

Whose Water is it Anyway? Indigenous Water Sovereignty in Canada: An Indigenous Resurgence Analysis of the case of *Halalt First Nation v British Columbia*

by

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Bachelor of Environmental Studies (Honours), University of Waterloo, 2006

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of the Requirements for the Degree of

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Supervisory Committee

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Abstract

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Colonialism is ongoing in Canada and continues to affect Indigenous-state relations in a number of political and social areas, including water governance. Few other studies link colonial and decolonizing concepts to Indigenous water governance including discussions of power as well as structural and political assumptions, which speak to systemic factors and barriers to increased Indigenous water sovereignty. The purpose of this study is to undertake an in-depth decolonial analysis of the dynamics occurring in a legal water management dispute between an Indigenous community and the Canadian state. More specifically, the goal of this investigation is to identify how ongoing colonial factors affect the Halalt First Nation's sovereignty over their waters. To this end, the research question is: Using an Indigenous resurgence (IR) analysis, what does the *Halalt First Nation v British Columbia (Minister of the Environment) (Halalt v BC)* caselaw reveal about the state of Indigenous water sovereignty in Canada? I employ a case study methodology where I analyse the Environmental Assessment (EA) and legal court case of *Halalt v BC*. I seek to provide a decolonial perspective, so in this study I use an IR theoretical framework. I collect data through interviews with ten participants including three Band Council staff members involved in the *Halalt v British Columbia* EA and court case study. I analyse the findings using three Indigenous resurgence themes of transfer of power from the state to an Indigenous community, increased respect and use of Indigenous worldviews, and Indigenous self-determination in light of the primary data I collected via key informant interviews and case study participants. The data reveals that there was no evidence that Indigenous resurgence is taking place in the case study as per Halalt participants' experience of the case study nor the other participants' opinion of the case study. In this thesis, I advocate for decolonization in the form of increased Indigenous political authority for the Halalt and all Indigenous communities in Canada.

Keywords: Indigenous water sovereignty, Indigenous water governance, Indigenous resurgence, environmental assessment, Aboriginal law

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List of Acronyms

AANDC: Aboriginal Affairs and Northern Development Canada

AFN: Assembly of First Nations

DIAND: Department of Indian Affairs and Northern Affairs Canada

DNC: District of North Cowichan (synonymous with MNC: Municipality of North Cowichan)

EA: Environmental Assessment

EAO: Environmental Assessment Office (of British Columbia)

HTG: Hul'qumi'num Treaty Group

IR: Indigenous Resurgence

INAC: Indian and Northern Affairs Canada

INAC (~2015-2017): Indigenous and Northern Affairs Canada

OAG: Office of the Auditor General

RCAP: Royal Commission on Aboriginal Peoples

SCC: Supreme Court of Canada

UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples

VIHA: Vancouver Island Health Authority

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Dedication

To Melissa,

My life can be divided into two:

Before I met you and after I knew you.

I believe in you too.

Chapter 1

1.0: Background and Context

The recent #IdleNoMore and Indigenous Nationhood Movements make it clear that, over 150 years after Confederation, all is not well between the state and Indigenous peoples in Canada; it is deeply unwell in fact.¹ One cannot open a newspaper without reading articles, editorials, or other commentary about litigation concerning Aboriginal rights or regarding discontentment with the state. The topics of the day largely centre around unresolved land claims,² unwanted resource extraction that harms Indigenous peoples' health as well as their lands and waters,³ and continued frustration with the paternalistic ways in which the Canadian government continues to treat Indigenous peoples.⁴ Yellowknives Dene Professor Glen Coulthard asserts, "Idle No More is an indication of the ultimate failure of this approach to reconciliation."⁵

¹ A stark public and visual example of Indigenous resistance included when a small group of Indigenous peoples (some from the Batawing Water Protectors group) and their allies erected a teepee on Parliament Hill during Canada's bicentennial, 150th anniversary celebrations in Ottawa. The Canadian Press, "Demonstrators erect teepee on Parliament Hill to protest Canada Day", *Global News* (29 June 2017), online: <<https://globalnews.ca/news/3564602/teepee-parliament-hill-canada-day/>> [The Canadian Press, "Demonstrators erect teepee on Parliament Hill to protest Canada Day"].

² Don Marks, "Government foot-dragging on land claims leaves Métis, First Nations fighting" (26 February 2015) online: <<http://www.cbc.ca/news/canada/manitoba/government-foot-dragging-on-land-claims-leaves-metis-first-nations-fighting-1.2973326>> [Marks, "Government foot-dragging"].

³ Alex Ballingall, Bruce Campion-Smith, & Tonda Maccharles, "Justin Trudeau's \$4.5 billion Trans Mountain pipeline purchase met with a storm of criticism", *The Star* (29 May 2018), online: <<https://www.thestar.com/news/canada/2018/05/29/justin-trudeaus-45-billion-trans-mountain-pipeline-purchase-met-with-a-storm-of-criticism.html>> [Ballingall et al, "Justin Trudeau's \$4.5 billion Trans Mountain pipeline"].

⁴ Alicia Elliott, "A memo to Canada: Indigenous people are not your incompetent children", *The Globe and Mail* (5 January 2018; Updated 6 January 2018) online: <<https://www.theglobeandmail.com/opinion/indigenous-memo-to-canada-were-not-your-incompetent-children/article37511319/>> [Elliott, "A Memo to Canada"].

⁵ Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, Minnesota: University of Minnesota Press, 2014) at 163 [Coulthard, *Red Skin, White Masks*]. The term reconciliation, similar to "Indigenous resurgence," has been defined in as many different ways as the number of authors that describe it. For the purpose of my Law and Society thesis, I employ the Supreme Court of Canada's (SCC) definition of reconciliation. In my words, I describe reconciliation as the resolution of legal conflicts, to the extent that is possible between Canada's asserted sovereignty and the prior inhabitancy of Indigenous societies and lands on Turtle Island (North America). See *R v Van der Peet* [1996] 2 SCR 507 at 42 [*Van der Peet*]. The SCC explains that the purpose of s. 35(1) of the *Constitution* of Canada, (which recognizes and affirms existing Aboriginal and treaty rights), is to reconcile "pre-existing aboriginal societies with the assertion of Crown sovereignty over Canada." (*Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act*, 1982]. For further legal enunciations of reconciliation by the SCC, see *Delgamuukw v R*, [1997] 3 SCR 1010 at paras 1016, 1018, 1065–66, 1096, 1100,

In a number of areas of Indigenous-state relations, the Canadian state has continually failed to live up to its legal and political promises with Indigenous peoples. One can see Canada's failures in terms of the legal Honour of the Crown, fiduciary duty, and the duty to consult and accommodate. Indigenous water governance is one realm that demonstrates problems with all aspects of ongoing colonialism. Indigenous peoples wish to have increased power to govern the waters in their territories yet have barriers due to colonialism that prevents gaining such political authority. There are few studies that link colonial and decolonizing concepts to Indigenous water governance including discussions of power as well as structural and political assumptions, which speak to systemic factors and barriers to increased Indigenous water sovereignty for Indigenous peoples.

(The lack of) progress on unequal access to decent quality drinking water and health outcomes due to poor on reserve drinking water is one indicator of ongoing challenges and deficiencies to Indigenous water sovereignty. Drinking water is one realm that can be examined to evaluate the degree of Indigenous water sovereignty currently taking place in Canada. Likewise, the *Halalt First Nation v British Columbia (Minister of Environment)* (*Halalt v BC*) case study that I use provides another contemporary example of the failure of reconciliation in the realm of Indigenous water sovereignty in Canada.⁶ Freshwater governance in British Columbia provides a useful

1106, 1108, 1111, 1123, 1134 [*Delgamuukw*]; *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511 at paras 513–14, 521–26, 528–31, 535–36 [*Haida*]; *Mitchell v Minister of National Revenue* 2001 SCC 33, [2001] 1 SCR 911 at paras 916–18, 928, 935, 955, 957, 958, 960, 974–77, 979, 984–85, 991–93; and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 261–63, 269, 274, 277, 292–93, 296–98, 307, 309, 314, 318. Furthermore, for comprehensive discussions of the conceptualization of “reconciliation” and “conciliation,” see Hannah Wylie, “Lost in Translation? Conciliation and Reconciliation in Canadian Conflicts” (2016) 54 *Intl J Can Studies* at 83-115 and Hannah Wylie, “Towards a Genealogy of Reconciliation in Canada” (2017) 51 *J Can Studies* 601.

⁶ Maya Basdeo & Lalita Bharadwaj, “Beyond Physical: Social Dimensions of the Water Crisis on Canada's First Nations and Considerations for Governance” (2013) XXIII:4 *Indigenous Policy J* at 4 [Basdeo & Bharadwaj, “Beyond Physical”]. By Indigenous water sovereignty, I borrow from Basdeo and Bharadwaj when they recommend that First Nations should have “agency” regarding water governance. This is to say that, for the purposes of my thesis, I am defining Indigenous water sovereignty as “the ability of First Nations to participate in water policy initiatives [including legislation creation and amendments] and environmental-decision making in general over issues in which they are directly affected”. See L Bharadwaj, S Nilson, I Judd-Henry, G Ouelette, L Parenteau, Chief D Watson, Chief D Bear, Chief G Ledoux, and Chief A Bear, “Waste Disposal in First-Nations Communities: The Issues and Steps Towards the Future” (2010) 68:7 *Journal of Environmental Health* at 35-39; KL Frohlich and L Potvin “Commentary: Structure or agency? The

site in which to analyse the tensions of the strained relationships and dynamics between the Canadian state and Indigenous peoples.⁷ This is because there continue to be “challenges, racism, and inequality” in the legal, political, and social relationships between Indigenous peoples and the state.⁸ These problems of racism and inequality are influenced by ongoing colonialism.

The purpose of this project is to undertake an in-depth decolonial analysis of the dynamics occurring in a legal water management dispute between an Indigenous community and the Canadian state. More specifically, the goal of this investigation is to identify any indication of resurgence and decolonization. Consequently, through this evidence gathering, the data illustrate some ongoing colonial factors that affect the Halalt’s sovereignty over their waters. To this end, the research question is: Using an

importance of both for addressing social inequalities in health” (2010) 39 Intl J Epidemiology at 378-379. See also M Mescarenhas, “Where the Waters Divide: First Nations, Tainted Water and Environmental Justice in Canada” (2007) 12:6 Local Environment at 565-577. In my own words, I describe Indigenous water sovereignty as the freedom or ability in the form of governance or control, for Indigenous peoples to practice their (economic, social, political, and spiritual) responsibilities to the waters in their traditional territories (free of prohibition from any outside forces). This includes rights to participate in the decision-making and governance around such waters. This definition is informed by discussions with the interview participants, secondary sources described in Chapter 1 in Section entitled “Decolonial Analyses of Indigenous Water Governance,” as well as analogous principles from the website for the Indigenous Food Systems Network entitled “Indigenous Food Sovereignty” online: <<https://www.indigenousfoodsystems.org/food-sovereignty>>. On this website, there are four main principles that this organization uses to describe Indigenous food sovereignty that include (1) sacred or divine sovereignty (2) participatory, (3) self-determination; and (4) policy. *Halalt First Nation v British Columbia (Minister of Environment)*, 2011 BCSC 945, 60 CELR (3d) 179, [2011] BCJ No 1343 [*Halalt v BC*, 2011 BCSC 945], and *Halalt First Nation v British Columbia (Minister of Environment)*, 2012 BCCA 472, [2012] BCJ No 2419 [*Halalt v BC*, 2012 BCCA 472]; I will collectively call these cases *Halalt v BC* for the purposes of this chapter.

⁷ Merrell-Ann Phare, Rosie Simms, Oliver M Brandes & Michael Miltenberger, *Collaborative Consent and British Columbia’s Water: Towards Watershed Co-Governance* (September 2017) POLIS Project on Ecological Governance and Centre for Indigenous Environmental Resources, at 1 online: <<http://poliswaterproject.org/polis-research-publication/collaborative-consent-british-columbias-water-towards-watershed-co-governance/>> [Phare et al, *Collaborative Consent and British Columbia’s Water*].

⁸ *Ibid.*

Indigenous resurgence (IR) analysis,⁹ what does the *Halalt v BC* caselaw reveal about the state of Indigenous water sovereignty in Canada?¹⁰

I employ a case study methodology where I analyse the Environmental Assessment (EA) and legal court case of *Halalt v BC*. This case is about Indigenous water sovereignty and who has ownership and control over the Chemainus River and Aquifer: the Halalt First Nation or the neighbouring municipality of the District of North Cowichan (DNC).¹¹ The case involved the DNC, a neighbouring municipality to Halalt, which proposed a wellhead project in 2003 to drill into Halalt's underground water source, the Chemainus Aquifer, in order to provide drinking water to the residents of North Cowichan.¹² The DNC first proposed to construct three wells adjacent to Halalt's Indian Reserve #2, on the north bank of the Chemainus River to extract ground water from the Chemainus Aquifer.¹³

⁹ Various Indigenous scholars contribute to Indigenous resurgence (IR) as a theoretical and academic form of resistance to combat colonial-capitalism. As a concept, IR is difficult to define as it encompasses numerous values and practices. In fact, some IR authors such as Nishnaabe Leanne Betasamosake Simpson refused to define IR. Previously, Simpson wanted to leave it up to her (Indigenous) readers to figure out what IR means for themselves based on the principles and ideas presented in her book *Dancing on Our Turtle's Back* as well as from teachings from Indigenous Elders and community. See Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring Press, 2011) at 25-26 [Simpson, *Dancing on Our Turtle's Back*]. That said, in her newest book, *As We Have Always Done*, Simpson does define IR as "...a radical practice in Indigenous theorizing, writing, organizing, and thinking, one that I believe is entirely consistent with and inherently from Indigenous thought." To many IR authors, IR is about Indigenous communities' revitalizing their traditions, languages, and practices, which they have been doing for decades. See Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis, MN: University of Minnesota Press, 2017) at 48 Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis, MN: University of Minnesota Press, 2017) at 48 [Simpson, *As We Have Always Done*].

¹⁰ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 and *Halalt v BC*, 2012 BCCA 472, *supra* note 6.

¹¹ By this I mean that in colonial law, the District of North Cowichan may have power or control over the Chemainus River and/or aquifer as being a delegated arm of the provincial government, which generally has control over Crown lands and waters. I discuss this in more detail below. For the purposes of my thesis, I will be using the terms District of North Cowichan (DNC) and the Municipality of North Cowichan (MNC) interchangeably. The *Halalt v BC* caselaw uses the former term and the Municipality of North Cowichan website uses the latter.

¹² *Halalt v BC*, 2012 BCCA 472, *supra* note 6 at para 2; See also *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at paras 19 & 106. In previous decades, the Town of Chemainus had been using surface water from the Banon Creek Reservoir located in the Chemainus Watershed for drinking water. However, turbidity during the winter months of the Banon Creek Reservoir surface water began to raise concerns for the DNC. Logging caused the turbidity in the Banon Creek Watershed.

¹³ *Ibid*, *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 18.

The Halalt initiated a lawsuit seeking to quash the EA certificate that the Environmental Assessment Office (EAO) issued for the project alleging that the provincial government failed to adequately perform its duty to consult and accommodate them.¹⁴ Halalt asserted Aboriginal rights and title (as well as proprietary rights) to the areas encompassing the project including the specific waters that the DNC proposed to extract.¹⁵ The issue in the litigation was whether the Crown discharged its duty to consult and accommodate Halalt's asserted interests as it is constitutionally obligated to do.¹⁶ The trial judgement contains significant *obiter* discussion regarding Aboriginal water rights and consequently Indigenous water sovereignty.

I seek to provide a decolonial perspective; therefore, I use the critical IR theoretical framework, which is mainly composed of Indigenous authors advocating for increasing Indigenous sovereignty. I collected data through interviews with ten participants including three Band Council members involved in the *Halalt v BC* case study. I analyse the findings using three IR themes found in the literature: transfer of power from the state to an Indigenous community, increased respect and use of Indigenous worldviews, and Indigenous self-determination, in light of the primary data I collected via key informant interviews and case study participants. I used these themes as benchmarks to determine whether any degree of decolonization occurred during the case study EA or litigation processes as per the viewpoints expressed by interviewee participants. The data revealed that there was no evidence that decolonization took place as per Halalt participants' experience of the case study nor the other non-Halalt participants' opinion of the *Halalt v BC* case. In this thesis, I advocate for decolonization in the form of increased Indigenous political authority for the Halalt and all Indigenous communities in Canada.

I divide Chapter 1 into several parts. First, I discuss the decades-old First Nations poor quality drinking water crisis that has gained national attention in Canada. The problem of poor drinking water is one of the clearest ways where we see Indigenous water sovereignty and governance at play on the national level. In this section, I explain how some First Nations are litigating against the federal government, alleging systemic

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

discrimination in terms of how the federal government has managed drinking water systems on reserves in Canada. Second, I discuss the colonial constitutional federal and provincial water governance systems in Canada and explain how they create a fragmented system that complicates drinking water management on reserves in Canada. Third, I explain the principles of Aboriginal law most relevant to my thesis, to illustrate the colonial legal limits afforded to Indigenous peoples in asserting control and power over waters in their territories. Fourth, I summarize the insights that a growing number of authors are noting when they apply a socio-cultural decolonial analysis to Indigenous water governance issues. This leads into a brief description of IR, the theoretical framework that I use in which to investigate my research question and analyse the case study from such a critical decolonial perspective. Fifth, I provide a summary of the court decisions of the case study, *Halalt v BC*, with which I examine issues of Indigenous water sovereignty in Canada in a different but related way than how the Canadian state is hindering Indigenous water sovereignty in the realm of drinking water.

This case study provides a useful site by which to examine Indigenous water sovereignty and Indigenous-state relations in terms of how effective the colonial courts take up reconciliation. It is also a suitable site by which to determine to what extent decolonization may be occurring.

Next, I briefly describe all the research components of my thesis project, which includes the statement of the problem, the purpose of my study, my research question, and my definition of terms. I conclude this chapter by providing the outline for all my thesis chapters.

1.1: Context of Indigenous Water Sovereignty: Drinking Water Crisis in Canada

“We were startled, upset. It was awful. This was a level of neglect that almost appeared purposeful.”¹⁷ “[D]espite extensive experience with First Nations communities, he had “never seen living like this in Canada – infrastructure so bad people are constantly putting themselves at risk of serious illness.”¹⁸ –Doctor Pete Sarsfield, Medical Officer of Health, Northwestern Health Unit, Ontario¹⁹

Lack of access to safe drinking water has been a concern in Indigenous communities throughout Canada for decades.²⁰ The Canadian government has known (or ought to have known) about the problem of poor drinking water on reserves in Canada since the 1950s. For example, in 1954, a government representative named Diamond Jenness was tasked with travelling throughout Canada to analyse the conditions of Indian reserves.²¹ He asked questions to highlight problems regarding steps needed to eradicate reserves and “end the apartheid system” as well as to analyse how the federal government could improve malnutrition and overall health on reserves.²² He found many concerns with the Indian reserves and concluded that their conditions were unacceptable.²³ Furthermore, a doctor who worked in northern Manitoba in the 1950s also reported, “drinking water quality was the greatest public health threat in reserve communities.”²⁴

¹⁷ David R Boyd, “No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada” (2011) 57:1 McGill LJ at 91 [Boyd, “No Taps, No Toilets”] citing “Water woes a harsh reality for Pikangikum” Kenora Daily Miner & News, October 26, 2006, online <www.kenoradailyminerandnews.com>.

¹⁸ *Ibid.*

¹⁹ Northwestern Health Unit, online: <<https://www.nwhu.on.ca/Pages/home.aspx>>.

²⁰ Carmen Ledo Garcia et al “Crisis on Tap: Seeking Solutions to Safe Water for Indigenous People”, Jeff Reading et al online (2011) APRCi 211 at 3 [Carmen Ledo Garcia et al, “Crisis on Tap”]; YouTube, “Crisis on Tap Full Video for CAHR” (26 April 2011) online: YouTube <<https://www.youtube.com/watch?v=lxmht-g2C5s>>. I am using the term “lack of access” and “water accessibility” purposely as it encompasses both quality and quantity as well as the fact Indigenous water governance authors such as Valine Crist use this term. See also See Valine Crist, “Life’s Essential: Debunking the Myths and Exposing the Realities of Canada’s Water System” (2010) 11 *PlatForum* [Crist, “Life’s Essential”].

²¹ Crist, “Life’s Essential”, *ibid* at 35 citing Diamond Jenness, “Canada’s Indians Yesterday. What of Today?” (1954) 20(1) *Can J Econ Political Sci* at 95-100.

²² *Ibid.*

²³ *Ibid.*

²⁴ Carmen Ledo Garcia et al, “Crisis on Tap”, *supra* note 20 at 3 citing Bureau of Health and Welfare Education (1961).

Authors widely publish the fact that there is a drinking water *crisis* in Canada that is disproportionately facing First Nations relative to the rest of the Canadian population. Authors use the term *crisis* deliberately and prominently in the titles of their writing. For example, the authors in the article “Boiling Point: Six community profiles of the water crisis facing First Nations within Canada” explain that the situation regarding First Nations drinking water has reached a point of crisis.²⁵ They call the neglect toward First Nations communities that are living in conditions similar to the Global South a national disgrace (especially in a country that has been lauded for its human rights record).²⁶

In a country with a large percentage of the world’s freshwater, there is a perception by Canadians that our water is abundant and clean.²⁷ However, this is not the case as there is much less freshwater availability than people understand.²⁸ This misguided view of freshwater abundance equates to irresponsible use of drinking water, environmental degradation, unnecessary waste,²⁹ and to most Canadians taking their taps and toilets for granted in terms of the availability and readiness of water to serve their households.³⁰ The non-Indigenous population in our country would not be able to fathom the reality of resorting to drinking poor water, expensive bottled water, or untreated lake water in order to have their daily water needs met.³¹ Whereas, the reality for a large percentage of Indigenous communities in Canada are that they live in fear for their health because of the uncertainty and substandard quality of drinking water that comes out of their taps.³² The high profile case of water contamination in Kashechewan

²⁵ Andrea Harden and Holly Levalliant, Polaris Institute, “Boiling Point: Six community profiles of the water crisis facing First Nations within Canada” (2008) at 23, online: <https://d3n8a8pro7vhmx.cloudfront.net/polaris-institute/pages/31/attachments/original/1411065375/Boiling_Point.pdf?1411065375> [Polaris, “Boiling Point”].

²⁶ *Ibid.* In similar language, another text is by water governance expert and lawyer see also Merrell-Ann Phare, *Denying The Source: The Crisis of First Nations Water Rights* (Surrey: Rocky Mountain Books, 2009) [Phare, *Denying the Source*]. See also Carmen Ledo Garcia et al, “Crisis on Tap”, *supra* note 20 *supra* note 20 at 3.

²⁷ John B Sprague, “Great Wet North? Canada’s Myth of Water Abundance” in Karen Bakker (ed), *Eau Canada: The Future of Canada’s Water* (Vancouver, BC: UBC Press, 2006) at 23 [Bakker, *Eau Canada*].

²⁸ Karen Bakker (ed), *Eau Canada: ibid* at 4. As Karen Bakker explains, “We are not the “Kuwait of water”: Canada has under 7 percent of the global renewable water supply, and much of that supply flows north to areas relatively remote from population centres in southern Canada.”

²⁹ Crist, “Life’s Essential” *supra* note 20 at 29.

³⁰ Polaris, “Boiling Point” *supra* note 25 at 23.

³¹ *Ibid.*

³² *Ibid.*

may have sparked a re-examination and focus on this topic.³³ However, while this example might seem exceptional, it is not unique.³⁴ As recently as September 30, 2017, Health Canada reported that there were “Drinking water advisories, First Nations south of 60”, in 98 First Nations communities south of the 60-degree parallel, excluding British Columbia.³⁵

In practice, responsibility for the implementation of providing drinking water and wastewater management on reserve communities located south of the 60-degree parallel is divided between Indigenous and Northern Affairs Canada (INAC),³⁶ Health Canada, Environment Canada, and First Nations governments.³⁷ Indigenous and Northern Affairs Canada provides the funding required for capital construction,

³³ In 2005, 60% of the residents of Kashechewan First Nation, located in northern Ontario, had to be evacuated from their community to obtain immediate medical care after an outbreak of *E. coli* in the water system. See Ecojustice, “Waterproof 2: Canada’s Drinking Water Report Card” by Randy Christensen (2006) at 35.

³⁴ Polaris, *supra* note 25 at 6.

³⁵ Health Canada, “Questions and Answers: Drinking Water and Wastewater in First Nations communities south of 60°”, First Nations and Inuit Health, (Ottawa: Health Canada, Modified 31 March 2017) online: <<http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique//water-eau-eng.php>> [Health Canada, “Questions and Answers”]; Health Canada explains that DWAs are “preventive measures put in place to protect public health from drinking water that could be contaminated.” Health Canada goes on to state that a DWA, in a First Nations community could only be required for one building and therefore is not always representative of a community wide problem. There are three types of DWAs including: 1) Boil Water Advisories/Orders (BWAs/BWOs); 2) Do Not Consume Advisories/Orders, which can also be called Do Not Drink Advisories/Orders (DNDAs/DNDOs); and 3) Do Not Use Advisories/Orders: Health Canada, First Nations & Health Canada explains that drinking water advisories may be established for multiple reasons such as if there are overall water problems such as “line breaks, equipment failure, or poor filtration/disinfection during water treatment” or as a precautionary measure. This could include when there are emergency repairs made to the water distribution system or in cases where communities do not have a trained Water System Operator or Community-based Drinking Water Quality Monitor in place.

³⁶ This organization is legally known as the Department of Indian and Northern Affairs (DIAND), but has now been split into two departments named Indigenous Services and Crown-Indigenous Relations and Northern Affairs Canada; throughout my thesis, I generally refer to the most previously operationally known name, the Department of Indigenous and Northern Affairs (INAC); formerly known as the Aboriginal Affairs and Northern Development Canada (AANDC), Department of Indian Affairs and Northern Development (DIAND) and Indian Affairs and Northern Affairs Canada (INAC) prior to DIAND. I use INAC (both iterations), DIAND and AANDC synonymously for the purposes of my thesis. I may use one over the other to denote a certain period of when a departmental policy or program was in place. Also, I generally cite the acronym that various authors used. Doing so is a useful way to understand the timing of various funding/resource allocations (if one knows the various historical iterations of what the Department has been called).

³⁷ Canada, Library of Parliament Information and Research Service, “Safe Drinking Water in First Nations Communities” by Tonina Simeone, Publication No 08-43-E (Ottawa: 28 May 2010) at 1 [Simeone, “Safe Drinking Water in First Nations Communities”]; See also Health Canada, “Questions and Answers”, *supra* note 35; North of 60, the territorial governments are responsible for all communities’ safe drinking water, including that of First Nations and Inuit communities.

upgrading, and 80% of the operating and maintenance costs of water service provision in First Nations communities.³⁸ First Nations governments bear the remaining 20% of the latter costs.³⁹ Indigenous and Northern Affairs Canada also funds the training and certification of water operators,⁴⁰ as well as oversees the design, construction, and maintenance of water treatment facilities.⁴¹ First Nations Chief and Council are then responsible for the day-to-day operations of drinking water and wastewater management including training water system operators and monitoring drinking water quality through sampling and testing programs.⁴²

Health Canada is responsible for the delivery of drinking water monitoring programs on reserves south of the 60th parallel,⁴³ including drinking water quality monitoring and providing advice to First Nations communities and INAC on drinking water quality.⁴⁴ Environment Canada has powers to regulate the discharge of wastewater into federal waters or into any water if water quality has become a matter of national concern.⁴⁵ Environment Canada also has powers to enforce effluent discharge standards when it travels into water throughout Canada.⁴⁶

For its part, the Canadian government has worked to improve water quality on reserves since the 1960s through producing various reports, policies, programs, and funding initiatives, including parliamentary appointed spending.⁴⁷ Earlier government policies aimed to ensure “on-reserve residents had access to water facilities comparable with those for other Canadians living in communities of a similar size and location.”⁴⁸ For example, in 1977, the federal government acknowledged the disparate situation and,

³⁸ Simeone, “Safe Drinking Water in First Nations Communities”, *ibid* at 1-2.

³⁹ *Ibid* at 2

⁴⁰ Health Canada, “Questions and Answers” *supra* note 35.

⁴¹ Simeone, “Safe Drinking Water in First Nations Communities”, *supra* note 27 at 2.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ Health Canada, “Questions and Answers” *supra* note 35.

⁴⁵ Simeone, “Safe Drinking Water in First Nations Communities”, *supra* note 37 at 2.

⁴⁶ Health Canada, “Questions and Answers” *supra* note 35.

⁴⁷ Canada, Library of Parliament, Parliamentary Information and Research Service, “Legislative Summary: Bill S-8: The *Safe Drinking Water for First Nations Act*” by Tonina Simeone and Shauna Troniak, Publication No 41-1-S8-E, (19 April 2012), online: <<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/41-1/s8-e.pdf>> at 3 [Simeone and Troniak, “Bill S-8”].

⁴⁸ *Ibid* at 3.

through the *Federal Water Strategy*, attempted to elevate water quality on reserves to levels comparable to water quality off-reserves.⁴⁹

Over several decades, the federal government has implemented numerous policy initiatives to rectify drinking water quality deficiencies,⁵⁰ yet these programs and

⁴⁹ Boyd, “No Taps, No Toilets”, *supra* note 17 at 81.

⁵⁰ For example, see the numerous funding, policies, reports, and spending that the Government of Canada has initiated in the last fifteen years to attempt to fix the poor-quality water problems. In 2003, the federal government, INAC, and Health Canada launched the *First Nations Water Management Strategy*. On March 21, 2006, the Department of Indian and Northern Affairs Canada launched the Plan of Action for Drinking Water in First Nations Communities. Budget 2006 committed \$450 million to improve water supply, education outcomes, housing, and socio-economic conditions for Aboriginal children, women, and families. On May 31, 2006: Aboriginal Affairs and Northern Development Canada and the Assembly of First Nations, Health Canada, and Environment Canada announced the Expert Panel on Safe Drinking Water for First Nations. On May 31, 2007, the Senate Standing Committee on Aboriginal Peoples tables its report entitled *Safe Drinking Water for First Nations*. In Budget 2008, the federal government invested \$330 million to improve drinking water on First Nations lands over 2 years. In Budget 2009, the Government of Canada announced \$515 million (over two years) to “accelerate infrastructure projects” in First Nations communities, including \$165 million specifically for water and wastewater projects. On July 14, 2011, the federal government released an independent *National Assessment of First Nations Water and Wastewater Systems*. As previously discussed, Bill S-11 was introduced on May 26, 2010, but died on the Order Paper on March 26, 2011, in the Standing Senate Committee on Aboriginal Peoples when the 40th Parliament dissolved. Furthermore, Bill S-8 received Royal Assent on June 19, 2013. *The Safe Drinking Water for First Nations Act* came into force on November 1, 2013. Budget 2014 dedicated \$323.4 million over two years to improve water and wastewater infrastructure thereby committed the Government’s continued support of the *First Nations Water and Wastewater Action Plan*. In more recent years, under the current Liberal Trudeau Government, Budget 2016 committed \$1.8 billion over five years to repair and sustain water and wastewater infrastructure on reserves, train water operators, and end long-term boil water advisories. Additionally, this Budget invested \$141.7 million over five years to improve monitoring and testing of drinking water on First Nations reserve communities. The 2018 Federal Government Budget continued to add to previous investments to First Nations access to clean and safe drinking water in terms of construction and renovation of affected water systems by committing to \$172.6 million over 3 years. See: Indigenous and Northern Affairs Canada, “First Nations Water Management Strategy” (Page last modified on September 15, 2010) online: <<http://www.aadnc-aandc.gc.ca/eng/1100100010369/1100100010370>> [INAC, First Nations Water Management Strategy, 2010]; Canada, Office of the Auditor General, “Chapter 5: Drinking Water in First Nations Communities” in *Report of the Commissioner of the Environment and Sustainable Development* (Ottawa, ON: 2005) online: <<http://www.oag-bvg.gc.ca/internet/docs/c20050905ce.pdf>> [Auditor General, *Drinking Water in First Nations Communities*, 2005]; Canada, Senate, Standing Committee on Aboriginal Peoples “Safe Drinking Water for First Nations: Final Report of the Standing Committee on Aboriginal Peoples” (May 31, 2007), online: <<https://sencanada.ca/content/sen/committee/391/abor/rep/rep08jun07-e.htm>> [Senate Standing Committee Safe Drinking Report]; Indian and Northern Affairs Canada, “Plan of Action for Drinking Water in First Nations Communities” (Page last modified on September 15, 2010) online: <<http://www.aadnc-aandc.gc.ca/eng/1100100034958/1100100034966#pln>> [INAC, *Plan of Action for Drinking Water*, 2010]; Department of Finance Canada, *Budget 2006*, online: <<https://www.fin.gc.ca/budget06/brief/brief-eng.asp>>; Canadian Indian and Northern Affairs, *Report of the Expert Panel on Safe Drinking Water for First Nations* (Ottawa: Indian and Northern Affairs, 2006) online: <<http://publications.gc.ca/site/eng/298371/publication.html>>; Canada, Department of

funding expenditures have not yielded adequate results. To be clear, this is not to say that the government has not made progress. The point here is that the problems persist regardless of all the reports, funding, policy and legislative initiatives governments have advanced.

Thus, the problems of First Nations drinking water quality continue. As scholarship in this field has increasingly recognized, the lack of access to safe drinking water for First Nations is not a technical problem. The infrastructure and technology exist to rectify harms from unsafe drinking water.⁵¹ In actuality, poor First Nations' drinking water is a symptom of the larger project of colonialism as expressed through fragmented jurisdiction for drinking water and Indigenous peoples as well as a lack of recognition of Indigenous water sovereignty.

As various publications have reported,⁵² despite hundreds of millions of dollars invested in improving drinking water systems on reserves, a considerable number of

Finance *The Budget Plan 2008*, (Ottawa: Department of Finance, 2008) online: <<https://www.budget.gc.ca/2008/pdf/plan-eng.pdf>>; Canada, Department of Finance, *Budget 2009*, (Ottawa: Department of Finance, 2009) online: <<https://www.budget.gc.ca/2009/home-accueil-eng.html>>; Indigenous and Northern Affairs Canada, "National Assessment of First Nations Water and Wastewater Systems 2009-2011" (Modified 27 October 2016) online: <<http://www.aadnc-aandc.gc.ca/eng/1313426883501/1313426958782>>; Bill S-11, *An Act respecting the safety of drinking water on first nation lands*, 3rd Sess, 40th Parl, 2010 (referral to Committee on 14 December 2010) [Bill S-11]; Bill S-8, *An Act respecting the safety of drinking water on First Nations lands*, 1st Sess, 41st Parl (assented to 19 March 2013) [Bill S-8]; Indigenous and Northern Affairs Canada, "First Nations Water and Wastewater Action Plan" (Modified 5 February 2016) online: <<https://www.aadnc-aandc.gc.ca/eng/1432835675167/1432835738195>>; *Safe Drinking Water for First Nations Act*, SC 2013 c 21; Canada, Department of Finance, *Budget 2014*, (Ottawa: Department of Finance, 2014) online: <<https://www.budget.gc.ca/2014/home-accueil-eng.html>>; Canada, Department of Finance, *Budget 2016*, (Ottawa: Department of Finance, 2016) online: <<https://www.budget.gc.ca/2016/docs/plan/budget2016-en.pdf>> at 96; Canada, Office of the Parliamentary Budget Officer, *Budget Sufficiency for First Nations Water and Wastewater Infrastructure*, (Ottawa: 7 December 2017) at 131 online: <http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/FN%20Water/FN_Water_EN.pdf> [Budget Sufficiency First Nations, 2017]; Canada, Department of Finance, *Budget Plan 2018*, (Ottawa: Department of Finance, 2018) online: <<https://www.budget.gc.ca/2018/docs/plan/budget-2018-en.pdf>>.

⁵¹ Assembly of First Nations, 38th Annual General Assembly, 2017 Annual General Assembly – Regina, SK Final Resolutions, (2017) Resolution 51/2017 at N-P online: <https://www.afn.ca/wp-content/uploads/2017/08/2017-AFN-AGA-Resolutions_EN.pdf> [AFN Annual General Assembly 2017].

⁵² See *supra* note 50 for a summary of the numerous funding, policies, reports, and spending that the Government of Canada has initiated in the last fifteen years to attempt to fix the poor-quality water problems.

First Nations communities have drinking water where the quality or safety is still at risk.⁵³ For example, in 2009, the Government commenced the *National Assessment of First Nations Water and Wastewater in First Nations Communities*, which conducted a “detailed assessment of existing public and private water and wastewater facilities operating in First Nations communities across the country.”⁵⁴ Through this independent assessment, the government inspected 4,000 drinking water and wastewater systems of 97% of the drinking water and wastewater system on First Nations lands.⁵⁵ The National Assessment released its report in 2011,⁵⁶ stating that 73% of systems in First Nations communities posed high or medium risks to First Nations.⁵⁷ The National Assessment identified that 60% of the risk measured for water and wastewater systems were caused by deficiencies in operator qualification, record keeping as well as operation and maintenance.⁵⁸ The report concluded that, over the next 10 years, \$4.7 billion would be required to address these risks.⁵⁹

In 2014-2015, 395 (57%) of the 699 INAC-funded First Nations water systems required inspections and were deemed to “have a low risk of producing unsafe drinking water in the event of a problem, compared to 194 of 719 (27%) water systems inspected during the National Assessment.”⁶⁰ Likewise, the amount of high-risk water systems has decreased from 37% (268 of 719 systems) to 18% (127 of 693 systems) between the National Assessment and 2013-2014 (the most up-to-date time period for which detailed data are available).⁶¹ Over this same period, the amount of medium-risk water systems

⁵³ Auditor General, *Drinking Water in First Nations Communities*, 2005, *supra* note 50 at 2.

⁵⁴ AANDC, “ARCHIVED – Water and Wastewater Infrastructure - Investment Report April 2006 – March 2010” (Ottawa: 2011) online: <<https://www.aadnc-aandc.gc.ca/eng/1314039137100/1314039295756>>.

⁵⁵ DIAND, National Assessment of First Nations Water and Wastewater Systems: National Roll Up Report Final”, Prepared by Neegan Burnside Ltd. (Ottawa: April 2011) at 16 online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/enr_wtr_nawws_rurnat_rurnat_1313761126676_eng.pdf> [DIAND, National Roll Up Report 2011].

⁵⁶ *Ibid* at 16.

⁵⁷ *Ibid* at 11.

⁵⁸ AANDC, “ARCHIVED Chronology – Water” online: <<http://www.aadnc-aandc.gc.ca/eng/1308332537951/1308332754073>>.

⁵⁹ DIAND, National Roll Up Report 2011, *supra* note 55 at 34.

⁶⁰ Environment and Climate Change Canada, “Canadian Environmental Sustainability Indicators: First Nations Water and Wastewater System Risk”, (2016) at 15 online: <https://www.canada.ca/content/dam/eccc/migration/main/indicateurs-indicators/ea902cf7-9d5e-4d92-9490-1e8031b5890a/firstnationswaterfacilities_en.pdf>.

⁶¹ *Ibid*.

has stayed relatively stable from 36% (257 of 719 systems during the National Assessment) to 37% (256 of 693 systems in 2013-2014).⁶²

From these figures, it seems that the amount of systems that are low risk has increased, thereby decreasing the systems at high or medium, which is promising. However, in July 2018 the federal government reported that since November 2015, when the current Liberal government assumed power, 67 long-term drinking advisories have been removed,⁶³ but that 34 drinking water advisories were added in this same time.⁶⁴ Furthermore, this government update stated that there are 72 current long-term drinking water advisories affecting public systems on reserve as of July 2018.⁶⁵ The government has committed to ending all long-term drinking water advisories on public systems on reserve by March 2021.⁶⁶

The government has been trying to improve drinking water on First Nations reserves since the 1950s and it is arguable that reconciliation in Canada started in the 1970s. Over forty years since the 1969 White Paper,⁶⁷ Coulthard states that Canada has lost its political influence because Indigenous peoples see the federal government's attempts to make space for Indigenous peoples as empty gestures.⁶⁸ Therefore, it has

⁶² *Ibid.*

⁶³ Long-term drinking water advisories are those that have lasted one year or more. See Indigenous Services Canada, "Update on long-term drinking water advisories on public systems on reserve through July 2018", (Modified 6 August 2018) online: <<https://www.canada.ca/en/indigenous-services-canada/news/2018/08/update-on-long-term-drinking-water-advisories-on-public-systems-on-reserve-through-july-2018.html>>.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Canada, *Statement of the Government of Canada on Indian Policy*, (Ottawa: Ministry of Indian and Northern Affairs Canada, 1969) online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/cp1969_1100100010190_eng.pdf> [The 1969 White Paper]. The infamous White Paper was a policy paper proposed by the Liberal government in 1969 under Prime Minister Pierre Trudeau and Minister of Indian Affairs, Jean Chretien. It advocated for the repeal of the *Indian Act*, the dissolution of the Department of Indian Affairs, and the elimination of Indian status, reserves, and treaties. There was significant opposition to the White Paper by Indigenous peoples including complaints that they did not want any amendments made to the *Indian Act* without their consent and they wanted to retain their status as Indians and treaty beneficiaries. The White Paper was subsequently deserted but successive governments have attempted to accomplish its goals. See Pam Palmater, "Trudeau's dance of deception on Indigenous rights", *The Lawyers Daily* (26 February 2018), online: <<https://www.thelawyersdaily.ca/articles/5976/trudeau-s-dance-of-deception-on-indigenous-rights-pamela-palmater>>; See also Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000).

⁶⁸ Glen Coulthard, *Red Skin, White Masks*, *supra* note 5 at 163.

been over 45 years that the federal government and the courts have been working on both reconciliation and improving First Nations' drinking water management (mostly in terms of trying to improve poor water quality that dozens of First Nations reserves face). Unfortunately, after more than 40 years of the federal government working on both reconciliation and drinking water management, the problems with drinking water and resource disputes surrounding Indigenous water sovereignty claims persist.⁶⁹

For example, on June 16, 2014, four Alberta First Nations filed a lawsuit in the federal court against the federal government for the “deplorable” state of their drinking water.⁷⁰ The Tsuu T'ina, Ermineskin, Sucker Creek and Blood First Nations asked the Federal Court to compel Ottawa to “upgrade their water systems, provide continuing support to keep them operating safely and to refund money the bands say the government has saved over the years by not doing so.”⁷¹ This group of First Nations located in Treaties 6, 7, and 8 territories,⁷² state that they have tried to work with the federal government for years to no avail. What they are asking for is simple: equality with the non-Indigenous water systems in Canada: “All we’re asking for is equality with what

⁶⁹ While there could be multiple points at which to measure the beginning of reconciliation between the state and Indigenous peoples, I measure the start of this reconciliation from two points. From the government's point of view, I count this timing when the Government of Canada started working on improving drinking water on First Nations reserves. This was in 1954, which is also discussed in the main text of this chapter, when the government tasked a representative named Diamond Jenness with travelling throughout Canada to analyse the conditions of Indian reserves. He asked questions to highlight problems regarding steps needed to eradicate reserves and “end the apartheid system” as well as to analyse how the federal government could improve malnutrition and overall health on reserves. See Crist, “Life's Essential” *supra* note 20 at 35 citing Diamond Jenness, “Canada's Indians Yesterday. What of Today?” (1954) 20(1) *The Canadian Journal of Economics, Political Science/Revue Canadienne d'Economie et de Science Politique* at 95-100. Concurrently, from the courts point of view, I mark this date with an important Aboriginal rights case, the *Calder* case in 1973 where the SCC acknowledged that Aboriginal title to land was present at the time of the *Royal Proclamation of 1763* RSC, 1985 [Royal Proclamation], App II, No 1. See *Calder et al v Attorney-General of British Columbia* [1973] SCR 313 [*Calder*]. In addition, 1973 was also the year that the first of multiple comprehensive land claims (otherwise called “modern treaties”) was signed in 1975 that could also signify the beginning of reconciliation as well. See Canadian Environmental Assessment Agency, *James Bay and Northern Quebec Agreement* online: <<https://www.canada.ca/en/environmental-assessment-agency/corporate/james-bay-northern-quebec-agreement.html>>.

⁷⁰ Bob Weber, The Canadian Press, “Alberta First Nations sue Ottawa over safety of Drinking Water: Tsuu T'ina, Ermineskin, Sucker Creek and Blood First Nations involved in lawsuit” *CBC News* (16 June 2014), online:<<http://www.cbc.ca/news/canada/calgary/alberta-first-nations-sue-ottawa-over-safety-of-drinking-water-1.2677316>> [Weber, “Alberta First Nations sue Ottawa”].

⁷¹ *Ibid.*

⁷² Danika Littlechild, “Rights and Reconciliation: Alberta First Nations Take on the Federal Government over unsafe drinking water” (15 December 2014) *Water Canada* (blog) online: <<http://watercanada.net/2014/rights-and-reconciliation>>.

other, white people, have, that Indians are not allowed to have” said Chief Jim Badger of the Sucker Creek First Nation.⁷³

This case provides an example of Indigenous communities declaring that the federal government’s behaviour in regards to drinking water management on reserves equates to systemic discrimination and marginalization.⁷⁴ In the Statement of Claim, the plaintiffs allege that the federal government’s operationalization of drinking water treatment systems on their reserves amounts to discrimination against First Nations in the sense that it perpetuates the historical disadvantage, stereotyping, and prejudice against First Nations.⁷⁵ The Plaintiffs claim that the federal government built substandard water treatment facilities on their reserves and did not maintain them.⁷⁶ They also assert that these substandard treatment facilities have damaged residents’ health.⁷⁷ The plaintiff First Nations say this can be considered systemic discrimination, as it is a failure of the federal government to meet citizens’ basic needs.⁷⁸

By depriving First Nations, including the plaintiffs, of safe drinking water comparable to drinking water available in off-reserve communities, this intensifies the historic social, political, and legal disadvantage First Nations face as this group has been continually underrepresented, underserved, and excluded.⁷⁹ Furthermore, preventing safe drinking water impedes both health and dignity for the plaintiffs and other First Nations, diminishes the position of First Nations compared to their non-First Nations neighbours, and serves to buttress and perpetuate the underprivileged position of First Nations within Canada.⁸⁰

These Alberta First Nations claim that the federal government has produced, contributed to, and maintained unsafe drinking water conditions for their reserve communities as well as in First Nations reserves in Canada in general.⁸¹ The plaintiff

⁷³ Weber, “Alberta First Nations sue Ottawa” *supra* note 70.

⁷⁴ *Tsuu T’ina Nation v AG Canada*, Court File Number T-1429-14, June 16, 2014 (Statement of Claim to the Defendant) at paras 28, 59, 102, 111, 114, 121, & 123 [*Tsuu T’ina et al*, Statement of Claim].

⁷⁵ *Ibid* at para 121.

⁷⁶ Weber, “Alberta First Nations sue Ottawa” *supra* note 70.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

⁷⁹ *Tsuu T’ina*, Statement of Claim *supra* note 74 at para 121.

⁸⁰ *Ibid*.

⁸¹ *Ibid* at para 2.

First Nations allege, “Canada has avoided significant expenditures on account of its breaches of fiduciary duty and the obligations imposed by the Honour of the Crown.”⁸² The plaintiff First Nations allege that the federal government is in contravention of sections 7 and 15 of the *Charter of Rights and Freedoms*, 1982,⁸³ and section 31(1)(c) of the *Constitution Act*, 1982,⁸⁴ as well as various other international legal agreements including the *United Nations Declaration of the Rights of Indigenous Peoples*.⁸⁵ Furthermore, the Statement of Claim alleges that the *Indian Act* has been used as a tool by which the federal government limits First Nations control and power over the operations of their drinking water systems.⁸⁶

In addition to inferior quality drinking water on reserve being a site of conflict between Indigenous peoples, Indigenous water sovereignty issues play out in Canada

⁸² *Ibid* at para 130.

⁸³ *Ibid* at paras 1, 104-123. The Statement of Claim alleges that Canada’s conduct is in breach of ss 7 and 15 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, *supra* note 5, and cannot be demonstrably justified under section 1 of the *Charter*.

⁸⁴ *Ibid* at paras 1 and 124-127. Furthermore, the Statement of Claim alleges the federal government’s conduct is in contravention of s. 36(1)(c) of the Part II of the *Constitution Act*, 1982, *supra* note 5, in its failure to provide essential public services of a reasonable quality to all Canadians.

⁸⁵ *Ibid* at para 102. See also *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [*UN Declaration on the Rights of Indigenous Peoples*]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Rights of the Child*, November 20, 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Elimination of All Forms of Discrimination Against Women*, December 1979, 1249 UNTS 13; See Also *The Human Right to Water and Sanitation*, UNGAOR, 64th Sess, UN Doc GA Res 64/292, Plenary 48 (2010). This acknowledges, as a human right, the right to clean and safe drinking water and sanitation, which is essential to a full enjoyment of life and all human rights.

⁸⁶ *Ibid* at para 59. The *Indian Act* provides an example of the unidirectional way in which the federal government continues to treat First Nations (Basdeo & Bharadwaj “Beyond Physical” *supra* note 6 at 8 interpreting Grace Josephine Mildred Wuttunee Ouellette, *The Fourth World: An Indigenous Perspective on Feminism and Aboriginal Women’s Activism* (Halifax, NS: Fernwood Publishing, 2002) at 91). The *Indian Act* has changed little since its inception in 1876, when assimilationist policies ran strong in Canada (Basdeo & Bharadwaj, “Beyond Physical” *supra* note 6 at 8.) This points to a pattern of continued paternalism as First Nations continue to be wards of the Crown due to the federal government’s responsibility to “Indians and lands reserved for Indians.” *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK) s 91(24) [*Constitution Act, 1867*]. The point here being that the unequal relationship between the Canadian state and First Nations permeate all government institutions and policies, which leads to impacts in many political and social arenas including resource management (Nancy J Turner, Robin Gregory, Cheryl Brooks, Lee Failing, & Terre Satterfield, “From Invisibility to Transparency: Identifying the Implications” [Turner et al, “From Invisibility to Transparency”] (2008) 13(2): 7 *Ecology and Society*, online: <<http://www.ecologyandsociety.org/vol13/iss2/art7>>) [Turner et al, “From Invisibility to Transparency”]. The Canadian system of Indigenous governance (including over drinking water and water management) continues the asymmetrical power relations that keep Indigenous peoples marginalized on their own traditional lands (Crist, *supra* note 20 at 36).

other ways. Concerns about the Crown's fiduciary duty and Honour of the Crown are implicated in drinking water governance as well as resource extraction and duty to consult cases. In both areas, the issues revolve around who can make decisions over waters in traditional territories. Currently, Indigenous people lack the jurisdictional, management and political authority over their waters on reserve and in their wider traditional territories that they are demanding. This fundamentally undermines Indigenous water sovereignty in Canada.

1.2: Fragmented Colonial Jurisdiction for Water and Drinking Water Governance

Canada's *Constitution Acts* (1867 and 1982) do not clearly address the jurisdiction for water.⁸⁷ The way drinking water is managed in Canada between the federal and provincial governments creates confusion, uncertainty, and fragmentation in Indigenous water governance as well as drinking water management on reserves. Due to its physical properties, water flows in and out of different political jurisdictions. In Canada, the federal and provincial governments manage water (including drinking water) due to a constitutional arrangement.⁸⁸ Provincial ownership over water is generally presumed by virtue of s. 109 of the *Constitution Act*, 1867,⁸⁹ which vested land ownership in the original provinces of Canada.⁹⁰ Consequently, the provinces also then have "ownership rights to fresh water and the fish therein" by virtue of their provincial powers to "own" public lands.⁹¹

In addition to this water specific governance, the *Indian Act*, first established in 1876, continues to allow the federal government much power over First Nations and

⁸⁷ See *Constitution Act, 1867*, *ibid*, *The Constitution Act, 1982*, *supra* note 5.

⁸⁸ I am limiting my discussion of water ownership in Canada to the provinces south of the 60-degree parallel as the territories north of this have different land and water management arrangements.

⁸⁹ *Constitution Act, 1867*, *supra* note 86.

⁹⁰ See also Curran, "Water Law as a Watershed Endeavour: Federal Inactivity as an Opportunity for Local Initiative" (2015) 28.1 *Journal of Environmental Law and Practice* at 61 [Curran, "Water Law as a Watershed Endeavour"].

⁹¹ This interpretation is based on *Burrard Power Co v R*, (1910), [1911] AC 87 (Jud Com of Privy Coun) at 94 [*Burrard Power*]. Note that it is a weak basis on which the courts make this assertion. The judge also discussed *Burrard Power* and the jurisdictional allocation of water (as between the provinces or the federal government) in *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at paras 533-558. Whether water was allocated to being under the control and power of the provinces or federal government depended on the terms of union by which each province came into the federation. See also Curran, "Water Law as a Watershed Endeavour" *supra* note 90 at 61.

their lands.⁹² This power flows from the fact that the federal government has the constitutional responsibility for First Nations reserves due to section 91(24) of the *Constitution Act*, which enunciates that it is charged with managing “Indians and lands reserved for Indians.”⁹³ The *Indian Act* is the primary document that sets out the interaction between the federal government and First Nations reserve communities in Canada. In practice, this means that federal government politicians and civil servants conduct the decision-making and policy development over reserve and reserve lands (including waters and drinking water).⁹⁴

Therefore, the provincial governments have power over all non-Indigenous Crown lands and waters. The provinces also regulate drinking water and they assume that the federal government should provide drinking water to First Nations communities as per section 91(24).⁹⁵ Therefore, the federal government has acted in a scoped role in drinking water management in Canada in terms of its responsibility for First Nations.⁹⁶ Further complicating the legal uncertainty of Indigenous water governance is the fact that often First Nations, such as Halalt, claim ownership of the water on or under their reserves.⁹⁷

The provincial Crown continues to assert ownership over water resources, which, for example, was explicitly stated in the prior British Columbia *Water Act* and is stated in section 5(1) of British Columbia’s new *Water Sustainability Act*.⁹⁸ In Western (Canadian)

⁹² *Indian Act*, RSC, 1985 c I-5.

