commences an activity that infringes on a Treaty right, the Crown must provide meaningful consultation and accommodation where appropriate to the affected First Nation communities. Various court cases have reaffirmed the law and Section 35 rights, including *Delgamuukw v. British Columbia* and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. In addition, the courts have established that the honour Crown can be delegated to the provinces and that the duty to consult will rest solely with the Crown. Based on the *Haida Nation v. British Columbia (Minister of Forests)* and *Grassy Narrows First Nation v. Ontario (Natural Resources)*, the responsibilities of the Crown can be delegated from the Federal to Provincial governments meaning that the provinces must uphold all applicable constitutional obligations and Treaty rights. The above court cases confirm that the OMNRF acting on behalf of the province of Ontario must consult with First Nations communities based on good faith negotiations and provide accommodation where appropriate.

The First Nation perspective of meaningful consultation/accommodation originates from inherent rights they believe have never been extinguished and are guaranteed and protected by

Section 35. Because Section 92 of the Constitution violates the Royal Proclamation and Aboriginal Title by giving the provinces jurisdiction over sovereign First Nations lands without purchasing it from them or acquiring through treaty, First Nations have been forced to make requests and ask for specific consultation processes and accommodation based on policy and legislation the province has created. In the province of Ontario, the CFSA and FMPM direct forest management planning and because of this, First Nations must cater their requests and express their interests to suit these policies. The results from Table 5 show the criteria that would satisfy the First Nations definition of meaningful consultation, including ensuring that Section 92 powers do not infringe on Section 35 rights. Reconciling Section 92 and Section 35 regarding meaningfully consulting and accommodating First Nations includes full participation as equal stakeholders across the entirety of the FMP. This ultimately translates into increased control over the FMP, which means that First Nation communities will participate as equally as the OMNRF in developing, implementing, monitoring, and distributing benefits in the FMP. Another interest that First Nations want to see in FMP development is having direct agreements with the forest companies that hold the SFL's. A hypothetical example of this would be for an SFL holder to pay royalties to the First Nations communities affected by forest operations at their request. The Crown can pass certain aspects of consultation to the SFL holder (Haida Nation v. British Columbia (Minister of Forests) 2004), which can include agreements such as royalty payments; however, this decision ultimately rests with the Crown, which further amplifies the ability of the Crown to undermine the rights of First Nations, including their right to self-determination.

The Crown's perspective of meaningful consultation and accommodation is that it is merely a legal obligation and only is doing so to avoid violating any treaty or any pre-existing Aboriginal right. The decision in *Calder et al. v. Attorney-General of British Columbia,* (1973)

S.C.R. 313 shifted the province's tone on Aboriginal rights because this case made an Aboriginal right recognizable in a legal context. In *Calder*, the Supreme Court recognized that Aboriginal Title existed at the time of the Royal Proclamation 1763. It was still valid unless the Crown could prove that the land title was willingly extinguished by the Indians (Salmons 2009; Smith 2019). Before the *Calder* decision, the province of Ontario was acting on the decision in *St. Catharines Milling* where the Supreme Court reaffirmed the provinces jurisdiction over natural resources and established that the Indians did cede their rights to the land through treaty and would have no influence in the province's decisions. Today, it is arguable that the Crown continues to use decisions such as *St. Catharines Milling* to justify its actions in the forest industry and how it deals with First Nations communities on consultation. In Table 6, the policy analysis results show that the characteristics of the Crown's version of meaningful consultation and accommodation are the bare minimum and do not adequately meet the definition of meaningful consultation from the First Nations perspective (Table 5). Multiple First Nation communities have come forth and said that they feel the OMNRF FMP planning process does not provide adequate consultation. With the recent removal of Declaration Order MNR-75, the requirement to provide accommodation to communities affected by the FMP has been removed, which is a direct violation of Aboriginal and treaty rights (Anishinabek News 2021; Mountain 2021). Despite the visible displeasure from First Nation communities, The Hon. Minister of Northern Development, Mines, Natural Resources and Forestry, Greg Rickford, gave the stamp of approval on the state of Ontario's natural resources report 2021 in which the Crown has expressed that the relationship with Indigenous communities is in a good state and that the Crown is satisfied with its processes to work with Indigenous communities (OMNDMNRF 2021).