⁹³ *Constitution Act, 1867*, *supra* note 86; *Constitution Act, 1982*, *supra* note 5.

⁹⁴ Centre for Indigenous Environmental Resources, “Restoring the Lifeblood: Water, First Nations and Opportunities for Change” by Merrell-Ann Phare (Toronto: July 13, 2011) at 1-2 [Phare, “Restoring the Lifeblood”].

⁹⁵ *Ibid*; Tonina Simeone, *supra* note 37 at 1.

⁹⁶ Curran, “Water Law as a Watershed Endeavour” *supra* note 90 at 61.

⁹⁷ *Ibid*. As Curran points out in “Water as a Watershed Endeavour” the law regarding ownership and entitlement of water on and under Indian Reserves is unsettled in Canada. See also *obiter* in *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at paras 512-562.

⁹⁸ *Water Protection Act*, RSBC 1996, c 484 s 3(2): “The property in and the right to the use, percolation and any flow of ground water, wherever ground water is found in British Columbia, are for all purposes vested in the government and are conclusively deemed to have always been vested in the government.” Note, section 3 of the BC *Water Act*, RSBC 1996 c 483 was repealed in 2014. See also *Water Sustainability Act*, SBC (2014) c 15, s 5(1)-(2): “The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except insofar as private rights have been established under authorizations”; “The property in and the right to the use, percolation and flow of groundwater, wherever groundwater is found in British Columbia, are for all purposes vested in the government and are conclusively deemed to have always been vested in the government except insofar as

water law, the Crown pronounces its ownership of waters in its jurisdiction and then grants licenses for the beneficial use of the water in a specified volume to land owners or entities operating hydroelectric facilities or mines.⁹⁹

This creates a situation where First Nations communities are often downstream from various provincially regulated municipalities and industries.¹⁰⁰ These institutions and their processes can and do alter the quality and quantity of water by the time it reaches reserves in Canada.¹⁰¹ Because the provincial government regulates these waters and provides their water permits and conditions therein, the federal government has little power to regulate quality and quantity of water flowing into reserves that is ultimately used for First Nations drinking water supply.¹⁰²

What this means in practice is that First Nations communities are often left out of the decision-making and planning process for projects for which provincial authorization is being sought upstream that may affect their waters.¹⁰³ This lack of consultation with First Nations communities stands in stark contrast to the legal requirement to consult and accommodate First Nations where the Crown is contemplating a project where a constitutionally protected Aboriginal right such as fishing is involved.¹⁰⁴

private rights have been (a) established under authorizations, or (b) deemed under section 22 (8) [*precedence of rights*].” Also note the High Court of Australia’s decision in *Yanner v Eaton* [1999] HCA 53, where the court considered the nature or property and whether it meant complete ownership or a degree less than that such as a right to manage said property. Here, the court clarified that the term “property” does not necessarily denote full, beneficial, or legal ownership, but that something deemed as “property” equates to a legal *relationship* with an object as well as the right to exercise some kind of power over it. “Property” is variable and can have multiple degrees of intensity.

⁹⁹ Oliver Brandes and Deborah Curran, “Changing Currents: A Case Study in the Evolution of Water Law in Western Canada” in S Renzetti and DP Dupont (eds), *Water Policy and Governance in Canada, Global Issues in Water Policy 17* (Switzerland: Springer International Publishing, 2017) at 53 [Brandes & Curran, “Changing Currents”].

¹⁰⁰ Polaris, “Boiling Point” *supra* note 25.

¹⁰¹ *Ibid.*

¹⁰² See Indian and Northern Affairs Canada, “National Assessment of Water and Wastewater Systems in First Nations Communities: Summary Report” (2003) at 18 online: <<https://perma.cc/U2CG-BN5T>> [INAC 2003 Assessment].

¹⁰³ Constance MacIntosh, “Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves” (2007) 39 *Ottawa L Rev* 63 at 81 [MacIntosh, “Testing the Waters”].

¹⁰⁴ *Ibid.*

This results in a situation where if fish are poisoned by an upstream industrial activity, consultation is constitutionally required for an Aboriginal community with an alleged or proven right to fish.¹⁰⁵ However, if the company's activity only affects the quality of water within legal limits, this would not trigger the duty to consult, regardless of whether the diminished physical properties (e.g. foul taste or smell) may place additional demand on a reserve's water treatment facility and purification processes.¹⁰⁶

The absence of an (Aboriginal) right to clean water or legislation forcing recognition of "non-constitutional interests off-reserve" leaves First Nations communities with only reactive legal remedies such as damages or injunction for proven harms of water contamination.¹⁰⁷ The separation of water and drinking water management as divided between the provinces and the federal government creates a siloed and fractured experience for First Nations. The provincial Crown is legislating and managing waters in their watershed, but the federal government is responsible for the drinking water on reserves geographically scattered within the provincial watershed.

The federal approach to closing this legislative gap provides another illustration of lack of Indigenous control over Indigenous waters. The most recent federal government legislated solution to poor drinking water on First Nations reserves has been to enact the *Safe Drinking Water for First Nations Act (SDWFNA)*, which passed as law on June 19, 2013 and came into force on November 1, 2013.¹⁰⁸ Parliament brought this legislation first through Bill S-11,¹⁰⁹ and its revised version Bill S-8 and followed the *Expert Panel on Safe Drinking Water for First Nations'* recommendation to create a federal law to improve the quality of drinking water on reserves.¹¹⁰

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Safe Drinking Water for First Nations Act*, *supra* note 50.

¹⁰⁹ Bill S-11, *supra* note 50. Bill S-11 was proposed in the Senate on May 26, 2010. It received second reading and then was referred to the Standing Senate Committee on Aboriginal Peoples. Bill S-11 died on the Order Paper in the Standing Senate Committee on Aboriginal Peoples when the 40th Parliament was dissolved. See also Aboriginal Affairs and Northern Development Canada, "Chronology – Water" *supra* note 58.

¹¹⁰ Indigenous and Northern Affairs Canada, "Frequently Asked Questions - *Safe Drinking Water for First Nations Act*", online: <<https://perma.cc/HCC7-ACSY>> [INAC, "FAQ"]; INAC, "Water in First Nation communities online: <<http://www.aadnc-aandc.gc.ca/eng/1100100034879/1100100034883>> [INAC, "Water in First Nation communities"].

The purpose of the Act was to create legally binding and enforceable standards for First Nations reserves similar to what the provinces and territories in Canada are afforded, as there had been only unenforceable federal guidelines and policies up to this point.¹¹¹ The Act includes regulations to ensure clean and safe drinking water including monitoring and testing, the effective treatment of wastewater, training of water system operators, and the protection of sources of drinking water on First Nations lands.¹¹² While the federal government passed the *Act* a number of years ago, it is still working on developing its regulations. INAC is currently holding various engagement sessions with First Nations communities, technical groups, and First Nations' national and regional representative organizations.¹¹³

While there was broad consensus among Indigenous leaders that the absence of a regulatory framework has resulted in serious problems,¹¹⁴ Indigenous peoples widely criticized both proposed versions of the *SDWFNA* (Bill S-11 and Bill S-8)¹¹⁵ as discussed below. Not only has the Act not solved the legislative gap, as the government has still not created regulations for it, but it has caused tension in federal-Indigenous relations due to the approach the government has taken by which to implement it (without Indigenous consultation).¹¹⁶

The Assembly of First Nations (AFN) passed a resolution stating that Bill S-11 infringed on Indigenous peoples' inherent jurisdiction (i.e. customary laws and legal orders, their right to self-govern, which is protected under s. 35 of the Constitution), as

¹¹¹INAC, "*Safe Drinking Water for First Nations Act*. Engagement 2017" online: <<http://www.aadnc-aandc.gc.ca/eng/1496056786210/1496056888386>> [INAC, "*Safe Drinking Water for First Nations Act*. Engagement 2017"].

¹¹² INAC, "*Safe Drinking Water for First Nations Act*" online: <<https://www.aadnc-aandc.gc.ca/eng/1330528512623/1330528554327>>.

¹¹³ INAC, "*Safe Drinking Water for First Nations Act*. Engagement 2017" *supra* note 111.

¹¹⁴ Simeone, "Safe Drinking Water in First Nations Communities" *supra* note 27 at 6.

¹¹⁵ Bill S-11, *supra* note 50; Bill S-8, *supra* note 50.

¹¹⁶ AFN Annual General Assembly 2017, *supra* note 51 at Resolution 26/2017 paras E-K. Resolution 26/2017 explained that Indigenous peoples widely criticized the *Safe Drinking Water for First Nations Act (SDWFNA)* for "lack of meaningful engagement and consultation with First Nations as well as insufficient resources to enable First Nations to comply or implement the regulations." (at para E). Furthermore, Resolution 26/2017 added that the "current federal government's approach to engagement on the review of the *SDWFNA* clearly lacks meaningful engagement with First Nations and is not in compliance with First Nations inherent and Treaty rights and the UN Declaration." (at para K).

well as the *United Nations Declaration of Rights of Indigenous Peoples (UNDRIP)*.¹¹⁷ First Nations also complained that, in the development of the older Bill S-11, the government failed to satisfy its constitutional duty to consult and accommodate First Nations.¹¹⁸ During the engagement session that the government held in 2009, several First Nations expressed concern for the proposed legislation having water standards regulations without funding and capacity.¹¹⁹ They said that the *Act* has the potential to put drinking water in First Nations communities at increased risk due to compliance costs for monitoring and reporting as well as any potential financial penalties for failing to comply.¹²⁰

The AFN General Assembly has called for the federal government to repeal the *SDWFNA* multiple times.¹²¹ Furthermore, the AFN's Resolution 26/2017 calls for the current (2017) engagement consultation sessions to be terminated in favour of the federal government working directly with First Nations communities to develop the next steps in joint partnership.¹²² The AFN sees the government's engagement approach to review the *SDWFNA* as not meaningfully engaging with First Nations nor is it compliant with First Nations inherent and treaty rights.¹²³

The AFN also continues to have concerns about the liability that the federal government transferred to First Nations through the *Act*. The AFN is concerned that the *Act*'s provisions are an attempt to rid the moral and legal responsibilities the federal government has for providing First Nations safe drinking water.¹²⁴ The AFN stated that the *Act* enables the "Crown to escape liability from injury and death from unsafe drinking water in First Nations communities."¹²⁵ Without adequate funding and capacity, First Nations are concerned that they will not be able to take on such liability.

¹¹⁷ Assembly of First Nations, Special Chiefs Assembly, (December 2017) Resolution 58/2010 online: <<http://www.afn.ca/uploads/files/water/10-12-14.pdf>> [Special Chiefs Assembly, 2010].

¹¹⁸ *Ibid.*

¹¹⁹ Simeone and Troniak, "Bill S-8" *supra* note 47 at 11.

¹²⁰ *Ibid.*

¹²¹ Assembly of First Nations Annual General Assembly 2017, *supra* note 51 at Resolution 26/2017. See also Assembly of First Nations 2015 Special Chiefs Assembly – Gatineau, QC, Final Resolutions, Resolution 76/2015: Safe Drinking Water for First Nations, online: <<https://www.afn.ca/uploads/files/resolutions/res-sca-2015.pdf>> [AFN Resolution 76/2015].

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

Similar to the discussion above, there have been concerns since the *Act's* inception in the form of Bill S-8 and its predecessor, Bill S-11. A number of First Nations and First Nations organizations have criticized Bill S-8 and asserted substantial resistance to Bill S-11.¹²⁶ The AFN stated that Bill S-11 would not guarantee access to safe drinking water and that many First Nations do not have the necessary capacity, resources, or infrastructure to adapt to any imposed liabilities that may be associated with the legislation.¹²⁷ The 2006 Report of the *Expert Panel on Safe Drinking Water for First Nations* was clear that federal funding must coincide with transfers of regulatory standards from the federal government to First Nations in order for their communities to have the proper capacity to ensure safe drinking water.¹²⁸ In 2017, along with Resolution 26/2017 regarding the *SDWFNA*, the AFN passed a second Resolution advocating for Access to Federal Funding for Safe Drinking Water, which underscores its continued concerns for financial capacity.¹²⁹

As one can see, there are challenges for Indigenous water governance with the current fragmented colonial legislated jurisdiction of water governance in Canada. Therefore, an analysis of the opportunities for Indigenous water governance (and their corresponding challenges) within the Canadian common law court-based regime follows.

1.3: Aboriginal Rights and Title

The Supreme Court of Canada has not made a decision on Aboriginal water rights in Canada. Water rights are absent from the Supreme Court's definition of Aboriginal title.¹³⁰ Furthermore, governments in Canada have legislated their assertion of

¹²⁶ Simeone and Troniak, "Bill S-8" *supra* note 47 at 11; See also Ecojustice Canada, "Waterproof 3: Canada's Drinking Water Report Card" (November 2011) Randy Christensen at 29 online: <https://www.ecojustice.ca/wp-content/uploads/2014/11/Waterproof_Essentials_web_corrected_Dec_8.pdf>.

¹²⁷ Special Chiefs Assembly, 2010, *supra* note 117.

¹²⁸ Indian and Northern Affairs Canada, *Report of the Expert Panel on Safe Drinking Water for First Nations*, by the Expert Panel on Safe Drinking Water for First Nations, (Ottawa: 2006) at 60 online: <<http://publications.gc.ca/site/eng/298371/publication.html>> [*Expert Panel Report*].

¹²⁹ AFN Annual General Assembly 2017, *supra* note 51.

¹³⁰ Phare, *Denying the Source*, *supra* note 26. This situation contrasts with that of the United States, which over a century ago in 1908, established the *Winters* legal doctrine that acknowledged "Indian water rights" as incidental to land rights during reservation creation (*Winters v United States* 207 US 564 (1908) [*Winters*]). Principles similar to this case were

water ownership within their boundaries.¹³¹ Therefore, licences and permits are required and provided to “use” water.¹³² That said, Canadian colonial courts have recognized many rights to Aboriginal peoples, which are related to water such as the right to fish, hunt, trap, and use the “products” in streams, rivers, and forests.¹³³

In the Canadian context, there is a collage of designations for Indigenous lands including: historic treaties, modern treaties (comprehensive land claims settlements); First Nations reserves; and areas with no treaty that have outstanding First Nations’ land claims. Where there is no treaty, such as with the case of Halalt First Nation, the Supreme Court of Canada has acknowledged that Aboriginal rights and title were not extinguished when the *Constitution* of Canada was passed in 1982. Therefore, Indigenous peoples have ongoing claims for lands and waters that they are negotiating and disputing in Canada.

Section 35(1) of the Canadian *Constitution*, 1982 recognizes and affirms existing Aboriginal and treaty rights.¹³⁴ The test for whether an Aboriginal right exists is laid out in

acknowledged by the trial judge in *Halalt v BC*, however, there has been no acceptance of a *Winters*-type doctrine in Canada. (See e.g. *Halalt v BC* where Justice Wedge stated that “Halalt has an arguable case that [sic] the groundwater in the Aquifer was conveyed to the federal Crown in order to fulfill the objects for which the reserve lands were set aside.” *Halalt v BC*, 2011 BCSC 945 *supra* note 6 at para 561) See also *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 9 [*Tsilhqot’in*] where the SCC acknowledged for the first time Aboriginal title to specific lands, that the SCC acknowledges that the Plaintiffs specifically excluded beds and bodies of water and private land from their claim.

¹³¹ Phare, *Denying the Source*, *supra* note 26 at 1.

¹³² *Ibid.*

¹³³ From the 1970s to the present day, there have been various seminal court cases that have enunciated Aboriginal rights and title (as seen through the Western colonial Canadian state regime). Some of the foundational cases and principles include: the acknowledgment that Aboriginal title to land was present at the time of the *Royal Proclamation*, *supra* note 69 (*Calder et al supra* note 69) and this title remains in existence today (*Delgamuukw v R*, *supra* note 5); the acknowledgment of Aboriginal title for specific lands (*Tsilhqot’in*, *supra* note 130); the creation of a test to determine if an Aboriginal right exists and in what circumstances in which it is justified to be infringed upon (*R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*]; *R v Van der Peet* [1996] 2 SCR 507 [*Van der Peet*]). The SCC in *Van der Peet* at para 44 enunciated that an Aboriginal right must be a practice that has been integral to the distinctive nature of the culture prior to European contact. See *R v Lewis*, [1996] 1 SCR 921 [[1996] 3 CNLR 131] and *R v Nikal*, [1996] 1 SCR 1013 [[1996] 3 CNLR 178 for Supreme Court ruling on *Indian Act* Bylaws as being unable to regulate fisheries. See also: *R v Badger*, [1996] 1 SCR 771; *R v Marshall*, [1999] 3 SCR 456 [*Marshall*]; *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 (right for Métis to hunt); *Haida*, *supra* note 5, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550, and *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, (*sub nom Rio Tinto Alcon Inc v Carrier Sekani Tribal Council*) [2010] 2 SCR 650 [*Rio Tinto*] enunciated the requirement for the duty to consult and accommodate.

¹³⁴ *The Constitution Act*, 1982, *supra* note 5.

R v Sparrow, which also sets out the assessment of whether and in what circumstances a government can justify infringement of that right.¹³⁵ The *Sparrow* test is the framework used by judges to determine whether there is an infringement and whether such an infringement is lawful.¹³⁶ The multi-part test asks 1) whether there is an aboriginal right, 2) whether or not it has been extinguished, and 3) if it has not been extinguished, can the claimant (First Nation) demonstrate an infringement?¹³⁷ 4) If there is an infringement, the next step is to determine if the government can justify it?¹³⁸

The Supreme Court of Canada elaborated on the *Sparrow* infringement test in its decision in *Tsilhqot'in Nation v British Columbia*.¹³⁹ In order to justify infringements to Aboriginal title based on public interest, the government must demonstrate that:

- 1) it discharged its procedural duty to consult and accommodate;
- 2) its actions were backed by a compelling and substantial objective; and
- 3) the governmental action is consistent with the Crown's fiduciary obligation to the group.¹⁴⁰

However, even before an Aboriginal group initiates litigation, *Haida Nation v British Columbia* provides a framework for discussions between the Crown and the Aboriginal group concerning s. 35 rights that might be implicated by a potential Crown decision.¹⁴¹ The *Haida* assessment requires the Crown to consider Aboriginal rights *before* it makes final decisions that may negatively affect s. 35 rights.¹⁴²

The legal doctrine of the duty to consult and accommodate is enunciated through *Haida Nation v British Columbia* and more recently in *Rio Tinto Alcon Inc v Carrier Sekani Tribal Council*.¹⁴³ These cases set out the framework for judicial assessment of

¹³⁵ *Sparrow*, *supra* note 133.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Tsilhqot'in*, *supra* note 5.

¹⁴⁰ *Ibid* at para 77.

¹⁴¹ Jack Woodward QC, *Native Law*, (Toronto: Carswell, 1989) (loose-leaf revision 2018) chapter 5 ss 1240 [Woodward].

¹⁴² *Ibid.*

¹⁴³ *Haida*, *supra* note 5; see also *Rio Tinto*, *supra* note 133.

the Crown's constitutional duties for all pre-proof claims of Aboriginal title and rights.¹⁴⁴ The purpose of the duty to consult is reconciliation between the Crown and the Aboriginal peoples of Canada¹⁴⁵ and it is rooted in the Honour of the Crown.¹⁴⁶ The duty to consult is meant to oblige the Crown and First Nations to enter into conversations regarding the protection of s. 35 Aboriginal rights and the Crown's other interests.¹⁴⁷ It is both a legal and constitutional duty,¹⁴⁸ and it is intended to preserve resources for future Aboriginal generations.¹⁴⁹ The duty to consult and accommodate arises when the Crown knows or ought to know that Aboriginal rights may be present,¹⁵⁰ which in BC, is essentially anywhere on the land or waters. The duty to consult also arises when the Crown is contemplating conduct that may adversely affect those rights.¹⁵¹

The content of the Crown's duty to consult is dependent on the circumstances. First, the duty is proportionate to a preliminary assessment of the strength of the Aboriginal claim to title or rights, and the seriousness of the potential adverse impact on the title or right claimed.¹⁵² The depth for the duty to consult and accommodate lies on a spectrum.¹⁵³ The duty can lie either at the low end of the spectrum where a claim to Aboriginal title or rights is weak and the potential for infringement is minor or at the high end where there is a strong *prima facie* claim and there is a significant risk for non-compensable damage.¹⁵⁴ The latter case would require deep consultation.¹⁵⁵ In the last few years, the Supreme Court of Canada and Federal Court of Appeal have produced important decisions regarding the duty to consult such as *Gitxaala Nation v*

¹⁴⁴ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 54 citing *Haida*.

¹⁴⁵ *Haida*, *supra* note 5 at para 14.

¹⁴⁶ *Rio Tinto*, *supra* note 133 at para 32; *Haida*, *supra* note 5 at para 20.

¹⁴⁷ *Delgamuukw*, *supra* note 5 at 186. See also: Woodward, *supra* note 139 at ss 1190. The duty to consult and accommodate comes from the Crown's requirement to achieve a fair "settlement of Aboriginal claims through the treaty process". Therefore, while treaty claims' negotiations are occurring, there is an implied duty to consult with "Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation" (*Rio Tinto*, *supra* note 133 at para 32; *Haida*, *supra* note 5 at para 20).

¹⁴⁸ *Rio Tinto*, *supra* note 133 at 34.

¹⁴⁹ Woodward, *supra* note 139 at ss 1995 citing *Rio Tinto*, *supra* note 133 at paras 33-34, 41, 50, 53 and 83.

¹⁵⁰ *Haida*, *supra* note 5 at para 35; *Rio Tinto*, *supra* note 133 at para 31.

¹⁵¹ *Rio Tinto*, *supra* note 133 at para 31.

¹⁵² *Haida*, *supra* note 5 at para 39.

¹⁵³ *Ibid* at para 43.

¹⁵⁴ *Ibid* at paras 43-44.

¹⁵⁵ *Ibid* at para 44.

Canada (2016),¹⁵⁶ *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, (2017),¹⁵⁷ and *Tsleil-Waututh Nation v Canada (Attorney General)* (2018).¹⁵⁸ While these cases have elaborated on the procedural details of which governmental body can and must discharge the duty to consult and accommodate, the duty to consult largely remains a procedural right that rarely has substantive outcomes. While provincial Crowns in Canada claim they are upholding this responsibility, many First Nations assert that *meaningful* consultations are not taking place.¹⁵⁹ Nevertheless, beyond wanting mere consultation, Indigenous peoples want to hold a central role in decision-making on their lands and regarding their watersheds.¹⁶⁰ The problems with the duty to consult also illustrate weaknesses of section 35 as well.¹⁶¹ The colonial construct of “rights” concentrates too narrowly on the ability to access water for sustenance rather than considering Indigenous water in a modern context.¹⁶² Instead, scholars of Indigenous

¹⁵⁶ *Gitxaala Nation v Canada*, [2016] 4 FCR 418, 2016 FCA 187. In this case, because the federal government did not properly fulfill the duty to consult it owed to Aboriginal peoples affected by the proposed Northern Gateway Project, the Federal Court of Appeal quashed the Governor in Council Order that directed the National Energy Board to issue Certificates of Public Convenience and Necessity to Northern Gateway (See: Sharon Mascher, “Note to Canada on the Northern Gateway Project: This is NOT What Deep Consultation With Aboriginal People Looks Like” (12 August 2016) *ABlawg.ca* (blog) online: <<https://ablawg.ca/2016/08/12/northern-gateway-deep-consultation-with-aboriginal-people/>>).

¹⁵⁷ *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, [2017] 1 SCR 1069, 2017 SCC 40.

¹⁵⁸ *Tsleil-Waututh Nation v Canada (Attorney General)* 2018 FCA 153.

¹⁵⁹ British Columbia First Nations Summit, “*Water Sustainability Act* Legislative Proposal Comments to the Ministry of the Environment Government of British Columbia” (Vancouver: December 2013); The Union of British Columbia Indian Chiefs. Union of British Columbia Indian Chiefs, “April 2010 UBCIC Submission to British Columbia Ministry of Environment Water Stewardship Division’s *Water Act* Modernization Initiative”, online: <https://www.ubcic.bc.ca/april_c7skecx4cgegqkwkassx9lz908>; and Suzanne von der Porten and Rob C de Loë, “Water governance and Indigenous governance: towards a synthesis” (2013) 23 *Indigenous Policy J* at 1-12 [von der Porten and de Loë, “Water governance and Indigenous governance”].

¹⁶⁰ *Ibid* von der Porten and de Loë, “Water governance and Indigenous governance” at 1-12; Phare, *Denying the Source*, *supra* note 26.

¹⁶¹ For critical discussions that detail the weaknesses of the duty to consult See Kathryn H Garvie, Lane Lowe, & Karena Shaw, “Shale Gas Development in Fort Nelson First Nation Territory: Potential Regional Impacts of the LNG Boom” (Winter 2014/2015) 184 *BC Studies* at 45-51, 53-61, and 63-72; Kathryn H Garvie & Karena Shaw “Oil and gas Consultation and Shale Gas Development in British Columbia” (2014) 184 *BC Studies* at 73-102; and Dwight G Newman, *Revisiting the Duty to Consult with Aboriginal Peoples* (Saskatoon: Purich Publishing Limited: 2014); Dwight Newman, “Why the duty to consult may be harming aboriginal communities”, *The Globe and Mail* (6 May 2014), online: <<https://www.theglobeandmail.com/opinion/why-the-duty-to-consult-may-be-harming-aboriginal-communities/article18482956/>>. (Dwight Newman is a non-Indigenous professor of Law at the University of Saskatchewan and a leader in duty to consult research.)

¹⁶² John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Jeff Corntassel, “Toward sustainable self-determination: rethinking the contemporary Indigenous-rights discourse” (2008) 33:105 *Alternatives: Global, Local, Political* at 105-132 [Corntassel, “Toward

governance advocate for self-determination and protections over traditional practices and identity, which would require a basis to water governance that is more than what the Aboriginal rights framework can provide.¹⁶³

Although there is no specific colonial common law Aboriginal right to water, various lawyers and Indigenous peoples assert that there should be. There are two different rights-based reasons that give Indigenous peoples legal power over their water resources. First, Indigenous communities had rich and diverse cultures and governance structures which preceded European arrival.¹⁶⁴ These governance structures included systems to manage land and waters. This equates to Indigenous peoples having “inherent rights” to manage their waters.¹⁶⁵ Second, the courts have recognized various Aboriginal rights that are tangential to water rights. For example, as water governance expert, Merrell-Ann Phare states: “[v]arious courts have recognized rights to engage in a broad range of “practices, customs and traditions,” including rights to hunt, fish, trap and gather and to engage in ceremonial, cultural and spiritual activities.”¹⁶⁶ Yet Canada continues to assert its sovereignty as the vested owner of the waters in Canada.

As I will demonstrate throughout this thesis, Indigenous nations in Canada strongly contest this Crown asserted ownership of water, especially in British Columbia where most of the lands and waters are unceded (meaning that Indigenous peoples did not give them up to the Crown in the form of treaties).¹⁶⁷

There is a siloed provincial and federal approach to drinking water that fragments drinking water management for First Nations. In addition, there is no recognized Aboriginal right to water in and of itself. Therefore, First Nations are relegated to the tools of the duty to consult and accommodate to (indirectly) protect their waters. This

Sustainable Self-Determination”]; D Schreiber, “First Nations, consultation, and the rule of law: salmon farming and colonialism in British Columbia” (2006) 30 *Am Indian Cult Res J* at 19-40; M Somerville “Developing relational understandings of water through collaboration with Indigenous knowledges” (2014) 1 *Wiley Interdiscip Rev Water* at 401-411.

¹⁶³ Michele-Lee Moore, Suzanne von der Porten, & Heather Castleden, “Consultation is not consent: hydraulic fracturing and water governance on Indigenous lands in Canada” (January/February 2017) 4 *WIREs Water*, Wiley Periodicals Inc at 5 [Moore et al, “Consultation is not Consent”].

¹⁶⁴ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto, ON: University of Toronto, 2002).

¹⁶⁵ Phare, *Denying the Source*, *supra* note 26 at 36 & 46.

¹⁶⁶ *Ibid* at 40.

¹⁶⁷ Brandes and Curran, “Changing Currents” *supra* note 99 at 58.

combination of factors adds up to a system that stymies Indigenous water sovereignty in Canada.

1.4: Decolonial Analyses of Indigenous Water Governance

This section describes and explains the importance of a decolonial analysis of Indigenous water governance and illustrates the ways in which I am making an academic contribution to this field. There are a growing number of authors that are connecting historical and current colonial realities both in the realms of Indigenous water governance generally as well as drinking water on reserves.¹⁶⁸ These authors realize that Indigenous drinking water problems in Canada are a product of social and political issues rather than physical or technical problems. The need to analyse Indigenous water governance from the broader socio-cultural context arose because despite decades of funding and policies, First Nations drinking water problems persist. When one starts to analyse the subject through a decolonial lens, insights into why the issues continue emerge where they have not appeared in previous technical or policy-based analyses.

The most important aspect to note here is the social and institutional inequality of First Nations drinking water accessibility in Canada. By this, I mean that there is unequal access to safe drinking water for First Nations as compared to non-Indigenous Canadians, which equates to a two-tiered system.¹⁶⁹ This is not just in the realm of physiological health. It also relates to the cultural, social, and spiritual well-being of Indigenous peoples.¹⁷⁰ Valine Crist characterized the jeopardization of Indigenous

¹⁶⁸ For an excellent synthesis of the reasons that problems persist for First Nations water issues despite various funding provisions and increased awareness of the issues, see Basdeo & Bharadwaj, “Beyond Physical” *supra* note 6; Crist, *Life’s Essential*, *supra* note 20; Danika Littlechild, “Transformation and Re-Formation: First Nations and Water in Canada” (2014) Master of Laws Thesis, University of Victoria, Victoria, BC [Littlechild, “Transformation and Re-Formation”]; Deborah McGregor, “Anishinabe-Kwe, Traditional Knowledge, and Water Protection” (Winter/Spring 2008) *Canadian Woman Studies* at 26-30 [“Anishinabe-Kwe, Traditional Knowledge, and Water Protection”]; Phare, *Denying the Source*, *supra* note 26; Phare, “Restoring the Lifeblood”, *supra* note 94; Suzanne von der Porten, *Collaborative Environmental Governance and Indigenous Governance: A Synthesis* (PhD Thesis, University of Waterloo, 2013) [von der Porten, *Collaborative Environmental Governance*].

¹⁶⁹ Crist, “Life’s Essential” *supra* note 20.

¹⁷⁰ Robin Gregory and William Trousdale “Compensating aboriginal cultural losses: An alternative approach to assessing environmental damages” (2009) 90 *Journal of Environmental Management* at 2469-2479.

peoples' physical, spiritual, and cultural health as an example of structural violence.¹⁷¹ Such wide-ranging effects of drinking water issues bring forth concerns of “equity, justice, and institutional trends.”¹⁷² Quality of life will continue to suffer until Indigenous communities are able to obtain sufficient water resources.¹⁷³

Part of the problem with how Indigenous water is managed in Canada is the fact that Indigenous and non-Indigenous peoples in Canada have divergent worldviews on the subject.¹⁷⁴ On the one hand, the Canadian state has been founded on a European expansionist worldview where natural resources are meant to be developed to serve human purposes.¹⁷⁵ This is the dominant worldview and continues to provide the underlying assumption and value for resource development (and the consequent uses and effects on waters on Crown lands) in Canada.¹⁷⁶

On the other hand, the arrival of the European settlers brought colonial Eurocentric worldviews based on scientific knowledge. In time, the imposition through force and coercion of these worldviews has become at least partially to blame for resource management conflicts between Euro-Canadian and Indigenous interests.¹⁷⁷ Furthermore, Canada's approach to colonization, using policies and legislation that privilege Western scientific knowledge in order to assimilate First Nations, has led Indigenous worldviews to be disrespected and devalued.¹⁷⁸ Assuming Western colonial

¹⁷¹ Crist, “Life's Essential” *supra* note 20 at 29, 35 & 36. Crist goes on to state that the inequalities and structural violence found within the realm of water management is but one representation of poor quality of life for Indigenous peoples and speaks loudly of the necessity to break down the colonial relationships so that all peoples living in Canada can be treated fairly and ethically.

¹⁷² *Ibid.*

¹⁷³ Norris Hundley Jr, “The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle” (1978) 9:4 *The Western Historical Quarterly* at 456.

¹⁷⁴ Phare, *Denying the Source*, *supra* note 26 at 73. Phare astutely points out that she does not intend to state that either all Indigenous or non-Indigenous peoples subscribe to worldviews that are either spiritual or spiritless, respectively, nor is there agreement “that the assumptions underlying these worldviews are correct and held by all members of the respective societies.” Furthermore, even if a person subscribes to certain stewardship beliefs does not mean that the person will constantly adhere to them.

¹⁷⁵ Basdeo & Bharadwaj, “Beyond Physical” *supra* note 6 at 4.

¹⁷⁶ Karen Bakker & Christina Cook, “Water Governance in Canada: Innovation and Fragmentation” (2011) 27(2) *Water Resources Development* at 275-289.

¹⁷⁷ Basdeo & Bharadwaj, “Beyond Physical” *supra* note 6 at 7.

¹⁷⁸ Heather Castleden, Catherine Hart, Ashlee Cunsolo, Sherilee Harper, & Debbie Martin, “Reconciliation and Relationality in Water Research and Management in Canada: Implementing Indigenous Ontologies, Epistemologies, and Methodologies” in Steven Renzetti and Diane P Dupont, (eds), *Water Policy and Governance in Canada, Global Issues in Water Policy* 17 (Switzerland: Springer International Publishing, 2017) at 73-74 citing Phare, *Denying the Source*,

worldviews should be advanced, threatens Indigenous worldviews and may consequently prevent models of sustainable governance that may lead Canada to ecological, social, and cultural sustainability in terms of respect and protection of water for all Canadians.¹⁷⁹ The problem of the imposition of Eurocentric worldviews is discussed further in Chapter 2.

Furthermore, various Indigenous authors characterize worldviews of water as lifeblood,¹⁸⁰ sacred,¹⁸¹ incapable of being owned,¹⁸² and interconnected to humans, plants, and animals.¹⁸³ Indigenous peoples' place-based spiritual relationship to their specific lands and waters leads to respect for and principles of reciprocity and responsibilities to care for their environment.¹⁸⁴ Therefore, when an Indigenous community's "place" is destroyed in the form of water contamination, diversion, degradation, or destruction, usually due to government or industry development, this has extensive consequences for First Nations.¹⁸⁵

Some water governance experts believe that these non-physical attributes attract less attention due to the difficulty in quantifying cultural and spiritual impacts.¹⁸⁶ The effects of drinking water contamination, as well as water diversion, destruction, degradation of water sources, include invaluable losses to traditional knowledge, cultural identity, and Indigenous ways of life.¹⁸⁷ There is a perception that exists that both Canada and Canadians do not care much about First Nations drinking water issues and

supra note 26 [Castleden et al, "Reconciliation and Relationality"]. Furthermore, colonial policies have also led to various other social and health issues which exacerbate the disparities in the social and cultural health of Indigenous and non-Indigenous peoples in Canada. These issues include low education and employment rates, obesity, substance abuse, violence including domestic and sexual abuse, high suicide rates, and waterborne illnesses and other infectious diseases such as tuberculosis. See Naomi Adelson, "The Embodiment of Inequity: Health Disparities in Aboriginal Canada" (March-April 2005) 96 Supplement 2 *Canadian Journal of Public Health* at 45-61.

¹⁷⁹ Phare, Denying the Source, *supra* note 26 at 74.

¹⁸⁰ Phare, "Restoring the Lifeblood" *supra* note 94.

¹⁸¹ *Ibid* at 3.

¹⁸² *Ibid* at 1.

¹⁸³ *Ibid* at 72. One must of course keep in mind that there is no single pan-Indigenous worldview on water.

¹⁸⁴ *Ibid* at 71-72.

¹⁸⁵ Littlechild, "Transformation and Re-Formation" *supra* note 166 at 6.

¹⁸⁶ Turner et al, "From Invisibility to Transparency" *supra* note 86.

¹⁸⁷ See Basdeo & Bharadwaj, "Beyond Physical" *supra* note 6 at 3-4 for their comments about cultural harms from drinking water contamination and Littlechild, "Transformation and Re-Formation" *supra* note 168 at 6 for her comments about cultural losses regarding water governance.

other social conditions given the disproportionate media and government attention paid to non-Indigenous issues.¹⁸⁸ Certainly, discussion and analysis regarding these socio-cultural water issues has been limited.¹⁸⁹

The stark differences in Indigenous and non-Indigenous worldviews equates to a clash in the ways non-Indigenous colonial legal systems operate and how Indigenous peoples wish to govern the waters on reserve and in their traditional territories. First Nations water accessibility issues provide a crisp example illustrating the ongoing ingrained colonial relationship between Indigenous peoples and the power structures that continue marginalizing them.¹⁹⁰ In the water realm, this then threatens the health and well-being of Indigenous peoples.¹⁹¹ Poor First Nations' drinking water is a symptom of the larger project of colonialism in terms of the federal and provincial Crowns controlling Indigenous water management and First Nations physically and culturally suffering from the effects of water contamination of drinking water and degradation of sources of water surrounding reserves. As Crist states: “[i]n establishing power and authority over Indigenous peoples, the [federal] government continues to maintain inequalities through a vicious pattern originating from the [explicitly] colonial period.”¹⁹²

Indeed, there is much written about the disparities between Indigenous and non-Indigenous peoples as being linked to the colonial paternal relationship between the Canadian state and Indigenous peoples.¹⁹³ One cannot comprehensively deliberate upon any social problem in Indigenous communities without addressing the historical and enduring effects of colonization.¹⁹⁴ However, while an understanding of historical and current impacts of colonialism in Canada appears central and necessary, such discussions are often absent from resource management decision-making as well as federal and provincial policy development.¹⁹⁵

¹⁸⁸ Maura Hanrahan, “Water Rights and Wrongs” (2003) 29:1 *Alternatives Journal* at 31-34 and Robert J Patrick, “Uneven access to safe drinking water for First Nations in Canada: connecting health and place through source water protection” (2011) 17 *Health & Place* at 386-389.

¹⁸⁹ Basdeo & Bharadwaj, “Beyond Physical” *supra* note 6 at 4.

¹⁹⁰ Crist, “Life’s Essential” *supra* note 20 at 36.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ Adelson, *supra* note 173.

¹⁹⁴ Basdeo & Bharadwaj, “Beyond Physical” *supra* note 6 at 6.

¹⁹⁵ *Ibid* at 8.

Flowing from the ongoing colonial relationship between the federal government and Indigenous peoples is the fact that Indigenous peoples do not have recognized decision-making authority over water usage.¹⁹⁶ This is the case even though their waters and their communities are affected by the decisions that federal and provincial governments make.¹⁹⁷ Indigenous peoples wish to have participation in the governance of their waters in a way that allows them to practice self-determination and to conduct their responsibilities to their waters.

Indigenous peoples want decision-making concerning water to incorporate Indigenous worldviews of water as interconnected with humans, plants, and animals instead of ignoring them.¹⁹⁸ Government and industry could rectify some of the social and environmental justice concerns facing Indigenous peoples if they acknowledged the ongoing negative effects of colonialism. This would mean publicly admitting Canada's perpetual drive to assert exclusive authority and attempt to address it in its present form as well as to concurrently recognize the fundamental relationship of water to Indigenous' cultures.¹⁹⁹ Furthermore, some authors such as Basdeo and Bharadwaj recognize Indigenous water sovereignty as creating a legitimate role for Indigenous peoples as decision-makers and they assert that "pulling up more chairs" at the table would also allow for a more equitable water governance structure for Indigenous water management in Canada.²⁰⁰

In response to the unidirectional water management and power over resources, many Indigenous peoples advocate for decolonization via various social movements like #IdleNoMore and other direct-action events. However, other Indigenous communities seek out the power of Western courts to advance Aboriginal rights. For example, in the cases where there is no treaty, some First Nations have requested the courts to interpret who is entitled to the water within and surrounding their communities. Therefore, the

¹⁹⁶ Phare, *Denying the Source*, *supra* note 26 at 9.

¹⁹⁷ Castleden et al, "Reconciliation and Relationality", *supra* note 173 at 73.

¹⁹⁸ Basdeo & Bharadwaj, "Beyond Physical" *supra* note 6 at 10.

¹⁹⁹ *Ibid.*

²⁰⁰ Phare, *Denying the Source*, *supra* note 26 at 78. See also Littlechild, "Transformation and Re-Formation", *supra* note 168 at 112-113.

courts have been asked to make decisions on such questions on a case-by-case basis.²⁰¹

There are advantages to litigation in the court system as it is seen as a legitimate mechanism by which to resolve disputes as well as a forum in which Indigenous voices are heard. However, such court cases are expensive and often lengthy, which further strain already depleted financial and human capital in First Nations reserve communities.²⁰² This is also exacerbated by the fact that such legal battles arise over various resource development disputes against government and industry, both of which are heavily funded. The playing field in the court system is clearly uneven as illustrated in the *Halalt v BC* case.²⁰³

2.0: Case Study: *Halalt First Nation v British Columbia*

This section summarizes the case study I use for my thesis. A more detailed account is provided in Chapter 4: Results. Halalt's lands and waters are unceded and Halalt has never entered a treaty with the Crown to relinquish any entitlement to their lands or waters.

Halalt is currently engaged in the British Columbia Treaty process as one of six First Nation members of the Hul'qumi'num Treaty Group ("HTG").²⁰⁴ This treaty process between the HTG, Canada, and British Columbia includes negotiations regarding freshwater and groundwater.²⁰⁵ The Halalt have deep spiritual, cultural, social, and economic connections to the Chemainus River.²⁰⁶

²⁰¹ See for example, *Peigan Indian Band v Alberta*, [1998] AJ No 1108 (QB). For a discussion on this case, see Phare, *Denying the Source*, *supra* note 26 at 1-6; *Tsuu T'ina Nation v Alberta (Environment)*, 2008 ABQB 547 (CanLII); *Tsuu T'ina Nation v Alberta (Environment)*, 2010 ABCA 137; and *Halalt v BC*, *supra* note 6 and *Halalt v BC*, 2012 BCCA 472, *supra* note 6; Leave to Supreme Court denied 2013 Carswell BC 2083 (SCC).

²⁰² *Ibid.*

²⁰³ *Ibid.* Furthermore, this is evidenced by the fact there is at least one organization that exists to "raise legal defence funds to assist First Nations who enforce their rights and title to protect their traditional territories." See Respecting Aboriginal Values and Environmental Needs (RAVEN Trust) "About" online: <<https://raventrust.com/about/>>.

²⁰⁴ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 17.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid* at para 102.

The District of North Cowichan's well-head project underwent a joint federal and provincial EA.²⁰⁷ The project became a "reviewable project" due to the amount of water that the DNC proposed to extract.²⁰⁸ The EA process lasted several years and the parties ended up in dispute over the potential the project had to bear on Halalt fishing, hunting, ceremonial rights, and Halalt's exclusive interest in the water of the Chemainus River and Aquifer.²⁰⁹ During the EA process, Halalt argued that it had not been adequately consulted by the Crown.²¹⁰ Halalt also asserted that the Project's modifications over the years could not be considered adequate accommodation of Halalt's interests.²¹¹

Despite Halalt's concerns, the provincial Ministers (of Environment and Community Development) approved the project in March 2009.²¹² The project completed in 2010 and is now fully operational.²¹³ The original proposal was to have three wells extracting water year-round but over the course of the EA, the project was modified.²¹⁴ The final Certificate of Approval for the project permitted construction of two wells that could only operate each year from October 15 to June 15 at an extraction rate of 75 L/s.²¹⁵ Therefore, pumping water in the summer was prohibited.²¹⁶ However, despite this timing constraint, the District continually described the project as allowing for year-round pumping for emergency and testing purposes. The Certificate of Approval did not describe under which circumstances that emergency summer groundwater extraction

²⁰⁷ *Ibid* at para 115.

²⁰⁸ British Columbia, *Environmental Assessment Act, Reviewable Projects Regulation, BC Reg 370/2002* [BC EAA Reg 370/2002]. The project triggered an EA as per the British Columbia *Reviewable Projects Regulation* because, when the two groundwater wells would be operating simultaneously, the water extracted would be more than 75 Litres/second. As per section 11(4) of the *Regulation*, if a water project will extract 75 L/s or more, the project must first obtain an environmental certificate, which requires undergoing an environmental assessment. This in turn, also triggers the Aboriginal duty to consult.

²⁰⁹ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 451.

²¹⁰ *Ibid* at para 32.

²¹¹ *Ibid*.

²¹² *Ibid* at para 33.

²¹³ *Ibid* at para 36.

²¹⁴ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at paras 22-24. The original project was to have three groundwater wells operating at a maximum extraction of 75 Litres per second (L/s) with only two wells operating simultaneously to extract water year-round up to a maximum of 131 L/s. Various studies throughout the EA led scientists to conclude that this may have significant adverse effects on the Chemainus river's fish and fish habitat during summer months. Therefore, the proposed project was modified to exclude pumping over summer months unless there was an emergency or testing purposes.

²¹⁵ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 33.

²¹⁶ *Halalt v BC*, 2012 BCCA 472, *supra* note 6 at 186.

would be permitted.²¹⁷ The Certificate simply allowed the District to develop an emergency plan for such extraction with the local health authority, Vancouver Island Health Authority (VIHA).²¹⁸ Co-management of the project with Halalt was limited in that the Certificate did not provide Halalt with any substantive monitoring role regarding the ongoing effects of the Project on the Chemainus River nor was Halalt able to give input into the plan regarding summer emergency groundwater extraction.²¹⁹

As the EA process did not address several of Halalt's concerns when the Ministers approved the project, Halalt brought a petition for judicial review of the project approval decision in 2009. Halalt asked the court to quash the EA project certificate.²²⁰ Concurrent to the trial litigation, in 2010, Halalt also held a peaceful protest in the form of a roadblock where they informed surrounding residents about their concerns about the Project.²²¹ Halalt asserted Aboriginal rights and title to the areas surrounding the project.²²² As previously discussed, Halalt are engaged in the BC Treaty Process with the HTG for claims including freshwater and groundwater. In its petition, Halalt argued that while the Province had notice to such claims, it still failed to properly consult and accommodate Halalt regarding Halalt's asserted interests.²²³ Therefore, the issue at trial was whether the Provincial Crown fulfilled its constitutional obligations to consult and accommodate Halalt's asserted interests during the EA process.²²⁴ Put another way, the issue at trial was whether the Province should have consulted Halalt regarding the groundwater extraction based on Halalt's legitimate claim to a proprietary interest in the groundwater.²²⁵

Based on the evidence, the trial judge found that it was the responsibility of the Provincial Crown representative, the British Columbia Environmental Assessment Office (EAO), which was conducting the EA, to determine the level of consultation required concerning the possible infringements of the Project to Halalt's asserted Aboriginal rights

²¹⁷ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 33.

²¹⁸ *Ibid* at para 33.

²¹⁹ *Ibid* at para 35.

²²⁰ *Ibid* at para 4.

²²¹ *Ibid* at para 440-441.

²²² *Ibid* at para 4.

²²³ *Ibid*.

²²⁴ *Ibid* at para 9.

²²⁵ *Ibid* at para 493.

and title.²²⁶ Justice Wedge found that the EAO did not adequately conduct a strength of claim assessment before the project was submitted.²²⁷ She found that Halalt should have been provided deep consultation because of the *prima facie* strength of their claims of Aboriginal rights and title.²²⁸ Justice Wedge said that regardless of an intention by the EAO to deeply consult with Halalt, such consultation did not occur.²²⁹ For example, Halalt was not informed about the final modified form of the project before it was approved.²³⁰ Therefore, the consultation process was found to be inadequate.²³¹

Furthermore, the trial judge found that the project modification did not constitute accommodation due to Halalt's asserted Aboriginal interests, it was simply a modification based on scientific concerns that arose during the EA (regarding the potential for significant adverse effects to the Chemainus Aquifer and River).²³² In the end, Justice Wedge suspended the EA certificate and ordered "adequate consultation" regarding the year-round operation of the groundwater pumping and any appropriate interim accommodation of Halalt's interest that resulted from such consultation.²³³

Though this case is primarily known for its duty to consult principles, it is also a case about Indigenous water sovereignty and has important Aboriginal water rights implications.²³⁴ In the trial judgment, Justice Wedge provided a lengthy analysis of Aboriginal water rights. Though she made it clear that she was not being asked to rule on ownership of water, she stated that Halalt had a *prima facie* "case in support of its asserted Aboriginal title to the Project area"²³⁵ and that Halalt had "an arguable case that the groundwater in the Aquifer was conveyed to the federal Crown in order to fulfill the

²²⁶ *Ibid* at para 710.

²²⁷ *Ibid*.

²²⁸ *Ibid*.

²²⁹ *Ibid* at 244, 255, 355, & 639. One example of this was illustrated by the fact that the Halalt did not receive certain information that was provided to other participating parties and at times was only provided with information much later than when it was given to other participants.

²³⁰ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 679-680.

²³¹ *Ibid* at para 710.

²³² *Ibid* at para 685-688.

²³³ *Ibid* at para 753.

²³⁴ See for example, lawyer Nigel Bankes, "Aboriginal title, reserve rights to groundwater and (possibly) a right to an instream flow" (July 29, 2011) *ABlawg.ca* (blog) online: <<https://ablawg.ca/2011/07/29/aboriginal-title-reserve-rights-to-groundwater-and-possibly-a-right-to-an-instream-flow/>>.

²³⁵ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 486.

objects for which reserve lands were set aside.”²³⁶ Justice Wedge based her conclusion that Halalt had an arguable case to the groundwater in the Chemainus Aquifer on the fact that the ownership of water was given by the Crown to Halalt based on various points of political history of the formation of Canada’s governance systems as well as the creation of “Indian Reserve lands.”²³⁷ At paragraph 559 of her judgement, she stated:

Based on the foregoing, it is arguable that ownership of the groundwater in the Aquifer adjacent to and under I.R. #2 is deemed to have vested in the Province as early as 1849 or 1858 (when the colonies were established by the Imperial government) or 1866 (when Vancouver Island and mainland British Columbia were joined under one government) or, alternatively, at the time of the Union with the Dominion in 1871. It is also arguable that the proprietary interest in the "use, flow and percolation" of groundwater passed to the Dominion at the time of the Union. Alternatively, it is arguable that the proprietary interest passed to the Dominion when the Province transferred title to Indian Reserve lands to the federal government pursuant to the 1938 OIC.²³⁸

Justice Wedge then concluded that if the province conveyed the Chemainus Aquifer to the federal Crown to fulfill the objectives for which reserve lands were created, then the province of BC cannot claim to have expropriated the water by way of legislative act.²³⁹

The Minister of Environment, the Minister of Community Development, and the DNC appealed the trial judge decision. The Court of Appeal overturned Justice Wedge’s decision, allowed these appeals, and set aside the declarations and orders made.²⁴⁰ Justice Chiasson for the Court of Appeal stated that the Chambers Judge erred in how she interpreted the Certificate, which led her to incorrectly characterize the scope of the approved project.²⁴¹ Regarding the duty to consult, Justice Chiasson concluded that Halalt were deeply consulted and that limiting pumping to one pump during the winter months was reasonable accommodation.²⁴² He also held that Halalt was not entitled to an assessment on the strength of its claim to Aboriginal rights and title to the aquifer

²³⁶ *Ibid* at para 561. See also paras 559-562 for a full discussion on the trial judge’s conclusion to this effect. This is remarkably similar reasoning to how the US Courts rationalized water rights for Indian reservation in the Winter’s doctrine discussed at note 130 above.

²³⁷ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 559.

²³⁸ *Ibid*.

²³⁹ *Halalt v BC*, 2012 BCCA 472, *supra* note 6 at para 561; see paras 559-562 for a full discussion on the trial judge’s conclusion to this effect.

²⁴⁰ *Halalt v BC*, 2012 BCCA 472, *supra* note 6 at para 193.

²⁴¹ *Ibid* at para 191.

²⁴² *Ibid* at para 192.

within the context of the EA.²⁴³ Justice Chiasson stated the Project submitted and approved by the Ministers did address Halalt's concerns.²⁴⁴ Lastly, Justice Chiasson held that the trial judge erred in law when she called for consultation on year-round pumping and that she erred in fact when deciding that such consultation had not occurred.²⁴⁵

Halalt appealed the Court of Appeal decision to the Supreme Court of Canada in 2013.²⁴⁶ Halalt asked the SCC to resolve the outstanding legal issues surrounding the ownership of the waters in dispute, which was a question that did not revolve around the duty to consult.²⁴⁷ Halalt asked the SCC to determine "two key legal issues - who owns the groundwater under the reserve and Aboriginal-title lands?...and where a First Nation asserts both Aboriginal rights and title, can the Crown do its consultation based only on the rights, and not the title?"²⁴⁸ The Supreme Court of Canada denied Halalt's leave to appeal and did not provide its reasons for such a decision.²⁴⁹

On March 31, 2015, the Municipality of North Cowichan (MNC) applied to the EAO to amend the existing EA certificate to operate the Chemainus Wells year-round.²⁵⁰ This would include operating the wells between June 15 to October 15 yearly,

²⁴³ *Ibid* at para 127.

²⁴⁴ *Ibid* at para 189.

²⁴⁵ *Ibid* at para 190.

²⁴⁶ Supreme Court of Canada, "Summary 35179: *Chief James Robert Thomas, aka Sulsimutstun, et al v Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Minister of Environment and the Minister of Community Development, et al*" online: <<https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=35179>> [Summary 35179, *Halalt v BC* Leave to Appeal to SCC].

²⁴⁷ *Halalt v BC*, Leave to Appeal to the SCC refused, Docket 35179 (Applicant's Memorandum of Argument, 27 January 2013) at para 3 [*Halalt*, Leave to Appeal to the SCC, Applicant's Memorandum].

²⁴⁸ *Ibid* at paras 2 & 5.

²⁴⁹ Dani Bryant, "Bulletin: Supreme Court of Canada Dismisses Leave in Aboriginal Consultation Cases", (July 11, 2013) Fasken Martineau, online: <<https://www.fasken.com/en/knowledgehub/2013/07/aboriginallawbulletin-20130711>>.

²⁵⁰ BC, Municipality of North Cowichan, "Chemainus Well Project, Update: Application to Amend BC Environmental Assessment Office Certificate #W09-01" (April 2018) Chemainus Well Project online: <<http://www.northcowichan.ca/EN/main/departments/utilities/water/chemainus-well-project.html>> [Chemainus Well Project Update, April 2018]. See also BC, Municipality of North Cowichan, *Chemainus Wells Water Supply Project: Environmental Assessment Certificate Amendment Application* (Duncan, BC: 27 March 2015) prepared by Todd Hatfield et al online: <http://www.northcowichan.ca/assets/Departments/Engineering/PDFs/Chemainus%20Wells%20Water%20Supply%20Project_EAC%20Amendment%20Application_reduced.pdf>.

in addition to the presently approved October 15 to June 15 operation. The amendment application was approved in the end, which will be further discussed below.

The *Halalt v BC* litigation is a useful case to analyse as the underlying issue is about Indigenous water sovereignty. It illustrates the colonial jurisdiction fragmentation discussed above in that while the federal government has the responsibility of First Nations water management on reserve, it was the provincial government, through the BC EAO that was assessing whether the project should be approved. In the absence of an Aboriginal right to water in Canadian law and having no treaty water rights, Halalt chose to bring forward litigation in the form of a duty to consult and accommodate claim. However, despite its best efforts, this litigation did not prove a valuable or effective site in which to assert their water sovereignty.

This case is about who can control, own, and manage the waters in question. Throughout the EA process for this proposed project, Halalt illustrated its disapproval of the project as well as the desire to have the power to manage their lands and waters. I assert that the Halalt case is another example of continued colonization. Here, it is the Canadian state via the DNC and the provincial regulatory mechanism that is extracting resources from the land without respecting Halalt's Indigenous water sovereignty.

I analyse this case to determine what insights I can make by looking at this issue from a socio-cultural decolonial IR analysis. Problems of drinking water accessibility and Indigenous water management are continuing while socio-political forces marginalize Indigenous spiritual, cultural, and physical health. Therefore, I seek to analyse aspects that go beyond the technical, political, and legal frameworks of an EA and litigation framework. Determinations can be made as to the barriers to improving Indigenous water governance and drinking water management on reserves in Canada by using a decolonial socio-political lens that takes into consideration colonization and race-relations between First Nations and the state in Canada.

Indigenous resurgence is a critical and decolonial theoretical body of largely Indigenous-authored scholarship. Indigenous resurgence is useful to analyse asymmetrical power (imbalances) and race relations with natural resource disputes between Indigenous communities and the Canadian state. Indigenous resurgence

provides a critical analysis with a decolonizing lens. Indigenous resurgence offers useful determinants of decolonization because if the IR themes are achieved, even to a lesser degree, then one can say that decolonization is occurring, as it is the ultimate goal of IR. One requires this critical analysis if one wishes to decolonize Canada or come to any (re-)conciliation. This is beneficial for analysing how state-First Nations relations have been so tumultuous over the past centuries. This historical understanding provides insight today about the ongoing effects of colonization and how colonial consequences affect Indigenous water sovereignty and water governance in Indigenous communities.

3.0: My Research Project

The purpose of this study is to undertake an in-depth decolonial analysis of a legal water management dispute between an Indigenous community and the Canadian state. More specifically, the purpose of this study is to identify how ongoing colonial factors affect the Halalt First Nation's sovereignty over water to better understand why the Halalt have had challenges in accessing their own waters. By this, I mean that I am exploring the Halalt's lack of agency, governance, and sovereignty over drinking water and water resources in their territory.

There are numerous government reports and academic literature on the crisis of poor drinking water on First Nations reserves in Canada in terms of technical infrastructure, financial,²⁵¹ science, health,²⁵² policy-based, and colonial legal discussions.²⁵³ There is also much literature on Aboriginal legal disputes over water resources with the state. However, discussion of the connection between colonization and water governance within the realm of IR or Aboriginal legal literature from the

²⁵¹ See Auditor General, *Drinking Water in First Nations Communities*, 2005, *supra* note 50 for an analysis of the Indian and Northern Affairs and Health Canada funding and programs were working to ensure "First Nations communities provide[d] residents with access to drinking water comparable with that of other Canadians living in communities of a similar size and location" (Office of the Attorney General at 1).

²⁵² Laura Eggertson, "Despite federal promises, First Nations' water problems persist" (2008) 178(8) CMAJ 985 online: <<https://doi.org/10.1503/cmaj.080429>>.

²⁵³ See for example, Boyd, "No Taps, No Toilets" *supra* note 17; INAC, *First Nations Water Management Strategy*, 2010, *supra* note 50; Auditor General, *Drinking Water in First Nations Communities*, 2005, *supra* note 50; INAC, *Plan of Action for Drinking Water*, 2010, *supra* note 50; *Expert Panel Report*, *supra* note 128; Senate Standing Committee Safe Drinking Report, *supra* note 50; DIAND, *National Roll Up Report 2011*, *supra* note 55; *Budget Sufficiency First Nations*, 2017, *supra* note 50.

viewpoint of Indigenous sovereignty is limited. There are discussions of Aboriginal rights to water from a Western legal framework but not from the viewpoint of Indigenous sovereignty.

This thesis, unlike many other previous discussions regarding Indigenous water governance in the Aboriginal legal literature, provides research connecting IR principles to water management in the context of a First Nations reserve. This thesis links colonial and decolonizing concepts to Indigenous water governance including discussions of power as well as structural and political assumptions, which speak to systemic factors and barriers to increased Indigenous water sovereignty in terms of access to Indigenous waters.

Some of the importance of this study is to shed light on how Indigenous peoples and the state view water governance issues from such different worldviews. Part of this was to gain insight into how power structures perpetuate water accessibility issues for Indigenous peoples living in Canada and how this affects the daily lives of these Indigenous peoples. At the core of this research, there is a desire to discover the barriers to increasing Indigenous water sovereignty as well as exploring what a decolonized Indigenous water governance system may look like.

I use a variety of terms to describe the Indigenous peoples of Turtle Island, which are the descendants of those who originally inhabited what is now known as Canada. There are legal as well as political ramifications of these different terms, especially in the context of Canadian Aboriginal law. Furthermore, while these terms may seem interchangeable, I selected each term carefully to be as anti-oppressive and decolonizing as I could. Where possible, I strive to use the actual nation of the Indigenous person or group/community to which I am referring (e.g. Halalt First Nation, Coast Salish, Anishinabe, Mohawk, Dene). Where I do not know a specific community or nation, I most often use the term Indigenous or First Nation, as those are the most frequently self-identified terms that I have seen preferred by Indigenous peoples living in Canada. When I use “Aboriginal,” a commonly used term in Canadian Aboriginal law, I am referring to the definition from section 35(2) in the Canadian *Constitution, 1982* that states that “*aboriginal peoples of Canada*” includes the Indian, Inuit and Métis peoples of Canada.” I only use the term Indian when strictly referring to the terminology used in the

Indian Act or Constitution. Note, however, that authors debate all these terms and there is no agreement on which term is best to use.²⁵⁴

Figure 1: Terminology Relating to Indigenous Peoples in Canada²⁵⁵

- **Indigenous:** Generally used to describe Indigenous peoples worldwide.
- **Aboriginal:** Canadian Crown legal term denoting First Nation, Inuit and Métis peoples.
- **Indian:** Outdated (generally derogatory) term still in legal use, that refers to First Nations.
- **Inuit:** Indigenous peoples who live mostly in the Canadian arctic.
- **Métis:** People of mixed First Nation and European ancestry who self-identify as Métis.
- **First Nation:** Denotes Indigenous peoples in Canada who self-identify as First Nations. I use this term when specifically discussing Indigenous peoples in the reserve context.
- **Indigenous Nation:** Highly centralized, loosely federated, or small and clan-based political and cultural groups.²⁵⁶

Finding a term to identify and describe non-Indigenous individuals and society is also fraught with difficulties. While I strive to use the term “settler society” to encapsulate the multicultural nature of races in Canada, I also use terms such as “non-Indigenous” and “Canadians” as synonyms. By settler society, I mean the general thoughts, perceptions, and ways of being of non-Indigenous people living in Canada that often contributes to the perpetuation of colonial values in society and the state. For the purposes of my thesis, I am defining “settler” as a non-Indigenous person living on the lands claimed by Canada.²⁵⁷ Lastly, the use of pronouns such as “us” and “we” in the context of First Nations-settler relations is also problematic, especially in a thesis

²⁵⁴ See Linda Tuhiwai Smith, *Decolonizing Methodologies* (London and New York: Zed books, 2012) at 6 where she explains that the term Indigenous is problematic because it does not encompass recognition of the differences between distinct populations that have experienced imperialism in vastly diverse ways [Smith, *Decolonizing Methodologies*].

²⁵⁵ von der Porten, *Collaborative Environmental Governance and Indigenous Governance*, *supra* note 168 at 8. This chart is based loosely off Box 1.

²⁵⁶ Canada, Commission on Aboriginal Peoples, *Report on the Royal Commission on Aboriginal Peoples*, (Ottawa: 1996) prepared by George Erasmus and Rene Dussault, online: <<http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>> [RCAP Report].

²⁵⁷ See Corey Snelgrove, Rita Dhamoon & Jeff Corntassel, “Unsettling settler colonialism: The discourse and politics of settlers, and solidarity with Indigenous nations” (2014) 3:2 *Decolonization: Indigeneity, Education & Society* at 1-32 for an in-depth look surrounding the political, academic, and activist use of the term settler [Snelgrove et al, “Unsettling settler colonialism”].

attempting to decrease discourse that contributes to “us and them” mentalities and “Othering.”²⁵⁸

4.0: Thesis Outline

This thesis provides research regarding the connection between colonization (including goals of decolonizing Indigenous water management), political Indigenous-state relations, and drinking water management, the combination of which authors seldom discuss in IR or drinking water governance literatures. It is, however, currently an area of growth in the latter. Therefore, it is the purpose of this thesis to illuminate the connections between colonization and Indigenous water management, particularly in the context of a case study of a watershed dispute between a delegated arm of the provincial Crown and a First Nation community. By analysing this legal dispute and water governance in Halalt traditional territory, I can provide commentary on its implications as to ongoing colonial paternal practices by the state as well as Indigenous water sovereignty in Canada.

In the second chapter, I present a literature review in the theoretical field of IR. This is where I summarize the principles of IR and its critique of current Indigenous sovereignty issues with the state. Here, I also describe the themes I use to analyse the case study: 1) transformation of political and social power from the state to Indigenous communities, 2) increased respect for Indigenous worldviews (as an alternate to Eurocentric state worldviews), and 3) Indigenous self-determination. I end this chapter by explaining why these three goals of IR authors provide a useful analytical framework to examine Indigenous-state relations and Indigenous water sovereignty in my project and to determine whether decolonization is occurring.

²⁵⁸ Fair herising “Interrupting Positions: Critical Thresholds and Queer Pro/Positions” in Leslie Brown and Susan Strega, (eds) *Research as Resistance*, (Toronto: Canadian Scholars’ Press, 2005) at 148 [*Research as Resistance* & herising, “Interrupting Positions”]. herising notes the pitfalls of using the term “we.” Fair explains that “we” is problematic “especially given that it is often invoked by Euro-centric, Western writers to speak into a universal and homogenous subject.” Unless there is a direct quote that signifies an Indigenous population, when I use “we” I am referring to non-Indigenous settler society, to which I am a member. When I use the term “they” I am referring to Indigenous peoples or the government(s) of Canada as specified.

In chapter 3, I detail the research methodology, which includes use of qualitative research and case study as methods. Here I explore the anti-oppressive and decolonial paradigms in which I approached the research as well as data collection and thematic data analysis methods. I do so to ensure I am not reproducing Eurocentric research that has often harmed Indigenous communities.

I report on the major findings of the results in chapter 4. I first describe the legal judgments of the case study and explain the results from the key informant interviews considering the Halalt experience of the EA, court case processes and non-Halalt interviewees views on the Halalt case study and Indigenous water sovereignty. This chapter is organized according to the three IR themes that I used to answer my research question to ultimately determine whether any decolonization presented itself.

In chapter 5, I analyse the findings in light of the primary data I collected via key informant interviews and case study participants. The research showed that there was no decolonization illustrated in the Chemainus Wells project EA and the corresponding case of *Halalt v BC*. Halalt were prevented from practicing their Indigenous water sovereignty. I also consider the implications of using the Halalt case study to extrapolate lessons given its limited context about whether water sovereignty is occurring. Furthermore, in this chapter I provide comments on the perceived strengths and limitations of my study.

In my conclusion, I explain that colonialism is ongoing, assumes Eurocentric values, and is disrespectful and unfair to Indigenous peoples. Canada must continue its reconciliation and decolonization efforts as it is legally required and politically desired. I provide some suggestions for how to move forward on a large scale to decolonize and improve Indigenous water sovereignty in Canada. If Canada does not continue to make concrete steps towards reconciliation, as has been demonstrated over the last several decades, Indigenous peoples and their allies will persevere and keep fighting to protect their lands and waters.

Chapter 2

1.0: Introduction

Indigenous resurgence (IR) is a critical and decolonial theoretical body of largely Indigenous-authored scholarship. It is useful as a theoretical framework for my project for several related reasons. First, with my goals of social justice and corresponding anti-oppressive and decolonial approach, IR is a beneficial choice as most of the authors writing within the field are Indigenous.²⁵⁹ This body of literature prioritizes Indigenous voices. Therefore, it presents Indigenous peoples' ideas, reflections, critiques, and suggestions. Second, IR allows for an historic contextualization that considers Indigenous perspectives of colonial problems, which Western and Canadian academic, legal, and policy discussions too often ignore, dismiss, or discount. Furthermore, the Indigenous worldviews brought forward through IR theory supply an alternative to the state-based Eurocentric ways of thinking that have been unsuccessful in terms of ameliorating or removing the negative effects of colonization.

²⁵⁹ Another reason that I prioritize Indigenous viewpoints accords with the goals of IR that I have chosen for my theoretical framework. Employing Indigenous-authored scholarship 1) transfers power from colonial/Eurocentric sources to Indigenous individuals; 2) Increases respect for Indigenous worldviews; and 3) increases self-determination. As Linda Tuhiwai Smith has stated in Smith, *Decolonizing Methodologies*, *supra* note 254, "research" is a dirty word to Indigenous peoples as it has been used as a source of disempowering Indigenous peoples by gaining then stealing their knowledge. Indigenous scholarship combats this Eurocentric anthropology and political science literature. I discuss the three analytical themes that I employ in my themes respectively to discuss this here. When Indigenous scholarship is used, it empowers Indigenous peoples and transfers legitimacy and authority back into what Indigenous peoples are saying (rather than Eurocentric colonial scholarship). It increases respect for Indigenous worldviews by re-framing how, for example, water is talked about. This informs and enlightens the reader to things like seeing water as different than just a resource. Lastly, Indigenous peoples authoring Indigenous scholarship is being self-determining in that they are having a say in how their information and ideas are being published, characterized, and used. That said, while I prioritize Indigenous authors, that is not to exclude the numerous non-Indigenous authors and scholars in Canada that contribute to the strength, advocacy, and theoretical ideas and critiques within the field of IR. Among these non-Indigenous authors such as James Tully, Elaine Coburn, and Kelly Aguirre, whom I cite as well as others such as Hadley Friedland and Rebecca Johnston. This work is beneficial to the field of IR and should continue. That said, in IR, I would say that the non-Indigenous authors are the outsider as while we can be aware of colonialism's ongoing nature and appreciate the need for decolonization, we cannot fully claim to understand or appreciate what it is like to be Indigenous and provide viewpoints from one's experience and training. See also discussion in Chapter 3: Methodology below regarding the specialized training that Indigenous scholars possess that makes them uniquely situated to analyse colonial relations separate and apart from, but perhaps on top of the fact that they have lived experience as Indigenous peoples.

This thesis sets out to answer my research question: Using an IR analysis, what does the *Halalt v BC*²⁶⁰ caselaw reveal about the state of Indigenous water sovereignty in Canada? To provide the theoretical framework in which I answer my research question, I divide this chapter into several sections.

In the first part of this chapter, I provide a survey of the IR literature in Canada highlighting principles that are most useful to my project. I start by describing the rapidly expanding theoretical field of IR. I explain the history of IR and how it developed in resistance to state-based ongoing colonialism and paternalism. Then I describe some of the scholars who I consider as contributors to the field of IR literature as well as their post-colonial influences. I explain how authors discuss IR from a range of sites such as from Indigenous nationhood, pedagogy, and feminism. I also explain that IR is an embraced site of challenging encounters and provide details about how IR's locations of struggle are real and informed by the lived experience of Indigenous colonized persons. As Indigenous resurgence and Indigenous resistance terms are both common and can sound synonymous in the IR literature, I take care to explain the difference between the two. I also explain my literature review scoping choices here.

Next, I discuss how IR authors deconstruct current state-based legal mechanisms to show that these processes will not lead to Indigenous self-determination. To conduct these critiques, IR authors problematize colonial-capitalism,²⁶¹ Eurocentrism, and the assumptions that allow the state to retain control of power, devalue Indigenous worldviews, prevent true Indigenous self-determination, and continue the dispossession of Indigenous lands. I explain that while there can be sites of IR within state processes, IR authors often advocate for a (re-)turn to focus on Indigenous nationhood, communities, and cultures outside of the state.

Then I delve into three themes that I have identified as prevalent and recurrent in the IR literature. The first theme is transformation of political and social change from the

²⁶⁰ *Halalt v BC*, 2011 BCSC 945 *supra* note 6; *Halalt v BC*, 2012 BCCA 472, *supra* note 6.

²⁶¹ See Kelly Aguirre, "Telling Stories: Idle No More, Indigenous Resurgence and Political Theory" in Elaine Coburn (ed), *More Will Sing Their Way to Freedom: Indigenous Resistance and Resurgence*, (Halifax & Winnipeg: Fernwood Publishing, 2015) at 187 [Aguirre "Telling Stories"]. Indigenous authors often use the term "colonial-capitalism" instead of capitalism (or colonialism). The term "colonial-capitalism" adds to the term "capitalism" the idea that Indigenous peoples are being dispossessed from their lands due to capitalist forces.

state to Indigenous communities. The second theme is increased respect for or use of Indigenous worldviews (as an alternative to Eurocentric worldviews). The third theme describes IR authors' conception of Indigenous self-determination, which is one of the ultimate goals of IR, meaning the authority and ability for Indigenous peoples to make decisions over their lands and waters.

Finally, after the description of each theme, I express the usefulness of each theme to the analysis of my research project. I explain how and why I have chosen these three IR themes as the indicia that I use to analyse the data I collected via participant interviews. These sections provide the justifications as to why these three themes provide useful evidence in which to indicate whether decolonization is occurring in a given resource-dispute between an Indigenous community and the Canadian state.

2.0: Overall Description of Indigenous resurgence

Various Indigenous scholars have created IR as a theoretical and academic form of resistance to combat colonial-capitalism.²⁶² As a concept, IR is difficult to define as it

²⁶² For a survey of the most commonly cited IR literature discovered in my research, see: Taiaiake Alfred, "Colonialism and State Dependency" (2009) 5.2 J Aboriginal Health at 42-60 [Alfred, "Colonialism and State Dependency"]; Taiaiake Alfred, *Heeding the Voices of our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Don Mills, ON: Oxford University Press); Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* 1st ed (Don Mills, ON: Oxford University Press, 1999) [Alfred, *Peace, Power, Righteousness*, 1st ed]; Taiaiake Alfred, in *Peace, Power, Righteousness: An Indigenous Manifesto* 2nd ed (Don Mills, ON: Oxford University Press, 1999) [Alfred, *Peace, Power, Righteousness*, 2nd ed]; Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, ON: Broadview Press, 2005) [Alfred, *Wasáse*]; Taiaiake Alfred and Jeff Corntassel, "Being Indigenous: Resurgences Against Contemporary Colonialism" (2005) Government and Opposition Ltd, Blackwell Publishing at 601 [Alfred and Corntassel, "Being Indigenous"]; Bryce and Corntassel, "Practicing Sustainable Self-Determination: Indigenous Approaches to Cultural Restoration and Revitalization" (2012) XVIII:II, Spring/Summer, The Brown Journal of World Affairs [Bryce and Corntassel, "Practicing Sustainable Self-Determination"]; Corntassel, "Toward Sustainable Self-Determination" *supra* note 162; Jeff Corntassel, "Re-envisioning Resurgence: Indigenous pathways to decolonization and sustainable self-determination" (2012) 1:1, Decolonization: Indigeneity, Education & Society at 86-101 online: <<http://creativecommons.org/licenses/by-nc/3.0>> [Corntassel, "Re-envisioning Resurgence"]; Coulthard, *Red Skin, White Masks*, *supra* note 5; Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6 Contemporary Political Theory at 437-460 [Coulthard, "Subjects of Empire"]; Simpson, *Dancing on Our Turtle's Back*, *supra* note 9. Leanne Simpson (ed), *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring Publishing, 2008) [Simpson (ed), *Lighting the Eighth Fire*]. While for the purposes of this technical piece of academic writing, I am focusing on the theoretical IR knowledge, it is important to note that there is much IR writing and advocacy also available on the internet, including personal blogs as well as storytelling. At times in my thesis, I

encompasses numerous values and practices. In fact, Nishnaabe Leanne Betasamosake Simpson previously refused to define IR, as she wants to leave it up to her (Indigenous) readers to figure out what IR means for themselves based on the principles and ideas presented in her book *Dancing on Our Turtle's Back* as well as from teachings from Indigenous Elders and community.²⁶³ That said, in her newest book, *As We Have Always Done*, Simpson does define the theoretical body of IR as "...a radical practice in Indigenous theorizing, writing, organizing,²⁶⁴ and thinking, one that [she] believe[s] is entirely consistent with and inherently from Indigenous thought."²⁶⁵ To many IR authors, IR is about Indigenous communities revitalizing their traditions, languages, and practices, which they have been doing for decades.

Another helpful description of IR is from Tsalagi (Cherokee) professor Jeff Corntassel who states, "Indigenous resurgence is ultimately about reframing the conversation around decolonization in order to re-center and reinvigorate Indigenous nationhood."²⁶⁶ Indigenous resurgence authors seek a transformation in society, which re-creates Indigenous existences, regenerates Indigenous cultures, and overcomes the forces that bind Indigenous peoples to a colonial past, which keeps them as dependent victims.²⁶⁷ Specifically, the ultimate goals of IR are to decolonize, transcend the colonial system, and achieve Indigenous self-determination.²⁶⁸ Indigenous resurgence seeks this transcendence through transformative political and social change that it achieves through deconstructing capital-colonialism and advancing Indigenous worldviews as an alternative to Western Eurocentric worldviews, the latter of which provides the basis for colonial-capitalism.

highlight these "non-academic" sources as IR is not abstract or solely rooted in academia. It is place-based, individual, spiritual and rooted in an innumerable number of "non-academic" sources.

²⁶³ Simpson, *Dancing on Our Turtle's Back*, *supra* note 9 at 25-26.

²⁶⁴ See Steve Bonspiel, "The Oka Crisis was supposed to be a wake-up call. Little has changed in 27 years" *CBC News, Opinion* (11 July 2017) online: <<https://www.cbc.ca/news/opinion/oka-crisis-anniversary-1.4197880>>. If I understand "organizing" to include activism, I will state here that on the non-academic side, IR can also be considered a social movement that was borne out of Indigenous activism in the United States and Canada in the 1960s and 1970s and notably with the Oka crisis in Canada.

²⁶⁵ Simpson, *As We Have Always Done*, *supra* note 9 at 48.

²⁶⁶ Snelgrove et al, "Unsettling settler colonialism", *supra* note 257 at 4.

²⁶⁷ Alfred, *Wasáse*, *supra* note 262 at 19.

²⁶⁸ Bryce and Corntassel, "Practicing Sustainable Self-Determination" *supra* note 262 at 151-162.

While I provide these descriptions of IR from select authors and describe various key tenets of IR, for the purposes of my thesis, I do not purport to place boundaries around this wide-ranging field, which various IR authors conceptualize very differently.

Indigenous resurgence as an academic field of study has grown exponentially in the last ten years, although if one takes a broad approach to temporally defining the field, it has been around for decades.²⁶⁹ Some authors state the birth of IR can be linked to Mohawk political scientist Taiaiake Alfred's early book *Wasáse: Indigenous Pathways of Action and Freedom* that was first published in 2005.²⁷⁰ Alfred uses the "resurgence" paradigm as a political theory that can be used to shift the consciousness of Indigenous peoples, away from state-centred reconciliation and towards decolonization,²⁷¹ in a way that provides the basis of an Indigenous social movement that could transform Canadian society.²⁷² Indigenous resurgence political theory is important as it delivers the mechanisms for critically evaluating and assessing state-Indigenous relations in order to

²⁶⁹ Notably, Vine Deloria Jr, *Custer died for your sins: An Indian Manifesto* (Norman, OK: University of Oklahoma Press, 1988), which was originally published in 1969 [Deloria Jr, *Custer died for your sins*]. Deloria Jr. was one of the first Indigenous authors to take on the defiant and outspoken (for the time) task of problematizing the government, anthropologists, and churches. Therefore, it can be considered a seminal work in the realm of "Indigenous resistance/resurgence" and much of what he states in his book resonates today in terms of the American government treating Indigenous peoples paternally and the fact that this needs to change. Various authors such as Tuck, Yang, Alfred, and Cornthassel cite Vine Deloria Jr. in their scholarship.

²⁷⁰ Alfred, *Wasáse*, *supra* note 262. In "Learning from the Land: Indigenous Land-Based Pedagogy and Decolonization," Wildcat et al assert that the paradigm of Indigenous resurgence originates from Taiaiake Alfred's book *Wasáse* (M Wildcat, M Simpson, S Irlbacher-Fox & G Coulthard, "Learning from the land: Indigenous land-based pedagogy and decolonization" (2014) 3:3 *Decolonization: Indigeneity, Education & Society* [Wildcat, "Learning from the Land"] at III). However, note that Professor John Borrows was the first to use the term "resurgence" in his 2002 book entitled *Recovering Canada: The Resurgence of Indigenous Law* (John Borrows, *Recovering Canada* (Borrows, *Recovering Canada*, *supra* note 164). Furthermore, See Alfred, *Peace, Power, Righteousness*, 1st ed; Alfred, *Peace, Power, Righteousness* 2nd ed. This book was modelled after *Custer Died for your Sins*, *ibid*, also pre-dated *Wasáse*.

²⁷¹ Indigenous Resurgence authors emphasize that colonization is ongoing whereas the currently topical state-based method of "reconciliation" (reconciling Canadian sovereignty and prior Indigenous occupancy/sovereignty as well as the historical legacy of violent and traumatic colonization from residential schools has had on Indigenous peoples) places colonization as an event that is temporally situated in the past. For the purposes of this paper, I define decolonization as the repatriation of Indigenous lands and life. See Eve Tuck and K Wayne Yang, "Decolonization is not a metaphor" (2012) 1:1 *Decolonization: Indigeneity, Education & Society* at 21 [Tuck and Yang] where they argue that while the term "decolonization" is used as a metaphor for various social justice projects for locations such as schools and society in general, the term "decolonization" should not be used as a metaphor and should only be referenced when discussing the specific project of the repatriation of Indigenous land and life.

²⁷² Wildcat, "Learning from the Land" *supra* note 270 at III.

deconstruct assumptions that justify state monopoly of power.²⁷³ Furthermore, IR critically examines Canadian history with the goal of transforming this colonial power that continues to dominate Indigenous peoples.²⁷⁴

Indigenous resurgence as a body of literature constitutes a break from previous Indigenous scholarship that focused on “revolution”-type advocacy that attempted to convince settler society and the state to restructure their views and society.²⁷⁵ In contrast, IR takes an inward turn to focus on Indigenous ways of being, knowing, and performing land-based and cultural practices founded on Indigenous spirituality,²⁷⁶ rather than focusing primarily on Western legal laws or state-based institutions (such as government, courts, and legislation). Simpson, another seminal author in the field of IR, interprets Alfred’s work as a refocusing of Indigenous resistance scholarship “from trying to transform the colonial outside into a flourishing of the Indigenous inside.”²⁷⁷

Alfred and Corntassel’s support for this internal Indigenous emphasis is evidenced by their warning that focusing on colonialism can be dangerous.²⁷⁸ They explain that while colonization (and Indigenous peoples’ relations with the state) is one part of the story of Indigenous existences it is not the only story of Indigenous identity.²⁷⁹ Allowing colonization to be the central reference point to Indigenous existences inherently limits Indigenous freedom.²⁸⁰ Colonialism is a narrative where settler power is the central reference and assumption, which imposes an interpretation of the world that is merely a perspective on that power.²⁸¹

²⁷³ Alfred and Corntassel, “Being Indigenous” *supra* note 262 at 601.

²⁷⁴ Coulthard, *Red Skin, White Masks*, note 5 at 157.

²⁷⁵ Taiaiake Alfred, “Opening Words” in Simpson (ed), *Lighting the Eighth Fire*, *supra* note 262 at 10. Here, Alfred explains that there is a group of scholars and activists from his generation that hang on to ideas and actions that are related to old theories of revolution. Such theories relate to goals of restructuring society and persuading Settler society to change. This group of people see that these goals should be achieved through persuasion or force. See Alfred, *Peace, Power, Righteousness*, 1st ed, *supra* note 262. Alfred explains that a classical revolution is both unworkable given the relatively low current numbers of Indigenous peoples in North America today, but it also does not accord with traditional Indigenous philosophies.

²⁷⁶ *Ibid.*, Simpson (ed), *Lighting the Eighth Fire* at 11.

²⁷⁷ Simpson, *Dancing on Our Turtle’s Back*, *supra* note 9 at 17.

²⁷⁸ Alfred and Corntassel, “Being Indigenous” *supra* note 262 at 601.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

Many IR authors believe working outside of the state is important because they see engaging with the state as a political distraction for Indigenous self-determination as I discuss further below. In advocating for resurgence outside of the state, IR authors explain that trying to decolonize or solve Indigenous land questions through the state, what Coulthard calls the “politics of recognition,” can be both distracting and unfruitful.²⁸² Therefore, while the focus of IR is on Indigenous resurgence, resistance, governance, and nation-building external to the state, IR authors spend a considerable amount of time writing about the reasons and details of why the state is not a useful site by which to achieve self-determination.²⁸³

As IR is responding to colonialism, it draws from postcolonial scholarship as one means of analysing asymmetrical power relations. In doing so, IR authors draw from such postcolonial authors as Aimé Césaire,²⁸⁴ Homi Bhabha, Frantz Fanon,²⁸⁵ Paulo Freire,²⁸⁶ Albert Memmi,²⁸⁷ Edward Said,²⁸⁸ Gayatri Chakravorty Spivak,²⁸⁹ and Robert Young.²⁹⁰ Some post-colonial authors attribute the birth of post-colonialism to Edward Said who, in his book, *Orientalism*, created a concept of “the other” and “othering;” a distinguishing between “us” and “them,” respectively the “Occident” and the “Orient.” This endorsed the concept that European ways of thinking and knowing as being as

²⁸² Coulthard, throughout his book, *Red Skin, White Masks*, *supra* note 5, says that the “politics of recognition,” that is state-based legal recognition and reconciliation processes, have distracted Indigenous peoples from building up their own nations and achieving sovereignty. Likewise, Corntassel calls this concept the “politics of distraction,” which he explains threatens Indigenous homelands, cultures and communities in his article: Corntassel, “Re-envisioning Resurgence” *supra* note 262 at 91, 95, and 97. As an alternative to working within state legal mechanisms, Corntassel advocates for land-based performance of Indigenous responsibilities as a means of protecting Mother Earth.

²⁸³ Alfred and Corntassel, “Being Indigenous” *supra* note 262.

²⁸⁴ Aimé Césaire, *Discourse on Colonialism* (New York, NY: Monthly Review Press, 1972 and 2000).

²⁸⁵ Frantz Fanon, *The Wretched of the Earth* (New York, NY: Grove Press, 1963) [Fanon, *The Wretched of the Earth*] and Frantz Fanon, *Black Skin, White Masks*, trans. Charles Lam Markmann (1967); (repr Boston: Grove Press, 1991) [Fanon, *Black Skin, White Masks*].

²⁸⁶ Paulo Freire, *Pedagogy of the Oppressed* (New York: Continuum, 2000) [Freire, *Pedagogy of the Oppressed*].

²⁸⁷ Albert Memmi, *The Colonizer and the Colonized* (Boston, MA, Beacon Press, 1965), revised edition: Routledge, 2013.

²⁸⁸ Edward Said, *Orientalism*, (New York: Pantheon Books, 1978); Edward Said, *Culture and Imperialism* (New York, NY: Vintage, 1993).

²⁸⁹ Gayatri Chakravorty Spivak, “Scattered Speculations on the Question of Value” (Winter 1985) 15:4 *Diacritics* at 73-93.

²⁹⁰ Robert Young, *Postcolonialism: A Very Short Introduction* (Oxford, UK: Oxford University Press, 2003).

supreme over “the Other.”²⁹¹ In the Canadian context of examining colonial power relations, Indigenous peoples are “the Other” and seen as inferior to Europeans and Settlers. Indigenous resurgence theorists also draw their insights from those who write about power, such as Michel Foucault,²⁹² and race and feminism, such as Audre Lorde,²⁹³ and Canadian author Sherene Razack,²⁹⁴ as well as many other Indigenous academics and activists to explain power dynamics between the state and Indigenous peoples living in Canada.

There are now dozens of authors who contribute to the theoretical scholarship of IR. These authors offer their understandings on resurgence politics, decolonization,

²⁹¹ Emma LaRocque, *When the Other Is Me: Native Resistance Discourse 1850-1990* (Winnipeg: University of Manitoba Press, 2010) at 23, 38, & 167 [LaRocque, “When the Other Is Me”].

²⁹² Michel Foucault, *Fearless Speech*, Ed Joseph Pearson, (New York: Semiotext(e), 2001).

²⁹³ Audre Lorde, *Sister Outsider* (Freedom, CA: Crossing Press, 1984).

²⁹⁴ Sherene Razack (Ed), *Race, space, and the law* (Toronto: Between the Lines, 2002); Sherene Razack, “Stealing the Pain of Others: Reflections on Canadian Humanitarian Responses” (2007) 29 *The Review of Education, Pedagogy, and Culture Studies* at 375-394.

nationhood, Indigenous worldviews, pedagogy,²⁹⁵ feminism,²⁹⁶ and heteropatriarchy.²⁹⁷ IR scholars write about reaction, resistance, dissent, reform, transformation, and resurgence against colonization. Indigenous resurgence authors discuss politics, power, power-relations, and cultural transformation. Indigenous resurgence happens in many places and in many ways. In academia, it occurs in various disciplines including political

²⁹⁵ For a discussion on how Indigenous worldviews should be taught and learned see Wildcat et al, "Learning from the land" *supra* note 270 at I-XV; Emma LaRocque, "Foreword: Resist No Longer": Reflections on Resistance Writing and Teaching" in *More Will Sing*, *supra* note 256; and Tuck and Yang, *supra* note 271 at 1-40.

²⁹⁶ Though a gendered analysis is outside of the scope of my thesis project, I will note that there are various IR and "Critical Indigenous Legal Theory" authors that provide excellent insights into the patriarchal ways that state-Indigenous interactions, laws, and systems of governance negatively affect Indigenous women and girls and thwart Indigenous liberation efforts. See for example, the following authors that write about gendered analyses and feminism in the area of Indigenous resurgence including Winona LaDuke, lawyer/professor Pam Palmater, the late Mohawk scholar Patricia Monture-Angus, Métis feminist Emma LaRocque, Sto:lo Lee Maracle, Gitksan law professor Val Napoleon, Audra Simpson and Nishnaabe Leanne Simpson. See Winona LaDuke, *Recovering the Sacred: The Power of Naming and Claiming* (Cambridge, MA: South End Press, 2005); Emma LaRocque, "Métis and Feminist" in Joyce Green (ed) *Making Space for Indigenous Feminism* (Halifax: Fernwood, 2007); Lee Maracle, *I Am Woman: A Native Perspective on Sociology and Feminism* (Vancouver: Press Gang Publishers, 1996); Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Press, 1995); Pam Palmater, *Indigenous Nationhood: Empowering Grassroots Citizens* (Black Point, Nova Scotia: Fernwood Publishing, 2015) [Palmater, *Indigenous Nationhood*] (especially Section 3); Audra Simpson (2014) *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham, North Carolina: Duke University Press, 2014); Simpson (ed), *Lighting the Eighth Fire*, *supra* note 262; Simpson, *Dancing on Our Turtle's Back*, *supra* note 9; Val Napoleon, "Indigenous Discourse: Gender, Identity, and Community" in Ben Richardson, Shin Imai, and Ken McNeil, eds *Indigenous Peoples and the Law* (UK: Hart, 2009) at 233-255. Note also that there is a growing body of literature authored by Indigenous men who are acknowledging and analysing colonialism from a feminist perspective. See for example, Alfred, *Wasáse*, *supra* note 262 at 84; Coulthard, *Red Skin, White Masks*, *supra* note 5 at 157 where he states, Indigenous feminist scholarship has made "it impossible to credibly ignore the impact that colonial patriarchy continues to have on our national liberation efforts."

²⁹⁷ There is also a growing body of Indigenous works that analyse not only gender but also sexuality and that comments on the intersection of colonization and heteronormativity, including regarding how heteropatriarchy also injures Indigenous nationhood movements. For examples of authors that write from the intersection of Queer Studies and IR, see Coulthard *Red Skin, White Masks*, *supra* note 5 in his section on "Notes to Conclusion" where he identifies at footnotes 22 and 23 at 217: Chris Finley, "Decolonizing the Queer Native Body (and Recovering the Native Bull-Dyke): Bringing 'Sexy Back' and out of Native Studies' Closet" in Qwo-Li Driskill, Chris Finley, Brian Joseph Gilley, and Scott Lauria Morgensen (eds) *Queer Indigenous Studies: Critical Interventions in Theory, Politics, and Literature* (Minneapolis: University of Minnesota Press, 2011) at 31-42 [Qwo-Li Driskill et al, *Queer Indigenous Studies*]; Andrea Smith, "Queer Theory and Native Studies: The Heteronormativity of Settler-Colonialism" in Qwo-Li Driskill et al (eds) *Queer Indigenous Studies* at 43-65; Leanne Simpson, "Queering Resurgence: Taking on Heteropatriarchy in Indigenous Nation-Building" Mamawipawin: Indigenous Governance and Community Based Research Space (blog) online: <<https://www.leannesimpson.ca/writings/queering-resurgence-taking-on-heteropatriarchy-in-indigenous-nation-building>>.

science, environmental science, education, fine arts, social work, Indigenous studies, law, and Indigenous governance.

2.1: Indigenous resurgence Scholarship

Indigenous resurgence authors have similar overarching goals though they vary with their visions and strategies of how best to decolonize and advocate for these objectives. I borrow the spirit of Peter Kulchyski's description of Native Studies as also being a description for IR theory. Like universities' Native Studies Departments and scholarship, IR theory includes writing about "erased names and places, stolen lands, resources, stories, and art by Settlers and colonial governments."²⁹⁸ Similarly, though the answers that IR theorists advocate to decolonize are difficult to name as diverse situations call for different solutions, the principles behind such resolutions remain the same.²⁹⁹

There is a movement within IR to advocate for and re-establish Indigenous communities' historic great powers. Therefore, IR authors adorn the literature frequently with "re-" words such as resurgence, regenerate,³⁰⁰ reclaim,³⁰¹ revitalize,³⁰² and recommit.³⁰³ Indigenous resurgence authors seek resurgence through a return to traditional Indigenous ways to provide sustainable solutions for the political, economic, and social difficulties plaguing Indigenous peoples.³⁰⁴

One can consider IR as a social movement and as with other social justice movements, the theory of IR is not merely abstract, nor does it occur in a vacuum. There is Indigenous praxis that informs IR and vice versa. Therefore, it is important to note that IR also occurs through a number of ways: the arts;³⁰⁵ direct action, activism,

²⁹⁸ Peter Kulchyski, "What is Native Studies?", in Ron F Laliberte et al ed, *Expressions in Canadian Native Studies* (Saskatoon: University Extension Press, 2000).

²⁹⁹ Alfred, *Wasáse*, *supra* note 262 at 40.

³⁰⁰ Alfred and Corntassel, "Being Indigenous" *supra* note 262 at 599, 601, & 610.

³⁰¹ Bryce and Corntassel, "Practicing Sustainable Self-Determination" *supra* note 262 at 152 & 153.

³⁰² Corntassel, "Re-envisioning Resurgence" *supra* note 262 at 86, 93, 95, 97, 98.

³⁰³ Alfred and Corntassel, "Being Indigenous" *supra* note 262 at 599, 601, & 610.

³⁰⁴ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 154-156.

³⁰⁵ Jarrett Martineau, "Rhythms of Change: Mobilizing Decolonial Consciousness, Indigenous resurgence and the Idle No More Movement" in *More Will Sing*, *supra* note 256 at 229-254 [Martineau, "Rhythms of Change"].

and Indigenous movements.³⁰⁶ Similarly, IR manifests on reserves and traditional territories, using land-based practices and applying traditional governance and ceremony, including storytelling.³⁰⁷ While IR generally happens outside of the state, I acknowledge and assert that litigation and legislative lobbying can also comprise IR sites. Furthermore, various Indigenous scholars believe that engaging with the state to advance Indigenous sovereignty is necessary and useful.³⁰⁸

For example, in his latest book from 2016, *Freedom and Indigenous Constitutionalism*, Anishinabe professor of law John Borrows pushes back on the IR idea

³⁰⁶ There have been many “waves” of Indigenous movements in Canada due to the state’s resistance to Indigenous social justice and resurgence. See Glen Coulthard, “IdleNoMore in Historical Context” (December 24, 2012) *Decolonization: Indigeneity, Education & Society* (blog) online: <<https://decolonization.wordpress.com/2012/12/24/idlenomore-in-historical-context/>>. “Idle No More” is the most recent mass Indigenous movement in Canada, but there have been others that have occurred in the last few decades and indeed resurgence has been going on for centuries. For a description of the Idle No More movement, see Coulthard, *Red Skin, White Masks* *supra* note 5 at 159-168 where Coulthard explains the importance of how direct political activism such as the actions that occurred during the Idle No More movement equates to success in formal negotiations between Indigenous peoples and the state. Coulthard asserts that any successes in obtaining Indigenous territorial and cultural rights has been due to the tireless work of activists practicing their responsibilities to each other and to their lands. For another example of direct action under the Indigenous Nationhood Movement includes the reclaiming of PKOLS (colonially named Mount Douglas) in 2012, see Martineau, “Rhythms of Change” *ibid* at 229-254; See also Alfred, *Wasáse*, *supra* note 262 and Coulthard, *Red Skin, White Masks*, *supra* note 5 for a discussion of violent standoffs between Indigenous peoples and the state where Indigenous peoples were standing up for their lands and rights and responsibilities to those lands: such as in Oka, Quebec; Gustafsen Lake, British Columbia; and Ipperwash, Ontario.

³⁰⁷ Simpson, *Dancing on Our Turtle’s Back*, *supra* note 9 at 33-34 & 103-105; Aguirre “Telling Stories” *supra* note 261 at 184-207.

³⁰⁸ Sakej Henderson, “The Split Head Resistance: Using Imperial Law to Contradict Colonial Law for Aboriginal Justice” in *More Will Sing*, *supra* note 256 at 50-66 [Henderson “The Split Head Resistance”]. Furthermore, Indigenous professor Dale Turner, in his book *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) [Turner, *This Is Not a Peace Pipe*], states that he believes that Indigenous lawyers should become skilled at working within courts in order to make positive change for Indigenous peoples. Turner is critical of authors such as Patricia Monture-Angus and Taiaiake Alfred as he says they do not suggest solutions that involve engaging with the current dominant political and legal institutions (courts and state governments) when they offer their decolonial strategies (Turner, *This is Not A Peace Pipe* at 106-113). Keep in mind that *This Is Not a Peace Pipe* was published over a decade ago and Alfred and Simpson have published multiple articles and books since this time. In any case, Turner advocates for working within the system because through this participation, Indigenous peoples can influence legal and political sites into respecting Indigenous worldviews (Dale Turner, *This is Not a Peace Pipe* *supra* note 295). That said, even Turner admits that turning towards Indigenous philosophy is a beneficial place to turn to for the future of Indigenous well-being (Turner, *This is Not a Peace Pipe* at 113). Furthermore, in general, there are many Indigenous communities that believe that working outside of the state is not realistic as the state provides funding that enable Indigenous communities to provide services to their people. Therefore, there are Indigenous communities that are working with the state regardless of the IR concerns laid out in this chapter. (Professor Heidi Stark, personal communication).

that Indigenous peoples should avoid dealings with the state in order to achieve Indigenous self-determination.³⁰⁹ He states that Canada's political order has not allowed enough space or the place for Indigenous peoples to pursue their idea of the "good life" in consideration of Indigenous traditions and their goals of self-determination.³¹⁰ He agrees with other Indigenous authors that problematize the state as a limited site for Indigenous political advancement.³¹¹ Borrows says that there is ample evidence demonstrating that state institutions such as the courts and legislatures have acted in many ways that have damaged Indigenous peoples' existence. However, he is also critical of (what I am branding as) the "IR sentiment" that advocates for ignoring the state.³¹² Borrows explains that while it is a firmly held belief in various Indigenous political circles that governments cannot be trusted,³¹³ ignoring the state and hoping its power will wither or disappear is unrealistic.³¹⁴ While the state's power in some areas might be reduced using this tactic, in other spheres "it will continue to steal and despoil Indigenous lands, resources, families, and relationships – without hesitation."³¹⁵ Borrows suggests that while caution should be at the forefront when dealing with the state, Indigenous peoples could benefit from being open to interacting, compromising, and working within state structures towards possible solutions.³¹⁶ Simply ignoring the Canadian state will not make it go away and "new relationships will be needed that require institutional and structural components."³¹⁷ Before moving on, I will also note that there is a body of scholarship and commentary written by people who criticize IR authors

³⁰⁹ John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto, 2016) at 161-2.

³¹⁰ *Ibid* at 161.

³¹¹ *Ibid*.

³¹² *Ibid*.

³¹³ *Ibid*.

³¹⁴ *Ibid* at 162.

³¹⁵ *Ibid*.

³¹⁶ *Ibid* at 162-3.

³¹⁷ *Ibid*.

and principles.³¹⁸ IR authors largely see these critiques as matching colonial dynamics and view them as pro-assimilationist, paternal, and racist.³¹⁹

It is important when trying to understand IR that one also moves down from analysing colonialism from the societal level to the stratum of Indigenous communities and to the component of the Indigenous individual. Indigenous peoples do not experience colonialism as theoretical frameworks. Instead, colonialism is made a daily reality in Indigenous lives when colonial externalities become harmful forces affecting individuals and communities such as when limitations are placed on freedoms, which cause psychological, mental, and behavioural disturbances.³²⁰ Alfred discusses how land dispossession and cultural dislocation has led Indigenous peoples to be psychologically, physically, and financially dependent on the state.³²¹ The corollary to this is that IR can also be present in people's daily-lived experiences whether that is in an empowered way or within a struggle or both.

Indigenous resurgence also currently exists as a site of struggle, fight, and opposition for individuals and communities. These struggles are something that IR advocates accept and embrace as part of the inherent challenge of creating a new reality. While IR is usually rooted in strength and empowerment, IR authors also characterize their competition with the state by using concepts of a "fight" or a "struggle." Alfred asserts that his conception of an Indigenous warrior, "Wasáse, struggle in all of its

³¹⁸ See for example, Tom Flanagan, *First Nations, Second Thoughts*, 2nd ed (Montreal, QC: McGill-Queen's University Press, 2000); Tom Flanagan, Christopher Alcantara, and André Le Dressay *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal, QC: McGill-Queen's University Press, 2010); and Frances Widdowson and Albert Howard, *Disrobing the Aboriginal industry: The deception behind Indigenous cultural preservation* (Montreal: McGill-Queen's University Press, 2008). Indigenous authors explain that these critics write with Eurocentric liberal views that mirror colonial assimilationist values. Indigenous resurgence authors see this literature as pro-assimilationist, racist, paternal, disrespectful, and dehumanizing towards Indigenous peoples.

³¹⁹ For discussions of the IR responses to these critics see Alfred, "Colonialism and State Dependency" *supra* note 262 at 42-60; Leanne Simpson, "Book Review Essay of Frances Widdowson and Albert Howard *Disrobing the Aboriginal Industry: The Deception behind Indigenous Cultural Preservation*" (2008) *Wicazo Sa Review* at 107; Palmater, *Indigenous Nationhood*, *supra* note 296 at 204-205; Shiri Pasternak, "Book Review: Beyond the Indian Act: Restoring Aboriginal Property Rights" (2010) 30:2 *The Canadian Journal of Native Studies* at 424.

³²⁰ Alfred, "Colonialism and State Dependency" *supra* note 262 at 43.

³²¹ *Ibid* at 42-60.

forms, truly defines an authentic existence.”³²² Furthermore, Alfred states that even when Indigenous communities are spiritually powerful, “the Indigenous way is a struggle.”³²³ Coburn explains that Indigenous movements can be characterized as struggles because there are unequal relationships between Indigenous peoples and various external forces.³²⁴ These struggles are illustrated by opposition from multi-national corporations (MNC’s), the state, non-Indigenous communities, and even Indigenous communities and individuals.

First, Indigenous peoples face opposition from living their authentic existences due to the state’s insatiable thirst for resource development. The state is powerful as it is physically and intellectually backed by society’s legitimization of the state as well as police, military, and intelligence services.³²⁵ Second, Indigenous individuals and communities also face opposition from multi-national corporations that dispossess Indigenous peoples from land and water, which corporations understand as solely profit-making “resources.”³²⁶ Third, non-Indigenous peoples who perpetuate colonial institutions, Eurocentric arrogance, and white superiority also create opposition to Indigenous authentic existence and self-determination.³²⁷ Lastly, IR authors and activists also state that opposition arises from the Indigenous peoples and communities themselves which, along with the state and MNCs, also prioritize profits over people.³²⁸ Some of this state opposition is illustrated in the case study discussed in Chapter 4 and 5.

³²² Alfred, *Wasáse*, *supra* note 262 at 28. For a more detailed discussion on struggle see Alfred, *Wasáse*, *supra* note 262 at 103.

³²³ *Ibid* at 256.

³²⁴ Elaine Coburn, “Introduction” in Elaine Coburn, ed, *More Will Sing Their Way to Freedom: Indigenous Resistance and Resurgence* (Halifax, NS & Winnipeg, MB: Fernwood Publishing, 2015) [Coburn, “Introduction”] citing Maria Campbell, *Halfbreed* (Toronto: McLelland and Stuart, 1973) at 13. “And there are some who even after a hundred years continue to struggle for equality and justice for their people.”

³²⁵ *Ibid* at 25.

³²⁶ *Ibid*.

³²⁷ *Ibid*

³²⁸ Clifford (Kam’ayaam Chachim’multhnii) Atleo, “Aboriginal Economic Development and Living Nuu-chah-nulth-aht” in *More Will Sing*, *supra* note 256. Similarly, see Coulthard, “Subjects of Empire” *supra* note 262 at 452. Coulthard asserts that strategies that have sought self-determination via mainstream economic development have facilitated the creation of a new elite of Indigenous capitalists whose attraction to profit has come to outweigh their ancestral obligations to the land and to other humans. Furthermore, see Alfred, *Wasáse*, *supra* note 262 at 211-213. Alfred points out that while economic development may help First Nations with some sovereignty and ability to participate in cultural activities, it is usually at odds with living an authentic Indigenous life.

Another unique characteristic of IR authors is that they are quite critical in their analyses. LaRocque explains that Native Studies scholars, into which I infuse IR scholars, have an important part to play in fighting oppression by theorizing about the origins and social consequences of oppression as well as reconstruction of Indigenous communities.³²⁹ Therefore, LaRocque explains that though resistance scholarship is compassionate and humanized, it is and must also be critical.³³⁰

Indigenous resurgence scholars recognize that their critical inquiry does not stop at the state. Said explains that political liberation through critique must be paramount regardless of one's loyalty to a group's cause for survival. One cannot be so drawn in as to reduce the academic's critical sense.³³¹ Indigenous resurgence authors such as Nuu-chah-nulth scholar Johnny Mack, Alfred, Coulthard, and Arthur Manuel provide illustrations of being internally critical of their own communities.³³² There is a truth-seeking principle of honesty that is at the heart of these critiques even if such critical inquiry may seem hurtful, distasteful, or even malicious.³³³

³²⁹ LaRocque, "Foreword: "Resist No Longer" *supra* note 295 at 20.