A community-led forest management plan's ultimate goal is for the First Nations and Crown to work together collaboratively in equal parts to ensure that all stakeholders involved can be satisfied (Table 7). The communities involved with the Nawiinginokiima Forest Management Corporation, the Northeast Superior Enhanced Sustainable Forest Licence and the Whitefeather Forest Initiative have identified areas of First Nations interest that need to be incorporated in the FMP. Most importantly, incorporating traditional values into the text of the FMP's is a must which can then be followed by including increased governance which will allow economic and social development to occur within the communities. These initiatives can then pave the way to protecting the environment and restoring First Nation culture because economic and social development will inject resources into the community to facilitate the implementation and monitoring of the FMP with an increased focus on the environmental and cultural aspects of forestry for First Nation communities. An example of an initiative created through economic and social development in an FMP is the Indigenous Guardian program. This program trains Indigenous youth to become "Guardians" and monitor and enforce environmental stewardships on their lands (Indigenous Guardians Toolkit 2022). The Northeast Superior Enhanced Sustainable Forest Licence has its own Guardian program and has shown how successful the characteristics in Table 7 can be if applied appropriately. It is clear that community-led forest management plans compared to the standardized FMP process bring increased benefits to First Nations communities and lead towards increased collaboration between both parties. However, at the end of the day, the Crown makes the final decision on if it will use this FMP planning approach.

The need for implementing community-led forest management plans can be associated to the many benefits that they can provide to First Nations communities (Table 8). As the term

implies, community-led forest management plans are, community-led. This means that communities will be able to dictate the direction of the FMP and how forest management planning will take place rather than just providing input as is the procedure in the current FMP planning process. When First Nations communities can direct the FMP, this means that the ability to negotiate resource revenue sharing agreements will be improved which will ultimately increase community revenues that can provide communities appropriate funds to be self-sufficient and prosper. The current procedure for resource revenue sharing agreements in Ontario is directed by the Crown and on their terms. As an example, the resource revenue sharing agreement for the communities associated with the Wabun Tribal Council in northeastern Ontario is that 45% of revenues from each FMU will be dispersed to the communities located in that FMU. Within this agreement, the terms, sharing formula, payment distributions and allocation of funds are all at the discretion of the Crown (Government of Ontario 2021). At face value, the 45% may seem like a good number but in reality, that number is dismantled into smaller pieces for each affected community which does not appropriately compensate for exploitation of resources on their traditional territories. Customized resource revenue sharing agreements on the terms of First Nations communities as a part of community-led forest management plans will pave the way for communities to benefit even further. Revenues directly injected into communities will allow communities to create their own natural resources policy and enforcement teams to ensure that traditional lands are being respected. Most importantly, with communities having resources to fund initiatives within their communities, there is the opportunity to increase land-based education based on traditional values which can be considered as a path towards reconciliation (Arellano et al. 2019). Indigenous people and their belief systems are based off of their interactions and connections to the land. In todays colonized

society, it is suggested that the only path towards meaningful reconciliation based on true Indigenous values can occur through land-based reconciliation (Korteweg and Root 2016), something that is possible through the implementation of community led forest management plans (Table 8).

6.0. CONCLUSION

It was determined that the implementation of community-led forest management plans would allow to province of Ontario to meet its honour of the Crown and provide meaningful consultation and accommodation to First Nations communities. This determination is significant for Ontario's forest industry because it demonstrates that it is possible to have forest management plans that will satisfy all parties involved and offers a solution that can contribute towards meaningful reconciliation. Although the findings of this thesis are beneficial to First Nation communities, the process for developing community-led forest management plans is still centered around the Crown's colonial perspectives of natural resources management. At the end of the day, the Minister of Northern Development, Mines, Natural Resources and Forestry gets the final word and still has legislative authority to deny any effort put forth by First Nations communities. This highlights the need that reconciling section 92 with section 35 of the Constitution is a still an area of high priority for First Nations communities and that in order for the Crown to truly be sincere with its efforts towards working with First Nations communities, the Crown must acknowledge and respect Aboriginal Title to all First Nation Lands.

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