³³⁰ *Ibid.* See also Edward Said, *Representations of the Intellectual*, (New York: Vintage Books, 1994) at 86. LaRocque follows Edward Said's assertion of the objective of an academic as requiring a "critical and relatively independent spirit of analysis and judgment."

³³¹ *Ibid.*, at 41.

³³² See Johnny Mack, *Thickening Totems and Thinning Imperialism* (LLM Thesis, University of Victoria Faculty of Law, 2009) [Mack, *Thickening Totems and Thinning Imperialism*] and *Unsettling Canada: A National Wake-Up Call* (Arthur Manuel and RM Derrikson *Unsettling Canada: A National Wake-Up Call* (Toronto: Between the Lines, 2015). For more discussions of "truth-telling," see also Simpson, *Dancing on Our Turtle's Back*, *supra* note 9 at 17 and Alfred and Corntassel, "Being Indigenous" *supra* note 262 at 614. Furthermore, there is also critique within the IR literature of various Indigenous organizations and institutions such as the Assembly of First Nations, the British Columbia First Nations Summit, which are publicly criticized by Indigenous academics for example, being too lenient and government-friendly.

³³³ *Ibid.* at 24. Mack explains that the principle for respect ("eesok" in his Nuu-chah-nulth language), which includes the principle of self-respect, translates into not staying silent in the face of injustice regardless of whether this will upset peaceful relations with others (Mack, *Thickening Totems and Thinning Imperialism* at 24). Furthermore, see Cliff Atleo Jr, "Unsettling Canada: A Review" (2016) 5:1 *Decolonization: Indigeneity, Education and Society* at 75. Cliff Atleo Jr. describes Alfred and Manuel's work as "scathing" though he understands the need for Indigenous peoples to hold Indigenous leaders accountable in order to learn from Indigenous communities' mistakes. For example, Cliff Atleo Jr. describes Taiaiake Alfred's *Peace Power and Righteousness* as a "scathing indictment of Canadian Aboriginal leadership". Atleo Jr. also describes Arthur Manuel's book: *Unsettling Canada*, *ibid.* as a "scathing critique both of settler Canadian policies that deny Indigenous land, rights and nationhood, and of our own Aboriginal leadership that has at times forsaken our fundamental rights and responsibilities for the politics of recognition and distraction" (Atleo Jr, "Unsettling Canada" at 73).

2.2: Indigenous resurgence vs. Indigenous resistance

Indigenous resurgence literature frequently uses the term “resistance” along with “resurgence.” While at times IR authors use these terms interchangeably, they do not necessarily mean the same thing. As they are both key terms in the literature, I will explain how I see these similarities and differences.

Indigenous resurgence authors use the term “resistance” to denote the application of energy against an opposing force such as strategies of deconstructing, opposing, combatting, fighting and struggles (against colonial injustice). Indigenous resurgence on the other hand, focuses on constructive, creative, and generative practices but can also be critical, deconstructing, and combative.³³⁴ Coburn points out that the decolonization project cannot all be generative.³³⁵ Indigenous resistance is necessary as Indigenous existence is currently a project of survival against centuries-old genocidal policies, continuous Indigenous land and water dispossession and destruction at the hands of the state, capitalism, and numerous non-Indigenous persons.³³⁶ Furthermore, Cree-speaking, Métis professor and feminist Emma LaRocque takes the view that Indigenous resistance does in fact mean both deconstruction and reconstruction due to the expanse of the dehumanization of Indigenous peoples.³³⁷

Certainly, IR can be Indigenous resistance against the state, but IR is more about finding power within Indigenous communities as compared to having a (combative) relationship with the state.³³⁸ LaRocque explains that Indigenous resistance and IR join in

³³⁴ Corntassel, “Re-envisioning Resurgence” *supra* note 262 at 91.

³³⁵ Elaine Coburn, “Preface” in Elaine Coburn, ed, *More Will Sing Their Way to Freedom: Indigenous Resistance and Resurgence* (Halifax, NS & Winnipeg, MB: Fernwood Publishing, 2015) [Coburn, “Preface”, *More Will Sing*].

³³⁶ *Ibid* at 1.

³³⁷ LaRocque, “When the Other Is Me” *supra* note 291 at 11; LaRocque explains that when an idea such as “Indigenous peoples are savage” is deconstructed, the idea that ‘Indigenous peoples are fully human’ is what is reconstructed. Some Native Studies scholars are against the term ‘resistance’ because it is seen as negative and oppositional (LaRocque, “Foreword: “Resist No Longer”, *supra* note 295 at 13-14). Furthermore, see Thomas King, “Godzilla vs. Post-colonial” in Ajay Heble, D Palmateer Pennee, and JR Struthers (eds), *New Contexts of Canadian Criticism* (Peterborough, ON: Broadview Press, 1997) at 242-243. King problematizes the word “postcolonial” saying that it separates Indigenous peoples from their traditions that were in place before colonialism occurred and that continue in spite of colonialism. The term post-colonial then is problematic as it presumes that current Indigenous writing is principally a paradigm of oppression.

³³⁸ *Ibid*, LaRocque, “When the Other Is Me” at 10-11.

the project of Indigenous self-determination. Indigenous resurgence and Indigenous resistance theory exist because of the colonial oppression of Indigenous peoples. Both bodies of works are written in opposition to the prevailing colonial ways of thinking and governing.

Lastly of note, regarding resurgence and resistance, is that neither of these terms are meant to only project negative thoughts and strategies. There is much joy and love in IR and Indigenous authors also enunciate the joy and spirituality of IR acts.³³⁹ Indigenous resistance and IR are also hopeful. As Coburn points out, just because colonial-capitalism is an historical fact, does not mean it is inevitable and needs to continue.³⁴⁰

As I have described above, IR scholarship is wide-ranging, grounded in Indigenous community revitalization and activism, and demonstrates an awareness about the ongoing effects of colonialism. Indigenous writers draw from political theory, post-colonial theory, Aboriginal law, and critical race theory. Indigenous resurgence is concerned with achieving Indigenous sovereignty and the emancipatory possibilities of looking within Indigenous communities to find strength to assert self-determination and to transcend colonialism. In advocating for turning away from the state and inward to Indigenous communities' traditions, IR also warns Indigenous peoples of the dangers of engaging with the state to achieve self-determination or decolonization. Indigenous resurgence advocates for the resurgence of Indigenous traditions, ceremonies, language, and culture to restore, re-empower, and regenerate Indigenous communities. Now that I have described some of the principles of IR, I detail the problems that IR sees with state-based colonial-capitalism and Indigenous attempts to achieve self-determination through the state.

³³⁹ For example, see Simpson, *Dancing on Our Turtle's Back*, *supra* note 9 at 11-13. Simpson describes one joyful act of "everyday resurgence" (as Cornassel would call it) as the Grand Entry and Procession that the Nishnaabeg community performed in the streets of Peterborough on National Aboriginal Day, June 21, 2009 that she describes in Chapter 1 of her book. Simpson characterizes this act as resurgent as it is the Nishnaabeg community celebrating their culture, in traditional ways, without seeking any attention, understanding, power, or rights from Canadians or the Canadian state. It was a way of the Nishnaabeg community coming together, regardless of political background, in order to transform the colonized streets of Peterborough into a decolonized space, if only briefly; See also Jennifer Adese, "Behaving Unexpectedly in Expected Places: First Nations Artists and the Embodiment of Visual Sovereignty" in *More Will Sing* *supra* note 256; Alex Wilson, "A Steadily Beating Heart" in *More Will Sing*, *supra* note 256 at 255-264.

³⁴⁰ Coburn, "Preface", *More Will Sing*, *supra* note 335 at 3.

2.3: Indigenous resurgence Disagreement with the Canadian state

This second part of my literature review details some of the ways in which IR authors find defects in how the Canadian state assumes and holds on to power. In this section, I also discuss how the state has been effective in justifying itself as the most competent body to lead Indigenous peoples to self-determination and Indigenous water sovereignty.

First, I discuss how IR authors explain that Eurocentrism, which provides the philosophical basis of colonial-capitalism, dominates Canadian society and therefore these views can regulate state thinking and operations. Indigenous resurgence authors explain that Eurocentrism is founded on Enlightenment-based principles such as rationality, which is mechanistic, bureaucratic, and controlling.³⁴¹ While Eurocentric worldviews are not necessarily inherently bad, they are at odds with Indigenous worldviews and ways Indigenous peoples wish to decolonize due to the force and coercion to which the state uses to implement law and policies based on Eurocentric worldviews. The dominance of Eurocentric thinking in the Canadian state and society allows Canada to legitimize its asserted Crown sovereignty. Correspondingly then, the Canadian state retains the assumption that the colonial-capitalist system should continue to exist and that the state can and should be the main vehicle for any transformative changes regarding the governance of Indigenous peoples. The continuance of state control of power perpetuates colonial-capital dynamics between the state and Indigenous peoples including dispossession of Indigenous peoples from their lands.

Second, I explain how, in taking issue with state assumptions and retention of power, some IR authors assume the task of deconstructing these assumptions of Canadian Crown sovereignty and explain the harms of Eurocentrism on Indigenous sovereignty (including self-determination). While the Canadian state outwardly seems to attempt to move towards increasing power for Indigenous communities, IR authors point

³⁴¹ *Ibid* at 207.

to decades of the courts limiting rights as evidence that the state in fact holds on to its power tightly and does not want to give it up.

Third, I discuss the numerous ways in which IR authors see the court as restraining Indigenous rights in Canada (by characterizing them as individualistic (when Indigenous rights are communal)) as well as limited to cultural rights and restricted to matters internal to Indigenous communities. Indigenous resurgence authors take issue with these limits and therefore they deconstruct these assumptions and dynamics to justify the need for Indigenous communities to operate outside of the state to achieve self-determination. These discussions of coercive Eurocentric worldviews and the dangers of seeking Indigenous self-determination through the state is necessary in that they provide the base by which to understand the three IR themes I chose by which to analyse my case study.

2.3.1: The Dominance of Colonial-Capitalism

Colonial-capitalism comprises the dispossession and displacement of Indigenous peoples from their lands due to an ongoing and insatiable capitalist accrual of land.³⁴² As Coulthard explains, “Settler-colonialism is territorially acquisitive in perpetuity.”³⁴³ While Canadians might have a conception that colonization is an historical event, it is in fact ongoing. Indigenous resurgence authors describe colonialism as “shape-shifting”³⁴⁴ or zombie-like,³⁴⁵ and emphasize the fact that although this “neo-colonization” does not look as overt as during Confederation or explicitly assimilationist policy days,³⁴⁶ it still harms and co-opts Indigenous peoples in many ways, including by limiting legal expressions of Indigenous self-determination.³⁴⁷

Indigenous resurgence authors explain that colonialism is at odds with an Indigenous peaceful and free existence because of the stark differences in worldviews between Eurocentric and Indigenous communities. I discuss this detail in the thematic

³⁴² Aguirre “Telling Stories” *supra* note 261 at 187.

³⁴³ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 152.

³⁴⁴ Alfred and Corntassel, “Being Indigenous” *supra* note 262 at 601-605.

³⁴⁵ Coburn, “Introduction” *supra* note 324 at 35.

³⁴⁶ Alfred, *Wasáse*, *supra* note 262 at 127-128.

³⁴⁷ Alfred and Corntassel, “Being Indigenous” *supra* note 262 at 601-605.

discussion below. Dispossessing Indigenous peoples from their lands strips Indigenous peoples from their spiritual power including their connection to each other, ceremonies, languages, and histories.³⁴⁸ These connections are vital to living an authentic existence that all humans should have the opportunity to do.³⁴⁹

Eurocentrism provides the philosophical basis for colonial-capitalism. European ideas and philosophies have advanced in the world as universal truths as compared to being bound by specific European cultures and places.³⁵⁰ Eurocentric views are seen as universal truths and therefore superior to other viewpoints such as Indigenous worldviews. This is because Eurocentric knowledge and methods implanted in Western scholarship on Indigenous peoples (and other areas such as governance, law, and education), have been advanced as scientific and empirical (rather than culturally European).³⁵¹ It is only relatively recently that Indigenous authors have contested the dominance of these ways of knowing.³⁵²

Indigenous resurgence authors are keen to comment on the notion of Eurocentric superiority and they point out that this “European arrogance” or “European Miracle” notion are used to legitimize colonization.³⁵³ Alfred asserts that to succeed in decolonizing, this Euroamerican arrogance, prejudicial biases, and racism must be overcome.³⁵⁴ This requires interrogating and problematizing the unquestioned normalcy of Eurocentric beliefs and assumptions.³⁵⁵ Indigenous resurgence literature problematizes European beliefs and assumptions to challenge the legitimacy of how the state operates.³⁵⁶

³⁴⁸ *Ibid* at 599.

³⁴⁹ *Ibid*.

³⁵⁰ LaRocque, “Foreword: “Resist No Longer” *supra* note 295 at 9.

³⁵¹ *Ibid*.

³⁵² *Ibid*.

³⁵³ For an in-depth discussion of the “European Miracle,” see JM Blaut, *The Colonizer’s Model of the World: Geographical Diffusionism and Eurocentric History* (New York: Guilford Press, 1993). Blaut explains at 1 that the “European Miracle” is the idea that European civilization has an exceptional historical advantage due to its race, culture, mind, or spirit that gives these human beings a fixed superiority over all other communities historically and presently.

³⁵⁴ Alfred, *Wasáse*, *supra* note 262 at 101-102.

³⁵⁵ *Ibid* at 110.

³⁵⁶ *Ibid* at 111 and 201-203.

Alfred maintains that Eurocentric arrogance is responsible for social and psychological suffering, land dispossession, and environmental pollution in Indigenous communities.³⁵⁷ Despite these negative consequences and the unstable relations between Indigenous peoples and the state, Eurocentric arrogance persists by attempting to design solutions from the same Eurocentric intellectual and moral framework that initially created the problems.³⁵⁸ The issue of colonialism as it currently relates to Indigenous peoples is a combination of monotheistic religion, liberal political theory, and neoliberal capitalistic economics that justify racial and cultural superiority of European ways of knowing.³⁵⁹

Therefore, because the Canadian state normalizes Eurocentrism, society views this belief system as universal and superior to Indigenous worldviews. Thus, the state forces it upon Indigenous peoples. Indigenous resurgence authors explain that this imperial and colonial mentality has a basic Euroamerican worldview that precludes Indigenous ways of knowing, being, and acting.³⁶⁰ This disrespect, devaluing, and dismissal of Indigenous worldviews equate to Indigenous land dispossession. As LaRocque explains, language struggles relate to legal struggles because colonial languages subjectify nature, which undermines Indigenous humanity and inherent rights to land and governance based on the relationships and use that Indigenous peoples have had over their lands for millennia.³⁶¹

It is important to keep in mind that while the issues are racial in nature, with white/European superiority being central, colonization is not necessarily racial alone. While “the white man” is often seen as the enemy in Indigenous movements, IR authors

³⁵⁷ *Ibid* at 111.

³⁵⁸ *Ibid*.

³⁵⁹ *Ibid* at 103; Alfred cites Robert D. Kaplan, “Looking the World in the Eye” (December 2001) *The Atlantic* at 68-82. See also Alfred, *Wasáse*, *supra* note 262 at 108-109. Alfred explains that these deep roots of racism and intolerance come from Judeo-Christian religions where there is only “one right way”. The beliefs that are thought to be superior, which have roots in these monotheistic religions are notions such as “individual rights as the highest expression of human freedom, representative democracy as being the best guarantor of peace and order, and capitalism as the only means to achieve the satisfaction of human material needs.”

³⁶⁰ *Ibid* at 110.

³⁶¹ LaRocque, “Foreword: “Resist No Longer”, *supra* note 295 at 12. For a discussion of the subjectification of nature see Coulthard, “Subjects of Empire”, *supra* note 262.

explain that it is not necessarily simply a racial issue as much as it is an imperial way of thinking that is the problem.³⁶²

2.3.2: The Dangers and Limitations of Attempting to Achieve Indigenous Self-Determination through Canadian-Based Legal Mechanisms

The fact that Canada persists in its paternal and colonial treatment of Indigenous peoples can be seen in Indigenous attempts to achieve self-determination by state institutions and processes. Indigenous resurgence authors emphasise that while the goals sought and the benefits achieved by the Canadian court system are valuable, they are limited.³⁶³ Indigenous resurgence authors have commended the successes of Indigenous peoples winning significant court battles over resource rights.³⁶⁴ Alfred admits that the goals sought in the Canadian courts such as self-government, land claim settlements, economic development, as well as legal recognition of Indigenous rights are crucial.³⁶⁵ Coulthard adds that the courts have provided extraordinary protection for specific cultural rights.³⁶⁶ Furthermore, IR authors such as Alfred, Corntassel, and Coulthard state that legal and political advocacy should continue.³⁶⁷ That said, the success of these legal achievements have only benefited a small minority of First Nations.³⁶⁸

There is a problem with the state retaining control of power in Canada regarding Indigenous sovereignty including management of Indigenous lands and waters. The issue is that the legal and political processes that the state uses to reconcile Canadian and Indigenous sovereignty (and resolve (resource) disputes) are ineffective and

³⁶² Alfred, *Wasáse*, *supra* note 262 at 102.

³⁶³ *Ibid* at 30 and Coulthard, *Red Skin, White Masks*, *supra* note 5 at 41.

³⁶⁴ LaRocque, "Foreword: "Resist No Longer", *supra* note 295 at 18.

³⁶⁵ Alfred, *Wasáse*, *supra* note 262 at 30.

³⁶⁶ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 41.

³⁶⁷ See Corntassel, "Toward Sustainable Self-Determination" *supra* note 162 at 121. While Corntassel advocates for community-based political resurgence, he clarifies that he is not advocating for an entire abandonment of rights-based discourse, which he admits can be a helpful instrument to use various political tactics as well as to make space for Indigenous spaces in state-centred bodies. See also Coulthard, *Red Skin, White Masks*, *supra* note 5 at 179. Coulthard, also briefly states at his conclusion that Indigenous peoples need to continue participating in state political and legal structures due to the reality of Settler-colonialism treating Indigenous peoples as minorities in their own native lands.

³⁶⁸ Alfred, *Wasáse* *supra* note 262 at 30-31 & 225.

inequitable. Some IR authors have broken with the advocacy for inclusion in state-based processes as they see the state's systems as failing Indigenous peoples' political and social wellness.³⁶⁹ These authors see that state-based "Aboriginal law" is not solving resource conflicts between Indigenous peoples and the state in the ways that Indigenous peoples wish to see.³⁷⁰ Indigenous resurgence authors assert that while it may outwardly look like the state is trying to transfer power and lands over to Indigenous peoples, its mechanisms are still in fact colonial and have interests in continuing the dispossession of Indigenous lands.

Some Indigenous authors dismiss state-based self-government processes, land claims agreement and Aboriginal rights court cases by characterizing these modes as the "politics of pity,"³⁷¹ the "politics of recognition,"³⁷² and the "politics of distraction."³⁷³ These authors believe that these strategies distract Indigenous peoples from more effective means to advance Indigenous sovereignty. Legalist strategies to protect land and water rights in colonial courts have failed.³⁷⁴ This legalist approach is weak and ineffective as a method of challenging colonial worldviews and Settler society.³⁷⁵ Furthermore, Alfred asserts that state-based legal and Indigenous governance systems, such as the *Indian Act* and the Department of Indigenous and Northern Affairs Band Council governance system serve white power and state and Settler interests.³⁷⁶

³⁶⁹ See for example, Glen Coulthard, in both *Red Skin, White Mask*, *supra* note 5 and Coulthard, "Subjects of Empire" *supra* note 262.

³⁷⁰ *Ibid.*

³⁷¹ Alfred, *Wasáse* *supra* note 262 at 20.

³⁷² See Glen Coulthard, in both *Red Skin, White Mask*, *supra* note 5 at 3 & 23-24 and Coulthard, "Subjects of Empire" *supra* note 262 at 439. In *Red Skin, White Mask* and "Subjects of Empire", Coulthard writes extensively on what he calls the "politics of recognition," in which his main argument is that the state-based treaty, legislation, and litigation strategies that Indigenous peoples have been engaged with for the last few decades are a distraction to actual Indigenous sovereignty and resurgence. He argues that "...the politics of recognition in its contemporary form promises to reproduce the very configurations of colonial power that Indigenous peoples' demands for recognition have historically sought to transcend." See Coulthard, "Subjects of Empire" *supra* note 262 at 439.

³⁷³ See Alfred and Corntassel, "Being Indigenous" *supra* note 262 and Corntassel, "Re-envisioning Resurgence," *supra* note 262 at 86-101 for a discussion of the "politics of distraction," which is a very similar if not synonymous concept to what Coulthard characterizes as the "politics of recognition".

³⁷⁴ Alfred, *Wasáse*, *supra* note 262 at 24 & 104. Alfred describes the conventional "legalist approach" as characterized by constitutional rights, fair treatment for Indigenous peoples within Canadian legal structures as well as a moral appeal to Christianity, the religious foundation of imperialism.

³⁷⁵ *Ibid* at 104.

³⁷⁶ *Ibid* at 20.

Part of the issue with reconciliation of Canadian and Indigenous sovereignty is the difference in the ways the state and IR authors conceptualize colonization. Indigenous resurgence authors conceive of colonialism as a structure and problematize the fact that the state characterizes it as an (historical) event. Coulthard explains that there is a problem when the state considers and deals with an Indigenous issue and reconciliation with the idea that colonialism happened in the past, as, in Patrick Wolfe's words, "an event" and not "a structure."³⁷⁷ In other words, the state generally conceives of colonialism as an experience temporally situated at some relatively fixed period in history, meaning that the state sees this as having ended.³⁷⁸ Indigenous resurgence authors state that situating colonialism as a completed event prevents the state from seeing, accepting, and admitting that colonial-capitalism is ongoing. This lack of acknowledgement prevents Indigenous self-determination. This is because Settler colonialism eternally seeks the procurement of (Indigenous) lands.³⁷⁹ Even though IR authors assert that society can transcend colonialism, they warn that as long as colonialism exists as a structure, it will not have an end date.³⁸⁰

Indigenous resurgence authors explain that while the modes that the colonial Canadian state have used to remove Indigenous peoples to gain access to their territories has altered over the years, their goals have been the same.³⁸¹ These aims are to gather Indigenous peoples' lands for state expansion, settlement, and to advance capitalist development.³⁸² Therefore, the Canadian state's orientation of reconciliation of Canadian sovereignty with Indigenous nationhood remains colonial to the extent that it intrinsically obliges the denial of Indigenous land autonomy and self-determination.³⁸³

Furthermore, the rights afforded to Indigenous peoples do not extend past cultural rights.³⁸⁴ Coulthard explains that the state bounds and limits the accommodation

³⁷⁷ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 125; citing Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2006) 8:4 *Journal of Genocide Research* at 388 and 390.

³⁷⁸ *Ibid.*

³⁷⁹ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 125 & 152.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ *Ibid* at 151.

³⁸⁴ *Ibid* at 41.

of any Indigenous legal protection only to the extent that it does not conflict with its colonial sovereignty or capitalist production.³⁸⁵

In addition to denying its participation in ongoing colonialism, the Canadian state illustrates its reticence in giving up this unjust grip of control.³⁸⁶ Yet Indigenous communities require a power change for a long-lasting transformation. Indigenous resurgence authors ask, how can the state solve Indigenous sovereignty issues if it is unwilling to give up its authority so that it can resolve these problems?

Another way in which the state illustrates its resistance to sharing its power to allow true Indigenous self-determination is seen in how the Supreme Court of Canada (SCC), over the last 30 years, has constantly denied recognition of Indigenous peoples' self-determination. Coulthard explains that this is due to its compliance with legal precedence founded on white supremacist myths that Indigenous societies were too unsophisticated to bear political rights when first contact occurred with European powers.³⁸⁷ The courts continually decline opportunities to acknowledge the racist origins of the colonial legal authority assumed by the Canadian state over Indigenous peoples and their lands.³⁸⁸

³⁸⁵ *Ibid* at 66.

³⁸⁶ Alfred, *Wasáse*, *supra* note 262 at 112. One way in which the state illustrates its reticence to give up power is that it rejects any notion of Indigenous autonomy as it is seen as a threat to Canadian national unity. In Alfred's view, Canadian conceptions of "national unity" and social peace espoused by the state are myths, yet they are thought of by Canadians as sacred and therefore remain unexamined and unquestioned. The consequence of this is a political atmosphere where notions of justice that are different from that of the state are seen as threatening to the foundation of nation-states that purport to surpass colonialism. Alfred contends that the notion of this national unity is premised on the idea that Indigenous peoples and Canadians could live harmoniously if everyone were the same, homogenous. This explains why the state rejects pluralistic proposals for the Indigenous Canadian relationship as well as "the inherent institutional-statist bias in all discussions of reforming relations..."

³⁸⁷ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 41; Coulthard cites Michael Asch, "From 'Calder' to 'Van der Peet': Aboriginal Rights and Canadian Law" in Indigenous Peoples' Rights in Australia, Canada, and New Zealand, ed. Paul Havemann, (Auckland: Oxford University Press, 1999) at 428-226; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto, ON: University of Toronto Press, 2001); James Tully, "The Struggles of Indigenous Peoples for and of Freedom" in Duncan Ivison, Paul Patton and Will Saunders, (ed), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2001) at 36-59 [Tully, "The Struggles of Indigenous Peoples"]; see also: Coulthard, "Subjects of Empire" *supra* note 262 at 451-452.

³⁸⁸ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 41.

Coulthard uses a Fanonian viewpoint to explain his argument regarding state limits of Aboriginal rights. Coulthard explains how the state, courts, policy makers, and corporate interests combine in systems that limit the “liberal discourse of recognition” in ways that preserve the colonial status quo.³⁸⁹ In their attempt to reconcile Canadian sovereignty with prior existing Indigenous inhabitancy, the courts continue their refusal in accepting that Indigenous peoples had political governance systems at the time of European contact.³⁹⁰ Instead of acknowledging Indigenous sovereignty, the courts offer up a narrow conception of cultural rights that can be infringed upon for various legislative objectives.³⁹¹

Even the right to Indigenous self-government, which is constitutionally protected in Canada, can be contravened in the SCC’s “justifiable infringement test” spelled out in *R v Sparrow* and other cases such as *R v Marshall* (No. 2).³⁹² For example, in the case of *Delgamuukw v British Columbia*,³⁹³ the SCC also enunciated an extensive list of when Aboriginal rights could be infringed upon.³⁹⁴ After reviewing these SCC cases, Coulthard concludes that it seems that the present colonial forces in Canada, much as they were in Fanon’s day, are only willing to recognize Indigenous collective rights and characteristics to the extent that this acknowledgment does not threaten the underlying legal, political, and economic foundation of colonialism.³⁹⁵

³⁸⁹ *Ibid* at 40.

³⁹⁰ *Ibid* at 124.

³⁹¹ *Ibid*.

³⁹² *Sparrow*, *supra* note 133; *Marshall*, *supra* note 133; Coulthard, *Red Skin, White Masks*, *supra* note 5 at 124.

³⁹³ *Delgamuukw*, *supra* note 5.

³⁹⁴ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 41, points to the case of *Delgamuukw*, *supra* note 5 at paras 161-162 as an example where the Crown could infringe on Aboriginal rights if the state could show that there was a legislative objective that was “compelling and substantial” that is in accordance with the fiduciary duty that the Crown owes to Aboriginal peoples due to their special relationship. Coulthard also explains at that in *Delgamuukw*, *supra* note 5, the Supreme Court enunciated that to justify such an infringement one could present “virtually any exploitative economic venture.” This includes “development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims.” (*Delgamuukw*, *supra* note 5 at para 165 cited in Coulthard, *Red Skin, White Masks*, *supra* note 5 at 41).

³⁹⁵ *Ibid*. Furthermore, yet another problem IR authors find with state-based Aboriginal law is the limited way in which the Canadian state interprets Indigenous rights as individualistic instead of collective. See Alfred, *Wasáse*, *supra* note 262 at 112. Alfred explains that rather than expressing “Indigeneity” in its correct collective cultural context, the courts only offer a set of individual rights as combined into the context of a community. Such state-based aggregated individual rights do not equate to Indigenous communal rights that pre-dates the state. The state’s position here

Another way in which the state limits Aboriginal rights is the way in which the court restricts such rights to internal Indigenous communities. In terms of Indigenous self-determination, the court's provided "inherent right to self-government" preclude a right to sovereignty.³⁹⁶ The court is instead granting a recognition of the Aboriginal right to govern Indigenous communities' internal matters integrally tied to their distinctive identities, cultures, traditions, languages, and institutions.³⁹⁷

Limiting the scope of Indigenous rights and its justification on infringements to an Indigenous rights clause illustrates how the courts have protected and maintained state authority to assert its control and hold on to its power tightly.³⁹⁸ This is a point that is important to make here because it helps explain why IR tactics to transform power and social relations must be so assertive and delegitimizing.

Corntassel also explains the ways in which state legal mechanisms limit Indigenous peoples from achieving self-determination. He lists four ways that the state and international organizations frame Indigenous self-determination claims over the last 30 years that jeopardize the futures of Indigenous communities.³⁹⁹ First, Indigenous self-determination claims are compartmentalized to issues of legal and political nature and separated from discussions of sustainability, sustainable livelihoods, Indigenous identities, homelands, and natural resources.⁴⁰⁰

essentially proclaims that Indigenous rights do not equal liberal human rights guarantees, which is a viewpoint premised on the unsubstantiated belief that Euroamerican concepts of rights and freedoms are superior to Indigenous worldviews.

³⁹⁶ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 123.

³⁹⁷ *Ibid* at 123. Coulthard cites Canada, DIAND, *The Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Self-Government* (Ottawa: DIAND, 1995) online: <<https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>>.

³⁹⁸ See Alfred, *Wasáse*, *supra* note 262 at 120 for details on this fear that drives the state to hold onto power tightly.

³⁹⁹ Corntassel, "Toward Sustainable Self-Determination" *supra* note 162 at 107-108.

⁴⁰⁰ *Ibid* at 107, 113, & 124. Corntassel points to the Nisga'a Final Agreement (also known as the Nisga'a Treaty) as an example of where some (limited) political and legal autonomy was granted to the Nisga'a but the Agreement failed to "address interrelated issues of regenerating sustainable livelihoods, food security, and renewal of community relationships with the natural world." (Corntassel, "Toward Sustainable Self-Determination" *supra* note 162 at 107). Here, Corntassel cites James Tully's assessment of the Nisga'a Agreement. See Tully, "The Struggles of Indigenous Peoples", *supra* note 387 at 50. Tully explains that the Nisga'a Final Agreement was the first time that an Indigenous people on Turtle Island (North America) voluntarily surrendered their rights and land and accepted the status as "a distinctive minority with group

Second, at times, Indigenous self-determination “rights discourse” claims deny Indigenous peoples from their identities, and at times brand Indigenous peoples as minority populations instead of “Indigenous” or other designations that provide more weight under international law.⁴⁰¹ Third, the political and legal rights framing de-emphasises First Nations cultural relationships and responsibilities to Mother Earth.⁴⁰² Fourth, this state framing has limited decolonization by creating *ad hoc* legal mechanisms against it.⁴⁰³

In the past thirty years, through numerous attempts to gain state recognition to the right to self-government, Indigenous peoples have gradually accepted the legitimacy of the liberal democratic state as the means to political regulation.⁴⁰⁴ By seeking Indigenous sovereignty through the state, Indigenous peoples have allowed their political goals to be understood and considered by a statist regime.⁴⁰⁵ Indigenous resurgence authors warn that seeking Indigenous liberation through existing human rights mechanisms, not only prevents the advancement of Indigenous self-determination and regeneration,⁴⁰⁶ it actually further embeds unjust legal and political structures.⁴⁰⁷ This then only allows for minor amendments to the established ruling colonial powers of control.⁴⁰⁸

Indigenous resurgence authors problematize the state and its legal mechanisms as a means of affording Indigenous self-determination. Indigenous resurgence authors explain that Eurocentrism prevails as a way of thinking in Canadian society and in the Canadian state, which is at odds with Indigenous worldviews. Therefore, courts and state-based Aboriginal law does not actually achieve Indigenous self-determination in the ways Indigenous peoples want. Therefore, IR authors see it is a dangerous activity to engage in the “politics of recognition”, which are state-based legal recognition of Aboriginal rights. This is because the state uses its processes as sites to co-opt and

rights within Canada.” Tully explained that the Nisqa’a Agreement looks to be the first completion of “strategies of extinguishment (release) and incorporation by agreement.”

⁴⁰¹ *Ibid* at 107.

⁴⁰² *Ibid* at 107-108.

⁴⁰³ *Ibid* at 108.

⁴⁰⁴ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 159.

⁴⁰⁵ Alfred in *Peace, Power, and Righteousness*, 1st ed, *supra* note 262 at 56.

⁴⁰⁶ Corntassel, “Re-envisioning Resurgence” *supra* note 262 at 92.

⁴⁰⁷ See Alfred, *Wasáse*, *supra* note 262 at 180.

⁴⁰⁸ *Ibid*.

further entrench Indigenous peoples in the colonial status quo, which is comprised of asymmetrical power relationships in which the state will always determine the boundaries and outcomes. As Coulthard states:

The politics of recognition in its contemporary liberal form promises to reproduce the very configurations of colonialist, racist, patriarchal state-power that Indigenous peoples' demands for recognition have historically sought to transcend.⁴⁰⁹

Indigenous resurgence authors therefore assert that to truly achieve Indigenous self-determination, Indigenous peoples must work outside of the state. The next part of this literature review details the three IR themes that are common to the goals for which multiple IR authors' advocate.

3.0: Themes & Analytical Framework: Indicia of Indigenous resurgence

Given my review of the literature, three themes emerged as prevalent for what IR authors emphasise is needed for Indigenous peoples to flourish: 1) transformation of political and social power from the state to Indigenous communities, 2) increased respect for and use of Indigenous worldviews as an alternative to Eurocentric worldviews, and 3) Indigenous self-determination. The discussion of each of these three themes details the visions and aspirations for which IR authors advocate: increased power, respect, and self-determination for Indigenous peoples. These themes are prevalent throughout the IR literature regardless of whether one is talking about gender equality, land sovereignty, or ameliorating other social ills.

One can use these three themes from the IR literature as an analytical framework for analysing sites of state-Indigenous conflicts over natural resources. Given the prevalence and frequency of these themes discussed by various IR authors, one can see that there is some consensus of these goals and values of IR, regardless of the diverse ways in which IR authors envision increasing self-determination and advancing decolonization.

⁴⁰⁹ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 3.

These three IR themes are useful to my analytical framework and argument that colonialism is ongoing and present in the realm of Indigenous water sovereignty in that they can help illustrate whether and to what extent decolonization is present during any state-Indigenous interaction. I propose an analytical framework that concludes that decolonization is present if one of these themes or goals is occurring or has occurred in the EA or case of *Halalt v BC* as perceived by the interview participants. By using these themes as indicia of decolonization, I can then determine if the threats that IR authors warn of come through in the relationships and dynamics that Halalt had with the state in the EA or case of *Halalt v BC*. These reasons make it useful to analyse whether IR occurred in the case study as an indicator of decolonization.

For example, if there is evidence that a transformation of political or social power, increased respect and/or use of Indigenous worldviews (especially as an alternate to Eurocentric worldviews) or Indigenous self-determination is present then one can answer the question: “do we know/understand that decolonization has occurred or is occurring here or not?” in the positive. One can use one or a combination of these themes as an indicator or indicia to evaluate whether decolonization is present in conflicts over natural resources between Indigenous communities and the state.

I note here that although IR advocates for a turn away from the state, it still provides a useful lens through which to analyse a conflict where an Indigenous community (Halalt) chose to engage the state in colonial legal mechanisms to try to resolve this dispute. Using an anti-state theoretical framework can provide illuminating conclusions where a simple colonial legal analysis would not.

The following sections describe the tenets of each of the three IR themes and conclude by noting how they contribute to my analytical framework and explaining why they are useful indicia by which to analyse my case study.

3.1: Theme 1: Transformation of Political and Social Power

3.1.1: Description of Theme 1

Indigenous Resurgence authors view the Canadian state as having failed thus far regarding the development of Western-state based Aboriginal law and its project of reconciliation of Canadian and Indigenous sovereignty. Therefore, IR authors advocate for a power shift to real decolonization and Indigenous self-determination. In this section, I outline the modes and processes by which IR authors see this transformation occurring.

First, I provide the context of why and how IR authors think this transformation should happen. This will help make clear the basis for why they believe this transition needs to happen outside of the state. Second, I discuss how IR authors assert that IR must start with Indigenous individuals then move outwards to their families then communities. Third, I explain how IR authors state that grounding individuals and communities in traditional Indigenous cultural practices in relation to the natural world is one such effective way to transform social and political power.

In his interpretation of Charles R Hale's scholarship, Alfred asserts that generally, Indigenous peoples have three main demands: "1) exclusive governance over a significant territory;⁴¹⁰ 2) control of resources within that territory, with the expectation of sharing the proceeds of development with the state; and 3) the legal and political recognition of [Indigenous] cultural norms in the territory."⁴¹¹ For example, Indigenous peoples want Settlers to acknowledge Indigenous peoples' integral connection to the land.⁴¹²

⁴¹⁰ The Canadian state often forces Indigenous peoples into such a stern political stance. However, I acknowledge that this territorial exclusivity might not always be required because alternatives such as i.e. intra-First Nation governance schemes are also possible. Furthermore, Indigenous communities often advocate for co-governance and co-management of resources between Indigenous communities and the Canadian state.

⁴¹¹ Alfred, *Wasáse*, *supra* note 262 at 157 interpreting Charles R Hale, *Resistance and Contradiction: Miskitu Indians and the Nicaraguan State, 1894-1987* (Stanford, California: Stanford University Press, 1994) at 192 [Hale, *Resistance and Contradiction*].

⁴¹² Alfred, *Wasáse*, *supra* note 262 at 19 & 281. To be explicit however, while Indigenous peoples want their territories returned to them generally, contrary to what the Canadian state and Canadians may fear, Indigenous peoples do not generally wish for such a transformation to include non-Indigenous peoples going "back to where they came from." As Alfred explains, successful

Indigenous resurgence authors state that the transformation required for decolonization must start with Indigenous individuals and then move outwards to the community and nation level.⁴¹³ Self-transformation is necessary before the relationship between Indigenous peoples and the state can be altered.⁴¹⁴ Alfred sees this as the first step to removing oneself from dependency on the state and to develop self-sufficiency.⁴¹⁵ To do so, Indigenous peoples must gain their self-worth from within. Drawing on Fanon's views, Coulthard explains that individuals need to change the psychology of their colonized minds to be filled with self-worth, pride, and confidence.⁴¹⁶ To do so Coulthard interprets Fanon's views to mean that the colonized must self-recognize as "free, dignified, and distinct contributors to humanity."⁴¹⁷ Rooting Indigenous peoples in their cultures and teachings provides such self-empowerment and provides the ultimate antidote to colonization.⁴¹⁸ This grounding requires reconnection to homelands through ceremony and other land-based cultural practices as well as rebuilding Indigenous communities.⁴¹⁹

Alfred also contends that self-determination must start with the self.⁴²⁰ He proclaims that one must take a mindful and spiritual journey of internally rejecting colonists' authority and colonial definitions of whom Indigenous peoples are, what constitutes Indigenous rights, what is valuable, and how Indigenous peoples should live.⁴²¹ There needs to be a revolt against what colonists envision them becoming and to remember and act on traditional ancestral values.⁴²² This is the process of spiritual revolution needed to ensure Indigenous peoples' survival.⁴²³

Indigenous liberation would look like the creation of a new peaceful society rather than attempting to abolish or replace the Canadian state or to expel the colonial settlers.

⁴¹³ *Ibid* at 20 and 32; Coulthard, *Red Skin, White Masks*, *supra* note 5 at 43; Simpson, *Dancing on Our Turtle's Back*, *supra* note 9 at 17.

⁴¹⁴ Simpson, *Dancing on Our Turtle's Back*, *supra* note 9 at 17.

⁴¹⁵ Alfred, *Wasáse*, *supra* note 262 at 20.

⁴¹⁶ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 43.

⁴¹⁷ *Ibid*; Coulthard cites: Fanon, *The Wretched of the Earth*, *supra* note 285 at 148.

⁴¹⁸ Simpson, *Dancing on Our Turtle's Back*, *supra* note 9 at 17.

⁴¹⁹ Alfred, "Colonialism and State Dependency" *supra* note 262 at 42-60.

⁴²⁰ Alfred, *Wasáse*, *supra* note 262 at 32.

⁴²¹ *Ibid*.

⁴²² *Ibid*.

⁴²³ *Ibid*.

Corntassel encourages Indigenous peoples to keep in mind that “change happens in small increments”⁴²⁴ and it does so “one warrior at a time.”⁴²⁵ Likewise, the transformation to Indigenous regeneration and decolonization will occur through one-on-one mentoring and directly guided experiential practices in small intimate groups.⁴²⁶ After transforming oneself, then decolonization can become realized when there is a collective commitment to a movement that is founded on an ethical and political vision that concurrently rejects colonial positions of feeble submission, acting as victims, and rampant violence.⁴²⁷

Alfred advocates for a spiritually and culturally rooted peaceful warrior movement that transforms society and politics to recreate the whole political landscape into an authentic post-imperial image.⁴²⁸ He explains that resurgence is present when there is a united disposition, an interconnected community, and the renewal of peaceful and respectful relationships.⁴²⁹ Alfred’s vision of a “politics of resurgence” is a non-violent, spiritual, and genuinely cultured strategy that creates a realistic threat to the colonial regime.⁴³⁰

In addition to the self and community transformations that IR sees as necessary, Alfred asserts that a reconceptualization and a shift in consciousness in how the assumptions and legitimacy of the state is viewed are required to decolonize.⁴³¹ As an alternative to the “legalist system” as described above, Alfred asserts that Indigenous peoples must advance social equality and political pluralism that reflects universal humanistic principles.⁴³² This must be done by illuminating radical truth through racial prejudice and deep emotional attachments to colonial institutions, both of which are largely unnoticed by the dominant Settler and colonial culture.⁴³³ Alfred sees

⁴²⁴ Corntassel, “Toward Sustainable Self-Determination” *supra* note 162 at 126.

⁴²⁵ Alfred and Corntassel, “Being Indigenous” *supra* note 262 at 613.

⁴²⁶ *Ibid.*

⁴²⁷ Alfred, *Wasáse*, *supra* note 262 at 20.

⁴²⁸ *Ibid* at 27.

⁴²⁹ *Ibid* at 45.

⁴³⁰ *Ibid* at 204.

⁴³¹ *Ibid* at 231.

⁴³² *Ibid* at 104.

⁴³³ *Ibid.*

decolonization as a factual discovery process where the emancipatory keys lay in the power of truth.⁴³⁴

The state has moved away from its overt violent war-machine to a covert mechanism that appears beneficent and honourable in its dealings with Indigenous peoples.⁴³⁵ While Alfred admits it would be too difficult to challenge the physical (military) force of the state, the state's other two components, authority and legitimacy can be contested.⁴³⁶ Therefore, assuming that the state will continue to not use violence against Indigenous peoples rather than requiring Indigenous-led armed conflict, creating political and social crises to delegitimize the state is a necessary tactic to transform political and social power.⁴³⁷ Simpson explains that this necessitates Indigenous individuals and cooperatives to identify, question, and eviscerate the sinister character of subjugation and imperialism that affects every facet of Indigenous lives.⁴³⁸

There needs to be a disconnection between how the state operates as stealthily colonial and how Settler society believes it should operate.⁴³⁹ Moral struggles are created when Settlers understand how the state treats Indigenous peoples in violently repressive ways.⁴⁴⁰ Scenes of open violence and subjugation of Indigenous peoples will conflict with Settler conceptions of the Canadian state as a peaceful, safe, and democratic society.⁴⁴¹

Delegitimizing the state is one way that may achieve transformation of political or social power. This may be possible because once the difference in perceived and actual state operations occurs, political and legal governance systems will be forced to change to the realities of power.⁴⁴² This is because Settlers would reject overt state violence to achieve colonial goals.⁴⁴³ As a result, Alfred argues that Indigenous peoples would then

⁴³⁴ *Ibid* at 280.

⁴³⁵ *Ibid* at 267.

⁴³⁶ *Ibid* at 55.

⁴³⁷ *Ibid*.

⁴³⁸ Simpson, *Dancing on Our Turtle's Back*, *supra* note 9 at 25-26.

⁴³⁹ Alfred, *Wasáse*, *supra* note 262 at 267-268.

⁴⁴⁰ *Ibid* at 268. The state mostly uses violent force to repress Indigenous peoples within the context of resource conflicts where licenses have been given out to extract from the land and waters.

⁴⁴¹ *Ibid*.

⁴⁴² *Ibid*.

⁴⁴³ *Ibid*.

be able to achieve their most basic of objectives for a just relationship with the state as well as sustainable peaceful coexistence.⁴⁴⁴ These goals would include restitution, returning unceded lands, and reforming state legal mechanisms to include nation-to-nation Indigenous-state relationships.⁴⁴⁵

Alongside problematizing the state's ongoing colonialism and assimilation, IR authors call on Indigenous peoples to build a new Indigenous reality. As Coulthard points out, both Alfred and Simpson call for Indigenous peoples' to "turn away" from attempts to transform the state through the liberal legal recognition process and to substitute such strategies with liberation movements that focus on traditional Indigenous values.⁴⁴⁶ Building upon past Indigenous struggles and movements it is now the time of current Indigenous peoples "who choose to turn away from the legacies of colonialism and take on the challenge of creating a new reality for ourselves and for our people."⁴⁴⁷

Simpson explains that Indigenous peoples should create this new reality by re-establishing their future visions and the processes by which they wish to live in the contemporary context.⁴⁴⁸ Indigenous peoples can regenerate outside the state, as IR praxis is not reliant on the state for funding or a friendly political climate.⁴⁴⁹ Indigenous resurgence can operate on Indigenous terms without the authorization of the state, opportunity, or the acceptance of Canadian opinion.⁴⁵⁰ Instead, what are needed are Elders, Indigenous languages, communities, resolve, and action.⁴⁵¹

Furthermore, Simpson advocates for transformation of power to occur via Indigenous legal systems and traditions. She explains that transformation through IR methods should occur by "re-investing in [Indigenous] ways of being: regenerating [Indigenous] political and intellectual traditions; articulating and living [Indigenous] legal systems; language learning; ceremonial and spiritual pursuits; creating and using

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Ibid.*

⁴⁴⁶ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 154; citing Alfred, *Peace, Power, and Righteousness*, 1st ed, *supra* note 262 at xiii; Simpson, *Dancing on Our Turtle's Back*, *supra* note 9 at 17.

⁴⁴⁷ Alfred, *Wasáse*, *supra* note 262 at 19.

⁴⁴⁸ Simpson, *Dancing on Our Turtle's Back*, *supra* note 9 at 17.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.*

[Indigenous] artistic and performance-based traditions.”⁴⁵² Simpson reminds us that mass mobilization to create a transformative political change is only one way of performing Indigenous resistance.⁴⁵³ The other resistance is in Indigenous peoples practicing their languages, cultures, and systems of governance.⁴⁵⁴

3.1.2: Analytical Framework of Theme 1

Based on my discussion of theme 1 above, if there is or was evidence that social or political power shifted from the state to Indigenous communities, decolonization is occurring. I justify my use of my IR Theme 1 as an indicator that IR is occurring for three reasons. First, IR as an academic tool has been explicitly created to combat colonialism in the Canadian state.⁴⁵⁵ Indigenous resurgence authors continually deliberate on the fact that Indigenous communities do not want to be dominated by the capitalist-colonial Canadian state.⁴⁵⁶ Second, IR authors frequently discuss power struggles with the state and want to undo the unjust power shift that removed governance, political, and social power from Indigenous peoples and their communities.⁴⁵⁷ Examples of this include how IR authors explicitly state that they want to transform political and social power from the state to Indigenous communities.⁴⁵⁸

Third, in addition to stating that the state needs to transfer power to Indigenous communities, IR authors detail the various *methods* by which Indigenous individuals and communities can transfer this power. One such method that IR authors use as a site of possible transformation is their deconstruction and problematization of the assumptions upon which the state legitimizes its Crown asserted sovereignty.⁴⁵⁹ Furthermore, IR has a sub-theme of how to declare sovereignty outside of the state as a way to transform

⁴⁵² *Ibid* at 17-18.

⁴⁵³ Simpson, *Dancing on Our Turtle's Back*, *supra* note 9 at 16.

⁴⁵⁴ *Ibid*.

⁴⁵⁵ See above section in this thesis, 2.0: Overall Description of Indigenous resurgence.

Alfred, *Wasáse* *supra* note 262. Wildcat et al, “Learning from the Land” *supra* note 270 at III.

⁴⁵⁶ See above sections in this thesis, 2.0: Overall Description of Indigenous resurgence, 2.1: Indigenous resurgence Scholarship, and 2.3.1: The Dominance of Colonial-Capitalism. Coulthard, *Red Skin, White Masks* *supra* note 5 at 157.

⁴⁵⁷ See above sections in this thesis, 1.0: Introduction and 2.1: Indigenous resurgence Scholarship. Coulthard, *Red Skin, White Masks* *supra* note 5 at 157.

⁴⁵⁸ See above section in this thesis, 3.1: Theme 1: Transformation of Political and Social Power.

⁴⁵⁹ See above section in this thesis, 2.3.1: The Dominance of Colonial-Capitalism. Alfred, *Wasáse*, *supra* note 262 at 110-111 and 201-203.

power to indigenous communities.⁴⁶⁰ Lastly, another method that IR authors assert can be used to transform political and social power from the state to Indigenous peoples is “everyday acts of resurgence” via land-based cultural practices and ceremonies.⁴⁶¹

From these examples, one can see that transformation of political and social power is a recurrent thematic topic in the IR literature. I justify using transformation of political and social power as an indicator to show evidence that decolonization is present because that is what Indigenous peoples in Canada discuss and assert. Indigenous resurgence is relational, and its goals of decolonization would not exist had colonization not happened. Indigenous resurgence authors want to decolonize and undo the negative effects of colonization. There is evidence that Indigenous peoples do not want the power to stay in the state because it is not Indigenous peoples being sovereign over their resources, for which they want and for which they advocate. That is why they want a transformation of power from the state to Indigenous peoples. Transformation of power from the state to Indigenous communities is decolonial and therefore an indicator of decolonization as it is reversing that power that the state withdrew from Indigenous communities through colonization.

Therefore, I assert that decolonization is present when power and social relations are renegotiated, transformed, or reformed providing Indigenous peoples an increase of power. This may occur, for example, when the state, usually the federal or provincial governments, transfers power to Indigenous communities.

Theme 1 is specifically useful to my project because, as I will show in Chapter 4: Results, Halalt was seeking a transformation of power through various requests that they made that would transform power from the state to their community. Furthermore, as discussed above, IR explains that a danger of engaging with the state is that it will retain power tightly and be reticent to give up control (to Indigenous communities).

⁴⁶⁰ See above sections in this thesis, 2.0: Overall Description of Indigenous resurgence and 3.1.1: Description of Theme 1. Coulthard, *Red Skin, White Masks*, *supra* note 5; Simpson, *Dancing on Our Turtle’s Back*, *supra* note 9 at 17.

⁴⁶¹ See above sections in this thesis, 2.0: Overall Description of Indigenous resurgence; 3.1.2: Analytical Framework of Theme 1 and 3.3.1: Description of Theme 3. Corntassel, “Re-envisioning Resurgence” *supra* note 262 at 88-99.

3.2: Theme 2: Indigenous Worldviews as an Alternative to Eurocentric Worldviews

3.2.1: Description of Theme 2

Indigenous resurgence authors accept the challenge of providing alternatives to the colonial-capitalist system they are intent on removing.⁴⁶² These authors hold that Indigenous worldviews will empower political mobilization of Indigenous communities and contribute to decolonization. As IR advocates are interested in re-centering Indigenous governance from the state to Indigenous communities, acknowledging, accepting, and increasing respect for Indigenous worldviews can be starting points for decolonization. Some of the main Indigenous principles detailed in the IR discourse include respect, reciprocity, relationships, responsibilities, and place-basedness.

There of course is no specific pan-Indigenous worldview and it is important to note that Indigenous worldviews are adaptive, flexible, and can change over time. However, there are similar themes in the IR literature that flow through different Indigenous communities whether they are, for example, Nishnaabeg, Dene, or Mohawk for example.

Generally, Indigenous worldviews respect relationships with all living and non-living things. Indigenous worldviews provide alternatives, commencing with a foundation of respect, which acknowledges and allows the integrity and autonomy of various elements in the natural world.⁴⁶³ When Indigenous individuals and communities perform land and water-based practices, they are committing to and revitalizing their Indigenous responsibilities to mother Earth.⁴⁶⁴ For IR authors, practicing these land and water-based responsibilities is not just cultural, it is political. In order to decolonize, Simpson states that Indigenous peoples need to reclaim their best cultural practices, lifeways, and

⁴⁶² Coulthard, *Red Skin, White Masks*, *supra* note 5 at 173. Furthermore, see Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, MA: South End Press, 2005) at 5. Tsalagi (Cherokee) scholar Andrea Smith acknowledges the responsibility to provide Indigenous alternatives when contesting state governance. She states that if Indigenous people recognize the state as a culprit of violence against (Indigenous) women as well as a perpetrator of Indigenous peoples' genocide, then Indigenous peoples must create alternative forms of governance that challenge those forces that do not presume the continuance of colonial nation-states.

⁴⁶³ Alfred, *Wasáse*, *supra* note 262 at 46.

⁴⁶⁴ Bryce and Corntassel, "Practicing Sustainable Self-Determination" *supra* note 262 at 160.

knowledge systems in the active, empathetic, respectful fashion in which they were initially created.⁴⁶⁵ Corntassel asserts that Indigenous peoples must perform their community-based responsibilities to reposition themselves politically and philosophically to regenerate themselves, their families, and communities.⁴⁶⁶ This allows for new pathways for sustainable self-determination to open.⁴⁶⁷

Indigenous resurgence authors also include “place-basedness” as an integral concept to an Indigenous way of life. For Indigenous peoples, “place” as a concept is a way of knowing and experiencing the world and relating to others.⁴⁶⁸ Indigenous ways of being and knowing are related to (geographically situated) place-based knowledge about specific lands and waters in their traditional territories. This is an ethic where specific lands, waters, plants, and animals are deeply respected due to their spiritual importance to Indigenous peoples. This place-based cultural ethic drives Indigenous sovereignty movements and political disputes (such as in land claim negotiations) due to the importance of specific territorial areas to particular Indigenous nations.⁴⁶⁹ Politically, Coulthard explains, that these relational practices and place-based systems of knowing sometimes form resistance against other worldviews that threaten to destroy Indigenous sense of place.⁴⁷⁰

From the principles of reciprocity and relationships between humans and nature flow responsibilities for Indigenous peoples to take care of the world around them. For example, in Coulthard’s Dene community, because non-human plants, animals, lands, and waters have spirit and agency in Indigenous communities, meant that ethically, humans held certain obligations to these entities similar to how Indigenous peoples have responsibilities to each other.⁴⁷¹ Coulthard’s Dene community believes that meeting these ethical obligations equates into the land, plants, animals, and waters reciprocating and meeting their obligations to humans, which would ensure the survival and well-being

⁴⁶⁵ Simpson, *Dancing on Our Turtle’s Back*, *supra* note 9 at 18.

⁴⁶⁶ *Ibid* at 121.

⁴⁶⁷ *Ibid*. See the Women’s Water Walkers discussion below as an example of a land-based resurgence practice that IR authors frequently cite.

⁴⁶⁸ Coulthard, *Red Skin, White Masks*, *supra* note 5 at 61.

⁴⁶⁹ *Ibid* at 53.

⁴⁷⁰ *Ibid* at 61.

⁴⁷¹ *Ibid*.

of all living and non-living things over time.⁴⁷² Coulthard explains that non-Indigenous allies (as well as Indigenous peoples) also have a responsibility for taking care of the land.⁴⁷³

Indigenous resurgence authors contend there is a spiritual and moral ethic that requires Indigenous peoples to take care of the Earth. For example, Corntassel explains that Indigenous communities need a spiritual revolution to build responsibility-based procedures.⁴⁷⁴ The way one treats the natural environment indeed is different depending on whether one conceives of an entitlement to nature as compared to a responsibility for its care.

Indigenous resurgence authors believe that there should be heightened awareness and respect for Indigenous responsibilities to nature. Therefore, instead of focusing on advocating for Aboriginal rights discourse, Corntassel asserts that Indigenous communities should direct their energies towards inherent Indigenous responsibilities, which is where he sees the “real power” laying.⁴⁷⁵

Indigenous resurgence authors frequently explain that a responsibility ethic must supersede rights-based movements for substantive changes towards decolonization to occur within the state system.⁴⁷⁶ Specifically, Corntassel states that starting from a place of community-based responsibilities is critical for a political and philosophical repositioning of Indigenous individual, community, and family regeneration.⁴⁷⁷ Indigenous peoples should create their own community-based solutions in order for this regeneration and decolonization to take place on a larger scale.⁴⁷⁸ Corntassel explains that because of their responsibility ethic, Indigenous peoples have predated the rights-based state system and they will outlast it.⁴⁷⁹

⁴⁷² *Ibid.*

⁴⁷³ *Ibid* at 177.

⁴⁷⁴ Corntassel, “Toward Sustainable Self-Determination” *supra* note 162 at 124.

⁴⁷⁵ Corntassel, “Re-envisioning Resurgence” *supra* note 262 at 91.

⁴⁷⁶ Corntassel, “Toward Sustainable Self-Determination” *supra* note 162 at 121.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid* at 126.

Indigenous resurgence authors often cite the Women's Water Walkers of the Wikiwemikong unceded First Nation in Ontario as a way to illustrate an example of what it means to practice an Indigenous resurgence responsibility to the natural environment.⁴⁸⁰ Specifically, Corntassel characterizes this action as an example of an "everyday act of resurgence."⁴⁸¹ This movement began in 2002 and is led by First Nations women including Josephine Mandamin and Irene Peters as a response to the growing environmental pollution that was affecting their traditional waters.⁴⁸² This group was led by women who wanted to ensure they practiced their responsibility of protecting the waters.⁴⁸³ Women in Indigenous communities have the responsibility of protecting the water by virtue of their special connection to water that comes from being life givers. These women lead an annual spiritual walk and water ceremony carrying buckets of water around the various Great Lakes traveling for hundreds of kilometres to raise awareness of the need to protect the waters.⁴⁸⁴

Corntassel explains that the Water Walkers actions of resurgence remind Indigenous peoples to act on their values and illustrate to future generations that the present Indigenous peoples defended their lands, cultures, and communities.⁴⁸⁵ Indeed, these walks have inspired women from other Indigenous communities to organize their own water walks.⁴⁸⁶ In practicing this beautiful sacred movement, these women do not need permission to practice their responsibilities to the water and are not bogged down by bureaucracy.⁴⁸⁷ This is a way for women to participate in Indigenous water management. As Anishinaabe Professor Deborah McGregor points out, state-centric water governance systems only marginally represent women though they are the spiritual keepers of Indigenous waters.⁴⁸⁸

⁴⁸⁰ Bryce and Corntassel, "Practicing Sustainable Self-Determination" *supra* note 262; Corntassel, "Re-envisioning Resurgence" *supra* note 262 at 94, and McGregor, "Anishinabe-Kwe, Traditional Knowledge, and Water Protection," *supra* note 168. See also Mother Earth Water Walk "Homepage" online: <<http://www.motherearthwaterwalk.com/>> [Mother Earth Water Walk].

⁴⁸¹ Corntassel, "Re-envisioning Resurgence" *supra* note 262 at 88.

⁴⁸² *Ibid* at 94. See also Mother Earth Water Walk, *supra* note 461.

⁴⁸³ *Ibid*.

⁴⁸⁴ *Ibid*.

⁴⁸⁵ *Ibid*.

⁴⁸⁶ McGregor, "Anishinabe-Kwe Traditional Knowledge and Water Protection" *supra* note 168 at 29.

⁴⁸⁷ *Ibid*.

⁴⁸⁸ *Ibid*. Professor McGregor is an Anishinaabe woman from Whitefish River First Nation, Birch Island, Ontario.

In this section, I described the visions that IR authors have for a transformation where the respect and use of Indigenous worldviews (as an alternative to Eurocentric worldviews) is amplified. The next section will discuss the usefulness of Theme 2 as an indicator of decolonization in the case study.

3.2.2: Analytical Framework of Theme 2

Founded on my discussion of theme 2 above, decolonization is occurring or has occurred if there is or was evidence of an increased respect or deference to Indigenous worldviews (instead of Eurocentric worldviews). I justify using this IR theme as an indicator that decolonization has occurred for two reasons.

First, IR authors repeatedly challenge Eurocentric views as discordant with Indigenous worldviews.⁴⁸⁹ To do so, IR authors spend time deconstructing the problems and assumptions of Eurocentric worldviews.⁴⁹⁰ Second, IR authors often discuss the benefits of Indigenous worldviews to humans and the natural world.⁴⁹¹ This includes discussions detailing various tenets of Indigenous worldviews such as spirituality, place-basedness, respect, reciprocity, relationships, and responsibilities.⁴⁹² Furthermore, IR authors frequently discuss explicit examples of Indigenous worldviews, including the need to understand human relationships with nature as a reciprocal responsibility with a moral ethic and spiritual philosophy.⁴⁹³

Founded on the prevalence of Indigenous worldviews as a topic Indigenous authors discuss; one can state that decolonization is present when there is an increased respect for Indigenous worldviews (as an alternative to Eurocentric worldviews). For example, I suggest that IR is present when a situation, action, or event makes space for

⁴⁸⁹ See above section in this thesis, 2.3.1: The Dominance of Colonial-Capitalism. See also Alfred, *Wasáse*, *supra* note 262 at 101-102.

⁴⁹⁰ See above section in this thesis, 2.3.1: The Dominance of Colonial-Capitalism. See also Alfred, *Wasáse*, *supra* note 262 at 110-111 and 201-203.

⁴⁹¹ See above section in this thesis, 3.2.1: Description of Theme 2. See also Alfred, *Wasáse*, *supra* note 262 at 46.

⁴⁹² See above sections in this thesis, 3.2.1: Description of Theme 2. Coulthard, *Red Skin, White Masks* *supra* note 5 at 53; Corntassel, "Toward Sustainable Self-Determination," *supra* note 162 at 121; Corntassel, "Re-envisioning Resurgence" *supra* note 262 at 91; Bryce and Corntassel, "Practicing Sustainable Self-Determination" *supra* note 262 at 160.

⁴⁹³ *Ibid.*

an Indigenous way of thinking as an alternative to the liberal, economic, Western, Eurocentric perspectives that the Canadian state imposes. Decolonization is therefore present when Indigenous worldviews are considered, respected, and celebrated. This is because any increase of respect and use of Indigenous worldviews would equate to an undoing of colonial/Western/Eurocentric thinking and assumptions, which is inherently decolonizing. This increase of respect and use of Indigenous worldviews can be present in academia, direct action, education campaigns, or through advocacy in the courts.

Theme 2 is valuable to my project because, as I illustrate in Chapter 4: Results, Halalt wish to have the ability to care for their waters in a responsible and care-taking type fashion. Therefore, it is useful to analyse whether this occurred in the EA and *Halalt v BC* case study as an indicator of decolonization. Furthermore, as discussed above, IR explains that the limits of engaging the state for this theme revolve around the fact that the state operates using Eurocentric values that devalue Indigenous worldviews.

3.3: Theme 3: Indigenous Sustainable Self-Determination

3.3.1: Description of Theme 3

Like IR theory in general, the concept of Indigenous self-determination is also a cluster of abstract ideas and conceptions and the literature does not specifically define it. However, the main goal of Indigenous liberation and self-determination is to transcend colonialism.⁴⁹⁴ As well, like other IR practices, Indigenous nations each have their own way of describing and acting on their self-determination and freedom.⁴⁹⁵ That said, some of the tenets mentioned very frequently during IR discussions of self-determination that relate most to my project include autonomy, self-governance, and self-sufficiency. Coulthard adds the principle of sustainability to self-determination to denote the importance of considering future generations as discussed below.

One can divide the principle of autonomy regarding Indigenous self-determination into the following ideas: the ability to exist and operate in political, social,

⁴⁹⁴ Coburn, "Introduction" *supra* note 324 at 32.

⁴⁹⁵ Alfred and Corntassel, "Being Indigenous" *supra* note 262 at 614.

and economic ways, unencumbered by outside forces,⁴⁹⁶ the right of a people to govern themselves,⁴⁹⁷ and the ability to create one's authority and to interpret the scope of that authority.⁴⁹⁸

To use a similar term, Alfred defines liberation as the achievement of autonomy in social, political, cultural, and economic spheres.⁴⁹⁹ In terms of autonomy, Alfred describes Indigenous self-determination as the "right to exist as peoples, unencumbered by the demands, controls, and false identities imposed on [Indigenous peoples] by others."⁵⁰⁰ At its most basic level, James Tully explains that self-determination is the ability to self-govern by one's "own laws and [to] exercise jurisdiction over their territories."⁵⁰¹ Seneca lawyer Robert Odawi Porter, adds that a trademark characteristic of the right to self-determination is the ability for any people to "interpret the scope of their own authority."⁵⁰² While this trait might seem obvious, it is crucial to embodying meaningful self-determination.⁵⁰³

Indigenous self-determination is a manifestation of Indigenous resurgence and resistance. This may manifest as pride in Indigenous traditions, economic self-sufficiency, independence of mind and courage in the defence of Indigenous lands and rights.⁵⁰⁴ Additionally, Indigenous self-determination can be considered a resistance of non-Indigenous/European notions of power and control such as taxation, citizenship, executive authority, and the European concept of sovereignty.⁵⁰⁵ In addition, IR authors

⁴⁹⁶ Alfred, *Peace, Power, and Righteousness*, 2nd ed, *supra* note 262 at 8.

⁴⁹⁷ Tully, "The Struggles of Indigenous Peoples" *supra* note 387 at 36–59.

⁴⁹⁸ Robert Odawi Porter, "Tribal Disobedience" (2006) 11 *Texas Journal of Civil Liberties and Civil Rights* at 171 Porter, ["Tribal Disobedience"].

⁴⁹⁹ Alfred, *Wasáse*, *supra* note 262 at 281.

⁵⁰⁰ Alfred, *Peace, Power, and Righteousness*, 2nd ed, *supra* note 262 at 8.

⁵⁰¹ Tully, "The Struggles of Indigenous Peoples", *supra* note 387 at 36–59 at note 4, page 57.

While James Tully is not necessarily an explicit IR writer, I have briefly included some of his work in my literature review as he does write on Indigenous governance, as well as Indigenous law and rights. Furthermore, he collaborates with Indigenous authors such as Taiaiake Alfred and Glen Coulthard.

⁵⁰² Porter, "Tribal Disobedience" *supra* note 498 at 171.

⁵⁰³ *Ibid.*

⁵⁰⁴ Alfred, *Peace, Power, and Righteousness*, *supra* note 262 at 9.

⁵⁰⁵ *Ibid.* See also 3, 4, and 79-94 for a discussion of why Alfred does not see Indigenous governance as a sovereignty in terms of a "state sovereignty" model. His main point is that Indigenous peoples cannot have governing structures that mimic state institutions or fill up political space. Instead, Indigenous governance must encompass Indigenous content. This would be different from having Indigenous staff at Band Councils and within Indigenous and Northern Affairs Canada.

also discuss “everyday acts of resurgence” as legitimate and central forms of Indigenous self-determination.⁵⁰⁶ Simpson explains that, for her, living as a Nishnaabekwe,⁵⁰⁷ being on the land, and helping her children connect with the land are deliberate and direct acts of sovereignty and resurgence.⁵⁰⁸

Indigenous resurgence authors assert that transformation from a colonized self or community to Indigenous self-determination needs to occur with the Indigenous “self” first then move outwards to the community and nation level.⁵⁰⁹ This is necessary before the relationship between Indigenous peoples and the state can be transformed.⁵¹⁰ Alfred explains that the first step of this transformation is to remove oneself from dependency on the state and to develop self-sufficiency.⁵¹¹

To develop self-sufficiency, Indigenous peoples must gain their self-worth from within.⁵¹² As stated above, colonization can be defeated when Indigenous peoples are rooted in their cultures and teachings.⁵¹³ Such grounding necessitates rebuilding Indigenous communities and land-based cultural practices and ceremonies that reconnect Indigenous peoples to their homelands.⁵¹⁴

Corntassel incorporates the idea of sustainability to his vision of self-determination to advance the political mobilization of Indigenous peoples.⁵¹⁵ To him, the conception of sustainability, while generally a Western/European term related to

⁵⁰⁶ Corntassel, “Re-envisioning Resurgence” *supra* note 262 at 88-99.

⁵⁰⁷ A Nishnaabe woman. Nishnaabe is also sometimes seen as spelled Nishnaabeg, Anishinabek, for example.

⁵⁰⁸ Leanne Simpson, “Aambe! Maajaadaa! (What #IdleNoMore Means to Me)” (December 21, 2012) *Decolonization: Indigeneity, Education & Society* 1:1 (blog) online: <<https://decolonization.wordpress.com/2012/12/21/aambe-maajaadaa-what-idlenomore-means-to-me>>. See also Corntassel, “Re-envisioning Resurgence” *supra* note 262 at 86-101. Corntassel also provides specific examples of various Indigenous communities that use specific land-based practices to perform their responsibilities to the land such as the Nishnaabekwewag “Water Walkers”.

⁵⁰⁹ Alfred, *Wasáse*, *supra* note 262 at 20 & 32; Coulthard, *Red Skin, White Masks*, *supra* note 5 at 43; Simpson, *Dancing on Our Turtle’s Back*, *supra* note 9 at 17.

⁵¹⁰ *Ibid*, Simpson, *Dancing on Our Turtle’s Back* at 17.

⁵¹¹ Alfred, *Wasáse*, *supra* note 262 at 20.

⁵¹² See Fanon, *The Wretched of the Earth*, *supra* note 285 at 148. According to Fanon, from which IR scholars draw key principles, there is a need for individuals to change the psychology of their colonized minds to self-worth of pride and confidence.

⁵¹³ Simpson, *Dancing on Our Turtle’s Back*, *supra* note 9 at 17.

⁵¹⁴ Alfred, “Colonialism and State Dependency” *supra* note 262 at 42-60.

⁵¹⁵ Bryce and Corntassel, “Practicing Sustainable Self-Determination” *supra* note 262.

international law,⁵¹⁶ is fitting for the conception of self-determination as it relates to Indigenous concepts of reciprocity, relationships, and responsibilities to other living and non-living beings.⁵¹⁷

Bryce and Corntassel posit that the quest for self-determination is translated into a pursuit for sustainable self-determination when it is reconceptualised as a responsibility-based movement.⁵¹⁸ Instead of simply living on the land, an Indigenous conception of sustainability encompasses the notion of one's responsibilities to their natural environment and giving more than one takes from the land and waters.⁵¹⁹ Sustainable self-determination expands the scope of what constitutes Indigenous self-determination processes and it regenerates Indigenous natural laws.⁵²⁰

Sustainable self-determination allows for transmission of Indigenous traditions including land practices from present to future generations. Corntassel asserts that Indigenous sustainable self-determination is both an individual and a community-driven activity.⁵²¹ As a process, Indigenous peoples can practice sustainable self-determination in the present, both locally and regionally, which will allow the passage of practices and traditions to future generations.⁵²²

3.3.2: Analytical Framework of Theme 3

Based on my discussion of theme 3 as deliberated upon above, one can see decolonization is illustrated if there was evidence that Indigenous self-determination is

⁵¹⁶ See GH Brundtland, *Our Common Future: Report of the World Commission on Environment and Development* (Oxford University 1987) at 41. online: <<http://www.un-documents.net/our-common-future.pdf>>. While there have been multiple ways that sustainability has been defined, the most frequently cited definition of sustainable development in Western realms has been from the Report of the United Nations' created World Commission on Environment and Development entitled "Our Common Future" and commonly known as the Brundtland Report, which states that sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

⁵¹⁷ Bryce and Corntassel, "Practicing Sustainable Self-Determination" *supra* note 262.

⁵¹⁸ *Ibid* at 160.

⁵¹⁹ *Ibid* at 156.

⁵²⁰ Corntassel, "Toward Sustainable Self-Determination" *supra* note 162 at 119.

⁵²¹ Bryce and Corntassel, "Practicing Sustainable Self-Determination" *supra* note 262 at 156.

⁵²² Corntassel, "Toward Sustainable Self-Determination" *supra* note 162 at 119.

occurring. I substantiate using the IR theme of Indigenous self-determination as an indicator that decolonization is present or has occurred for five reasons.

First, IR authors frequently declare that Indigenous self-determination is the highest goal of IR.⁵²³ Second, IR authors spend a considerable amount of time discussing how methods of interacting with state legal mechanisms will not likely provide for Indigenous self-determination.⁵²⁴ Indigenous resurgence authors therefore spend significant time deconstructing current state-based legal mechanisms to show that these processes will not lead to Indigenous self-determination.⁵²⁵ Third, Indigenous authors detail the means of their visions of Indigenous self-determination.⁵²⁶ Indigenous resurgence authors often discuss self-governance and self-sufficiency as indicators of Indigenous self-determination.⁵²⁷ Furthermore, as we can also see from the literature, this Indigenous self-determination includes conceptions of Indigenous peoples decolonizing themselves first then moving out to family and community as a way to transform current lack of power into Indigenous self-determination.⁵²⁸ Lastly, Corntassel has dedicated several pieces of scholarship to the relevance of “sustainability” to the concept of self-determination as a helpful way to include principles of reciprocity, relationships, and responsibilities to the natural world.⁵²⁹

Therefore, given the prevalence in the literature of discussions of Indigenous self-determination as an IR goal, it is useful as a theme that illustrates that decolonization is occurring. In the case at hand, one can confirm the occurrence of decolonization when an Indigenous community has control or the ability to make decisions on the waters in its traditional territory unencumbered by the municipal,

⁵²³ See above section in this thesis, 3.3.1: Description of Theme 3.

⁵²⁴ See above section in this thesis, 2.3.2: The Dangers and Limitations of Attempting to Achieve Indigenous Self-Determination through Canadian-Based Legal Mechanisms. Coulthard, *Red Skin, White Masks*, *supra* note 5; Coulthard, “Subjects of Empire” *supra* note 262 at 439.

⁵²⁵ *Ibid.*

⁵²⁶ See above section in this thesis, 3.3.1: Description of Theme 3. Alfred, *Wasáse*, *supra* note 262 at 281.

⁵²⁷ See above section in this thesis, 3.3.1: Description of Theme 3. Alfred, *Peace, Power, and Righteousness*, *supra* note 262 at 9.

⁵²⁸ See above sections in this thesis, 3.1.1: Description of Theme 1 and 3.3.1: Description of Theme 3. Alfred, *Wasáse*, *supra* note 262 at 20 and 32; Coulthard, *Red Skin, White Masks*, *supra* note 5 at 43; Simpson, *Dancing on Our Turtle’s Back*, *supra* note 9 at 17.

⁵²⁹ See above sections in this thesis, 3.3.1: Description of Theme 3. Bryce and Corntassel, “Practicing Sustainable Self-Determination” *supra* note 262.

provincial, or federal state. This is because colonization took away the powers for Indigenous peoples to be self-determining, therefore, reversing this stripping of power by increasing self-determination would be de-colonizing.

Theme 3 is useful as an indicator of IR as an analytical framework for my project because, as I demonstrate in Chapter 4: Results, Halalt wished to be self-determining (and make decisions over their waters). Therefore, it is useful to analyse whether this self-determination occurred in the case study as an indicator of decolonization. Furthermore, as discussed above, IR explains that the dangers of engaging the state, for Theme 3, revolve around the fact that the state mechanisms have not provided for Indigenous self-determination.

In examining these three recurrent IR themes of “Transformation of Political and Social Power (from the state to Indigenous communities),” “(Increasing Use of Respect for) Indigenous Worldviews as an Alternative to Eurocentric Worldviews,” and “Indigenous Sustainable Self-Determination,” we can see that they are all bound by a desire to make life for Indigenous peoples more equal to that of non-Indigenous peoples. There are Indigenous principles in all these themes that drive the philosophy and political actions of Indigenous resurgence. Each theme discusses the ways in which Indigenous peoples resist the colonial paternal relationship and develop their own power and sovereignty.

4.0: Conclusion

In this chapter, I summarized my survey of the IR literature. I employ three themes as select principles found in IR literature as the base for the analytical framework, which I use to analyse Indigenous water sovereignty issues and determine whether and to what degree decolonization is occurring in the case study regarding the *Halalt v BC* court case. Indigenous resurgence provides a critical inquiry using Indigenous voices that can provide a deeper understanding of why the differences in Eurocentric and Indigenous worldviews affect Indigenous water dispossession and the management of Indigenous resources in general. Indigenous resurgence authors explain that state-centric European style governance over Indigenous resources is unwanted and unfair and there is a need for political and social transformation.

Indigenous worldviews provide an alternative to the colonial-capitalist dominant system for the ultimate goal of sustainable self-determination for Indigenous peoples living in the lands claimed by Canada.

In the next chapter, I detail my methodology, which includes anti-oppressive methods, in keeping with my goals of decolonizing my research. Chapter 3 provides the details of the methodology that I use to explore my research question. This includes my theoretical framework as well as my data collection and data analysis methods.

Chapter 3

1.0: Introduction

This study sets out to answer my research question: Using an Indigenous Resurgence (IR) analysis, what does the *Halalt First Nation v British Columbia (Minister of Environment (Halalt v BC))*⁵³⁰ caselaw reveal about the state of Indigenous water sovereignty in Canada? My research is filling in a gap that I see in the IR and water management bodies of literature about discussions regarding the effect of ongoing colonialism on current Indigenous water governance and Indigenous water sovereignty.

The purpose of my methodology chapter is to explain the methods, choices, and justifications of how I came to conduct this qualitative research project. In this chapter, I explain my anti-oppressive and decolonial lenses that create my research paradigm and how I analysed a judicial case study where a state-Indigenous natural resource conflict occurred using an IR theoretical framework supplemented by key informant interviews.

I also discuss my data collection selection process and methods as well as the case study and the thematic analysis methods I used to investigate and analyse my data. Particularly, I examine three IR themes of transformation of power from the state to Indigenous persons/communities, increased respect for Indigenous worldviews, and Indigenous self-determination in the case study of this thesis.

I employed these themes as the theoretical framework in which to determine whether any degree of decolonization occurred in the *Halalt v BC* case study from the perspective of Halalt First Nation Band Council participants and my other non-Halalt interviewees. I use the three IR themes as a gauge to determine whether this decolonization occurred. I also outline the scope of what is included and excluded from my research in terms of the case study. Lastly, I conclude by making comments about the limitations of my study.

⁵³⁰ *Halalt v BC*, 2011 BCSC 945, *supra* note 6; *Halalt v BC*, 2012 BCCA 472, *supra* note 6.

2.0: My Positionality: Who I am & How I Approach this Research

To make overt how power relations permeate the construction and legitimacy of knowledge, my location and political commitments as a researcher must be taken up.⁵³¹ The following section explains the story of how I came to be an Indigenous advocate and decolonization activist supporting Indigenous struggles and how I came to research the colonial systems that perpetuate Indigenous drinking water issues.

I grew up with an environmental and social justice ethic as encouraged by my immediate family, which led me to pursue a Bachelor of Environmental Studies degree. Afterwards, while pursuing my Juris Doctor specializing in environmental law at the University of Ottawa, I merged this academic specialty with Aboriginal law and Indigenous advocacy. The University of Ottawa first-year law curriculum made it clear that colonization is ongoing, and the Canadian state and society continue to marginalize Indigenous peoples. After repeatedly hearing these messages, I felt strongly compelled to develop a career in Indigenous advocacy to help decolonize and to lend support to the improvement of political, social, and economic equality of Indigenous and non-Indigenous peoples living in Canada.

Subsequently, I pursued my Master of Laws at the University of Victoria in 2011 because I wanted to further specialize in Aboriginal law and Indigenous advocacy. I became specifically interested in water as it is at the crux of many environmental and Indigenous issues and I thought it would supply a rich multi-faceted issue to discuss and analyse. I also view non-Indigenous allyship as a supportive and crucial means of Indigenous advocacy. Therefore, I view my role as a non-Indigenous person as having a responsibility to aid with the reconciliation between Indigenous and non-Indigenous peoples in Canada.

I come to this research with anti-oppressive and decolonizing lenses. To conduct anti-oppressive research means to adhere to transformative principles of critical thinking,

⁵³¹ Leslie Brown & Susan Strega, "Introduction: Transgressive Possibilities" in *Research As Resistance*, *supra* note 253.

social justice, and community building.⁵³² As it is important for researchers studying Indigenous issues to understand how Eurocentric scientific research has been used as an historical tool of colonialism, I must be mindful in the way I use such academic sources. Even though I fit in the category of so-called “well-intended researchers,”⁵³³ I am acutely aware of my position, as a non-Indigenous academic conducting Indigenous research and it is important to me that I not perpetuate colonial degradation or unfairly use my power as a researcher while completing my project.

I used critical thinking as a method to ensure anti-oppressive research in my thesis. As I come to my project with an ideology of social justice, it made sense to use a critical theory to problematize the case study of the *Halalt v BC* to see how creative solutions might arise when we seek equality between Indigenous and non-Indigenous peoples living in Canada. In conducting my literature review, I critically examined the literature to understand the context of the situation, locate myself in the scholarship, and to help refine my research questions.⁵³⁴ I did this to assess how the information was constructed, to whom, for whose benefit, and how each piece affects further information and research on the topic.⁵³⁵ Published information in the form of articles, books, and websites that comes from a place of privilege comprises only a limited amount of knowledge regarding Indigenous peoples.⁵³⁶ A sizable amount of scholarship on Indigenous peoples has been produced by non-Indigenous authors.⁵³⁷ This means the “potential to reproduce colonizing ideologies and colonizing perspectives is always present.”⁵³⁸

⁵³² Karen Potts & Leslie Brown, “Becoming an Anti-Oppressive Researcher” in Brown & Strega, *Research as Resistance supra* note 253 at 283 [Potts & Brown, “Becoming an Anti-Oppressive Researcher”].

⁵³³ Kathy Absolon & Cam Willett, “Putting Ourselves Forward: Location in Aboriginal Research” in Brown & Strega, *Research as Resistance supra* note 253 at 120 [Absolon & Willet, “Putting Ourselves Forward”].

⁵³⁴ Robert K Yin, *Case Study Research: Design and Methods: Applied Social Sciences Research Methods Series* 4th ed (Thousand Oaks, California: Sage, 2009) vol 5 at 14 [Yin, *Case Study Research*]: “Novices may think that the purpose of a literature review is to determine the answers about what is known on a topic; in contrast, experienced investigators review previous research to develop sharper and more insightful questions about the topic.”

⁵³⁵ Absolon & Willett, “Putting Ourselves Forward” *supra* note 533 at 120.

⁵³⁶ Potts & Brown, “Becoming an Anti-Oppressive Researcher” *supra* note 532 at 266.

⁵³⁷ *Ibid.*

⁵³⁸ Smith, *Decolonizing Methodologies, supra* note 254 at 174.

Furthermore, I attempted to use my agency to make methodological choices to alter oppressive relations,⁵³⁹ in an effort to mitigate any negative effects as much as possible such as how colonialism uses research as a tool for power.⁵⁴⁰ For example, as research has been used as a colonial tool to define what constitutes legitimate knowledge,⁵⁴¹ to work against (re)producing patterns or processes of colonial or epistemic violence in relation to knowledge gained from marginalized communities,⁵⁴² I prioritized Indigenous voices. I did so for several reasons. First, Indigenous peoples face the daily reality of ongoing colonization and frustration with how they are being treated by the state as colonialism is embedded in every aspect of their lives such as in law, politics, language, religion, philosophy, art, and sexuality.⁵⁴³ As Freire states, “who are better prepared than the oppressed to understand the terrible significance of an oppressive society?”⁵⁴⁴

Second, in addition to their lived experience, the work of Indigenous scholars is important beyond these authors’ positions as Indigenous peoples. Often these scholars trained for years in analysing colonial dynamics, Indigenous-state relations, the ongoing effects of colonialism and power. They create and shaped wide array of academic conversations, ideas, and debates that take on the enormous challenge of decolonizing the state. Indigenous scholars show passion, creativity, and perseverance in their anti-colonial studies and academic scholarship. What makes this even more impressive is the fact that many of these scholars have faced the effects of colonization both in their home communities, personal lives, and in university settings that have prioritized non-Indigenous research and scholarship. This also makes the theoretical field of IR and “Indigenous Studies” practical and driven by the interests and needs of Indigenous individuals, communities, thereby reflecting the aims of Indigenous nations, as compared to being driven by other (e.g. historical, non-Indigenous anthropocentric, or scientific) purposes.

Third, I prioritize Indigenous viewpoints to level the uneven playing field whereby non-Indigenous authors form a large part of the scholarship on Indigenous issues. Part of being an Indigenous ally means the responsibility of helping shift power to marginalized

⁵³⁹ Potts & Brown, “Becoming an Anti-Oppressive Researcher” *supra* note 532 at 257.

⁵⁴⁰ Smith, *Decolonizing Methodologies*, *supra* note 254 at 175.

⁵⁴¹ *Ibid* at 175.

⁵⁴² herising, “Interrupting Positions” *supra* note 258 at 139.

⁵⁴³ Turner, *This is Not a Peace Pipe*, *supra* note 308 at 109.

⁵⁴⁴ Freire, *Pedagogy of the Oppressed*, *supra* note 286 at 27.

individuals and communities.⁵⁴⁵ I have been taught and tried best to practice the following methods to decolonize my research: reading Indigenous authors' work, listening to Indigenous academics' lectures, and attending cultural ceremonies where Indigenous peoples taught me about how they honour their knowledge and relationships with the natural world, including water.

Lastly, anti-oppressive research realizes that valid knowledge comes from lived experience of self and others.⁵⁴⁶ Indigenous control of the research process is pivotal to decolonization, for which I advocate.⁵⁴⁷ Therefore, in my case, to conduct ethical research, I needed to go beyond the library and speak with Indigenous peoples.⁵⁴⁸

In terms of prioritizing Indigenous voices in my methods, first, I chose IR as a theoretical framework because it is comprised mostly of Indigenous authors. Second, I interviewed Indigenous peoples as well as individuals who I would classify as allies to supplement the Indigenous scholarship I employed. Third, I interviewed Halalt First Nation Band Council members to gain their perspective as Indigenous people navigating the Western court system.

3.0: Appreciation of the Value of Indigenous Methodologies

I developed an appreciation of Indigenous Methodologies (IM/IMs) in relation to my project in researching and reading about decolonizing methodologies, as guided by Linda Tuhiwai Smith's *Decolonizing Methodologies* book and various chapters in Leslie Brown and Susan Strega's *Research as Resistance* book as well as Opaskwayak Cree scholar Shawn Wilson's journal article "What is Indigenous research methodology?"⁵⁴⁹

⁵⁴⁵ Potts & Brown, "Becoming an Anti-Oppressive Researcher" *supra* note 532 at 283.

⁵⁴⁶ *Ibid* at 266.

⁵⁴⁷ Margaret Kovach, "Emerging from the Margins: Indigenous Methodologies" in *Research As Resistance*, *supra* note 253 at 23 [Kovach, "Emerging from the Margins"].

⁵⁴⁸ Absolon & Willett, "Putting Ourselves Forward" *supra* note 533 at 118 citing DA Mihesuah, (ed), *Natives and academics: Researching and writing about American Indians* (Lincoln, NE: University of Nebraska Press, 1998).

⁵⁴⁹ See Smith, *Decolonizing Methodologies*, *supra* note 254; Brown & Strega, *Research as Resistance* *supra* note 253. Wilson, Shawn, "What is Indigenous Research Methodology?" (2001) 25:2, *Canadian Journal of Native Education*, CBCA Complete [Wilson, "What is Indigenous Research Methodology?"] Please note that while I write generically about Indigenous Methodologies, which is reflective of some of the language used in these sources, I would like to be clear that there is no pan-Indigenous methodology and there is great diversity in Indigenous

While there is no pan-Indigenous methodology, some Indigenous cultures that live on Turtle Island (North America) share several principles and values. This section provides a brief description of IMs that informed my methods and approach to my research project. In learning about IM and the importance of various Indigenous procedures to Indigenous communities, I learned that protocol (the way in which one should do things) is just as important if not more so than the outcome. Therefore, this meant that I carefully selected my research methods and design in a purposeful way to ensure I decolonized my research as much as possible. Specifically, in relation to my project, the IM principles that most informed my research approach and research design were reciprocity, relationship building, and respect. I included the following description to make explicit my conception of IM.

Indigenous methodologies have existed for centuries, but they are nascent in the formal academic sense.⁵⁵⁰ Potts and Brown assert that Indigenous paradigms largely comprise an example of anti-oppressive research methods in that they provide alternate viewpoints to Western science and positivism.⁵⁵¹ Furthermore, these authors state that IMs can be openly critical and commit themselves to a transformative agenda to create a more just society for Indigenous peoples.⁵⁵² Margaret Kovach believes that Indigenous methodologies flow from an Indigenous way of knowing, which incorporates Indigenous theoretical perspectives and ethical protocols.⁵⁵³ Furthermore, she states that these methods therefore align themselves with their Indigenous worldviews.⁵⁵⁴ She explains that Indigenous ways of knowing are fluid and experiential.⁵⁵⁵ They are born out of the land and requirements to be practical to feed, clothe, and transmit values.⁵⁵⁶ Indigenous

epistemology, methodology, and research methods. Furthermore, these authors offer but a few characterizations of Indigenous Methodologies. For other descriptions of Indigenous Methodologies, please see Norman K Denzin, Yvonna S Lincoln, Linda Tuhiwai Smith, eds, *Handbook of Critical and Indigenous Methodologies* (Thousand Oaks, California: SAGE Publications Inc, 2008); Louis Botha "Mixing methods as a process towards indigenous methodologies" (2011) 14:4 *International Journal of Social Research Methodology*; and Naohiro Nakamura, "Indigenous Methodologies: Suggestions for Junior Researchers" (2010) 48:1 *Geographic Research*.

⁵⁵⁰ Kovach, "Emerging from the Margins" *supra* note 547 at 29.

⁵⁵¹ Potts & Brown, "Becoming an Anti-Oppressive Researcher" *supra* note 532 at 281.

⁵⁵² *Ibid.*

⁵⁵³ Kovach, "Emerging from the Margins" *supra* note 547 at 32.

⁵⁵⁴ *Ibid* at 22.

⁵⁵⁵ *Ibid* at 27-28.

⁵⁵⁶ *Ibid* at 28.

knowledge is organic and has an emphasis on being humorous and heartfelt.⁵⁵⁷ “As the elders say, ‘[i]f you have important things to say, speak from the heart.’”⁵⁵⁸

Similar to anti-oppressive research, Kovach describes IMs as having no set methods, but they include tactics such as qualitative interviews and storytelling.⁵⁵⁹ Indigenous methodologies can be considered more as a set of principles to conduct oneself by in life and within research, which include interconnectedness of all living things, impact and intentions on person and community, foundation of research as lived Indigenous experience, groundedness of theories in Indigenous epistemology, transformative nature of research, sacredness and responsibility of maintaining personal and community integrity, and recognition of languages and cultures as living processes.⁵⁶⁰

To this list, Kovach adds the principles of collectivity, reciprocity, and respect.⁵⁶¹ She adds, “[r]esearch, like life, is about relationships.”⁵⁶² Kovach explains that being relational is fundamental in IM and describes it as having a relationship with all life forms.⁵⁶³ A relationship-based approach to conducting research with Indigenous communities is critical for several reasons.⁵⁶⁴ Philosophically, conducting research in this way honours the cultural value of interconnection.⁵⁶⁵ This means: taking the time to develop a connection with the community, which includes building relationships with people whether or not they are research participants; being humble about your research goals; and having conversations about who owns the research and what its uses are.⁵⁶⁶ Furthermore, Shawn Wilson underscores the importance of practicing relational accountability.⁵⁶⁷ To him, practicing IM means that one is accountable to “all their relations” while conducting research.⁵⁶⁸ In addition, he sees IM as requiring the upholding of one’s responsibilities to the relationships one has with the world around them.⁵⁶⁹ This accords

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid* at 22.

⁵⁶⁰ Potts & Brown, “Becoming an Anti-Oppressive Researcher” *supra* note 532 at 282.

⁵⁶¹ Kovach, “Emerging from the Margins” *supra* note 547 at 27.

⁵⁶² *Ibid* at 30.

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid.*

⁵⁶⁷ Wilson, “What is Indigenous Research Methodology?” *supra* note 549 at 177.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*

with his view that Indigenous paradigms emanate from the fundamental belief that knowledge is relational and it is shared with all of creation.⁵⁷⁰

Similarly, Kovach also highlights the theme of the collective, which means taking care of your community through principles of reciprocity and accountability.⁵⁷¹ One specific Indigenous nation's example of these concepts can be seen in Glen Coulthard's *Red Skin, White Masks* when he explains that in his Dene community, humans have specific obligations to land, water, plants, and animals.⁵⁷² It is believed that if these duties were met then the land, water, plants, and animals would reciprocate and ensure survival and well-being for the humans.⁵⁷³ In these descriptions, it is clear that in certain Indigenous paradigms, nature, and non-human components of the world are believed to have spirit and agency.⁵⁷⁴

4.0: Choice of Literature Review & Theoretical Framework

In my literature review chapter, I thoroughly described my theoretical framework, which I created from reviewing the IR literature. For the purposes of my methodology chapter, to make my research design process explicit, here I provide a summary of the reasons that I chose IR for my literature review and base for my theoretical framework.

Indigenous resurgence is useful as a theoretical framework for my project for several related reasons. First, with my goals of social justice and corresponding anti-oppressive and decolonial approach, IR is a beneficial choice as most of the authors writing within the field are Indigenous and therefore this body of literature prioritizes Indigenous viewpoints. Using an IR framework allows for Indigenous peoples' ideas, critiques, and suggestions to be heard. Second, IR allows for a historic contextualization that considers Indigenous perspectives of colonial problems, which Western and Canadian academic, legal, and policy discussions have too often ignored, dismissed, or discounted. In addition, as a non-Indigenous author, it may be arrogant to think that I could comprehensively and ethically examine race-relations issues from my own non-

⁵⁷⁰ *Ibid* at 176.

⁵⁷¹ Kovach, "Emerging from the Margins" *supra* note 547 at 30.

⁵⁷² Coulthard, *Red Skin, White Masks*, *supra* note 5 at 61.

⁵⁷³ *Ibid*.

⁵⁷⁴ *Ibid*.

Indigenous vantage point or by primarily using non-Indigenous authors in my analysis. Furthermore, the Indigenous worldviews brought forward through IR theory provide an alternative to the Eurocentric ways of thinking that has been unsuccessful in terms of ameliorating or removing the negative effects of colonization, which the state has attempted to do.

Indigenous resurgence is useful to investigate power and race relations with natural resource disputes between Indigenous communities and the state as it provides a critical analysis with a decolonizing lens. One requires such critical viewpoints if one wishes to decolonize Canada or come to any reconciliation between Canada's asserted sovereignty and the prior inhabitancy of Indigenous peoples and lands on Turtle Island. Furthermore, IR provides a comprehensive critique of Crown behaviour as IR authors deconstruct the assumptions of the Canadian state that continue to allow Canada to operate in a colonial and capitalist fashion. For example, IR problematizes the assumption that the Canadian state justifies asserting its sovereignty over the lands in Canada even though Indigenous peoples occupied it before the British and French arrived. This is useful for examining how state-Indigenous relations have been so tumultuous over the past few centuries. This historical understanding provides insight today about how colonial consequences affect Indigenous water sovereignty and water governance in Indigenous communities.

To comprise my analytical framework, I employ three IR goals as indicia to determine whether decolonization is occurring. These include the transformation of social and political power from the state to Indigenous communities, increasing respect for Indigenous worldviews (as an alternative to Eurocentric worldviews), and Indigenous self-determination. I use these three themes as indicia for determining whether decolonization emerged in the case of *Halalt v BC*.

There are several scoping choices that I made within my literature review in order to delimit my thesis. These include choices regarding my characterization of an "IR author," my primary use of IR authors working within the Canadian context, and how I differentiate between the terms IR and Indigenous resistance scholarship.

For the purposes of the thesis, I specify that I am describing IR writers in the following way. Indigenous resurgence writers are generally Indigenous, anti-colonial, and anti-capitalist advocates who are unsatisfied with the current state of race-relations between the state and Indigenous peoples living in North America. They view the dynamics of colonization as ongoing and negative and think such effects continue to marginalize Indigenous peoples.

My thesis focuses primarily on IR works written about the territories and lands claimed by Canada.⁵⁷⁵ There are several reasons for this. First, my case study is an example from Canada and I conducted interviews with experts on Indigenous (water) sovereignty and Indigenous rights in Canada. In addition, the context of Indigenous-state relations is unique to Canada due to historical and political nuances as discussed in Chapter 1. Therefore, it makes sense to use authors that focus on Canada rather than the United States or other international Indigenous settings as their historical and political contexts regarding state-Indigenous relations are different. These defining characteristics include the fact that Canada has a distinct colonial history where Aboriginal rights are constitutionally enshrined and there remains a lack of settled Aboriginal treaties. Furthermore, there are jurisdictional issues that are unique to Canada such as the fact that the provinces are responsible for drinking water management, yet it is the federal government that manages drinking water in First Nations reserve communities as they are responsible for “Indians, and Lands reserved for Indians” as per section 91(24) of the Canadian *Constitution Act, 1867*,⁵⁷⁶ again as discussed in Chapter 1. Therefore, I primarily rely on “Canadian” IR authors that write on IR topics in the Canadian context.⁵⁷⁷

However, while I focus on authors in the lands claimed by Canada such as Taiaiake Alfred, Elaine Coburn, Jeff Corntassel, Glen Coulthard,⁵⁷⁸ Emma LaRocque,

⁵⁷⁵ As compared to other global IR that focuses on Indigenous peoples in the lands claimed by the United States, Australia, New Zealand, or other locations where authors also discuss and practice IR.

⁵⁷⁶ *Constitution Act, 1867*, *supra* note 86.

⁵⁷⁷ The exception to using Canadian IR writers is when I use a writer that heavily cited by IR writers living in Canada. For example, I cite Vine Deloria Jr, the late Lakota scholar that lived in the lands claimed by the United States as he is often cited by IR authors such as Taiaiake Alfred, Jeff Corntassel, Glen Coulthard and by other authors published in the *Decolonization: Indigeneity, Education, and Society* journal.

⁵⁷⁸ Coulthard *Red Skin, White Masks*, *supra* note 5.

Pam Palmater, and Leanne Simpson,⁵⁷⁹ these academics draw from authors in the United States that have similar colonial struggles.⁵⁸⁰ Indigenous resurgence theorists also draw on authors that discuss Indigenous politics and policy in Canada,⁵⁸¹ as well as Aboriginal legal scholars.⁵⁸² Notably, I draw from the works of non-Indigenous political scientist professor James Tully and Anishinabe legal professor John Borrows on topics including self-determination.⁵⁸³

I focus on the IR assertions and practices that advance sovereignty such as Indigenous peoples focusing on their legal traditions, ceremony, and building relationships to the land and water. As previously stated, I describe “Indigenous resurgence” as Leanne Simpson defined it, as “...a radical practice in Indigenous theorizing, writing, organizing, and thinking, one that [she] believe[s] is entirely consistent with and inherently from Indigenous thought.”⁵⁸⁴

Regarding IR compared to Indigenous resistance, Alfred notes that resurgence is the highest level of Indigenous resistance possible. In Alfred’s words, resurgence is what resistance hopes to become and resurgence acts of a position of strength.⁵⁸⁵ Lastly, I use the term “resistance” when specifically discussing Indigenous strategies of deconstructing, opposing, combatting, fighting, and struggling against colonial injustice. I contrast this with how I conceive of IR as constructive, creative, and generative,

⁵⁷⁹ Simpson, *Lighting the Eighth Fire*, *supra* note 262.

⁵⁸⁰ See for example Deloria Jr., *supra* note 269.

⁵⁸¹ For example, Paul Nadasdy, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon*, (Vancouver: University of British Columbia Press, 2003) and Stephanie Irlbacher-Fox, *Finding Dahshaa Self-Government, Social Suffering, and Aboriginal Policy in Canada* (Vancouver: University of British Columbia Press, 2009).

⁵⁸² See John Borrows, various works; Ken Coates, various works; Leonard I Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996); and Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

⁵⁸³ I would not necessarily consider James Tully an explicit IR writer as he is a non-Indigenous political scientist, but he often collaborates with IR writers such as Taiaiake Alfred and Glen Coulthard. Similarly, while John Borrows’ is a critical Indigenous legal theorist, he focuses on the Canadian state in a much more collegial and hopeful fashion as compared to anti-state rhetoric that defines IR. Yet Borrows does collaborate with IR authors and it is prudent to include his work in my project as he writes extensively on Indigenous self-determination in Canada.

⁵⁸⁴ Again, to many IR authors, IR is about Indigenous communities’ revitalizing their traditions, languages, and practices, which they have been doing for decades. See Simpson, *As We Have Always Done*, *supra* note 9 at 48.

⁵⁸⁵ Alfred, *Wasáse*, *supra* note 262 at 151.

keeping in mind that IR is also critical, deconstructive, and combative. To be clear, the aim of both IR and Indigenous resistance is decolonization.

5.0: Methods

This section outlines the research and analysis methods that I use in my thesis. Please note that I received and maintained formal ethics approval for the duration of my thesis research, analysis, and writing process as outlined by the University of Victoria Office of Research Ethics.

5.1: Qualitative Approach

I conducted a case study analysis to examine my research question, which operates within a qualitative approach to research. Qualitative research is empirical, holistic, interpretive, and empathetic.⁵⁸⁶ I used a qualitative method in my study because it is a useful tool for studying a phenomenon in an interpretive way to gain meaning and understanding.⁵⁸⁷ In using a qualitative research paradigm, I come to this from a constructivist approach. Constructivism is a philosophical paradigm based on a relativist (as compared to a realist) ontology and a subjectivist (as compared to an objectivist) epistemology.⁵⁸⁸ This means that I have the assumption that reality is socially constructed and that there is not one single reality but multiple realities and that the meaning of what constitutes knowledge is internally constructed by individuals. As the constructivist research methodologist Sharan Merriam states “the key philosophical assumption upon which all types of qualitative research are based is the view that reality is constructed by individuals interacting with their social worlds.”⁵⁸⁹ To that end, I designed my research data collection in a way to gather the perspective of multiple

⁵⁸⁶ Robert E Stake, *The art of case study research* (Thousand Oaks, CA: SAGE, 1995).

⁵⁸⁷ J Douglas Toma, “Approaching Rigor in Applied Qualitative Research” in Clifton F Conrad & Ronald C Serlin Eds *The SAGE Handbook for Research in Education: Engaging Ideas and Enriching Inquiry* (Thousand Oaks, CA: SAGE, 2006) at 407.

⁵⁸⁸ Egon Guba EG & Yvonne Lincoln, *Fourth Generation Evaluation* (London: Sage Publications, 1989).

⁵⁸⁹ Sharan B Merriam, *Qualitative research and case study applications in education* (San Francisco, CA: Jossey-Bass, 1998) at 6.

participants.⁵⁹⁰ For example, I gathered multiple perspectives by interviewing ten people with different racial, lived, academic, and practical knowledge of the case study.

5.2: Research Design: Case Study

I chose to conduct a single case study analysis to examine the significance of insights that I could gain from applying IR to Indigenous water sovereignty in Canada. Various research methodologists define a case study differently.⁵⁹¹ However, amongst the different characterizations there are common features on which these researchers agree. Leading research methodologist, Robert K. Yin defines a case study as “an empirical inquiry that investigates a contemporary phenomenon (the “case”) in depth and within its real-world context, especially when the boundaries between the phenomenon and context may not be clearly evident.”⁵⁹² The boundary of my case study is the case of *Halalt v BC*, including the EA process that gave rise to the litigation.

Furthermore, I selected a case study as my research design for two reasons. First, it allows for a concentrated and deep understanding of the phenomenon under study, specifically the dynamics between Indigenous peoples and the state in a resource conflict in Canada. Case studies allow for what Clifford Geertz calls “thick description,”⁵⁹³ which means that not only will the phenomenon be explained in the descriptive/literal sense, but its context will also become apparent so that the phenomenon and ways in which various actors proceeded will become clear to the reader. Secondly, using a case study allows for a holistic and real-world perspective.⁵⁹⁴ Using a practical case study allows me to provide useful information to other real-world examples (as compared to only having theoretical significance). I am not looking to generalize or infer that the *Halalt v BC* is *representative* of other situations where Indigenous water sovereignty is an issue *per se*. However, I strove to create a

⁵⁹⁰ Yin, *Case Study Research*, *supra* note 534 at 17.

⁵⁹¹ See for example, Bedrettin Yazan, “Three Approaches to Case Study Methods in Education: Yin, Merriam, and Stake” (2015) 20:2 TQR 134 at 138 for a comparison of three leading methodologists (Robert K Yin, Sharan Merriam, and Robert Stake) approach to the conceptualization and practice of case study methodology.

⁵⁹² Yin, *Case Study Research*, *supra* note 534 at 16.

⁵⁹³ Clifford Geertz, “Thick Description: Toward an Interpretive Theory of Culture” in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) at 3-30.

⁵⁹⁴ Yin, *Case Study Research*, *supra* note 534 at 4.

framework that researchers could use in the future to determine whether IR may be taking place in the context of a resource conflict between the state and Indigenous people.

5.3: Selection of Case Study and Interviews

This section discusses how I went about selecting a case study First Nations community with which to work. In conducting anti-oppressive research, I felt that relationship building was best done face-to-face rather than through telephone or email communication. Therefore, I wanted to work with a community that was geographically accessible that would allow me to travel to the community in person. In asking University of Victoria Anthropology Professor Brian Thom advice on which Indigenous community on Vancouver Island might be suitable with which I could conduct research, he informed me about Halalt First Nation's Aboriginal water entitlement court case and encouraged me to contact them. This section discusses the relationship I built with Halalt, their agreement to allow me to conduct research with their community, and the IM and IR principles that guided my approach to my research.

I met with three Halalt First Nation band council members (an elected official and two staff members) before submitting my ethics clearance forms as it was important to me that I build a relationship with the Halalt members before asking them in a Western academic, formal, and written way whether they would consent to participation in my research project. I wanted to determine whether Halalt might be interested in working with me and if there were needs in the community that my research could address in the spirit of reciprocity. Part of the discussion included their interest in having me conduct a research project for them, which I plan to complete at the conclusion of my thesis. After I completed my interview with the Halalt participants, I gifted them all with tobacco, as is customary practice in many Indigenous communities, to show my gratitude and thank them for their participation. Another way of ensuring reciprocity is to report back and share your knowledge with the community with which one is working.⁵⁹⁵ To that end, I presented the Halalt Band Council members with the draft results chapter for their

⁵⁹⁵ Smith, *Decolonizing Methodologies*, *supra* note 254 at 16.

review before I finalized it. I will also provide the Halalt Band Council with a copy of my completed thesis.

In terms of the scope of my project, it is important to note that while my thesis deliberates on Indigenous water sovereignty, it is outside of my scope to discuss the Halalt's treaty claim to their traditional territories and their process of navigating the British Columbia Treaty Commission negotiation process. Therefore, I will not be discussing either of these topics in more than in a tangential way. I am solely analysing Indigenous water sovereignty in the way that the state dealt with Halalt in the resource conflict over drinking water in the aquifer underneath their reserve.

5.4: Participant Selection

This section includes a discussion and details about how and why I ideologically chose my interview participants as well as the methods by which I conducted my interviews. I chose to interview participants as part of my case study analysis for three reasons. First, much of Indigenous knowledge is not published in academic scholarship, which is a privileged means of information dissemination. In other words, I wanted to hear from Indigenous people (i.e. Halalt) regarding how they felt about the litigation that they initiated as the court case (textual case law and related legislation) only tells the story from a Western legal perspective which is very privileged, Eurocentric, and power-laden.

Second, interviews with numerous participants allowed for different perspectives and conceptions of the phenomenon under study. Third, completing interviews allowed a personal and relationship building component, which aided in my understanding of the specific case study phenomenon as well as Indigenous water sovereignty in general, as I became comfortable asking questions regarding sensitive topics. Fourth, it was important for me to interview people that could provide the government perspective in water governance in Canada in general as well as in the specific context of the *Halalt v BC* case. I did this to provide a more balanced view to ensure I was following my constructivist paradigm and acknowledging that in any given situation, there are multiple realities taking place. In fact, as laid out in the analysis chapter, the state/government perspective did differ greatly from that of the Indigenous and other likeminded anti-

colonial participants. Analysing differing perspectives enriched my understanding and analysis of the data.

To conduct comprehensive research, it was crucial to me to include Indigenous voices, legal perspectives, and environmental viewpoints to get a well-rounded sample of opinions that covered political, social, and economic views and knowledge. Therefore, I selected various lawyers, Indigenous people, and politicians to gather their thoughts on Indigenous water sovereignty and the judicial case of the *Halalt v BC*. I specifically interviewed the Halalt Band Council members to learn about their viewpoints of being Indigenous people experiencing an EA and colonial legal court case. I selected the non-Halalt participant interviewees based on their expertise in drinking water, the Halalt EA and court case, and Indigenous resurgence issues, such as the connection between colonization and Indigenous water governance. I chose and recruited all the participants based on their professional work, writing/scholarship, advocacy interest, or knowledge of Indigenous water sovereignty, Indigenous-state relations, and/or Indigenous drinking water governance expertise. I interviewed one recent doctoral graduate, one professor, two environmental lawyers, three people working at the Halalt Band Council office (one elected official and two staff members), and three people related to state institutions (including two politicians and one former civil servant). One of the two government officials that I interviewed was a District of North Cowichan (DNC) representative and the other civil servant worked on high-level federal government and Indigenous drinking water governance issues. In total, I interviewed seven men and three women. Four of the ten interviewees were of Indigenous descent: two were members of the Halalt First Nation, one was Cree, and one was Mohawk. The rest of the interview participants were Caucasian/non-Indigenous.⁵⁹⁶

⁵⁹⁶ While four of ten (40%) of the interviewees were of Indigenous decent, I realize that Indigenous peoples did not comprise the majority of the interview participants. I acknowledge that this may be in discordance with my wish to prioritize Indigenous viewpoints in my thesis. While I could have interviewed more Indigenous persons, I assert that having 40% of the interviewees as Indigenous in conjunction with a literature review composed of a majority of Indigenous authors still achieves my goal of prioritizing Indigenous viewpoints.

5.5: Methods of Data Collection

5.5.1: Data Collection of Legal Colonial Regime Texts

To understand the case study, I collected, read, and synthesized the trial and court of appeal judgments (as well as various procedural cases) that encompass the *Halalt v BC* case. Furthermore, I also collected, read, and summarized corresponding statutes, such as the British Columbia *Water Protection Act*,⁵⁹⁷ and related legislation. Chapter 4: Results describes the colonial legal process in terms of summarizing the *Halalt v BC* case as well the way in which the DNC, as a municipal purveyor of water, sought to use the water underneath the Halalt Reserve #2 to provide drinking water for its residents.

5.5.2: Data Collection via Participant Interviews

In terms of recruitment, I had established relationships with some participants I interviewed at various academic events I previously attended, while others I cold called based on their research or work specialties. There was also a snowballing effect when one interview participant suggested I speak to another person. Again, I selected various Indigenous and non-Indigenous participants that were involved in the *Halalt v BC* case study; had knowledge of the case study; or who had expertise and could speak to Indigenous-state relations in the realm of water, including colonial factors that influence Indigenous (drinking) water sovereignty in Canada.

I conducted in person and phone interviews from March 2013-July 2013. During my interviews, I used semi-structured open-ended interview questions. This permitted tailored questions and answers within a bounded time-frame as well as the flexibility to converse on views and opinions expressed even on topics that were not necessarily part of the interviews. The latter of which allowed for discussion where the participants had expertise. During the interviews, I gathered information to produce results leading to a comprehensive and rich discussion of the ways in which colonialism, sovereignty, and power manifest on the ground level in drinking water governance in Canada. This

⁵⁹⁷ *Water Protection Act*, *supra* note 98.

included conversations regarding the dynamics of ongoing colonialism in state structures and in the relationships between First Nations band councils and Indigenous and Northern Affairs Canada (INAC) as well as the ways in which colonialism displayed in the case study.

The interviews that I conducted lasted 1-1.5 hours and took place one-on-one except for the group interview with the three Halalt Band council members.⁵⁹⁸ During the interviews, I took hand-written notes as well as audio recorded both the in-person and phone conversations. I subsequently transcribed the interview audio recordings and reviewed my notes for analysis purposes.

During the interview process, I informed the participants that they could add, delete, or edit their interview data. Therefore, after completing my interviews, I sent a several-page summary of each interview transcription to the respective participants to allow them to provide feedback as to whether my understanding of our conversation was accurate. All interviewees participated in this member checking and approved, edited, and clarified their understanding and intentions of their thoughts in the interviews. This process allowed interviewees to have as much control over their disseminated knowledge as possible. Member checking is useful in research methodology as it provides a method by which to validate the data and ensure consistency. Member checking also provides a way to ensure the truthfulness of the collected data.

5.6: Data Analysis

5.6.1: Description of Thematic Analysis

In thematic analysis, researchers gather data and categorize it in themes and sub-themes to make them comparable. Therefore, it is a method that provides a way to reduce and simplify collected data. Thematic analysis allows researchers to structure qualitative data in a way that can then satisfy and answer the research question and

⁵⁹⁸ I conducted a group interview with the three Halalt Band Council participants due to a request from them to do so for expediency purposes.

objectives. Both the research question(s) as well as one's broader theoretical assumptions should help decide the data analysis method chosen.⁵⁹⁹

Thematic analysis encompasses searching across an entire data set.⁶⁰⁰ For my purposes, the entire data set is comprised of all the transcripts of the ten participant interviews. I conducted thematic analysis to analyse the data to find recurrent patterns of meaning and to help answer my research question: Using an IR analysis, what does the *Halalt v BC* case reveal about the state of Indigenous water sovereignty in Canada?⁶⁰¹

Several benefits to thematic analysis explain why it fits my study well as a method. Thematic analysis is a relatively easy method to learn, results are generally accessible to a range of readers.⁶⁰² It can usefully summarize key features of a large body of data and offer a thick description of a data set.⁶⁰³ Thematic analysis can also highlight similarities and differences across a data set, generate unanticipated insights, allow for different interpretations of the data, and it can be useful in producing qualitative analyses to inform policy development.⁶⁰⁴

Furthermore, thematic analysis offers a flexible method that can be used with a variety of epistemologies and research questions.⁶⁰⁵ However, research methodologists, Braun and Clarke warn that because the approach is flexible, it becomes very important, similar to qualitative analysis in general, that the researcher makes her theoretical position explicit.⁶⁰⁶ When theoretical positions are not made clear, it leaves the reader to guess what assumptions the researcher makes in terms of the nature of the data and what it represents.⁶⁰⁷ In this regard, I make my choices clear in my methodology.

⁵⁹⁹ Virginia Braun & Victoria Clarke, "Using thematic analysis in psychology" (2006) 3:2 *Qualitative Research in Psychology* 77 at 97 [Braun & Clarke, "Using thematic analysis in psychology"].

⁶⁰⁰ *Ibid* at 86.

⁶⁰¹ *Ibid*.

⁶⁰² *Ibid* at 97.

⁶⁰³ *Ibid*.

⁶⁰⁴ *Ibid*.

⁶⁰⁵ *Ibid*.

⁶⁰⁶ *Ibid* at 81.

⁶⁰⁷ *Ibid*.

As thematic analysis is not wed to a particular theoretical method, it can be a realist, essentialist, constructivist, or contextualist method.⁶⁰⁸ Due to this flexibility, thematic analysis requires the researchers to make a number of choices explicit.⁶⁰⁹ First, a researcher needs to decide what constitutes a “theme.”⁶¹⁰ A theme is something that is important about the data in terms of the research question being asked and that represents some kind of meaning or pattern within the data set.⁶¹¹ In terms of coding the data, one needs to be clear on what counts as a pattern in terms of “size” or prevalence and correspondingly how such prevalence is determined both within each data item as well as across the entire data set.⁶¹² There is also the choice of providing a rich description over the entire data set or a detailed and nuanced account of one particular theme or group of themes.⁶¹³ The researcher should also choose semantic or latent themes and make clear their epistemology.⁶¹⁴

I selected a deductive approach, guided by IR theory (as compared to an inductive data-driven approach),⁶¹⁵ where I am providing a rich description of aspects of the results that deal with the IR themes I employ. This is because the way in which a researcher approaches thematic analysis (or any method) must clearly relate to their research question.

Further, I decided to select and analyse my themes from a latent/interpretive level as compared to a semantic or explicit level.⁶¹⁶ This means that I went beyond the surface content of analysing the data to “examine the underlying ideas, assumptions, and conceptualizations – and ideologies – that are theorized as shaping or informing the semantic content of the data.”⁶¹⁷ This allowed me to identify the composition, form, and meaning of the phenomenon under study.⁶¹⁸

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Ibid* at 81-82.

⁶¹⁰ *Ibid* at 82.

⁶¹¹ *Ibid.*

⁶¹² *Ibid.*

⁶¹³ *Ibid* at 83.

⁶¹⁴ *Ibid* at 84.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*

⁶¹⁸ *Ibid.*

As previously discussed, I am using a constructivist approach, which tends to go hand in hand with a latent thematic analysis approach in that a constructivist approach seeks to find meaning in sociocultural contexts,⁶¹⁹ and where patterns are identified as socially produced.⁶²⁰ A constructivist approach “examines the ways in which events, realities, meanings, experiences and so on are the effects of a range of discourses operating within society.”⁶²¹ Braun and Clarke explain that while thematic analysis using latent themes is generally more constructionist, this is not always the case.⁶²²

5.6.2: Thematic Analysis of Halalt & Indigenous Water Sovereignty Perspective: Participant Interviews

This section describes how I analysed my case study and interview participant data using a thematic analysis using the three IR themes of transformation of political and social power, increased respect for Indigenous worldviews, and Indigenous self-determination. In conducting this analysis, I followed the guidance of Virginia Braun and Victoria Clarke’s seminal article “Using thematic analysis in psychology,” which established a systematic method of conducting thematic analysis.⁶²³ These authors developed a 6-phase model to conduct thematic analysis. These phases include 1) familiarizing oneself with the data, 2) generating initial codes, 3) searching for themes, 4) reviewing themes, 5) defining and naming themes, and 6) reporting on the findings.⁶²⁴ The thematic analysis examined how Halalt (and others) perceived the colonial legal process that Halalt chose to engage in by initiating litigation as discussed in the participant interview data collection section below. The three IR themes were used as determinants regarding whether any decolonization was present.

In phase 1, I first transcribed my interviews, read, re-read, and noted my initial ideas. In phase 2, I systematically coded interesting elements across the entire data set, gathering data pieces related to each code.⁶²⁵ In phase 3, I grouped the codes into their

⁶¹⁹ *Ibid* at 85.

⁶²⁰ *Ibid* at 81.

⁶²¹ *Ibid*.

⁶²² *Ibid* at 85.

⁶²³ *Ibid* at 77-101.

⁶²⁴ *Ibid* at 87-93.

⁶²⁵ *Ibid* at 87.

potential theme groups of the three IR themes chosen.⁶²⁶ In phase 4, I checked whether the themes worked “in relation to the coded extracts (Level 1) and the entire data set (Level 2), generating a thematic ‘map’ of the analysis.”⁶²⁷ In phase 5, I conducted an ongoing refining investigation to ensure a clear delimiting of the terms and data that fit in each theme as well as an analysis to refine the overall story that the analysis provides.⁶²⁸ Phase 6 provided the final analysis, which included selecting compelling extracts and a final analysis of the data in a way that relates back to the research question and literature review that then comprises the final academic report (i.e. my analysis and discussion in Chapter 4).⁶²⁹

6.0: Methodological Limitations and Risks

My thesis has several limitations relating to my research design, data collection, and analysis. First, my research design is limited in terms of conducting anti-oppressive research in a deeper way. A more anti-oppressive research design, for example, may have occurred had I co-created a research project with the Halalt community that could have contributed in the way in which the Halalt (or another Nation) may have preferred. Instead, I approached them with a pre-conceived project that I created. Regardless of this, the members of the Halalt Band Council that I interviewed did see value in my project and agreed to participate. Furthermore, in the IM spirit of reciprocity and respect, I asked the Halalt Band Council members how I could give back to their community to show my gratitude for them letting me interview them and use *Halalt v BC* as a case study for my thesis. One of the members expressed that it could be beneficial to the community if I completed a research project for the band council. Even though that conversation was a long time ago, I look forward to completing such a project for Halalt at the end of my thesis if it is still desired.

Second, I could have strengthened my methodology by asking more questions that are direct about the wellhead EA, court litigation, and Halalt’s experience within that process (and non-Halalt interviewees’ viewpoints about the Halalt case study). In my interviews, I focused on asking participants about drinking water, the experience of

⁶²⁶ *Ibid.*

⁶²⁷ *Ibid.*

⁶²⁸ *Ibid.*

⁶²⁹ *Ibid.*

drinking water quality, and whether First Nations or Crown governments should have control over its management on reserves, whereas an IR analysis seeks to understand governance and sovereignty concerns. That said, the data that the interviewees provided went beyond a simple textual analysis of the court decisions and legal pleadings. By conducting interviews, I aimed to gather information about participants' thoughts about the interactions of the colonial state through a water licensing decision in the case of *Halalt v BC* and what that indicates about IR or Indigenous water sovereignty.

Third, my data collection phase could have been more anti-oppressive if I spoke to Halalt community members instead of just persons involved in the Canadian state-created Band council system. That said, while other Halalt members may have been able to provide their experiences in terms of their relationship with their waters generally, it may have been more difficult for them to comment on the EA and court case process as it is quite technical. Halalt members that were not directly involved with these processes may not have had as strong of an understanding of them in comparison to the Halalt band council members whom I interviewed.

Fourth, my literature review may be restricted because some newer IR has a limited amount of published scholarship. Consequently, it has a lack of critique and discussion including substantial published criticism that truly engages with its subject matter, which could be limiting.⁶³⁰ Fourth, my thesis is also less accessible as a product that I will deliver to the Halalt community than I would prefer as it is written using academic language, which often requires legal or post-secondary training to understand.

Fifth, my literature is heavily weighted on only a few IR authors, namely Taiiaki Alfred, Leanne Simpson, Jeff Corntassel, and Glen Coulthard. There are many more IR authors' whose work I could have cited or otherwise further incorporated into my

⁶³⁰ See for example Kyla Reid, *Towards Dialogue on Recognition of Indigenous Difference: Discourses on Self-Determination in Democratic Theory and Indigenous Scholarship* (LLM Thesis, UBC Faculty of Law, 2007) at 1-2. Reid argues that Indigenous theorists/Indigenous national sovereigntists and liberal democratic theorists, as groups of scholars, essentialize each other's scholarship. Reid explains that if we are to overcome a colonial past then these two groups of authors need to fully engage with the other's ideas.

literature review. Despite this, I do believe that my literature review is comprehensive and discusses the IR principles that are most relevant to my research study.

Sixth, in terms of my data analysis, as with any method, there are limitations and risks of thematic analysis. However, Braun and Clark note that many of the disadvantages that thematic analysis is susceptible to rely on whether the researcher poorly conducted the analysis rather than the method itself.⁶³¹ This is yet another reason it is crucial for researchers to make their epistemological assumptions and related approaches to the analysis clear. In addition, the flexibility of the method allows for a wide range of what can be said about the data.⁶³² Without a theoretical framework, which anchors the analytical claims the researcher makes, thematic analysis has limited “interpreting power beyond mere description.”⁶³³ This is combatted in my data analysis as my research question and analysis is intimately tied with IR theoretical framework.

Finally, the case study of the *Halalt v BC* case is atypical and not specifically a case about poor drinking water quality on a First Nation reserve or Indigenous water sovereignty, which is the first topic I sought to analyse. Rather, it is largely a case regarding the Aboriginal law principle of the “duty to consult and accommodate” and thus may limit a discussion of power dynamics in relation to an IR analysis.

At first, I understood that *Halalt v BC* and choosing the Halalt community would provide a case study regarding poor drinking water quality on a First Nations reserve. This conception would have fit my original goals of researching a case study that provided insight into the crisis of poor drinking water on reserves in Canada. There are two reasons that I understood the Halalt as a community having poor drinking water. First, after explaining that I wanted my Masters’ thesis focused on poor drinking water quality, Anthropology Professor Brian Thom recommended that I work with Halalt. Second, during my initial meeting with Halalt, one of the Band Council staff explained to me that Halalt suffered from Drinking Water Advisories in the past. The combination of these two interactions led me to believe that Halalt was an example of a community with poor drinking water quality. Halalt Band Council members subsequently told me while interviewing them that they believe that they have high drinking water quality.⁶³⁴

⁶³¹ Braun & Clarke, “Using thematic analysis in psychology” *supra* note 599 at 96-97.

⁶³² *Ibid* at 97.

⁶³³ *Ibid*.

⁶³⁴ Member of the Halalt band council, personal Interview.

Furthermore, the fact that the DNC tapped into the water underneath Halalt Reserve #2 also illustrates the perception that it is of excellent quality.

One Halalt Band council member, who was absent from my initial (pre-ethics clearance) meeting with the other two Halalt Band Council staff asserted that Halalt has high quality drinking water during the group interview I conducted with them. Although these interviewee participants explained that there have been sporadic Drinking Water Advisories (DWAs) in the past, they seemed to agree that Halalt's drinking water was quite clean as its water source is groundwater from the aquifer beneath their reserve. That said, this case study illustrates that even when water quality is "good," patterns of lack of power/control/management (i.e. challenges to Indigenous water sovereignty) still exist.

Therefore, in the sense that Halalt informed me during the group interview that their community does not have inferior quality water (that they are aware of), the reader should understand this case study as atypical and not representative of what many Indigenous peoples face in terms of a drinking water crisis. It may not be appropriate to completely extrapolate the results from this project to fit other Indigenous communities. However, there are many principles and lessons learned that could be shared with other Indigenous communities. Therefore, if the reader keeps the case study's limitations in mind, it can provide useful information for other communities and the discourse on Indigenous-state relations in general.

There are a few reasons that Halalt is still a valid case study in the context of Indigenous water governance. First, Halalt's interactions with the state reveal various power dynamics that are causing disputes and difficulties over their goal of having increased governance powers of their waters. Second, when you boil it down, the court battle was over quantity of water and water security for the District of North Cowichan (DNC). Therefore, this case study adds to the numerous examples in Canada where a state entity is taking a resource from an Indigenous community and using colonial legal systems to uphold those resource rights. Third, Halalt's day-to-day interactions with civil servants, coupled with their court battle with the DNC and their involvement in the Hul'qumi'num Treaty Group provide illustrations of how State-Indigenous dynamics play out on the ground.

There are many principles and lessons learned that can be shared with other Indigenous communities, if one keeps in mind the context of this example: A community that has been to the courts over accessibility and rights to their water, engaged with municipal, provincial, federal government and has future concerns about the quality of their water (re: septic tanks). In addition, Halalt may be representative of other Indigenous communities who are involved in legal battles over resources against the state as well as Indigenous communities that complain about the paternal way in which they feel INAC treats them. In these ways, while Halalt is atypical in terms of its own lack of poor water quality, its story as a case study is still illuminating.

7.0: Conclusion

In this chapter, I explored the ways in which I have designed my project to answer my thesis research question. To develop a deep understanding of a specific process of the *Halalt v BC* litigation concerning a resource dispute between the Canadian state and an Indigenous community, I used a qualitative research case study analysis. This chapter also discussed the specifics of my research design including how I chose the case study, as well as how I collected data, in terms of how I selected the case law and key informant interviews. I completed a thematic analysis using transcripts from participant interviews to provide an understanding of the Halalt experience of the litigation from Halalt's perspective as well as how other participants viewed current colonial legal Indigenous water governance. The proceeding chapters will relay the findings and provide my analysis of the results in relation to whether decolonization occurred as gauged by the three IR themes chosen.

Chapter 4

1.0: Introduction

In this chapter, I report on the major findings of my study and relate the results that have emerged in the data analysis. First, I begin by describing the characteristics of Halalt's relationship to their waters. Following this, there is a description of the *Halalt v BC* case law decisions.⁶³⁵ Next, I present Halalt's experience of the EA and court litigation structured through the three IR themes identified in the literature review. For each IR theme, I report on the sub-themes relating to water that emerge from the data to describe Halalt's experience using participant quotations from the interviews as evidence of how Halalt experienced the EA and case law processes. Each IR sub-theme ends with non-Halalt participants' views on each sub-theme when applicable.⁶³⁶

I analysed the data to answer my research question: using an IR analysis, what does the *Halalt v BC* caselaw reveal about the state of Indigenous water sovereignty in Canada? I have mapped the results into the three IR themes: 1) (Transformation of) Political and Social Power (from the State to an Indigenous community),⁶³⁷ 2) Respect for Indigenous Worldviews (as Alternative to Eurocentric Worldviews), and 3) Indigenous self-determination. I conducted this analysis using the three IR themes to determine the extent to which decolonization was occurring. Note that these are not clear-cut concepts and there is overlap between them in the reporting of the evidence, especially themes 1 and 3. I draw out the sub-themes related to Indigenous water sovereignty as defined in Chapter 1.

The results illustrate several findings regarding the three IR themes. First, in terms of the theme of "(Transformation of) Political and Social Power (from the State to

⁶³⁵ *Halalt v BC*, 2011 BCSC 945, *supra* note 6, and *Halalt v BC*, 2012 BCCA 472 *supra* note 6; I will collectively call these cases *Halalt v BC*. Note that there was no trial in this matter, the first piece of the litigation occurred at the BC Supreme Court level.

⁶³⁶ Only a few of the ten participants (other than the Halalt interviewees) were acquainted intimately with the *Halalt v BC* litigation. Most of the participants who knew about the case in general terms or that it was a case generally about the Aboriginal legal doctrine of the duty to consult and accommodate. That said, I did include non-Halalt comments that discussed various topics related to Indigenous resurgence and Indigenous water sovereignty in general.

⁶³⁷ There are parentheses around some words in this theme's title because Halalt was not afforded much political or social power throughout the EA and court litigation.

an Indigenous community),” the data indicated that the EA and legal court process left the question of who owns the water unresolved. Under this theme, we see that the EA and court processes denied Halalt’s request for recognition of ownership over their waters. Furthermore, the relevant state actors DNC; EAO, and the Province of BC) rejected Halalt’s appeals for shared decision-making and a watershed management plan. Secondly, regarding the IR theme of “(Respect for) Indigenous worldviews (as Alternative to Eurocentric worldviews),” the data show a disconnect between how Halalt conceptualize their waters and water management in a relational and relationship-type fashion as compared to a Eurocentric property-type of legal entitlement. Third, in relation to the IR theme of “Indigenous self-determination,” the results indicate that Halalt were unable to make governing decisions over the management of their waters.

2.0: Halalt Relationship to their Waters

Halalt’s deep relationship to their waters is evidenced throughout the interview data, background EA and litigation documents, and the BC Supreme Court decision. The findings show that the close connection that Halalt have to their waters encompasses spiritual, cultural, sustenance, social, and economic components. Halalt and other members of the HTG have managed these waters for decades as per their Indigenous laws. The discussion in Chapter 4 section 1.0 provides the background with which to understand Halalt’s conception of water ownership as broader than a property-type idea of “dominion and control over.” Conversely, their understanding of “ownership” is based on a relational and caretaking relationship.

Halalt has relied on the Chemainus River and Watershed historically and to the present day for water, seafood, plants, social, cultural, and ceremonial purposes.⁶³⁸ For example, Halalt members bathe in the water in the mountains to cleanse, calm, and destress themselves. They also used the Chemainus River for ceremonial bathing practices.⁶³⁹ Furthermore, one Halalt interviewee explained that the males that were

⁶³⁸ *Chief Thomas et al v Ministers et al*, BCSC Vancouver Reg No S098232, April 19, 2010 (Petitioners’ Outline of Argument) at para 27 [Halalt Nation Petitioners’ Outline of Argument].

⁶³⁹ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at paras 1 & 102.

members of Halalt's longhouse also participated in bathing in the mountains for ceremonial practices from periods of two-weeks to sixty days at a time.⁶⁴⁰

Furthermore, Halalt participants described some of what may be considered traditional knowledge regarding the water in their territories. They explained that they knew that the Chemainus Aquifer and the Chemainus River were connected.⁶⁴¹ As one participant explained:

It's connected. And...how did people know that? Well, you know, certain places in the River, when they either were swimming for recreation or bathing for cultural purposes, there would be cold; and why was it cold?

The participant implied that the water was noticeably cooler because of the cold water coming from the groundwater aquifer that was connected to the Chemainus River where Halalt people swim and bathe. This same Halalt interviewee explained that Halalt members would also use the water as a source of transportation to travel (sometimes en masse with up to 500 canoes) to areas where Halalt harvested food sources such as sockeye salmon in Robert's Bank and Fraser Canyon in the Lower Fraser River where they had traditional village sites.

Justice Wedge, the judge who decided the *Halalt v BC* case at the BC Supreme Court echoed her understanding of Halalt's deep cultural connection to the Chemainus River when she stated:

The Chemainus River is an integral part of the spiritual, cultural, social and economic life of Halalt. The River contains bathing holes that are also used for spiritual reasons. The Halalt obtain their drinking water from a groundwater well on I.R.#2. The well is also the source of drinking water for a neighbouring First Nation, the Penelakut.⁶⁴²

⁶⁴⁰ It was unclear from the participant group interview if Halalt community members still engage in this practice.

⁶⁴¹ This was later also acknowledged by the BC Supreme Court judge based on scientific studies that were presented as evidence during the BC Supreme Court level proceedings. See for example, *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 1, 14, 16, 101, 491, & 560.

⁶⁴² *Ibid* at para 102. Note also that I was informed by one Halalt Band Council interviewee that before Halalt had a drinking water system including indoor plumbing, the water for household cooking, cleaning, and bathing was provided from an outdoor tap (that provided water from the aquifer).

Justice Wedge also acknowledged, “[t]he River supports not only abundant fish stocks but a variety of trees, plants and herbs used by Halalt as part of their spiritual practices.”⁶⁴³ Halalt also use their waters as a place where they fish and around which Halalt members hunt and gather plants.⁶⁴⁴

Halalt, along with the other members of the HTG “have managed, conserved, harvested, used for cultural, domestic and livelihood purposes, sold or traded all the natural wealth and products of the Territory” including water resources and fish.⁶⁴⁵ These practices are integral to Halalt’s distinctive culture and they comprise Aboriginal rights as per Hul’qumi’num laws, customs, and practices.⁶⁴⁶ In his BC Supreme Court level affidavit, Halalt Chief James Thomas pointed out that these activities continue today to the extent that they have not been “restricted or prevented by interference from the federal and provincial governments, settlers and third parties in the Territory.”⁶⁴⁷ Furthermore, the present mandate of Halalt Chief and Council is to “preserve and protect the land, water and resources within Halalt’s traditional lands for the use, benefit and enjoyment of the current and future generations of Halalt People.”⁶⁴⁸

Halalt interviewees explained that there are different sides of how Halalt views the conception of managing their waters. One Halalt participant said on the one hand such management is administrative and technical. But on the other hand, there is a concept of the traditional First Nations’ responsibility of being stewards of the lands and waters. Halalt wishes to continue this stewardship. This participant said:

When I think of the management of jurisdiction of water. Is it [an] administrative...kind of right, operational type of thing? But when I think of management, I think of, you know, traditionally the First Nations took care of the water...we have a responsibility to continue to be stewards...and not just in a traditional way, but in a contemporary expression of that, however that works out, and if that means creating or adopting new infrastructure and importing that technology...to make it all happen that’s all part of it, right?...Maintaining or continuing to be stewards and doing that through some sort of shared decision-making or collaborative approach to

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid* at para 450.

⁶⁴⁵ *Halalt v BC*, 2011 BCSC 945 (Chief Thomas Affidavit #1, 2009 at para 16) [Chief Thomas Affidavit #1, 2009]

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid* at para 5.

governing and managing of the watershed and the aquifer. That's what we would want to do.

Based on the above discussion and as I will illustrate further below, it is evident that Halalt's relationship to their waters is more complex than them solely considering their waters as a property-type entitlement. To be clear, when Halalt asserted "ownership" over the water during the EA and litigation processes, they did not mean "dominion over." In their own words, as Halalt stated in their Applicant's Memorandum of Argument for leave to appeal to the Supreme Court of Canada, "Halalt takes a stewardship responsibility for the Chemainus Watershed, including groundwater."⁶⁴⁹

Halalt, being a member of the HTG has an "active treaty interest in negotiating the ownership *and management* of fresh-water resources in Hul'qumi'num Territory."⁶⁵⁰ The Halalt sense of "ownership" encompasses values beyond the concepts of property-type ownership. Halalt were asserting ownership in that they have a responsibility to care for and make corresponding management decisions over the use of their waters. One can infer and extrapolate from the Band Council's mandate that the Halalt idea of ownership is about decision-making and the ability to care for their waters.⁶⁵¹ If Halalt is unable to have this control over their waters, they are unable to practice their responsibilities to their waters. Halalt wants to have "a hand on the tap" in their words (as the Chief has said in relation to the Chemainus Wells Project).⁶⁵² Halalt also want to ensure that the state actors respect Halalt's relationship to and legally asserted sovereignty over their waters.

As one can see, Halalt have a cultural connection to the waters in their traditional territories as evidenced by their participant statements, EA and litigation documents, as well as the fact that the BC Supreme Court judgment acknowledged this deep relationship. Halalt have been managing their waters for present and future generations

⁶⁴⁹ *Halalt*, Leave to Appeal to the SCC, Applicant's Memorandum, *supra* note 247 at para 13.

⁶⁵⁰ Halalt Nation Petitioners' Outline of Argument, *supra* note 638 at para 64(c) emphasis added.

⁶⁵¹ Chief Thomas Affidavit #1, 2009, *supra* note 645 at para 5.

⁶⁵² See The Council of Canadians, "Halalt First Nations tries to block water project" (September 4, 2009) online: <<https://canadians.org/node/5043>>. Specifically, regarding the project, the Council of Canadians reproduced a written statement from Halalt Chief James Thomas that stated: "We want a comprehensive management plan for the watershed before this project goes ahead. And, if it goes ahead, we want to be full participants in a monitoring program...we want a hand on the tap should it ever be seen that the wells are damaging this river, its fish or our drinking supply." See similar statements also at *Halalt v BC*, 2011 BCSC 945, *supra* note 6, at paras 316 & 665.

for decades and they wish to continue this caretaking role, which they highly value due to their close connection to their waters. Halalt's relationship and responsibilities to their waters provided the impetus to initiate litigation, which they felt were at risk due to the Chemainus Wells Project. To deepen the reader's understanding of the EA and litigation, in the next section, I will expand on my previous summary of the *Halalt v BC* litigation case study from Chapter 1.

3.0: Case Study Description: *Halalt First Nation v British Columbia Case Law*

This section describes the EA and litigation processes for the Chemainus Wells Project and *Halalt v BC*. Halalt opposed the Chemainus Wells Project throughout the EA process asserting that the project infringed their Aboriginal rights and title to the waters that the DNC proposed to extract. Halalt initiated litigation alleging that the EAO and the Province of British Columbia did not conduct their duty to consult and accommodate to the appropriate degree. Justice Wedge ordered a stay of proceedings on actions or decisions pursuant to the Certificate (including operation of the wells) "pending adequate consultation concerning year-round operation of the well field and, resulting from such consultation, reasonable interim accommodation of Halalt's interests."⁶⁵³ The judge also provided a lengthy analysis regarding the *prima facie* ownership that Halalt had over the waters in their territories. On appeal, the Court of Appeal decided in favour of the province in concluding that there was adequate consultation and accommodation conducted and the project should be allowed to continue. The Supreme Court of Canada subsequently denied Halalt leave to appeal. At the end of this section, I conclude with an update of the status of the Chemainus Wells project explaining that the BC EAO granted the DNC their Certificate amendment and therefore are now allowed to operate the Chemainus Wells Project year-round, which was previously limited.

Halalt's lands and waters are unceded and Halalt have never entered a treaty with the Crown to relinquish any entitlement to their lands or waters. Halalt is currently engaged in the British Columbia Treaty process as one of six First Nation members of the

⁶⁵³ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 753.

HTG.⁶⁵⁴ This treaty process between the HTG and Canada and British Columbia includes negotiations regarding freshwater and groundwater.⁶⁵⁵

In previous decades, the Town of Chemainus had been using surface water from the Banon Creek Reservoir located in the Chemainus Watershed for drinking water.⁶⁵⁶ However, turbidity during the winter months of the Banon Creek Reservoir surface water began to raise concerns for the DNC.⁶⁵⁷ Logging in the Banon Creek Watershed caused the turbidity.⁶⁵⁸ The BC Supreme Court judge accepted that the DNC had issues of drinking water quality. However, both the DNC and Halalt participant interviewees discussed the fact that the DNC did not critically need the groundwater as a drinking water source as this water was not necessarily poor.⁶⁵⁹ The DNC representative interviewee explained that the issue was better characterized as a lack of certainty of the quality of water. This participant explained that it was the turbidity in the water that made it difficult to test the quality to ensure that it was sufficient for drinking water consumption.

The DNC's Chemainus Wells project underwent a joint federal and provincial EA.⁶⁶⁰ The project became a "reviewable project" due to the amount of water that the DNC proposed to extract.⁶⁶¹ The EA process lasted several years and the parties ended

⁶⁵⁴ *Ibid* at para 17.

⁶⁵⁵ *Ibid*.

⁶⁵⁶ *Ibid* at para 19.

⁶⁵⁷ *Ibid*.

⁶⁵⁸ *Ibid* at paras 19 and 106.

⁶⁵⁹ BC, Environmental Assessment Office, *Chemainus Wells Project: Assessment Report*, (BC: Environmental Assessment Office, 9 February 2009) at I [*Chemainus Wells Project Assessment Report*]. The Executive Summary of the report states that the chlorination used to disinfect the water for human consumption "may be less effective in killing water borne pathogens during periods of increased turbidity because the suspended matter in the water can act as a barrier to disinfection." In these cases, when turbidity was higher in Banon Creek reservoir as per Vancouver Island Health Authority acceptable levels, then the DNC would issue Boil Water Advisories for residents. Secondly, a less significant problem was also that there was a concern about the formation of trihalomethanes (by-products of chlorination that can form when chlorine is utilized to disinfect drinking water and naturally reacts with organic matter such as decaying vegetation and leaves. The DNC proposed the new drinking water treatment system (Chemainus Wells Project) to address these two problems.

⁶⁶⁰ *Halalt v BC*, 2011 BCSC 945 *supra* note 6 at para 115.

⁶⁶¹ See *BC EAA Reg 370/2002*, *supra* note 208, s 11(4). An EA was triggered as per the British Columbia *Reviewable Projects Regulation* as when the two groundwater wells would be operating simultaneously, the water extracted would be more than 75 Litres/second (L/s). As per section 11(4) of the *Regulation*, if a water project will extract 75 L/s or more, the project must first obtain an environmental certificate, which requires undergoing an environmental assessment. This in turn, also triggers the Aboriginal duty to consult.

up in dispute over the potential impacts the project had on Halalt fishing, hunting, and ceremonial rights in addition to Halalt's exclusive interest in the water of the Chemainus River and aquifer.⁶⁶² Halalt argued that the Crown did not adequately consult Halalt during the EA process.⁶⁶³

Chief Thomas's BC Supreme Court level affidavit states that "Halalt have been offended" by numerous aspects of the consultation and accommodation process.⁶⁶⁴ This included the fact that the EAO conducted the EA without publicly acknowledging Halalt's assertion of Aboriginal title and rights to the Project area nor publicly acknowledging that the Crown was legally required to conduct consultation regarding these Aboriginal claims to rights and title.⁶⁶⁵ Halalt repeatedly brought both of these concerns to the attention of the EAO.⁶⁶⁶ Furthermore, the Chief's affidavit also asserted that the EAO refused to acknowledge even privately to Halalt that it was legally required to consult and accommodate Halalt's Aboriginal rights, and this only changed after the Chief wrote a letter to the Minister of Environment in August 2008.⁶⁶⁷

Halalt was also "very offended" by how the EAO claimed it conducted "deep consultation" while concurrently denying that Halalt had a strong *prima facie* claim of title.⁶⁶⁸ Halalt stated that they engaged in the consultation in good faith and believed the higher goal of consultation was reconciliation between Aboriginal communities and the Crown's asserted sovereignty.⁶⁶⁹ The Chief explained in his affidavit that "deep consultation" is a commitment of the honour of the Crown, not a mere procedural formality.⁶⁷⁰ Furthermore, the Chief's affidavit disagreed that the change in the Project from three wells down to two constituted accommodation in law because Halalt were not informed about the decision to change the project.⁶⁷¹

⁶⁶² *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 451.

⁶⁶³ Chief Thomas Affidavit #1, 2009, *supra* note 645 at para 42; See also *Halalt v BC*, 2011 BCSC 945 *supra* note 6 at para 32.

⁶⁶⁴ *Ibid* at para 42.

⁶⁶⁵ *Ibid*.

⁶⁶⁶ *Ibid*.

⁶⁶⁷ Chief Thomas Affidavit #1, 2009, *supra* note 645 at para 42.

⁶⁶⁸ *Ibid*.

⁶⁶⁹ *Ibid*.

⁶⁷⁰ *Ibid*.

⁶⁷¹ *Ibid*.

Halalt also argued in court that they were not adequately consulted for several reasons. Some of these consultation deficiencies included that the BC EAO: failed to disclose information; failed to provide information at times it was shared with other stakeholders; failed to invite Halalt to key meetings; and failed to disclose key decisions that were made (and/or the documents upon which these decisions were made).⁶⁷² For example, the state actors did not provide Halalt with certain information that was provided to other participating parties and at times information was provided at a much later date than when it was given to other participants.⁶⁷³

Despite Halalt's concerns, the provincial Ministers of Environment and Community Development (the Ministers) approved the project in March 2009.⁶⁷⁴ The DNC finished the project in 2010 and it is now operational.⁶⁷⁵ The original proposal was to have three wells extracting water year-round but over the course of the EA, the DNC modified the project.⁶⁷⁶

The final Certificate of Approval (Certificate) for the project permitted construction of two wells that could only operate each year from October 15 to June 15 at an extraction rate of 75 Litres/second.⁶⁷⁷ Therefore, the Certificate prohibited pumping water.⁶⁷⁸ However, despite this timing constraint, the DNC always intended the project to allow for year-round pumping for emergency and testing purposes.⁶⁷⁹ The Certificate did not describe under which circumstances that emergency summer groundwater extraction would be permitted.⁶⁸⁰ The Certificate allowed the District to develop an emergency plan for such extraction with the local health authority, Vancouver Island Health Authority

⁶⁷² *Halalt v BC*, 2011 BCSC 945 *supra* note 6 at para 32.

⁶⁷³ *Ibid* at paras 244, 255, 355, & 639.

⁶⁷⁴ *Ibid* at para 33. Note that when I refer to the "Ministers" I am collectively referring to the British Columbia Minister of Environment and the British Columbia Minister of Community Development.

⁶⁷⁵ *Ibid* at para 36.

⁶⁷⁶ *Ibid* at paras 22-24. The original project was to have three groundwater wells operating at a maximum extraction of 75 L/s with only two wells operating simultaneously to extract water year-round up to a maximum of 131 L/s. Various studies throughout the EA led scientists to conclude that this may have significant adverse effects on the Chemainus River's fish and fish habitat during summer months. Therefore, the proposed project was modified to exclude pumping over summer months unless there was an emergency or testing purposes.

⁶⁷⁷ *Ibid* at para 33.

⁶⁷⁸ *Halalt v BC*, 2012 BCCA 472, *supra* note 6 at 186.

⁶⁷⁹ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 572.

⁶⁸⁰ *Ibid* at para 33.

(VIHA).⁶⁸¹ The Certificate did not provide Halalt with any specific role in monitoring regarding the ongoing effects of the project on the Chemainus River or allow Halalt to give input into the plan regarding summer emergency groundwater extraction.⁶⁸²

Halalt brought a petition for judicial review of the project approval decision in 2009, as the EA process did not address several of Halalt's concerns by the time the Ministers approved the project. Halalt asked the court to quash the EA project Certificate.⁶⁸³ Furthermore, concurrent to the BC Supreme Court litigation, in 2010, Halalt held a peaceful protest in the form of a roadblock where they informed surrounding residents about their concerns around the project.⁶⁸⁴

Halalt asserted Aboriginal rights and title to the areas surrounding the project.⁶⁸⁵ In its petition, Halalt argued that while the Province had notice to such claims, it still failed to properly consult and accommodate Halalt regarding their asserted interests.⁶⁸⁶ Among other arguments, Halalt claimed that the Ministers "erred in concluding that the project would have no significant adverse effects" and that the Ministers were wrong in concluding the project would not significantly impact the exercise of Halalt's Aboriginal rights and title.⁶⁸⁷

The Ministers alleged that the DNC's modification of the project accommodated Halalt's interests as the DNC reduced the amount of extractable groundwater in the proposal and restricted the period of the year where extraction could occur.⁶⁸⁸ However, Halalt disputed that the project modification equated to accommodation throughout the legal proceedings for two reasons.⁶⁸⁹ First, Halalt submitted that the Crown did not engage in deep consultation with them.⁶⁹⁰ Second, Halalt said that the DNC made the

⁶⁸¹ *Ibid.*

⁶⁸² *Ibid* at para 35.

⁶⁸³ *Ibid* at para 4.

⁶⁸⁴ *Ibid* at paras 440-441.

⁶⁸⁵ *Ibid* at para 4.

⁶⁸⁶ *Ibid.*

⁶⁸⁷ *Halalt First Nation v British Columbia* 2011 BCSC 945 (Halalt Petition to the Court at paras 3 & 4) [Halalt Petition to the BCSC, 2009].

⁶⁸⁸ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 5.

⁶⁸⁹ *Ibid* at para 7.

⁶⁹⁰ *Ibid.*

modifications in response to scientific concerns that arose during the course of the EA process and not to their assertion of Aboriginal rights.⁶⁹¹

With the above explanation of the various parties' positions, I now turn to reporting on the BC Supreme Court judgment. The BC Supreme Court judge, found that it was the responsibility of the Provincial Crown representative, the EAO, which conducted the EA, to determine the level of consultation required concerning the possible infringement of the project to Halalt's asserted Aboriginal rights and title.⁶⁹² Justice Wedge found that the EAO did not adequately conduct a strength of claim assessment before it approved the project.⁶⁹³ She found that Halalt should have been provided deep consultation because of the *prima facie* strength of its claims of their Aboriginal rights and title.⁶⁹⁴ Justice Wedge said that regardless of any intention by the EAO to deeply consult with Halalt, such consultation did not occur.⁶⁹⁵ For example, the state actors did not inform Halalt about the final modified form of the project before the EAO approved it.⁶⁹⁶ Therefore, Justice Wedge found the consultation process to be inadequate.⁶⁹⁷

Justice Wedge agreed with Halalt that the project modification did not constitute accommodation due to Halalt's asserted Aboriginal interests. In fact, scientific concerns that arose during the EA (regarding the potential for significant adverse effects to the Chemainus Aquifer and River) provided the justification for the modification.⁶⁹⁸ In the end, Justice Wedge suspended the Certificate and ordered "adequate consultation" regarding the year-round operation of the groundwater pumping and any appropriate interim accommodation of Halalt's interest that resulted from such consultation.⁶⁹⁹

While Justice Wedge examined groundwater ownership at length, the issue at the BC Supreme Court level was whether the Provincial Crown fulfilled its constitutional

⁶⁹¹ *Ibid.*

⁶⁹² *Ibid* at para 710.

⁶⁹³ *Ibid.*

⁶⁹⁴ *Ibid.*

⁶⁹⁵ *Ibid.*

⁶⁹⁶ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at paras 679-680.

⁶⁹⁷ *Ibid* at para 710.

⁶⁹⁸ *Ibid* at paras 685-688.

⁶⁹⁹ *Ibid* at para 753.

obligations to consult and accommodate Halalt's asserted interests during the EA process.⁷⁰⁰ Justice Wedge stated that:

The current proceeding does not require this Court to determine conclusively the question of ownership of the groundwater beneath Halalt's traditional territory or its reserve lands. The issue is whether the Province ought to have consulted with Halalt about the extraction of the groundwater on the basis that Halalt had a legitimate claim to a proprietary interest in it.⁷⁰¹

In Justice Wedge's lengthy analysis of Aboriginal water rights, she stated that Halalt had a *prima facie* "case in support of its asserted Aboriginal title to the Project area"⁷⁰² and that Halalt had "an arguable case that the groundwater in the Aquifer was conveyed to the federal Crown to fulfill the objects for which reserve lands were set aside."⁷⁰³ Justice Wedge concluded that:

Halalt has demonstrated a good *prima facie* case in support of its asserted Aboriginal title to the Project area. I have reached this conclusion on the information disclosed in the 2005 Commentary, the Duquette Report and the sources cited in the EA Report. The EAO itself acknowledged Halalt's strong historical and ongoing connections with the Project area. Shared exclusive occupation is not a bar to Halalt's claim on the facts of this case...⁷⁰⁴

Justice Wedge based her conclusion that the ownership of water was given by the Provincial Crown to the Federal Crown on various points of political history of the formation of Canada's governance systems as well as the creation of "Indian Reserve lands."⁷⁰⁵ In this discussion, she concluded that if the Province conveyed the Chemainus Aquifer to the Federal Crown in order to fulfill the objectives for which reserve lands were created, then the Province cannot claim to have expropriated the water by way of legislative act.⁷⁰⁶

⁷⁰⁰ *Ibid* at para 9.

⁷⁰¹ *Ibid* at para 493.

⁷⁰² *Ibid* at para 486.

⁷⁰³ *Ibid* at para 561. See also paras 559-562 for a full discussion on the BC Supreme Court judge's conclusion to this effect. This is very similar reasoning to how the US Courts rationalized water rights for Indian reservation in *Winter's* doctrine discussed at note 130 above.

⁷⁰⁴ *Ibid* at para 486.

⁷⁰⁵ *Ibid* at para 559.

⁷⁰⁶ *Halalt v BC*, 2012 BCCA 472, *supra* note 6 at para 561; see paras 559-562 for a full discussion on the BC Supreme Court judge's conclusion to this effect.

The Minister of Environment, the Minister of Community Development, and the DNC appealed the BC Supreme Court judge decision. The Court of Appeal overturned Justice Wedge's decision, allowed these appeals, and set aside the declarations and orders made.⁷⁰⁷ Justice Chiasson for the Court of Appeal stated that the BC Supreme Court Judge erred in how she interpreted the Certificate, which led her to incorrectly characterize the scope of the approved project.⁷⁰⁸ He also held that Halalt was not entitled to an assessment on the strength of its claim to Aboriginal rights and title to the aquifer within the context of the EA.⁷⁰⁹

Regarding the duty to consult, Justice Chiasson concluded that Halalt were deeply consulted and that limiting pumping to one pump during the winter months was reasonable accommodation.⁷¹⁰ He found that the project that the DNC submitted and which the Ministers approved did address Halalt's concerns.⁷¹¹ Lastly, Justice Chiasson held that Justice Wedge erred in law when she called for consultation on year-round pumping and that she erred in fact when deciding that such consultation had not occurred.⁷¹²

Halalt applied for leave to appeal the Court of Appeal decision to the SCC in 2013.⁷¹³ In part, Halalt asked the SCC to resolve the outstanding legal issues surrounding the ownership of the waters in dispute, which was a question that did not revolve around the duty to consult.⁷¹⁴ Halalt asked the SCC to determine two key legal issues:

- **Issue 1:** Is it a legal certainty that the Province has exclusive ownership of and jurisdiction regarding all the groundwater beneath an Indian Reserve and/or Aboriginal title lands?⁷¹⁵
- **Issue 2:** Where a First Nation asserts that both Aboriginal rights and Aboriginal title may be affected by contemplated Crown conduct, must the scope of the Crown's consultation reflect the strength of both the Aboriginal rights and the Aboriginal title?⁷¹⁶

⁷⁰⁷ *Ibid* at para 193.

⁷⁰⁸ *Ibid* at para 191.

⁷⁰⁹ *Ibid* at para 127.

⁷¹⁰ *Ibid* at para 192.

⁷¹¹ *Ibid* at para 189.

⁷¹² *Ibid* at para 190.

⁷¹³ Summary 35179, *Halalt v BC* Leave to Appeal to SCC, *supra* note 246.

⁷¹⁴ *Halalt*, Leave to Appeal to the SCC, Applicant's Memorandum, *supra* note 247 at paras 2 & 5.

⁷¹⁵ *Ibid* at para 47.

⁷¹⁶ *Ibid*.

In their Applicant's Memorandum of Argument in support of their Leave to Appeal to the SCC, the Halalt's question regarding water ownership highlighted legal uncertainties. Halalt asked who owns the groundwater under a reserve and Aboriginal title land:

No one, *per* the common law? The Province, *per* provincial statute? A First Nation, *per* Indian Reserve? A First Nation, *per* Aboriginal Title? A First Nation, *per prima facie* claim of Aboriginal title?⁷¹⁷

As indicated in both interviews and in the court pleadings, Halalt participants believed that their case regarding the legal uncertainty of groundwater ownership could be a test case in Canada. One participant explained, "I think we have a chance to make a leading statement on groundwater ownership and the consultation in respect of an [Aboriginal] interest." In attempting to illustrate that their case had national importance, Halalt highlighted that:

[d]isputes regarding access to groundwater are of increasing practical importance in locations all across Canada. The legal framework governing groundwater disputes is remarkably undeveloped concerning Aboriginal interests of any type, whether established or pre-proof.⁷¹⁸

While in their Memorandum of Argument for leave to appeal, Halalt asserted the national importance of their case, the SCC denied them leave to appeal without providing reasons for its decision.⁷¹⁹

On March 31, 2015, the DNC applied to the BC EAO to amend the existing Certificate to operate the Chemainus Wells year-round.⁷²⁰ This includes operating the wells between June 15 to October 15 yearly, in addition to the previously approved October 15 to June 15 operation.⁷²¹ After several years of water testing, government meetings and negotiations with Halalt, the EAO decided to grant the amendment application request on April 12, 2018.⁷²² Therefore, the original Certificate is now amended and the DNC is allowed to extract water from the wells year-round.

⁷¹⁷ *Ibid* at para 2, emphasis in original.

⁷¹⁸ *Ibid* at para 44.

⁷¹⁹ Summary 35179, *Halalt v BC* Leave to Appeal to SCC, *supra* note 246.

⁷²⁰ Chemainus Well Project Update, April 2018, *supra* note 250.

⁷²¹ *Ibid*.

⁷²² BC, Environmental Assessment Office, "Amendment #3 to Certificate #W09-01 for Chemainus Wells Water Supply Project" (April 12, 2018) Chemainus Well Project online:

Regarding water ownership, it is important to note that during the period that the EAO reviewed the amendment application, the SCC handed down a decision on a significant Aboriginal case entitled *Tsilhqot'in Nation v British Columbia* that changed the EAO's determination of Halalt's strength of claim.⁷²³ During the amendment application, Halalt reminded the Province that they had an ownership interest in the groundwater that the DNC had been pumping during winter months and then proposed to pump during the summer months.⁷²⁴ In response to this assertion, the EAO reported that it acknowledges Halalt's assertion of their ownership of the groundwater underneath their reserve and recognizes that the EAO has a duty to consult and accommodate.⁷²⁵ Following the *Tsilhqot'in* decision, the EAO revised its determination regarding Halalt's strength of claim (of Aboriginal rights and title to the area of the Chemainus Wells Project) from "weak" to "strong."⁷²⁶ The EAO noted that Halalt did not ask the SCC to make a determination on submerged lands and that the law is currently unsettled on this matter.⁷²⁷ During the process of the amendment application, the EAO said that irrespective of this legal uncertainty, they had already acknowledged that their duty to consult should be at the deep end of the *Haida* consultation spectrum.⁷²⁸ Furthermore, the EAO said that the EA process is not intended to be a rights-determining process.⁷²⁹

In conclusion, this case in Canadian law is about the duty to consult. However, the Halalt pleadings and approach asserted ownership and management regarding Aboriginal title to their waters. Throughout the EA process for this proposed project, Halalt illustrated its disapproval of the project as well as the desire to have the power to

<<https://projects.eao.gov.bc.ca/api/document/5acf9d48379cd80024a4bd85/fetch>>. Note, while there is much that could be analysed on the amendment application and Certificate approval, it is beyond the scope of my thesis to analyse this in detail. My interviews took place in 2013 before the SCC decision to deny leave to appeal was made as well as before the DNC's 2015 application to amend the Chemainus Wells Project was submitted. Therefore, I do not have formally gathered data from Halalt or non-Halalt interviewees regarding how Halalt experienced either of these events.

⁷²³ *Tsilhqot'in*, *supra* note 5.

⁷²⁴ BC, Environmental Assessment Office, "Chemainus Wells Project EAC Amendment Application: Issues Tracking Table" Chemainus Wells Project at 20 online: <<https://projects.eao.gov.bc.ca/api/document/5acfa013d666d0002485715c/fetch>> [BC EAO, Amendment Issues Tracking Table].

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.*

⁷²⁸ *Ibid.* See also *Haida*, *supra* note 5.

⁷²⁹ BC EAO, Amendment Issues Tracking Table, *supra* note 724 at 20.

manage their waters. In addition, the approach Canada used to address questions of political authority (ownership) and management were unsatisfactory for Halalt.

4.0: Reporting of Results of Indigenous resurgence themes

I present the results under each IR theme by first recounting and providing evidence of the Halalt First Nation experience and then I subsequently describe what other non-Halalt participants said about each IR theme as well as their thoughts on Indigenous water sovereignty in general. I derive evidence concerning how Halalt experienced this watershed dispute from three sources: 1) Halalt-submitted documents in the legal process;⁷³⁰ 2) statements from the court in the *Halalt v BC* BC Supreme Court and Court of Appeal legal judgements; and 3) transcripts of the interview with the Halalt Band Council members.⁷³¹ Interviews with non-Halalt participants comprise further evidence for the reporting of the results in this chapter.

First, I discuss the IR theme of “(Transformation of) Political and Social Power (from the State to an Indigenous Community),” in which I provide examples discussing possible routes of where the transference of power from the Canadian state (DNC or the provincial Crown) to Halalt could have occurred. In this theme, Halalt made several different requests that the province rejected. The DNC and the EAO denied Halalt’s call for recognition of their entitlement to the waters, shared-decision making, as well as a water management plan. Regarding water ownership, Halalt turned to the courts to resolve the legal uncertainty of who owns the water. Halalt explained their frustration that the courts did not accept their entitlement to their waters and they felt that this illustrated a lack of respect for Halalt’s prior occupancy and ownership over their territories. The

⁷³⁰ Notably, the evidence that I cite most often includes: Chief Thomas Affidavit #1, 2009, *supra* note 645; Halalt Petition to the BCSC, 2009, *supra* note 687; *Halalt v BC*, 2012 BCCA 472 (Factum of the Respondent Halalt First Nation, April 25, 2012) [Halalt Respondent Factum BCCA]; and *Halalt*, Leave to Appeal to the SCC, Applicant’s Memorandum, *supra* note 247.

⁷³¹ It is important to note that when I am making reference to the opinions of “the Halalt” for the purposes of my thesis, I am referring specifically to the three Halalt First Nation Band Council members that I interviewed (which will be specifically stated) or the plaintiff litigants in the *Halalt v BC* case (which was Chief James Robert Thomas, also known as Sulsimutstun, Chief of Halalt First Nation, on his own behalf and on behalf of all members of Halalt First Nation, and Halalt First Nation). This is not to say that there is a broad consensus of every member in the Halalt First Nation that would agree with the views expressed here. “The Halalt interviewees” and the “The Halalt litigants” may only be providing their own views and this might not be representative of the entire community of Halalt.

state actors did not provide Halalt the clarity on the water entitlement issue that they asked the courts to provide.

Second, in the theme of “(Respect for) Indigenous Worldviews (as an Alternative to Eurocentric Worldviews),” participants indicated that Halalt and the state actors conceived the physical hydrology of the Chemainus Aquifer and River differently. There was also evidence illustrating divergence between how the colonial state and Indigenous worldviews conceived water management. In theme 2, I illustrate Halalt’s frustration that government officials did not accept some of Halalt traditional knowledge regarding the connection between the Chemainus Aquifer and the River. Furthermore, the courts ultimate decision to allow the DNC to extract Halalt waters in a resource extraction property-type entitlement fashion frustrated Halalt as it prevented them from managing their waters in a responsibility-based way. This illustrated a tension in colonial and Indigenous worldviews.

Third, regarding the theme of “Indigenous self-determination,” Halalt provided examples of how they wished to have a “hand on the tap” in terms of decision-making over the management of their waters yet the state actors denied them this opportunity.

In summary, Halalt experienced significant barriers to gaining power, respect for their worldviews, and self-determination. The results also indicate that there was an overall theme of frustration for Halalt Band Council members in relation to these barriers and Halalt’s experience of the EA process with the DNC in each of the IR themes.

4.1: Halalt’s Experience: Theme 1: (Transformation of) Political and Social Power (from the State to an Indigenous community)

Under the IR theme of “(Transformation of) Political and Social Power (from the State to an Indigenous community),” two sub-themes relating to Indigenous water sovereignty emerged. First, there was a sub-theme of (lack of) recognition of ownership of water that participant interviewees discussed. Halalt asserts ownership over their waters due to their occupation of their territories prior to European contact. In sub-theme 1, I discuss the failures of the DNC and the province to provide Halalt with recognition of ownership to their waters, shared decision-making, or a watershed management plan, all which Halalt requested. Halalt also shared their frustrations regarding the unfairness of

the DNC's legal ability to access their waters especially in the face of opposition from Halalt.

Second, under sub-theme 2, participants noted the inability for legal dispute resolution through the EA and colonial court process to resolve their claims for ownership over their waters. Halalt expressed their frustration regarding the denial of recognition of ownership at both the EA and legal court processes. Throughout this theme participants indicated that Halalt (and Indigenous peoples in Canada generally) want recognition of their legal entitlement to the waters in their territories and shared decision-making such as co-management that would allow for joint governance.

4.1.1: Sub-Theme 1: (Lack of) Recognition of Ownership

Halalt Band Council interviewees explained that Halalt owns the waters in the Chemainus River and Chemainus Aquifer. Specifically, Halalt asserts, "shared exclusive occupation" (since before European contact) to parts of the Chemainus Watershed, Chemainus River, and Chemainus Aquifer including where the Chemainus Water Wells Project is located.⁷³² One participant said that:

Halalt would say we own the land and the groundwater...More particular to the case, we own the groundwater.

Halalt participants unwaveringly believe that their occupancy of their traditional territories illustrates their ownership over the Chemainus Aquifer under their reserve. However, Halalt participants also indicated that there is legal uncertainty, for which they sought advice from the courts. As one Halalt participant said:

It's going to define ownership. Going to be some issues. You know, 90% of that water sits under our reserve. So, who does have legal jurisdiction? Is it Halalt? AANDC? Is it the province? They never made that determination. That's why we are in court in regards to ownership and use of that water.

⁷³² Chief Thomas Affidavit #1, 2009, *supra* note 645 at para 17. Halalt asserts this "shared exclusive occupation" of Chemainus waters with the other Hul'qumi'num First Nations.

Furthermore, in their Court of Appeal Respondent Factum, Halalt alleged that the Province committed an error by dismissing Halalt's "claim to an ownership interest in the groundwater rather than considering it a credible claim."⁷³³

Halalt interviewees also expressed that they wanted a key role in the governance of the waters in their traditional territories. This did not necessarily mean a transfer of all governance powers. For example, Halalt expressed a willingness to share decision-making powers with various state institutions and one Halalt participant said that Halalt wished to govern with a co-management system. Another Halalt participant added that the basis for "any future discussion needs to be based on recognition of title, rights, and resources."

Overall Halalt interviewees illustrated frustration regarding the lack of recognition that they owned the waters over which the dispute was concerned. One participant said that, "this is Halalt's traditional territory, let alone the fact that the Aquifer's right beneath the reserve, I mean, how can you say it's not Halalt territory?"

Halalt also illustrated displeasure in their petition for judicial review about the Ministers' lack of respect for Halalt Aboriginal title and rights.⁷³⁴ Halalt stated that the ways in which the Ministers alleged to consult with Halalt was disrespectful and violated the Honour of the Crown.⁷³⁵ There was no recognition that Halalt had asserted Aboriginal title and rights nor did the Ministers acknowledge that the Province (via the EAO) was legally obligated to conduct consultation.⁷³⁶

Furthermore, another participant provided an analogy regarding the injustice and unfairness in the lack of recognition and respect afforded to Halalt's waters, which this participant said seemed basic and straightforward:

And, as far as our neighbors, I mean, I think we could simplify by you know, asking some ten-year-olds...is it okay for you to take an extension cord to your neighbour's house and plug in. You know...it's pretty simple. Even children would be able to say well, that's not right...

⁷³³ Halalt Respondent Factum BCCA, *supra* note 730 at para 67(d).

⁷³⁴ Halalt BCSC Petition 2009, *supra* note 687 at para 8.

⁷³⁵ *Ibid.*

⁷³⁶ *Ibid.*

This same Halalt participant provided another analogy by explaining that it would not be fair for one person to just dip their straw and start drinking another person's water.

Halalt participants also questioned whether there might be a racialized component to the water dispute with the DNC. One Halalt participant did not think Halalt should be dealing with this and posited:

I don't think we should be having to deal with this. I mean, why can't we just...If we weren't First Nations would we still be having this problem? That's the question right there. If...we were just some municipality and we're dealing with a neighbouring municipality, would we be dealing with the same things? I doubt it.

In addition, Halalt Band Council interviewees expressed frustration regarding the DNC's lack of need to withdraw Halalt's waters for their drinking water. One Halalt participant explained that they were not against sharing their waters:

We only took what we need. We never turned anyone away in terms of a need. But if they don't need it, why give it to them?

Halalt Band Council members explained that they would share the water if someone needed it. However, the Halalt view was that the DNC did not need the new Chemainus Wells Project. The purported "need" was just a potential concern caused by uncertainty as to whether the DNC *might* need the water. Chief Thomas's BC Supreme Court-level affidavit asserted that the DNC had not proven that the Wells Project was in fact needed and this lack of need has always concerned Halalt.⁷³⁷ In his affidavit, Chief Thomas explained that the DNC should have tried to rectify the problems with the Banon Creek surface water supply system instead.⁷³⁸ While the DNC said that trying to fix the surface water would be expensive, the DNC did not provide information to support this assertion.⁷³⁹

⁷³⁷ Chief Thomas Affidavit #1, 2009, *supra* note 645 at para 44.

⁷³⁸ *Ibid.*

⁷³⁹ *Ibid.*

Note that while the BC Supreme Court judgement discussed various evidence that explained that the DNC required the groundwater as a source of surface water due to issues of turbidity in the winter and water shortage concerns in the summer,⁷⁴⁰ the DNC representative interviewee clarified that the DNC's surface drinking water supply was not necessarily bad, but it was difficult to be definitive on its quality due to sediment in the water, which makes it difficult to test (as discussed above in section 2.0).

While Halalt interviewees explained that they do in fact have a good relationship with the DNC on many other issues, they questioned why the DNC did not look more seriously at other options into providing their town with drinking water. As their 2009 petition for judicial review stated, Halalt claims that the Ministers failed to adequately scrutinize the project and establish the actual *necessity* for the project and that any alternative options could not be achieved.⁷⁴¹

In conclusion, Halalt clearly asserted and the BC Supreme Court found that Halalt own the water due to their occupation of their territories. This was a key point that they sought to have the province and the courts to acknowledge. Halalt interviewees expressed frustration that the state actors did not recognize their entitlement to their waters. Halalt also felt it was unfair for the DNC to be able to extract their waters when it was unclear that it was even necessary for purposes of providing drinking water to their residents.

4.1.2: Sub-Theme 2: Colonial Processes Left Ownership Issues Unresolved

The EA and legal processes were inadequate in resolving issues about Halalt's legal entitlement to their waters. Halalt explained that the underlying issue to the watershed dispute was the uncertainty of ownership of the Chemainus Aquifer and Chemainus River and that the EA process they were involved in was inadequate at solving this entitlement issue. Halalt Band Council members expressed their upset in several ways regarding ownership. For example, one Halalt participant said that:

⁷⁴⁰ *Halalt v BC*, 2011 BCSC 945 *supra* note 6 at para 572.

⁷⁴¹ Halalt BCSC Petition 2009, *supra* note 687 at para 9.

You can have 100 meetings and still not talk about the right thing for example or do the right thing by what's being worked on with the water, right? Or the work that surrounds water. Decisions that affect the water.

Halalt participants explained that the numerous consultation meetings about the water-drilling project never discussed nor resolved the question of who owns the water. This is corroborated by the questions that Halalt asked the SCC when requesting leave to appeal regarding who is legally entitled to the water.

Halalt interviewees noted that there was a disconnect between the regulatory EA and legal processes in court, which focused on the strength of consultation and accommodation, and fundamental decisions over ownership. An example of an explicit direction to separate these topics was illustrated by correspondence between the Canadian Environmental Assessment Agency (CEAA) and EAO office (that was not copied to Halalt) in advance of a March 18, 2005 meeting that Halalt was to have regarding the project with BC EAO and CEAA officials.⁷⁴² The CEAA representative on the Chemainus Wells Project was advised, "to avoid discussing accommodation of Halalt's Aboriginal rights."⁷⁴³ A briefing email (which was forwarded to the BC EAO Project Manager for the EA [Finkel #1, Ex.213, cp.1933]) states:

Debate on ownership of the aquifer resource, benefits sharing, and accommodation of First Nation rights belong at a different table and should be carried out separately from the discussions at the meeting on Friday. You would be well advised to keep the discussions on Friday focused on a search for acceptable solutions to the issues and to steer away from political discussions.⁷⁴⁴

Halalt would have wanted the question of ownership discussed during negotiations with the DNC and during the EA process. One Halalt participant stated the following about the EA process:

And you know it never went to the fundamental fact of that this is our groundwater; it's under reserve, you're taking it. Do you have the right to take it? You don't have a right to it...If you are going to do it, you will do it in consultation with us, which we didn't agree to so...

⁷⁴² Halalt Nation Petitioners' Outline of Argument, *supra* note 638 at 28.

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid* at 28-29. See Finkel #1, Ex.213, cp.1934.

Note however, while Halalt discussed issues of ownership throughout the EA and court legal processes, Halalt made a strategic decision to litigate on the issue of duty to consult and accommodate instead of advancing an Aboriginal rights and title claim when they brought their petition forward to the BC Supreme Court. As one Halalt participant explained:

...we had a submitted or asserted at least that this was our title area, this was our rights and so on...but that we didn't want to - we kind of steered a long way from asserting rights and title to the area so that this wasn't a rights and title [case] and there's some strategic reasons for that because of the impact that would have on involvement in treaty and that kind of thing...litigation clauses and...those agreements and so on...And the other part was not putting out the informants' stuff to the BC EAO for the world to see, right. We have a different view of that now, we might do it differently now, but at the time it was not something that we - you talk to your informants and you say its going to be confidential and things like that and then you hope that the government treats it that way and they don't. So, it was a big issue kinda for us.

There were many meetings between the DNC and Halalt to discuss the project where Halalt were asked their opinion and provided information. However, as Halalt claimed in their Respondent Factum at the Court of Appeal level, this “engagement” with Halalt did not equate to “adequate consultation.”⁷⁴⁵ For example, some of these consultation deficiencies include the BC EAO's failure to: disclose information; disclose information at times it was provided to other stakeholders; invite Halalt to key meetings; disclose key decisions that were made (and/or the documents upon which these decisions were made).⁷⁴⁶

Of note, Halalt claimed that the Ministers did not even discuss shared decision-making roles for Halalt regarding the project construction, operation, or post-construction monitoring.⁷⁴⁷ Chief Thomas explained that Halalt were given no ability to participate in decision-making regarding the Project's operation nor any ability to have a role in ongoing monitoring.⁷⁴⁸ The Chief's affidavit stated that the Ministers' disregard of Halalt's request for shared decision-making occurred despite the potential for the Project to affect the

⁷⁴⁵ Halalt, Respondent Factum BCCA, *supra* note 730 at para 91.

⁷⁴⁶ *Ibid.*

⁷⁴⁷ Halalt, BCSC Petition 2009, *supra* note 687 at paras 7 & 41.

⁷⁴⁸ Chief Thomas Affidavit #1, 2009, *supra* note 645 at paras 37 & 41.

groundwater well that Halalt residents use for their domestic purposes as well as the water levels in the Chemainus River in a way that might affect fish (to which Halalt have Aboriginal rights).⁷⁴⁹

It was very frustrating to Halalt to be denied requests for shared decision-making. For example, one participant stated that “we asked for shared decision-making in the beginning of this fight with the municipality.” This Halalt participant explained that when Halalt asked for shared decision-making the general response from the DNC was a dismissive attitude this Halalt participant equated to a sentiment of:

Why would we do that? That’s stupid. Why would we share our resources and revenue with you?

To which this Halalt interviewee stated that he thought to himself:

Well you are in our country and we never signed a treaty. So, you know – get out.

Furthermore, Halalt repeatedly requested the creation of a Chemainus watershed management plan and argued that the Project should not be approved until such a plan is in place.⁷⁵⁰ Halalt asserted that such a plan would constitute reasonable accommodation of their Aboriginal interests to the Project. These repeated demands were denied. In response to these requests, the EAO maintained that it did not have the jurisdiction to order the creation of a watershed management plan.⁷⁵¹ Halalt claimed in its petition for judicial review that the Ministers erred in refusing to discuss a watershed management plan as a component of accommodation of Halalt’s Aboriginal interests.⁷⁵²

In summary, Halalt reported that the EA and legal processes left the issue of water ownership unresolved. Halalt requested recognition of ownership, shared decision-making, and a watershed management plan during the EA process. All requests were rejected. Halalt subsequently initiated litigation to seek legal acknowledgment to their entitlement to the waters in their territories. The courts also denied such recognition.

⁷⁴⁹ *Ibid* at para 7.

⁷⁵⁰ *Ibid* at paras 35 & 43.

⁷⁵¹ *Ibid* at para 43.

⁷⁵² *Ibid* at para 7.

The next section provides non-Halalt interview perspectives on how they saw the lack of settled treaty and the stalling of the HTG treaty negotiations as problematic for legal certainty of entitlement to the waters in Halalt's territories.

4.1.3: Other Interviewees Comments on Political/Social Power

Multiple non-Halalt participants mentioned the legal uncertainty and the fact that Indigenous peoples wish to and should have more power over their own water governance. They also noted that the lack of settled treaty for Halalt leaves issues of ownership of water unclear. Furthermore, there is ongoing legal uncertainty due to the stunted HTG treaty negotiations. These participants asserted that Indigenous peoples should have more say in their water governance.

Participants viewed the lengthy and stalled HTG negotiations in the British Columbia Treaty Commission process as negatively affecting resources (including lands and waters) in Halalt traditional territory. For example, one non-Halalt former government official stated:

Halalt is in a treaty process with the Hul'qumi'num Treaty Group but they have a traditional territory as well. Because none of this has been sorted out, you've now got non-indigenous peoples using up the resource in the absence of a treaty. So eventually what will happen if you allow that to continue to go on...I would argue that the government will continue to delay treaty until the resources are depleted and then the Bands are left with nothing. They're left with a shell of a land. So, the question about ownership of this water is an important one in the absence of a treaty and in the absence of treaty on traditional territories, where is the onus about duty to consult?

Non-Halalt participants also viewed the lack of settled treaty negotiation as a challenge to legal certainty around whether Halalt had legal entitlement to the waters of the Chemainus Aquifer. While the participant interviewee from the DNC admitted that, it may not have been advantageous for the DNC if Halalt had had a settled treaty, it would have negated any need for litigation on the Chemainus Wells Project.⁷⁵³ The DNC representative said that a treaty would have made it clear who had rights and who did

⁷⁵³ I am only able to paraphrase the results from the interviewee from the DNC as the interview was not recorded. Therefore, there are no specific quotations for this participant.

not. By this, the interviewee meant that the situation would have been far less confrontational and far less problematic because everyone would have known where they were standing. This participant admitted that it might not have been beneficial to the DNC, but it would have provided more certainty. Lastly, the DNC representative sympathized with Halalt in terms of the BC treaty process being stalled. This participant said that the Provincial Government was talking with the HTG about treaties in 2002 and are still talking about them, which makes First Nations (such as Halalt) stuck in limbo.

Lastly, multiple non-Halalt participants wished to see increased participation for First Nations in the management of their waters, including drinking water. One representative example includes a quote from one non-Indigenous lawyer who explained that when it comes to Indigenous water management there is:

colossal room for improvement. In particular...because I'm a lawyer, I come at it from the perspective of a foundation of governance that is respectful of indigenous inherent rights and worldviews and the relationship to water.⁷⁵⁴

In conclusion, the data provided from the non-Halalt participants indicated their concerns regarding the lack of settled treaty for Halalt and delayed HTG negotiations in the BC Treaty Commission process. These participants indicated that this lack of legal certainty leaves unanswered questions regarding Halalt's entitlement to the waters in their territories.

To summarize IR theme 1: "(Transformation of) Political and Social Power (from the State to an Indigenous Community)," Halalt clearly requested recognition of their ownership of water, a role in shared decision-making, and the creation of a watershed management plan during the EA process. Halalt asserts their ownership of the waters in their territories due to the occupation of such territories. Despite Halalt's political and cultural certainty of the ownership of their waters, the lack of such recognition of their water entitlement in the EA process and corresponding legal uncertainty provided the impetus for Halalt to seek legal recognition of their waters from the courts. Halalt wants

⁷⁵⁴ Please note that I have generally inserted quotations into the data verbatim to uphold the integrity of the participants' words. However, this means that there may be grammatical errors included.

legal recognition of their ownership over their waters so that they can make decisions over and practice their responsibility to them.

Halalt were frustrated throughout the EA and legal processes for several reasons. They were unable to achieve recognition to their entitlement over the waters in both the EA and the court processes. Halalt interviewees were also angered by the unfairness of the DNC's actions to remove their waters without their permission. While Halalt explained that they are willing to share their waters with those in need, they felt that the DNC did not adequately illustrate the necessity for extracting Halalt's waters. Halalt was also upset as the decision-makers in the EA and legal processes denied their requests for recognition of water entitlement, shared decision-making, and a watershed management plan. Lastly, the results under IR Theme 1 show that Halalt and non-Halalt participants recognized that the legal uncertainty of who owns the water was a problematic issue for Halalt. The next section, which discusses IR Theme 2: "(Respect for and use of) Indigenous Worldviews (as Alternative to Eurocentric Worldviews)," will continue to deliberate on Halalt's frustrations in terms of the province not believing some Halalt traditional knowledge as well as the tensions between Indigenous and colonial worldviews of water management.

4.2: Halalt's Experience: Theme 2: (Respect for and use of) Indigenous Worldviews (as Alternative to Eurocentric Worldviews)

Within the IR theme of "(Respect for) Indigenous Worldviews (as Alternative to Eurocentric Worldviews)," participants mentioned two types of tensions between Halalt worldviews and colonial state views. First, Halalt was annoyed that some of their traditional knowledge was not accepted until scientific knowledge proved it. Secondly, there is a strain expressed in Halalt's lack of ability to fulfil their Indigenous responsibilities as stewards to manage the waters (as compared to a Eurocentric property-type of right to the water). Whereas both parties use the language of "ownership," Halalt sees their waters in a relationship-type of way and the state EA and Court processes treated the water in a property-type fashion. Participants saw the difference in worldviews as illustrating stress between colonial and Indigenous worldviews.

The EA and court litigation were colonial in so far that the waters in Halalt territories (in the Chemainus River and Aquifer) were considered by the Canadian state as property of the government.⁷⁵⁵ The EAO repeatedly stated, “the province considers groundwater in British Columbia to be a resource that is vested in the Crown and under provincial jurisdiction.”⁷⁵⁶

The EA and court litigation were non-Indigenous legal structures that assumed that water should be considered in a property, rights-based way. While it is true that Halalt were also advocating their entitlement to the water in a property-type manner, their relationship to the water extends beyond ownership as discussed above. Halalt’s relationship with their waters includes a right to determine what happens to it in a stewardship and sustainability framework that includes many more responsibilities than just the right to use the water. It includes the right to determine what happens to the water and a corresponding responsibility to care for the water for present and future generations. In referring to the Chemainus Aquifer, Chief Thomas explained, “my responsibility as Chief is to protect it.”⁷⁵⁷ Another Halalt participant explained that, management of their waters is not solely about ownership and governance in the bureaucratic sense. One Halalt interviewee clarified that they had “responsibility as a First Nations people and it’s what we’ve done all of our life.”

Halalt also expressed frustration regarding the fact that the government representatives did not accept Halalt’s understanding that the Chemainus Aquifer and Chemainus River were connected. Halalt interviewees explained that there was some resistance during the EA process to recognizing some of Halalt traditional knowledge. Halalt participants stated that early in the development of the wellhead project, government representatives would state that there was no connection between the Chemainus Aquifer and the Chemainus River. This contrasted with the traditional knowledge of Halalt knowledge keepers’ (Elders’) understanding that there was a connection. As the BC Supreme Court judge stated, “Halalt’s elders believe there is an

⁷⁵⁵ *Water Protection Act*, *supra* note 98.

⁷⁵⁶ For example, see *Chemainus Wells Project Assessment Report*, *supra* note 659 at 73.

⁷⁵⁷ Chief Thomas Affidavit #1, 2009, *supra* note 645 at para 45. This comment was made in conjunction with the Chief’s statements that, in Halalt’s traditional territory, there is a serious shortage of Crown land that is available for treaty negotiations due to the Crown granting lands to the E&N railway in the 1800s. Furthermore, he explained that the Chemainus River and its fisheries are under significant stress. Therefore, the Aquifer is an important remaining resource for Halalt.

intricate and important interaction between the River and the Aquifer, and that the connection between the two is highly sensitive.”⁷⁵⁸ Halalt interviewees illustrated that their frustration came from the fact that government officials did not believe Halalt traditional knowledge until scientific studies corroborated this fact:

There was kind of a meeting in the old building...the old Band office there, where they were showing what the project was all about. And they were making statements about things like the aquifer was not connected to the River...

This provides some evidence that Halalt views were not necessarily respected regarding their Indigenous knowledge of the waters’ hydrogeology.

Furthermore, there was a sustainability component brought up by Halalt. Participants explained that they were concerned about the present-day decision-making and how this might affect future generations. One Halalt interviewee advocated for watershed management that would marry both Halalt traditional knowledge and scientific studies. The interviewee explained that these two bodies of knowledge would help to properly maintain a clean watershed as well as offer a tool to prevent resource extraction in the area. However, if there was going to be resource extraction, that any economic development benefits that come from it should be based on good stewardship and sustainability. This participant went on to explain that if there were any economic benefits, direct or indirect, it should be shared with Halalt to compensate them for the sustainable extraction of their resources. The next section illustrates the non-Halalt participants’ awareness of the Indigenous worldview of responsibility (to take care of the land and waters in First Nations communities).

4.2.1: Other Interviewees Comments on Indigenous Worldviews

Non-Halalt participants acknowledged the Indigenous worldview of “responsibility” to lands and waters. One non-Indigenous water governance expert interviewee explained that the corollary to a *right* to water is the Indigenous *responsibility* to water. This participant explained that a powerful way of conceptualizing an Indigenous responsibility to water is to think of being responsible for a child and then having her/him

⁷⁵⁸ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at para 16.

be taken away; if that was done, you would not be able to care for the child. This participant said:

It's this view of nature, and everything around you being your relative and you're responsible to take care of it and then all of a sudden, you've been kept from doing what you felt like you should do, and I feel that that aspect of it is so powerful in terms of that ethic.

This participant believed that generally, non-Indigenous people can conceive of what it would be like for a *right* to be taken away from someone but there needs to be an understanding of what it means to have one's *responsibility* taken away as well.

Non-Halalt participants saw a clash of Eurocentric vs. Indigenous worldviews as a complication in the differences in how the Canadian state operates regarding water as compared to a more sustainable way that Indigenous peoples might design water management.

One Indigenous professor explained that Indigenous peoples do not necessarily have a sacred relation to all waters, but they have a sacred, place-based relationship with the specific water bodies in their territories. Several participants agreed that Indigenous peoples have different worldviews than the state when it comes to the treatment of lands and waters. To increase Indigenous water sovereignty, one non-Indigenous lawyer participant advocated what was described as an "Indigenous water ethic." An Indigenous professor added that to improve Indigenous water sovereignty over drinking water, one needs to have a "more intimate relationship of reciprocity to the natural environment." This participant said, "some people frame it in spiritual terms, but you could also be very pragmatic as well."

In conclusion, under the IR theme of "(Respect for) Indigenous Worldviews (as an Alternative to Eurocentric worldviews)," one can see how the differences in vantage points between Halalt and the Canadian state lead to tensions of how Indigenous peoples think waters should be managed. Halalt were frustrated by the courts ultimate decision to allow the DNC to extract their waters in a resource extraction property-type entitlement fashion as it prevented Halalt from managing their waters in a responsibility-type manner. The next section of this chapter elaborates on the results encapsulated under the third IR

theme “Indigenous self-determination” and detail the ways in which Halalt had barriers to being water sovereign (as they were prevented from having ownership, decision-making powers, and therefore responsibility over their waters).

4.3: Halalt’s Experience: Theme 3: Indigenous Self-Determination

Under the IR theme of Indigenous self-determination, the results illustrate a lack of authority for Halalt to make decisions about waters that affect them. Halalt did not have sole control or authority over their water governance. Likewise, Halalt did not have co-management or resource sharing of their waters with the Provincial Crown. The EA process generally happened *to* them rather than *with* them in a way where Halalt would have been a partner in the Chemainus Wells project. This lack of decision-making ability or any sort of co-governance arrangement equated to a situation where Halalt could not have a say over topics such as construction, operation, monitoring of the Chemainus Wells Project, or broader watershed governance for their territories’ waters. Halalt was not a primary decision-maker, nor were they recipients of some documents and information that were provided to other interested parties.

When asked if they would like more decision-making over managing their waters, one Halalt participant said “of course.”⁷⁵⁹ Halalt interviewees also expressed frustration

⁷⁵⁹ While this thesis focuses on the state-First Nation relationship between the DNC, EAO, and BC, multiple interview participants made comments relating to the paternal ways that the federal government treats First Nations as well as advocating for an increase in management and decision-making power for First Nations over their general water management. For example, one Halalt participant believed that funds to manage waters diluted by the time they reached their Band Council itself as originating from the federal government departments such as Environment Canada, Health Canada, and INAC. Furthermore, Halalt members expressed frustration when describing federal department staff acting paternally and micromanaging their affairs. This same Halalt participant commented that if they could just have the water infrastructure in place, Halalt would be more than capable of managing their drinking water systems. This participant commented that it would be ideal to cut out INAC staff “middle men” and no longer have to deal with them in terms of their drinking water operations. Another example of when Halalt wished to take ownership over the management of their water systems was how they tried to install a wastewater system where microbiological organisms (plants) would filter the wastewater. One Halalt participant explained that they could have invested remaining government funds in other economic development with the money saved from a less expensive wastewater system. However, staff from INAC frowned upon this project as they were concerned that if there were no plants, the system did not work even though the project would cost \$100,000 instead of \$5 million for a conventional system. This frustrated Halalt members and one participant remarked: “So instead of putting creative minds to work, throw some money at it and we will just go towards a [conventional] lift-system.” Another non-Halalt participant understood this situation as Halalt “struggling with the INAC Department to have them consider an alternative that wasn’t in their square box.” This non-Halalt

about the lack of information that they received throughout the consultation process, which is well documented in the BC Supreme Court decision.⁷⁶⁰ Halalt Band Council members highlighted that but for the fact of the amount/volume extracted, Halalt would not have ever known about the wellhead project.⁷⁶¹ One Halalt interviewee explained that:

...had it not been for the volume that they wanted to extract, we would not have known about it. Because the volume triggered the ...Environmental Assessment process and the consultation.

This language identifies a sense of distress that Halalt could have been left completely out of the decision-making process and therefore lack any self-determination about the waters in their territories had it not been for the amount that the DNC proposed to extract.

Halalt Band Council members explained that they wanted to manage the waters in their traditional territories. They want to be stewards of the water and are open to various governance arrangements such as co-governance and revenue sharing for resource development projects that may be in the area. The bottom line for Halalt interviewee participants is that they “want a hand on the tap.”⁷⁶² The BC Supreme Court judge explained that “a hand on the tap” meant that Halalt has an “ownership interest in groundwater and a primary role in the decisions concerning extraction.”⁷⁶³ This information accorded with the messages from Halalt interviewees.

Therefore, due to their ownership interest and desire for decision-making and control over their waters, Halalt expressed irritation at the District’s unwillingness to share such decision-making. As the BC Supreme Court judge stated, “[t]he District was adamant that the only hand on the tap would be the District’s.”⁷⁶⁴ This in fact was

participant explained the Department was inflexible and it did not make sense why they would not choose a cheaper option for the wastewater treatment.

⁷⁶⁰ See *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at paras 244, 255, 355, & 639. One example of this was illustrated by the fact that Halalt did not receive certain information that was provided to other participating parties and at times had information provided to them much later than when it was given to other participants.

⁷⁶¹ See, *BC EAA Reg 370/2002*, *supra* note 208. As mentioned earlier, the project became a “reviewable project” requiring an EA as per sub-section 11(4) of the British Columbia *Reviewable Projects Regulation* as when the two groundwater wells would be operating simultaneously, the water extracted would be more than 75 L/s.

⁷⁶² *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at 316 & 665.

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid.*

illustrated by how Halalt Band Council members explained that they continuously asked the DNC for a watershed management plans to no avail. Ideally, Halalt Band Council members wanted some type of watershed governance board, where they would have a say in decisions that affected the water. Halalt interviewees would see Halalt Band Council taking the lead in such governance.

Halalt interviewees also expressed their concern about the possibility of the wellhead project as setting a precedent for fueling future development. Halalt participants feared that the existence of the Project's infrastructure would be used as a justification for further development.⁷⁶⁵ Chief Thomas stated that such future development would aggravate "the 'vicious circle' in which logging, agricultural and development within Halalt traditional territory have already rendered the District's surface water supply system unsustainable."⁷⁶⁶ There were also apprehensions about the possibility of the wellhead project becoming year-round in the future.⁷⁶⁷

In conclusion, Halalt wished to have power and control over the governance of their waters. Halalt wanted a "hand on the tap" as primary decision-makers over the water to which they are entitled. This did not occur in the EA or court processes.

4.0: Summary/Conclusion

The results of the case study of the Chemainus Wells Project EA and corresponding *Halalt v BC* case law illustrate various points of contention between Halalt and the DNC and EAO. Despite their deep relationship to their waters and prior occupation of their territories, Halalt failed to gain political recognition of their entitlement

⁷⁶⁵ Chief Thomas Affidavit #1, 2009, *supra* note 645 at para 36.

⁷⁶⁶ *Ibid* at para 36. The Chemainus Wells Project Assessment Report, February 9, 2009 confirms at 38 that Chief Thomas's understanding of logging creating adverse impacts on the surface water supply: "The primary impact from past logging practices has been increased sediment and bedload movement in the Chemainus River and adverse impacts to fish and fish habitat. While water quality in the aquifer has remained good over the same period, one can infer from development trends on Vancouver Island that there would be more, not less, land development in the lower (and possibly upper) portions of the Chemainus River watershed over the next 50 years, adding new point and non-point sources for impacts to surface water quality." (*Chemainus Wells Project Assessment Report, supra* note 659).

⁷⁶⁷ MNC applied for an amendment through the BC EAO to allow the well-head drilling project to extract water year-round. This amendment was granted on April 12, 2018. Chemainus Well Project Update, April 2018 *supra* note 250.

to the waters in their territories throughout the Chemainus Wells Project EA process, so they initiated litigation to gain legal clarity about such entitlement from the courts. While Halalt had legal uncertainty regarding their entitlement to their waters, they decided to frame the court litigation as based on the duty to consult. Halalt alleged that the province (EAO and DNC) failed to adequately consult and accommodate Halalt as was legally required. The BC Supreme Court judge decided in favour of Halalt and ordered a stay of proceedings until the province conducted further consultation and accommodation with Halalt regarding year-round pumping. However, the Court of Appeal overturned the BC Supreme Court decision and the SCC denied leave to appeal. This left the issue of legal entitlement to the waters in Halalt traditional territories unresolved.

Under the first IR theme, “(Transformation of) Political and Social Power (from the State to an Indigenous community), the data illustrate Halalt’s frustration regarding the denial of their requests for recognition of entitlement to their waters, shared decision-making, and a watershed management plan. Their requests to the courts for legal certainty were subsequently denied, which also frustrated Halalt. Regarding other issues of political and social power, Halalt participants explained that it was unfair that the DNC could extract the waters in Halalt territories without their permission. Halalt members thought this was especially unfair, as it was not proven that the DNC needed to do so. Non-Halalt participants also identified barriers to legal certainty regarding Halalt’s ownership of their waters as being comprised of the lack of settled treaty in Halalt territory and the corresponding stalling of the HTG process.

Second, regarding “(Respect for) Indigenous Worldviews (as an Alternative to Eurocentric Worldviews),” the results presented the differences in respect for Indigenous vs scientific knowledge and differences in worldview of how the Canadian state (DNC and EAO) and Halalt viewed ownership over water. Whereas both sides use the terminology of “ownership,” there were differences in the ways they think of this term. The state-based way was to think of water as a resource over which the province had legislated control. This is how the EA and legal processes viewed the waters. Conversely, a Halalt view of “ownership” encompassed broader values such as having responsibilities to their waters due to their close connection to them. Participants saw this difference in worldviews as illustrating tension between colonial and Indigenous worldviews.

In the third theme of “Indigenous self-determination,” the results showed that Halalt was unable to exercise control or decision-making over their water management. Halalt could not make decisions about the waters that affected them, as they did not have control, co-management, or resource sharing with the Provincial Crown. Halalt did not have a say in the construction, operation, or monitoring of the Chemainus Wells Project, or broader watershed governance for their territories’ waters.

The results point to several clear conclusions when evaluating the experience of Halalt and their water sovereignty. It is apparent that there was little evidence of decolonization occurring in the case study, as there were no positive results under any of the three IR themes. When one considers the entire data, one can recognize patterns of barriers to Halalt’s assertion of Indigenous water sovereignty within the colonial, legal, and government structures and processes. Halalt were denied power, respect for their Indigenous worldviews, self-determination, and the ability to be water sovereign, all of which greatly frustrated Halalt. Therefore, no decolonization transpired in the case study. The various levels of government illustrated resistance and inflexible approaches to working collaboratively with Halalt to achieve any amount of their water sovereignty. Taken as a whole, to the extent that the *Halalt v BC* case study may represent Indigenous-state relations in Canada, the results indicate that Indigenous peoples are far from achieving their desired level of water sovereignty in Canada. I elaborate on these implications of the findings in my discussion chapter 5.

Chapter 5

1.0: Introduction

In this chapter, I provide discussion and analysis regarding how the results relate to my research question: using an IR analysis, what does the *Halalt v BC* case reveal about the state of Indigenous water sovereignty in Canada? The data illustrate that there was no evidence of decolonization occurring as there was no degree of any of the three IR themes present in the Environmental Assessment (EA) or legal court.

In interviewing Halalt Band Council members involved in the *Halalt v BC* litigation, I gained some information as to whether and how an Indigenous community experienced IR throughout state-based processes. At the core of this research, there is a desire to discover the barriers to increased Indigenous water sovereignty as well as to explore what the elements of a decolonized Indigenous water governance system may look like.

The goal of this thesis is to illuminate the connections between colonization and Indigenous water governance using a decolonial framework. To achieve these goals, I examined a case study of a legal water management dispute between an Indigenous community and the Canadian state. Specifically, I analysed a drinking water well dispute between a delegated arm of the provincial Crown, the British Columbia Environmental Assessment Office (EAO), and an Indigenous community, the Halalt First Nation. In this project, I explored Halalt's (lack of) agency, governance, and sovereignty over drinking water and water resources in their territory. By analysing this legal dispute regarding water governance in Halalt traditional territory, I can subsequently provide commentary on its implications for decolonization and Indigenous water sovereignty in Canada. More specifically, my analysis allowed me to identify how ongoing colonial factors affect Halalt's ability to exercise IR, which in turn assisted my understanding of why they have had challenges in being water sovereign.

The results demonstrate that there was no decolonization occurring in the EA or court litigation processes for Halalt. In relation to determining whether IR occurred as per my three themes, I conclude that there was no transformation of political and social

power from the state to Indigenous communities, no respect for and use of Indigenous worldviews (as an Alternative to Eurocentric worldviews), and no ability for Halalt to be self-determining. The entire EA and court processes greatly frustrated Halalt interviewees as; overall, they wanted more power, respect, and recognition.

In this chapter, I focus on how the DNC, EAO, and courts rejected Halalt's requests for legal recognition over ownership, shared decision-making, and a watershed management plan to detail the failure of the state to recognize Indigenous political and social power or provide any movement towards decolonization. The various governance structures (EAO, DNC, and the Province of British Columbia) instead asserted their sovereignty using a non-collaborative and inflexible approach that assumed Crown sovereignty. In looking at the case study through a decolonial (IR) framework, the state denied all these calls for power in the form of increased oversight and governance.⁷⁶⁸ In the end, the colonial processes left ownership issues of Halalt's entitlement to their waters unresolved. The findings echo the IR literature in that throughout the EA and court processes Halalt made multiple requests for transfers of power from the Canadian state to Halalt. Indigenous Resurgence authors also explain that power frequently does not shift from the state to Indigenous peoples when asserted or requested. As the results illustrated that the state actors denied all these requests for power, the data therefore supports the IR assertion that working with the state to advance Indigenous sovereignty is often unfruitful and futile.

Regarding Theme 2, "Respect for and use of Indigenous worldviews (as an Alternative to Eurocentric worldviews)," I contend that while there was some recognition of the cultural relationship of Halalt to their waters, little room was created for respecting Halalt responsibility to their waters. The data demonstrates this lack of opportunity for respect for Indigenous worldviews by highlighting how the state prevented Halalt from practicing their commitments as caretakers of their waters (as the state actors disallowed Halalt to have any say in governance that allowed them to exercise their stewardship-type of responsibilities). Considering Indigenous worldviews, the evidence supports the IR literature in that Halalt interviewees explained the importance of their

⁷⁶⁸ Note that when I refer to transfer of power, authority, or control, I do not necessarily intend to infer or signify that the state should transfer *all* exclusive authority or control *to* Halalt. Instead I mean that at least *some* power should be transferred (such as in a type of shared decision-making regime).

ability to undertake their place-based obligations to their waters. Indigenous Resurgence authors assert the importance of being able to perform responsibilities to their territories based on the intimate connections that Indigenous peoples have to their lands and waters. Furthermore, the results reinforce the literature in that IR authors assert that collaborating with the state to exercise Indigenous laws can be unproductive. In this case, Halalt's inability to practice their water obligations due to barriers from the state illustrates the unproductivity of working with the state to achieve IR goals.

Next, in Theme 3, "Indigenous Self-Determination," the results demonstrate that Halalt was unable to be self-determining. Therefore, there was no evidence that IR occurred under Theme 3. The data indicates that because Halalt were unable to have control or autonomy over the governance of their waters or decisions over waters that affect them and to which they have a close relationship, they were unable to be self-determining. The evidence demonstrated that, as Halalt pursued the ability to participate in decisions that affected their community, Halalt was seeking self-determination. Halalt wished to have the unencumbered ability to self-govern, which accords with central goals of IR. Furthermore, as decolonization, in terms of returning power to Indigenous peoples so they can be self-determining over their lands and waters did not occur in the Halalt case study, the results bolster the IR sentiment that the state is an inappropriate route to achieving IR goals.

After reviewing the results by theme, I provide a discussion of the implications of the results for Indigenous water sovereignty. In this section, I explain how, as the state prevented Halalt from exercising IR under each of the indicia I identify as signifying IR activities (and therefore decolonization), it also indicates Halalt's lack of water sovereignty. Then, I provide some suggestions to advance IR for Halalt. This chapter then concludes with a brief discussion of the strengths and weaknesses of my research project.

2.0: Analysis

2.1: IR Theme 1: (Lack of) Transformation of Political and Social Power from the State to Halalt

The results demonstrated that there was no transfer of political or social power from the Canadian state (DNC, EAO, or the Province of BC) to Halalt. To be clear, in my analysis, I am labelling Halalt's various requests for recognition, decision-making, and a water governance plan as sources of political or social power. Therefore, I consider the following items "sources of power;" Halalt's request for: 1) recognition of an entitlement to their waters in the Chemainus River and Aquifer pursuant to Aboriginal rights and title under section 35 of the *Constitution Act, 1982*, 2) shared decision-making over the operation of the Chemainus Wells Project (and governance over the Chemainus Watershed in general), and 3) Chemainus Watershed Management Plan. I consider these requests to be sources of power because, if granted, they would have in some way transferred authority, control, and decision-making from the Canadian state to Halalt. Therefore, as the state actors denied these requests, there was no evidence that decolonization occurred in my case study under this theme.

The evidence illustrated that there were issues within multiple negotiating, decision-making, and arbitrating state processes and structures (with the DNC, EAO, and courts) respectively, that all failed to bring Halalt the power and sovereignty that they demanded over their waters. Furthermore, it is also especially problematic that the state actors did not transfer decision-making power to Halalt considering that they had legitimate Aboriginal rights claims in colonial law to the groundwater in terms of Aboriginal rights to fish.

While Halalt may have felt that the state actors did not take their Aboriginal legal claims seriously, the Crown would say that they did, but that Halalt chose the wrong venue for advancing rights claims. While the Crown may assert to have taken Halalt's Aboriginal legal claims seriously, the issue is that bounding claims within the colonial legal system, as Halalt did by litigating, can be problematic because the colonial legal system can be used by the state as one way to ignore or thwart Indigenous sovereignty.

Halalt made a strategic decision to litigate on the issue of failure of the common law duty to consult and accommodate instead of advancing an Aboriginal rights and title claim when they brought their judicial review petition forward to the BC Supreme Court.⁷⁶⁹ Halalt did not make this decision lightly. Perhaps Halalt would have made a different decision in a post-*Tsilhqot'in v British Columbia* Supreme Court of Canada (SCC) judgement landscape where it might be more advantageous to bring forward an Aboriginal rights and title claim. The choice to undergo a judicial review regarding an administrative decision rather than undertaking Aboriginal rights and title litigation makes sense in many cases as it is much less expensive and time-consuming to go through the former than the latter.

The fact that Halalt made this strategic decision illustrates two things. First, it speaks to the complexity of factors and situations that would provide venues or opportunities for decolonization to be present. Second, the fact that Halalt had to be strategic provides evidence that “the law” and colonial courts are not free from political elements. While all litigants may have to go through such a strategic assessment, the requirement to undergo such analysis and determination still illustrates that justice is not served by colonial courts in and of itself in an impartial apolitical manner. As the IR literature states, while some legal advances have benefitted some Indigenous issues such as certain resource disputes, these authors generally see the courts as political and bodies that do not offer justice to Indigenous communities. As discussed in Chapter 2, several IR authors therefore see engaging with the courts as being involved in the “politics of pity,”⁷⁷⁰ the “politics of recognition,”⁷⁷¹ and the “politics of distraction.”⁷⁷² These authors believe that these strategies distract Indigenous peoples from more effective means of advancing Indigenous sovereignty.

⁷⁶⁹ *Chemainus Wells Project Assessment Report*, *supra* note 659 at 119, 121, 123, & 131. Halalt made comments that were included in the summary table of comments from Report. The Report summarized the fact that Halalt had made claims to their title to the waters.

⁷⁷⁰ Alfred, *Wasáse*, *supra* note 262 at 20.

⁷⁷¹ See Glen Coulthard, in both *Red Skin, White Masks*, *supra* note 5; Coulthard, “Subjects of Empire” *supra* note 262. Coulthard writes extensively on what he calls the “politics of recognition,”

⁷⁷² See Alfred and Corntassel, “Being Indigenous” *supra* note 262 and Corntassel, “Re-envisioning Resurgence” *supra* note 262 at 86-101. For a discussion of “politics of distraction,” which is a very similar if not synonymous concept to what Coulthard characterizes as the “politics of recognition.”

By this, I mean that it is not necessarily straightforward to practice IR. Halalt was not able to exercise IR, as there were other processes and considerations at play. First, Halalt could not simply act under their own authority or jurisdiction given colonial processes that prevented any recognition of such political or legal autonomy or control. Halalt did not necessarily want to put themselves in a vulnerable place in terms of choosing a more expensive and time-consuming method to litigation. Second, Halalt consulted their informants and they wanted to be team players in terms of the needs of other Indigenous communities and how they might also be strategically litigating.

Furthermore, although Halalt chose to originally couch their claim in the duty to consult and accommodate, they did change their legal questions when they applied for leave to appeal to the SCC and asked the courts about ownership, jurisdiction, and entitlement to their waters. As previously explained, Halalt asked the SCC to determine two key legal issues: Issue 1: Is it a legal certainty that the Province has exclusive ownership of and jurisdiction regarding all the groundwater beneath an Indian Reserve and/or Aboriginal title lands?⁷⁷³ and 2) Where a First Nation asserts that both Aboriginal rights and Aboriginal title may be affected by contemplated Crown conduct, must the scope of the Crown's consultation reflect the strength of both the Aboriginal rights and the Aboriginal title?⁷⁷⁴

The colonial legal system is problematic in that it limits the operationalization of Aboriginal rights. It is misleading to understand that Aboriginal rights in law equate to obtaining or ensuring sovereignty over lands, waters, and (fish) resources in Indigenous territories on the ground for Indigenous communities. In other words, simply because Aboriginal rights exist in colonial legal systems via caselaw and legislation does not mean that, on the ground, Indigenous peoples are achieving sovereignty over their lands and waters.

The fact that one Halalt participant explained that “you can have 100 meetings and still not talk about the right thing” provides an example of how despite the existence of state legal and administrative processes that are supposed to recognize Aboriginal rights, that these systems do not adequately (re-)distribute power. By this, I mean that

⁷⁷³ *Halalt*, Leave to Appeal to the SCC, Applicant's Memorandum, *supra* note 247 at para 47.

⁷⁷⁴ *Ibid.*

while the duty to consult is legally required for EAs that implicate Aboriginal rights and title and that there is a system in place for consulting with Aboriginal peoples, it does not mean that this EA/state mechanism is an appropriate or useful instrument for dealing with sovereignty issues. It also shows how the colonial system compartmentalizes and does not allow for discussion of fulsome responsibilities and relationships in one venue. Furthermore, having the state (e.g. EAO/Province) tell Halalt that the Chemainus Wells negotiations and EA “consultations” were not a venue where they could discuss and work on water sovereignty is a lost opportunity to work with Halalt and make space for reconciliation and decolonization.

If deliberations of Halalt sovereignty and ownership over their lands and waters were stalled in the BC Treaty Commission process and the DNC would not enable Halalt’s discussions of ownership over their waters during “consultation” discussions that the DNC engaged in with Halalt during EA negotiations,⁷⁷⁵ it is reasonable that Halalt would bring up these issues during the EA process. It makes sense that Halalt would be compelled to bring their water sovereignty forward at a venue such as the EAO and then later during the court process where they engaged with the state over their waters in a legal system. Shutting out these discussions regarding sovereignty may have been “legally” appropriate for the state actors to decide but it was a missed opportunity for the Canadian governments to connect with an Indigenous community in a holistic way and to advance reconciliation and decolonization.

There was no movement or shift in power in terms of transferring jurisdiction from the DNC or the Province through the negotiations, EA process, or in the court litigation. We know that IR, in the sense of an allocation of political or social power, from the Canadian state to Halalt did not occur for four reasons. First, for its part, the Province of BC continually asserted that it had legal ownership over the groundwater as vested in the *BC Water Protection Act*.⁷⁷⁶ Second, in terms of the municipality, the DNC simply followed the provincial lead of how BC approached the issue and state-Indigenous relationship with Halalt and did not engage in a meaningful way with water sovereignty

⁷⁷⁵ See Halalt Nation Petitioners’ Outline of Argument, *supra* note 638 at 28. For example, during the March 18, 2005 meeting where the EAO Project Manager Mr. Finkle was advised by the Canadian Environmental Assessment Agency to avoid discussions of accommodating Halalt’s Aboriginal rights, as discussed in Chapter 4.

⁷⁷⁶ *Water Protection Act*, *supra* note 98.

issues with Halalt. Therefore, neither the DNC nor the EAO state actors worked towards reconciliation of asserted Canadian sovereignty with prior existence of the Halalt and decolonization did not occur.

Third, the provincial and municipal staff did not engage in discussions of Indigenous water sovereignty. The government civil servants' behaviour illustrated that these staff saw Indigenous water sovereignty as separate from the technical project of drilling wells for drinking water. This separation created an isolated effect where these state entities were unwilling to discuss issues outside of the traditional EA process. This compartmentalization happened regardless of how important Indigenous water sovereignty issues/entitlement claims were to Halalt or considering BC's "New Relationship"⁷⁷⁷ with First Nations or how the Canadian courts state that there needs to be more political negotiations instead of litigation regarding state-Indigenous resource disputes.

Fourth, Halalt asserted that they had a strong entitlement claim to the waters in their territories. By arguing that Halalt had a weak entitlement claim to their waters, this was one way in which the DNC and EAO illustrated their lack of acceptance of Halalt's request for legal recognition over their waters.

This unwillingness to engage with Halalt regarding their Indigenous water sovereignty illustrates a Eurocentric reductionist view of the issues. It is a consistent sentiment of "we are not dealing with this 'extraneous' issue" (of Indigenous water sovereignty) in the EA process. Halalt wanted to discuss, characterize, and scope the issue of Indigenous water sovereignty as important in the EA process. In the end, Halalt chose to litigate in the colonial courts. This ultimately ended up being an inappropriate venue for Halalt to solve their Indigenous water sovereignty issues as the process was long, expensive, and most importantly, left questions of Halalt's entitlement to their waters unresolved. This lack of resolution or closure in turn illustrates a fundamental problem and disconnect with working within the colonial system to try to resolve problems in a water dispute. The disconnection being that the courts will deal with the

⁷⁷⁷Government of British Columbia, *The New Relationship*, online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/other-docs/new_relationship_accord.pdf> [BC Government, *The New Relationship*].

tangential colonial legal issues (the duty to consult) but not deal with the heart of the issue: Halalt's Indigenous water sovereignty and their request for recognition of its legal entitlement to its waters.

The results illustrate that the state's lack of engagement on the topic of Indigenous water sovereignty frustrated Halalt. Halalt also viewed the state's unilateral building of the Chemainus Wells Project and extracting Halalt groundwater as unfair, especially in the absence of a treaty as non-Halalt participants discussed.

The data under Theme 1 provides several examples of strong ties to the IR literature in terms of: 1) Indigenous communities' advocacy for transfer of power back to Indigenous communities; 2) frustration regarding injustice; and 3) the need to reconceptualize the legitimacy for enabling decolonization. As stated in Chapter 2, one main IR goal is to decolonize and bring power back to Indigenous communities. Three main demands of Indigenous peoples include: "1) exclusive governance over a significant territory; 2) control of resources within that territory, with the expectation of sharing the proceeds of development with the state; and 3) the legal and political recognition of [Indigenous] cultural norms in the territory."⁷⁷⁸ As part of this acknowledgement, Indigenous peoples desire settlers to appreciate Indigenous peoples' integral connection to the land.⁷⁷⁹ This want for acknowledgement was illustrated in the evidence where Halalt repeatedly requested recognition of their water sovereignty, which includes the right to govern their waters due to Halalt occupancy of these territories in conjunction with their Indigenous worldviews and responsibilities to these waters.

Furthermore, Halalt's perception of the injustice of the state (DNC) drilling into their groundwater links the results to the IR literature. One can see this via examples when IR authors explain that they are frustrated by the lack of state transference of power and the inability for Indigenous peoples in Canada to assert control over the lands and waters in their territories. The case study, like the IR literature, illustrates power struggles and unfair power imbalances that occurred between Halalt and the state. Indigenous resurgence authors continually deliberate on the fact that Indigenous

⁷⁷⁸ Alfred, *Wasáse*, *supra* note 262 at 157 interpreting Hale, *Resistance and Contradiction*, *supra* note 411) at 192.

⁷⁷⁹ Alfred, *Wasáse*, *supra* note 262 at 19.

communities do not want the capitalist-colonial Canadian state to dominate them.⁷⁸⁰ In addition, IR authors frequently discuss power struggles with the state and want to undo the unjust power shift that removed governance, political, and social power from Indigenous peoples and their communities.⁷⁸¹

We can also recall that several IR authors explain that IR exists as sites of struggle, fights, and opposition. For example, Coburn explains that one can characterize Indigenous movements as struggles because there are unequal relationships between Indigenous peoples and various external forces.⁷⁸² As previously explained, one can see these struggles in opposition from multi-national corporations, the state, non-Indigenous communities, and even Indigenous communities and individuals.

A shift in consciousness in how society views the state's colonial assumptions is essential to decolonization.⁷⁸³ This deconstruction is a key IR tool vital to delegitimization of the state.⁷⁸⁴ One can see this in how Halalt attempted to ensure that the state reconceptualized a legal/technical EA process into characterizing the issue into the broader picture of Indigenous water sovereignty.

As IR authors assert, state-based legal mechanisms are not an opportune cite for a return of power to Indigenous peoples over their lands and waters. Recall that in advocating for resurgence outside of the state, IR authors clarify that trying to decolonize or solve Indigenous land questions through the state, what Coulthard labels the "politics of recognition," can be both distracting and unfruitful.⁷⁸⁵

In summary, there was no transfer of political or social power from the state to Halalt in the case study. Halalt asserted their title and Indigenous water sovereignty and the state denied these claims. The significance and implication of this demonstrated an inflexibility on the part of the state to truly engage with Halalt in a meaningful and holistic

⁷⁸⁰ Coulthard, *Red Skin, White Masks* *supra* note 5 at 157.

⁷⁸¹ *Ibid.*

⁷⁸² Coburn, "Introduction" *supra* note 324 at 13 citing Maria Campbell, *Halfbreed* (Toronto: McLelland and Stuart, 1973). "And there are some who even after a hundred years continue to struggle for equality and justice for their people."

⁷⁸³ *Ibid* at 231.

⁷⁸⁴ *Ibid* at 228 & 231.

⁷⁸⁵ Coulthard, *Red Skin, White Masks*, *supra* note 5.

manner. This lack of engagement was a missed opportunity for Indigenous and non-Indigenous reconciliation and decolonization. Similarly, in Theme 2, the data also illustrate a denial in the respect for and use of Indigenous worldviews (as an alternative to Eurocentric worldviews).

2.2: IR Theme 2: Respect for and use of Indigenous Worldviews (as an Alternative to Eurocentric Worldviews)

The data illustrate that the respect for and use of Halalt's Indigenous worldviews (as an Alternative to Eurocentric worldviews) was non-existent. The only data that demonstrates a respect for Halalt's Indigenous worldviews are the sections of the BC Supreme Court-level judgement that discuss the close connection and relationship that Halalt have with the waters in its territories including the waters in the Chemainus River and Chemainus Aquifer.⁷⁸⁶ For example, the BC Supreme Court judge explained the importance of the River and Aquifer on the "spiritual, cultural, and economic lives of the Halalt people,"⁷⁸⁷ and that the "River contains bathing holes that are also used for spiritual reasons."⁷⁸⁸ However, even though the court acknowledged Halalt's close connection to their waters, the state still assumed colonial, state-centric, or otherwise Eurocentric perspectives instead of respecting or using Halalt's worldviews.

The DNC and the provincial Crown denied Halalt respect for their Indigenous worldviews as evidenced by the fact that cumulatively the state decisions meant that Halalt was not able to perform their Indigenous responsibilities to care for their waters. Halalt did not overtly ask for their Indigenous worldviews to be recognized, but they wanted their relationship and connection to their waters respected so that they could practice their Indigenous obligations to their waters.

It is evident that the state actors did not show Halalt respect for and use of their Indigenous worldviews for three reasons. First, Halalt could not have authority or control over their waters in the form of recognized entitlement or shared decision-making as the DNC and EAO denied both requests. If these state actors provided some of this authority or control, it could have allowed Halalt space to perform their Indigenous

⁷⁸⁶ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 paras 1 & 102.

⁷⁸⁷ *Ibid* at para 1.

⁷⁸⁸ *Ibid* at para 102.

commitments to their waters. Second, neither the EA nor the court processes accepted, acknowledged, or recognized Halalt's responsibilities or discussed how the project should or could possibly be halted so Halalt could practice their Indigenous obligations to their waters. The EA and court processes did not make room or opportunities for Halalt to discharge these responsibilities in conjunction with the project (through monitoring or oversight of the operation of the wells for example). None of the state actors paused and suggested that this venue could be a space for a collaborative non-state means of looking at the issues or allowing for Halalt's Indigenous worldviews to be operationalized. The state actors presumed colonial systems of treating the water as a resource to be the worldview to be employed, and it was.

One can see that the DNC and the EAO accepted and preferred to use a colonial worldview for two reasons. First, the EAO and the Province kept pointing to colonial statutes (e.g. *BC Water Protection Act*) to assert legal colonial ownership over "its" groundwater "resource." In other words, the state actors emphasized the legal and colonial worldviews that assumes water is vested in the state; it is a resource; and that no other individual, group, or entity would have the ability to govern it. Second, there was no indication that the state-actors thought of water in any way other than treating it as a resource for human use. There was no mention that there was an openness for the state actors to view the water other than as a resource; they simply thought of in a technical way.

The implication of the assumed preference and use of a colonial worldview is a narrow view of water governance that is disrespectful to Indigenous communities and their perspectives. The assumption of colonial authority illustrates disregard for Indigenous peoples' prior-existence to European contact. It also demonstrates that the colonial system can be an inappropriate venue in which to seek acceptance or approval of pluralistic views that differ from that of the state. The assumption of colonial views shows little respect for minority rights or multicultural values. Again, these Eurocentric overarching inflexible views will not allow for reconciliation or decolonization.

The results reinforce principles from the IR literature. Halalt is asserting their place-based, deep relationship to their waters similar to how IR authors state what Indigenous peoples (must) do. Indigenous Resurgence authors explain that some

common tenets of Indigenous worldviews include place-basedness, respect, reciprocity, relationships, and responsibilities.⁷⁸⁹ Specifically, the data reinforces the IR literature in terms of Indigenous values of place-based responsibilities. The results illustrated this by Halalt interviewees stating that they are deeply tied to their waters in the Chemainus River and Aquifer and therefore have obligations to care for them. Water interconnects with humans, plants, and animals and ignoring these principles is disrespectful of Indigenous worldviews.⁷⁹⁰

To summarize, there was no respect for Indigenous worldviews evidenced in the case study. The state actors presumed it was proper to use a colonial worldview and there was no room made for Indigenous ways of thinking (or decolonization). Similarly, there was also no ability for Halalt to be self-determining, as discussed in the next section.

2.3: IR Theme 3: Indigenous Self-Determination

I conclude that Halalt could not be self-determining in their water governance. I assert this conclusion for five reasons. First, the results indicate that Halalt sought autonomy and self-governance in terms of how they wanted to interact with the state. Yet, Halalt could not make decisions on their own accord as the state controlled not only the extraction of their water, but also the decision-making and arbitrating of Halalt's opposition to the project. Halalt wished to have a "hand on the tap" in terms of control, governance, and decision-making ability over the management of their waters. As the BC Supreme Court judge reported, Halalt wanted "a primary role in the decisions concerning extraction."⁷⁹¹ However, the data indicate that there was an absence of power for Halalt to manage their waters as they saw fit. In other words, Halalt lacked governance power to be self-determining. Halalt wanted to be a primary participant in the decision-making of their water governance and were unable to do so.

⁷⁸⁹ See for example, Bryce and Corntassel, "Practicing Sustainable Self-Determination," *supra* note 262; Corntassel, "Re-envisioning Resurgence" *supra* note 262; and McGregor, "Anishinabe-Kwe Traditional Knowledge and Water Protection" *supra* note 168 at 26-30.

⁷⁹⁰ Basdeo and Bharadwaj, "Beyond Physical" *supra* note 6 at 10.

⁷⁹¹ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at 665.

Second, the DNC and EAO never acknowledged any legitimacy in Halalt's inherent right to self-determination. These state actors did not acknowledge Halalt's right to self-govern regarding various legal and political mechanisms during the EA process or the court process. The state actors never mentioned the United Nations Declaration of the Rights of Indigenous Peoples,⁷⁹² inherent Indigenous legal perspectives; or any goals of reconciliation.⁷⁹³

Third, Halalt did not have authority or control over their waters in the form of recognized entitlement or shared decision-making (as the DNC and EAO denied such requests). Halalt did not seem to have this power before the Chemainus Wells Project nor did this ability to be self-determining emerge throughout the project's EA process.

Fourth, Halalt was not able to make any decisions over their waters, let alone decisions that were *unencumbered* by the state (municipal and provincial governments). Water, under colonial law, was vested in the Province of British Columbia, even prior to this EA process. Therefore, Halalt could not decolonize, be self-governing, or operate in a self-sufficient manner. Halalt could not simply govern their waters in the Chemainus River and Aquifer in a politically autonomous way. They did not have any authority or control to do so in general and this ability to be self-determining did not come about through the EA or court processes either.

Fifth, there was no indication that the state actors considered or had interest in making space, exploring collaborative arrangements, admitting and respecting that Halalt owned the water in their territory, or letting Halalt govern the waters in their traditional territories. Again, the state actors kept the colonial status quo where the Crown controls everything including First Nations communities and their waters. With the colonial worldview, that water is a resource and vested in the provincial state arises

⁷⁹² *UN Declaration on the Rights of Indigenous Peoples*, *supra* note 85 at Articles 3-4. Article 3 states "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 4, states "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

⁷⁹³ See *RCAP Report*, *supra* note 256. Such reconciliation goals could have been gathered even pre-Truth and Reconciliation Commission, from the Royal Commission on Aboriginal Peoples.

the idea that no one else would have the ability to govern it (or for Indigenous worldviews to operate and have responsibility over it).

To meet Halalt's interest in self-determination and shared decision-making, the state actors could have applied to develop a Water Management Plan, which was an option available under the previous BC *Water Act*.⁷⁹⁴ As discussed, Halalt repeatedly asked for a Water Management Plan. This would have been one mechanism through which collaborative management could have occurred. Yet while such a legal mechanism was available in colonial law, the state did not avail themselves of it. Again, Indigenous water sovereignty and Indigenous self-determination was not even on the Canadian state actors' radar at all. The EA and the court process illustrated merely a technical and colonial exercise of drinking water extraction.

The results in Theme 3 support, confirm, and are consistent with what the IR literature states. For example, the findings indicate that Halalt was seeking autonomy and self-governance in terms of how they wanted to deal with the state, which are IR goals as lumped under the umbrella of Indigenous self-determination. Halalt wanted the ability to have a say in the decision-making of the water governance in their territories. Self-governance as a means to achieve Indigenous self-determination is also a goal for which the IR literature advocates. Indigenous resurgence authors break this down into principles of autonomy and self-governance. As described in Chapter 2, autonomy can be described as the ability to exist and operate in political, social, and economic ways, unencumbered by outside forces;⁷⁹⁵ the right of a people to govern themselves;⁷⁹⁶ and the ability to create one's authority and to interpret the scope of that authority.⁷⁹⁷ In terms of autonomy, Indigenous self-determination can be described as the "right to exist as peoples, unencumbered by the demands, controls, and false identities imposed on [Indigenous peoples] by others."⁷⁹⁸ At its most basic level, James Tully explains that

⁷⁹⁴ *Water Sustainability Act*, SBC 2014 c 15 at s 62-67. Section 62 explains that the minister may develop a water management plan in order to assist in addressing "(a) conflicts between water users, (b) conflicts between water users and instream flow requirements, or (c) risks to water quality." Furthermore, section 62 also states that the minister may "consider concerns related to fish, fish habitat and other environmental matters."

⁷⁹⁵ Alfred, *Peace, Power, and Righteousness*, 2nd ed, *supra* note 262 at 8.

⁷⁹⁶ Tully, "The Struggles of Indigenous Peoples", *supra* note 387 at 36–59 at note 4, p. 57.

⁷⁹⁷ Porter, "Tribal Disobedience", *supra* note 498 at 171.

⁷⁹⁸ Alfred, *Peace, Power, and Righteousness*, 2nd ed, *supra* note 262 at 8.

self-determination is the ability to self-govern by one's "own laws and [to] exercise jurisdiction over their territories."⁷⁹⁹

Therefore, in analysing the principles of autonomy, the ability to self-govern, and the capacity to operate in a way that is unencumbered by the state, we can see that the results show that Halalt sought self-determination. The fact that Halalt wanted a "hand on the tap" in terms of having a "primary role in the decisions concerning extraction" demonstrates their pursuit of this self-determination.⁸⁰⁰ Lastly, the fact that Halalt was unable to operate in a self-determining fashion accords with the IR belief that engaging with state-based legal processes will not achieve Indigenous self-determination.

To summarize Theme 3, the data shows that Halalt were not self-determining in their water governance, as they did not have the ability to make decisions over the water in their territories and there was no acknowledgement that they are entitled to such self-determination. Again, this lack of ability to be independent aligns with the IR literature that emphasizes that engaging with state-based legal processes will not achieve Indigenous self-determination. In conclusion, there was no sign of IR in any of the three themes. This lack of evidence of IR has implications for Indigenous water sovereignty.

2.4: Implications of My Case Study to Indigenous Water Sovereignty

There are several implications of the case study that have relevance for Indigenous water sovereignty, the overarching conclusion being that attempts to assert Indigenous water sovereignty within the colonial system is unsatisfactory for several reasons. This is because, first, Halalt was frustrated by the entire EA and court process. This upset illustrates that there continues to be (emotional) tensions involved in how the state treats Indigenous peoples. It also shows that the Canadian state is simply not providing the power transfers or respect, for which Indigenous peoples ask.

Second, the EA and court processes demonstrated that IR is not occurring and did not lead to any further degree of decolonization or Indigenous water sovereignty for Halalt. None of the state structures of water governance provided Halalt with the ability

⁷⁹⁹ Tully, "The Struggles of Indigenous Peoples", *supra* note 387 at 36–59 at note 4, p 57.

⁸⁰⁰ *Halalt v BC*, 2011 BCSC 945, *supra* note 6 at 316 & 665.

to control their territorial waters. The EA process did not provide for Indigenous water sovereignty, as there was no transference of power, respect or use of Indigenous worldviews, or ability for Halalt to have control or autonomy over the waters that affected them. Halalt asked for legal clarity but the courts did not provide such elucidation. In Canada there is an outstanding issue of “who owns the water” for Indigenous communities. Third, the HTG process is stalled and therefore is not helping Halalt on their path to Indigenous water sovereignty. The whole case study illustrates compartmentalization of issues where multiple state institutions maintain that Indigenous water sovereignty is: “not my problem” or “out of our jurisdiction.” This dismissive attitude indicates that there are colonial barriers to Halalt’s Indigenous water sovereignty. It is a barrier to reconciliation of Aboriginal pre-existence and Crown sovereignty.

In general, in Canada, the EA and court processes are supposed to make space for Indigenous voices to be heard and Indigenous rights to be protected as per legislation and related jurisprudence interpreting section 35 of the *Constitution of Canada*,⁸⁰¹ (including principles such as the duty to consult). Yet in the case study, it was difficult for Halalt to have their legal claims or worldviews taken seriously. While Halalt made a strategic choice to apply for a judicial review instead of commence litigation regarding their Aboriginal rights and title, the state actors did not take the opportunity to create any discussions and examinations to determine if they could carve out some decision-making or sovereignty to serve Halalt’s expressed entitlement to their waters. Despite the existence of state legal and administrative processes obligated to recognize Aboriginal rights, these systems did not adequately (re-)distribute any power. This supports the fact that some colonial legal and governance systems compartmentalize Indigenous issues and do not allow for fulsome discussion regarding responsibilities and relationships to transpire in one venue.

While it may be seen that the Crown did not take Halalt’s (Aboriginal) legal claims seriously, the Crown would say that they did in fact do so but that Halalt chose the wrong venue for advancing rights claims. However, from an alternate perspective: bounding claims within the colonial legal system, as Halalt did by litigating, can be problematic

⁸⁰¹ *Constitution Act, 1982, supra* note 5.

because the colonial legal system can be used by the state as one way to ignore or thwart sovereignty.

In all three themes, there was a separation and imbalance of power, worldviews, and ability to be self-determining. For example, there were problems with the legal structures in that they are separate and did not address the heart of the water sovereignty issues for Halalt. Interviewees from Halalt noted that there was a disconnect between the regulatory process through the EA and legal processes in court, the latter bodies of which focused on the strength of the duty to consult and fundamental decisions over ownership.

Current colonial legal and governance regimes both prevent and provide barriers to the assertion of Indigenous water sovereignty in Canada. Working within the state (within the colonial legal system) was limiting for Halalt. To the extent this case study is representative in Canada, the results indicate that Indigenous water sovereignty, reconciliation, and decolonization has a long way to go.

2.4.1: Recommendations

Flowing from the conclusion that it has been difficult for Indigenous communities to achieve water sovereignty in Canada, IR authors may say that Indigenous peoples should stop seeking recognition, power, and respect through the state. I, however, would submit three other recommendations. First, I suggest that Halalt and the DNC continue to build and strengthen their relationship for the two entities to share authority and allow Halalt participation in decision-making. There is a basis for doing so as the data revealed that Halalt were collegial with the DNC on issues other than the Chemainus Wells Project. Therefore, going forward this connection could be nurtured so that there would be more mutually respectful decision-making processes, even if it were simply several meetings a year where the DNC and HFN met in a government-to-government type of setting to discuss current and topical issues in the watershed. Such relationship building could increase understanding of Halalt's worldviews and obligations to their waters as well as lead to shared decision-making.

Second, another solution could be the creation of a watershed management plan. While there were provisions to create a water management plan under the previous *Water Act*, which was operational during the EA process, this act's successor legislation, the current *Water Sustainability Act* continues to provide for "water sustainability plans."⁸⁰² While the Chemainus Wells Project is operational now, a water sustainability plan could still be created in order to allow for shared-decision making between the DNC and Halalt regarding the waters in their territories. While this may not necessarily shift as much power in decision-making as Halalt may want, it could be a tool for commencing the process of restoring power to Halalt.

Third, I suggest the adoption of what one non-Indigenous participant described as an "Indigenous water ethic." Such a concept could bring together non-Indigenous and Indigenous people as well as to bring both groups closer to the waters in their watershed. I derive this suggestion from both Indigenous water governance literature as well as the interview participants' data. I would apply this interviewee's suggestions to the DNC and Halalt communities. Currently, colonial law merely allocates the use of water. Therefore, to decolonize Indigenous water governance, it is critical to appreciate water for its non-consumptive uses in order not to treat it solely as a resource for human use. Decolonizing water law requires joining into a relationship with water.

As IR asserts, the resolution of Indigenous sovereignty issues calls for a reconceptualization of accepted state assumptions of colonial domination. Therefore, I advocate for a cultural shift using an adoption and increase of a holistic and sustainability-based ethic. Nlaka'pamux lawyer Ardith Walkem provides ideas on how she sees the shaping of an Indigenous water ethic. Walkem explains that adopting a kincentric approach, an honouring of the "awareness that life in any environment is viable only when humans view the life surrounding them as kin."⁸⁰³ She says adopting a kincentric conceptualization may alter the basis by which Canadian society governs

⁸⁰² *Water Act*, *supra* note 98 at s 62-67. Section 62 explains that the minister may develop a water management plan in order to assist in addressing "(a) conflicts between water users, (b) conflicts between water users and instream flow requirements, or (c) risks to water quality." Furthermore, the minister may "consider concerns related to fish, fish habitat and other environmental matters." See also the current *Water Sustainability Act*, *supra* note 98 at s 64-85, specifically s. 69 discusses First Nations.

⁸⁰³ Ardith Walkem, "The Land Is Dry: Indigenous Peoples, Water, and Environmental Justice" in Karen Bakker ed, *Eau Canada*, *supra* note 27 at 314 [Walkem, "The Land is Dry"].

waters.⁸⁰⁴ Such a viewpoint would prevent the reduction of water to an individual human right.⁸⁰⁵

Making decisions based on beliefs that water is sacred and that all life has an equal right to water to preserve their own life would be much more sustainable. Whatever it looks like, a move away from a property-based view of water as a “resource” would be useful. If the sacredness of water was respected, there could be a transformation in the ways that Canadian society makes decisions around it.⁸⁰⁶ Furthermore, having the DNC commit *with* the Halalt community to reverse “deliberate suppression of indigenous laws and territorial rights offers hope of restoring environmental justice and of returning water to the land for all peoples.”⁸⁰⁷

One non-Indigenous participant interviewee suggested the development of a community-based monitoring program that could help improve Indigenous water governance. I recommend this as it could help the culture shift discussed above. Halalt and DNC could do this at the local level by organizing activities where both communities’ members come together once or more per year to learn about, become connected to, and appreciate the Chemainus watershed. This participant suggested that people from all ages of life from children to Elders could meet regularly and they could:

look at and describe and test the water that they have so that they know what it is. They know what it’s called. They know its personality. They know how it sustains them...and they know the scientific parameters, so they know how it’s doing physically, scientifically, so that they can...that would require the [knowledge of] groundwater, well water, surface water.

I suggest that the Halalt and the DNC adopt such a community-monitoring program. This participant explained that such an approach would develop a connection to the water in terms of a regular observance and examination of the water. This participant stated that it would be helpful for people to reconnect to their waters through this illumination of knowledge.

⁸⁰⁴ *Ibid* at 314.

⁸⁰⁵ *Ibid*.

⁸⁰⁶ *Ibid* at 317.

⁸⁰⁷ *Ibid* at 316-317.

In a similar vein, one Halalt interviewee participant also expressed that it would be useful to marry the Indigenous traditional knowledge with scientific information to learn and conduct studies about the waters in the area to ensure the pristine water will be available for future generations. This would demonstrate how to effectively use and maintain a clean watershed; ensure good stewardship, and sustainability (which this Halalt participant saw as useful for resisting resource extraction detrimental to the local habitat).

3.0: Strengths and Limitations

3.1: Strengths

There are two strengths of my research study. First, my research fills a gap that exists in the literature that does not address the connection between colonization and Indigenous water sovereignty issues. There is vast literature on the crisis of poor drinking water on First Nations reserves in Canada in terms of technical engineering, science, health, and policy-based solutions. There is also much literature on Aboriginal legal disputes over water resources with the state. However, there is only limited discussion of the connection between colonization and water governance within the realm of IR or Aboriginal legal literature from the viewpoint of Indigenous sovereignty.

There are discussions of Aboriginal rights to water from a Western legal framework but little from the viewpoint of Indigenous sovereignty. This thesis, unlike many previous discussions regarding Indigenous water governance in the Aboriginal legal literature, provides research connecting IR principles to water management in the context of a First Nations reserve. This thesis links colonial and decolonizing concepts to Indigenous water governance including discussions of power as well as structural and political assumptions, which all speak to systemic factors and barriers to increased water sovereignty in terms of access to Indigenous peoples' waters.

Second, another strength of my thesis is that the evidence reinforces the IR literature. This means that IR theory echoes the statements of the Indigenous peoples on the ground saying they want power transferred from the state to their communities, an increased respect and use of Indigenous worldviews, and to be able to express their

self-determination. The fact that the people on the ground are agreeing with the concepts IR authors discuss means that the theory is connected to what goes on in communities. Therefore, IR is not disconnected to the application of the theory as sometimes can happen with in academia. In other words, the results of my research support related theory, such as Indigenous sovereignty discussions, by verifying the assertions made in the IR literature.

3.2: Limitations

There is one main limitation of my thesis. My case study provides only one single example in a non-treaty First Nations context. Therefore, it is very fact specific and context dependent. It is not necessarily representative, and one cannot necessarily extrapolate it due to these limitations. It is important to note that there are other situations where other Indigenous resource extraction challenges to provincial decisions have succeeded.⁸⁰⁸

4.0: Conclusion

The research showed that there was no IR illustrated in the Chemainus Wells project EA and the corresponding case of *Halalt v BC*. Furthermore, Halalt was prevented from being water sovereign. The evidence indicates that there is a lot of work to be done to ensure that Indigenous peoples such as Halalt, have and can practice and operationalize their Indigenous water sovereignty in Canada.

Chapter 6 next concludes my thesis by explaining that colonization is ongoing and continues to affect Indigenous-state relations in many areas including Indigenous waters sovereignty. While the government of Canada says it desires to improve state-Indigenous relations, its actions say otherwise. This ongoing colonialism perpetuates an imbalance of power and disrespect towards Indigenous peoples. To the extent that the Halalt case study can be an example, it illustrates that there is much room for improvement in Indigenous water sovereignty in Canada. I conclude by asserting that

⁸⁰⁸ See for example, *Chief Sharleen Gale v Assistant Regional Water Manager* (2012), 2012-WAT-013(c) (BC Environmental Appeal Board); Andrew Gage “Fort Nelson First Nation Shuts Down Nexen’s License to Frack” (November 18, 2015) West Coast Environmental Law (blog) online: <<https://www.wcel.org/blog/fort-nelson-first-nation-shuts-down-nexens-license-frack>>.

Canada needs to keep working with Indigenous peoples to further decolonize and work towards further reconciliation. Indigenous peoples and allies, on their part, will continue their resistance and fight towards decolonization in water sovereignty and beyond.

Chapter 6

1.0: Conclusion

1.1: Colonization is Ongoing

As explained in chapter 1, the recent #IdleNoMore and Indigenous Nationhood Movements make it clear that, over 150 years after Confederation, all is not well between the state and Indigenous peoples in Canada, it is deeply unwell in fact.⁸⁰⁹ One cannot open a newspaper in Canada without reading articles, editorials, or other commentary about litigation concerning Aboriginal rights or Indigenous discontentment with the state. The topics of the day largely centre around unresolved land claims,⁸¹⁰ unwanted resource extraction that harms Indigenous peoples' health as well as their lands and waters,⁸¹¹ and continued frustration with the paternalistic ways in which the Canadian government continues to treat Indigenous peoples.⁸¹² Coulthard asserts that "Idle No More is an indication of the ultimate failure of this approach to reconciliation."⁸¹³

The *Halalt v BC* case study is but one contemporary example of the failure of reconciliation in the realm of Indigenous water sovereignty in Canada. The government has been trying to improve drinking water on First Nations reserves since the 1950s and it is arguable that reconciliation in Canada started in the 1970s. Therefore, it has been over 45 years that the federal government and the courts have been working on both reconciliation and improving First Nations' drinking water management. Yet following both of these government strategies, the problems with drinking water and resource disputes surrounding Indigenous water sovereignty claims continue.⁸¹⁴ The current conventional colonial approaches to reconciliation are not working.⁸¹⁵ Drinking water is one realm that can be examined to evaluate the degree of Indigenous water sovereignty currently taking place in Canada. The (lack of) progress on drinking water is an indicator

⁸⁰⁹ The Canadian Press, "Demonstrators erect teepee on Parliament Hill to protest Canada Day", *supra* note 1.

⁸¹⁰ Marks, "Government foot-dragging", *supra* note 2.

⁸¹¹ Ballingall et al, "Justin Trudeau's \$4.5 billion Trans Mountain pipeline," *supra* note 3.

⁸¹² Elliott, "A Memo to Canada", *supra* note 4.

⁸¹³ Glen Coulthard, *Red Skin, White Masks*, *supra* note 5 at 163.

⁸¹⁴ For explanation see above, *supra* note 69.

⁸¹⁵ Alfred, "Colonialism and State Dependency", *supra* note 262 at 44.

of the failed relationship between Canada and Indigenous peoples and it demonstrates the ongoing challenges and deficiencies to Indigenous water sovereignty. Furthermore, similar to other political and social issues (governance, housing, education, criminal justice etc.), reconciliation cannot be achieved in the area of Indigenous water sovereignty without addressing the failed relationship with the Canadian state.

Freshwater governance in British Columbia provides a useful site with which to analyse the tensions of the strained relationships and dynamics between the Canadian state and Indigenous peoples.⁸¹⁶ This is because there continues to be “challenges, racism, and inequality” in the legal, political, and social relationships between Indigenous peoples and the state.⁸¹⁷ These problems of racism and inequality are influenced by ongoing colonialism.

1.2: Ongoing Colonialism is Disrespectful and Unfair

As the Halalt case study is place-based, nation-specific, and context-dependent, it is not necessarily appropriate to extrapolate from it wide-ranging conclusions that might be applied to Indigenous water sovereignty in Canada. However, it provides an example of Indigenous peoples’ struggle to attain self-governance over their waters and the Canadian state’s continued operation in a colonial fashion where it is reticent to share power, respect Indigenous worldviews, and allow for Indigenous self-determination.

The data indicates that more work is required to secure water sovereignty in Canada for Indigenous communities such as Halalt. There is currently a large imbalance of power in water management between the state and Indigenous peoples. Water is not currently managed in a way that Indigenous peoples support. The Halalt case is an example of unilateral actions by the respective state actors (in the form of denying Indigenous requests for recognition of Aboriginal title and ownership), which indicate that there are strong colonial powers that are at play within legal and governance structures that prevent Indigenous water sovereignty.

⁸¹⁶ Phare et al, *Collaborative Consent and British Columbia’s Water* supra note 7 at 1.

⁸¹⁷ *Ibid.*

State actors continue to exclude Indigenous peoples from decision-making concerning the water governance in their territories and this exclusion affects Indigenous rights, spiritual, cultural, and economic water uses.⁸¹⁸ While different levels of governments in Canada are making domestic and international commitments around reconciliation, on the ground, these state actors are not operationalizing nation-to-nation relationships or allowing for Indigenous water sovereignty, for which Indigenous peoples are asking.⁸¹⁹ Furthermore, some of these commitments require Canada to act in the realm of Indigenous water governance to transfer the power that they currently wield to Indigenous communities. This was the case in the Halalt example where the compartmentalization of a technical EA process prohibited discussion of Indigenous water sovereignty regardless of how important Indigenous water sovereignty issues and entitlement claims were to Halalt. Furthermore, this lack of political space made for nation-to-nation relationship building with Halalt or enabling them to be water sovereign regardless of considering BC's "New Relationship"⁸²⁰ with First Nations or how the Canadian courts have generally said that there needs to be more political negotiations instead of litigation regarding state-first nation resource disputes.

Water governance is just one example of the problems with lack of recognition of Indigenous sovereignty by Canada, but it is symptomatic of the larger disease of

⁸¹⁸ *Ibid.*

⁸¹⁹ Such commitments that the government of Canada have endorsed include the *RCAP Report*; the Report of the Truth and Reconciliation Commission, and the United Nations Declaration of Rights of Indigenous peoples. See *Report on the RCAP*, *supra* note 256; Truth and Reconciliation Commission of Canada, *Honouring the Truth, reconciling the future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015); Justin Trudeau, Prime Minister of Canada, News Release, "Statement by Prime Minister on release of the Final Report of the Truth and Reconciliation Commission" (December 15, 2015) online: <<https://pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission>> [Prime Minister Trudeau News Release, December 2015]. (In this statement, the Prime Minister stated that: "...we will, in partnership with Indigenous communities, the provinces, territories, and other vital partners, fully implement the Calls to Action of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples"); *UN Declaration on the Rights of Indigenous Peoples*, *supra* note 85; Tim Fontaine, "Canada officially adopts UN declaration on rights of Indigenous Peoples", *CBC News* (10 May 2016), online: <<http://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>>; The Canadian Press, "Romeo Saganash's Indigenous rights bill passes in the House of Commons", *CBC News* (30 May 2018), online: <<http://www.cbc.ca/news/politics/saganash-undrip-bill-passes-1.4684889>>; John Paul Tasker, "Liberal government backs bill that demands full implementation of UN Indigenous rights declaration" *CBC News* (21 November 2017), online: <<http://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037>>.

⁸²⁰ BC Government, *The New Relationship*, *supra* note 777.

colonization. Colonization is ongoing and problematic as it assumes Eurocentric superiority, keeps power in the state, which thwarts power from transferring from the state back to Indigenous peoples and prevents Indigenous knowledge from being respected. The same issues (paternalism, unfairness, power imbalance, lack of respect, racism, and unequal treatment in the eyes of the law) that arise in water governance also manifest in other realms of Indigenous-state relations such as resource extraction,⁸²¹ land claim negotiations,⁸²² general Band Council governance,⁸²³ as well as housing,⁸²⁴ criminal justice,⁸²⁵ education,⁸²⁶ child welfare,⁸²⁷ and other social issues. In all of these areas of governance, Indigenous peoples in Canada have articulated for decades their desires to have power restored to them from the Canadian state, to have increased respect for Indigenous peoples in general as well as their worldviews, and that they wish to be self-determining so that they can make decisions regarding their lands,

⁸²¹ Ballingall et al, "Justin Trudeau's \$4.5 billion Trans Mountain pipeline", *supra* note 3.

⁸²² Marks, "Government foot-dragging", *supra* note 2.

⁸²³ Elliott, "A memo to Canada", *supra* note 4.

⁸²⁴ Lindsay Monk, "Decolonizing Home: A re-conceptualization of First Nations' housing in Canada", (Master of Arts Thesis, University of Victoria, 2014). Monk writes about the connection between colonization and First Nations housing.

⁸²⁵ Bill Graveland, "Not guilty verdict in shooting death of Colten Boushie 'absolutely perverse'", *The Star* (10 February 2018) online: <<https://www.thestar.com/news/canada/2018/02/10/outrage-follows-not-guilty-verdict-for-gerald-stanley-in-shooting-death-of-colten-boushie.html>>; Ann Macaulay, "Reconciliation in Canada's legal system", *The Canadian Bar Association National* (16 March 2018) online: <<http://nationalmagazine.ca/Articles/March-2018/Reconciliation-in-Canada-s-legal-system.aspx>>.

⁸²⁶ Brandi Morin, "First Nations students face continued funding shortfalls, advocate says", *CBC News* (31 August 2017), online: <<http://www.cbc.ca/news/indigenous/first-nations-students-face-continued-funding-shortfalls-1.4267540>>. In this article, Assembly of First Nations Chief Bobby Cameron explained that one cannot blame the current federal government (that invested \$2.6 billion over five years, which was met with some Indigenous opposition of this amount not being enough as the education gap was estimate at \$665) as "we've been waiting two, three decades for a K-12 funding increase on reserve and also post-secondary. We've been waiting a long time...at least now we have a government that's willing and investing. Sure things are slow, it's causing frustration."

⁸²⁷ Cindy Blackstock, "Piecemeal approach to change perpetuates inequality for First Nations children", *CBC News* (19 March 2018) online: <<http://www.cbc.ca/news/indigenous/opinion-indigenous-child-welfare-cindy-blackstock-1.4545845>>. Gitksan Professor Blackstock stated that: "Links between the inequities and the deaths of First Nations children were first documented in 1907 by Dr. Peter Henderson Bryce, the federal government's own Chief Medical Health Officer." Furthermore, as Katie Hyslop stated in her article, "The Kelowna Accord, Racism and the Child Welfare Crisis", *The Tyee* (22 May 2018) online: <<https://thetyee.ca/News/2018/05/22/Kelowna-Accord-Racism-Child-Welfare/>>: "The federal government has known about the over-representation of Indigenous children in care since at least 1977, and about the conditions on First Nations reserves and in Inuit communities for much longer than that. Yet it failed to act on child welfare, education, housing and infrastructure issues in Indigenous communities." This is similar to the federal government knowing about drinking water quality issues and despite decades of government knowledge and awareness, the issues continue.

waters, and other affairs. Yet these struggles and fights for power, respect, and self-determination continue.

While the stated intention of the Canadian government is to build relationships, consult with, and respect Indigenous peoples, when applied to specific tangible cases to use water or develop land the state does not provide such respect. Conversely, the government's actions illustrate the opposite. This creates a political stalemate for IR in that the state's intentions for change are expressed but processes on the ground do not achieve that change. At the end of the day, Canadian governments are often saying the right things in terms of what change is needed to improve Indigenous-state relations, but then prioritizes the economy or private use of the environment. One example of this is the difference in statement and then practice by the current Prime Minister Justin Trudeau who stated in 2016 (and multiple times since) that:

No relationship is more important to our government and to Canada than the one with Indigenous peoples. Today, we reaffirm our government's commitment to a renewed nation-to-nation relationship between Canada and Indigenous peoples, one based on the recognition of rights, respect, trust, co-operation, and partnership.⁸²⁸

This statement indicates a commitment to a renewed, positive, and respectful relationship between the Government of Canada and its Indigenous peoples. However, when one looks to issues such as the Kinder Morgan Trans Mountain pipeline proposal in Canada, where the economy is affected, economic concerns seem to trump this commitment to Indigenous relationship building.⁸²⁹ Prime Minister Trudeau stated:

⁸²⁸ Prime Minister Trudeau, News Release, December 2015, *supra* note 819. See also: Trudeau, Justin, Prime Minister of Canada, "Statement by the Prime Minister of Canada on National Aboriginal Day" (21 June 2016) online: <<https://pm.gc.ca/eng/news/2016/06/21/statement-prime-minister-canada-national-aboriginal-day>>.

⁸²⁹ In this example, the Canadian (Liberal) government has touted the purchase of the Trans Mountain Pipeline from Kinder Morgan as an investment for British Columbians, Albertans, and all Canadians in terms of the protection of well-paying jobs and the projects' commercial value projected return on investment for shareholders and the government of Canada (Tonda Maccharles, Bruce Campion-Smith, and Alex Ballingall, "Liberal government to buy Trans Mountain pipeline project, seek new investors" *The Star* (28 May 2018) online: <<https://www.thestar.com/news/canada/2018/05/28/liberal-government-to-buy-trans-mountain-pipeline-project-see-new-investors.html>>). Kinder Morgan's Trans Mountain project website reports that the project will create \$46.7 billion for the federal and provincial governments for the construction and the first 20 years of the pipeline's operation. Furthermore, the project website expects BC to receive \$5.7 billion; Alberta to collect \$19.4 billion; and the rest of Canada to share \$21.6 billion. (See Trans Mountain "Benefits" online: <<https://www.transmountain.com/benefits>>).

Canada is a country of the rule of law, and the federal government will act in the national interest. Access to world markets for Canadian resources is a core national interest. The Trans Mountain expansion *will* be built.⁸³⁰

Shockingly, in the face of significant Indigenous opposition, the Liberal government bought the Trans Mountain pipeline for \$4.5-billion.⁸³¹ While some First Nations certainly support the Trans-Mountain pipeline,⁸³² many Indigenous leaders, environmental groups, and opposition party politicians vehemently oppose the pipeline.⁸³³ The intentions in these abovementioned statements by federal government officials seem to conflict in terms of whether the Canadian government actually wants to support Indigenous-state relations. This confusion and difficulty in the government prioritizing Indigenous-state affairs seems to parallel the stark differences in worldviews between the Canadian state and Indigenous peoples.

Whereas Indigenous peoples seek to build long-term relationships, Canadian governments do not always act as though these reparations of colonization require long-term commitment. The government seems to understand logic like facts, budgets, deadlines, and voting cycles. Whereas the law and EA legislation are perhaps best considered as black and white, categorized and compartmentalized, the systemic changes needed in Canada such as political, cultural, and social change are grey. By this I mean that the systemic changes that are needed to rebuild nation-to-nation relationships and decolonize are long-term, complicated, and will be difficult to navigate. There is no easy fix for decolonization. However, the state would do well to adopt a longer-term vision of Canada that extends beyond voting cycles to sustainably decolonize and contribute to reconciliation with Indigenous peoples.

⁸³⁰ Prime Minister Justin Trudeau, "Canada is a country of the rule of law, and the federal government will act in the national interest. Access to world markets for Canadian resources is a core national interest. The Trans Mountain expansion will be built" (8 April 2018 at 9:20pm) online: Twitter <<https://twitter.com/JustinTrudeau/status/983137468047347712>>.

⁸³¹ Ballingall et al, "Justin Trudeau's \$4.5 billion Trans Mountain pipeline", *supra* note 3.

⁸³² Jorge Barrera, "Buying and expanding Trans-Mountain pipeline not a violation of Indigenous rights, says Minister", *CBC News* (29 May 2018; Last updated: 30 May 2018) online: <<http://www.cbc.ca/news/indigenous/trans-mountain-pipeline-bc-first-nations-1.4682395>>.

⁸³³ Ballingall et al, "Justin Trudeau's \$4.5 billion Trans Mountain pipeline", *supra* note 3.

1.3: Canada Must Reconcile as it is Legally Required and Politically Desired

If Canada continues to operate in a paternal fashion having imbalanced power over Indigenous communities, it will be met by increasing legal, political, and direct-action resistance. This is especially true while Canadian courts gradually recognize Indigenous peoples' legal rights to their lands such as was the case in the *Tsilhqot'in* decision.⁸³⁴

Indigenous advocacy in Canada is the civil right's movement of this generation.⁸³⁵ Indigenous communities will continue to fight, along with non-Indigenous allies, to reclaim their waters. This opposition is currently seen in courtrooms, political negotiations, and on the streets in protests and rallies. However, Indigenous peoples and their allies' patience may run out and people might opt for violent tactics in order to protect the land.⁸³⁶ In addition, it is in Canada's best interest to reconcile with Indigenous peoples because the current conflict produces insecurity for the state in terms of resource development projects. Furthermore, Canada will improve its reputation internationally if it treats its Indigenous peoples better.

With the advent of the recent #IdleNoMore movement and Truth and Reconciliation Commission Report, non-Indigenous Canadians are becoming progressively aware of Indigenous issues and consequently less and less tolerant of the government's historical and present-day mistreatment of Indigenous peoples.⁸³⁷

⁸³⁴ *Tsilhqot'in*, *supra* note 5.

⁸³⁵ Elizabeth Rinzetti, "Celebrate the teepee protest. Demonstration improves social justice", *The Globe and Mail* (Opinion) (29 June 2017; Updated 30 June 2017), online: <<https://www.theglobeandmail.com/opinion/protest-is-in-canadas-dna/article35502187/>>. Rinzetti explains that social justice in the realm of Indigenous issues is positive and brings about governmental changes, which has been crucial to good governance in Canada.

⁸³⁶ See Niigaan Sinclair, "Indigenous nationhood can save the world: Here's how." *The Globe and Mail* (12 September 2017; Updated 12 November 2017), online: <<https://www.theglobeandmail.com/opinion/recognizing-indigenous-nations-niigaan-sinclair/article36237415/>>. As Indigenous Professor Dr. Niigaanwewidam Sinclair stated "If we wait for Canada to recognize Indigenous nations for what we are we will likely be waiting forever. We are also headed for conflicts and wars – much of which we have only seen glimpses at in places like Oka in Quebec and Elsipogtog in New Brunswick – if this nation continues its march towards resource exploitation, pipelines, and same neoliberal agenda the world is headed. Right now most of our fights are in courtrooms but they won't be there much longer. The land is calling for more."

⁸³⁷ The Environics Institute for Survey Research, et al, "Canadian Public Opinion on Aboriginal Peoples: Final Report" (June 2016), online: <<https://tidescanada.org/wp->

The Halalt example is but one of many ongoing Indigenous versus state resource development conflicts. Indigenous peoples will continue fighting against the state to oppose them and ensure that they do not proceed. The Canadian government would be best advised to work *with* not against First Nations in this regard. Canada's behavior must change in attitude *and* action if it wants to achieve reconciliation and work *with* Indigenous peoples instead of having frequent resistance to various governmental policy, legislation, proposals, and projects.

Indigenous resurgence scholarship and advocacy reminds us that colonization is ongoing and continues to affect Indigenous-state relations in many areas including Indigenous water sovereignty. While the government of Canada says it desires to improve state-Indigenous relations, an IR view of the government's actions show otherwise. The lack of transfer of power, respect for Indigenous worldviews, and Indigenous self-determination demonstrated in the *Halalt v BC* case exemplifies how this ongoing colonialism perpetuates an imbalance of power and disrespect towards Indigenous peoples. To the extent that the Halalt case study can be an example, it illustrates that there is much room for improvement in Indigenous water sovereignty in Canada.

2.0: Implications for Practitioners: Hopeful Movements Towards IR

There are several actions and initiatives that can be undertaken that may support IR and advance its goals in Canada. Here I discuss several steps that the Canadian state is taking and can take that may move towards achieving the three IR themes. Suggestions for restoring Indigenous power would be to operate under the principles

content/uploads/2016/06/Canadian-Public-Opinion-on-Aboriginal-Peoples-2016-FINAL-REPORT.pdf>; "Globe editorial: After 150 years, Canada's Indigenous citizens are finally being heard", *The Globe and Mail* (29 June 2018; Updated 30 June 2018), online: <<https://www.theglobeandmail.com/opinion/editorials/globe-editorial-after-150-years-canadas-indigenous-citizens-are-finally-being-heard/article35506457/>>. This Globe and Mail editorial stated that "[f]rom that seed of protest [where Indigenous peoples used the Expo 67 "Indians of Canada" pavilion as a site of resistance where they showcased Indigenous poverty and challenged visitors view of cordial colonization] along with others planted in the 1960s, non-native Canadians' discomfort over the mistreatment of Indigenous people has steadily grown in the past 50 years. The Truth and Reconciliation Commission's inquiry into abuses at residential schools, completed in 2015, is the other bookend to this half-century of awakening."

discussed in the recent Report entitled, *Collaborative Consent and British Columbia's Water: Towards Watershed Co-Governance*.⁸³⁸ This report proposes that Indigenous and non-Indigenous governments work together and participate equally to change the development of policy and legal decisions through a collaborative consent process where there is long-term and thoughtful engagement by all sides.⁸³⁹ Collaborative consent illustrates a way to move forward on proposed decision-making and governance that is mutually consensual and based on a respect for each government.⁸⁴⁰ Collaborative consent illustrates one way of supporting IR.

In the realm of EA, there are hopeful initiatives in respect to Indigenous rights and authority in current EA law reform both at the provincial and federal levels. For its part, the Government of BC is currently reviewing its EA system to advance several state-Indigenous relations goals.⁸⁴¹ The Government of BC stated that this revitalization process has the goals of: ensuring “the legal rights of First Nations are respected”; “advancing reconciliation”; and contributing to the government’s implementation of UNDRIP.”⁸⁴² Specifically, in order to advance these goals, the EAO is working with the First Nations Mining Council, on behalf of the First Nations Leadership Council (which is a subset of the BC Assembly of First Nations).⁸⁴³ As of the writing of this thesis, the engagement with First Nations, stakeholders, and the public is ongoing.

Similar to the proposed BC EA legal reformation, the newly proposed federal Bill C-69 propositioning the creation of an *Impact Assessment Act*,⁸⁴⁴ which has been

⁸³⁸ Phare et al, *Collaborative Consent and British Columbia's Water*, *supra* note 7.

⁸³⁹ *Ibid* at 1.

⁸⁴⁰ *Ibid*.

⁸⁴¹ BC, Environmental Assessment Office, “Revitalizing B.C.’s environmental assessment process”, News Release, online: <<https://news.gov.bc.ca/releases/2018ENV0009-000337>>. See also Government of British Columbia, Public consultation begins on revitalizing B.C.’s environmental assessment process, News Release (18 June 2018) online: <https://news.gov.bc.ca/releases/2018ENV0048-001225>>; In June 2018, the Government of BC released its discussion paper on the EA reform and allowed for public comments on the discussion paper until July 30, 2018. The Government of BC stated that it will produce a document that outlines the results of this engagement in the summer of 2018. The goal is to release an “intentions paper” that details the changes to be made to the EA process in fall 2018.

⁸⁴² *Ibid*.

⁸⁴³ *Ibid*.

⁸⁴⁴ Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (second reading in the Senate 4 October 2018) [Bill C-69, *An Act to enact the Impact Assessment Act*].

introduced to replace the previously enacted *Canadian Environmental Assessment Act 2012*.⁸⁴⁵ This bill has a strong focus on Indigenous inclusion in decision-making and authority in the process of undergoing EAs. The government intends to advance reconciliation,⁸⁴⁶ respect Indigenous rights,⁸⁴⁷ cooperate with Indigenous jurisdictions, and allow for “meaningful participation” by collaborating with Indigenous peoples in a government-to-government fashion. The proposed legislation also states it will include Indigenous traditional knowledge (alongside scientific knowledge).⁸⁴⁸ Both levels of EA governance reform illustrate hopeful steps forward in improving Indigenous-state relations by increasing respect and decision-making power for Indigenous communities.

Initiatives such as the University of Victoria’s Indigenous Juris Doctor (JID) program provide examples of possible solutions regarding increasing respect for Indigenous worldviews throughout legal processes includes.⁸⁴⁹ This is one avenue where future legal practitioners and decision-makers can develop an increased respect for Indigenous ways of being, knowing, and governing along with or outside of colonial systems.

Lastly, to advance Halalt’s sovereignty over their waters, a system where municipal (e.g. DNC), provincial (e.g. BC EAO, BC Treaty Commission), and federal (e.g. Crown-Indigenous Relations and Northern Affairs and Indigenous Services Canada) levels of government *all* interact to ensure an appropriate relationship with Indigenous peoples in Canada. This could overcome how all of these structures only dealt with a fragment of how Halalt could advance their sovereignty. To this end, the Truth and Reconciliation Calls to Action for governments in Canada may be of

⁸⁴⁵ *Canadian Environmental Assessment Act, 2012*, SC 2012 c 19 s 52.

⁸⁴⁶ Bill C-69, *An Act to enact the Impact Assessment Act*, *supra* note 844.

⁸⁴⁷ *Ibid*; Government of Canada, “A proposed new impact assessment system” (Modified 2 June 2018, Accessed 16 June 2018) online: <<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html>>.

⁸⁴⁸ *Ibid*.

⁸⁴⁹ University of Victoria, “Joint Degree Program in Canadian Common Law and Indigenous Legal Orders JD/JID”, online: <<https://www.uvic.ca/law/about/indigenous/jid/index.php>>; See also University of Victoria, Media Release, “World’s first Indigenous law degree to be offered at UVic” (21 February 2018) online: <<https://www.uvic.ca/news/topics/2018+jid-indigenous-law+media-release>>.

assistance.⁸⁵⁰ Notably, Calls to Action 43, 47, and 57 demand Canadian governments to respect Indigenous autonomy, remove Eurocentric worldviews, and train public servants to understand colonization and the history of Indigenous peoples in Canada.⁸⁵¹ If the government bodies listed above implemented these recommendations, their understanding of the imbalance of power and respect for Indigenous sovereignty, worldviews, and self-determination may improve.

3.0: Future Research

As academia can be a site of Indigenous activism and praxis, future scholarly research has the potential to provide more knowledge and power to aid Indigenous resurgence and resistance. First, going forward, to advance reconciliation, it would be helpful for academics to explore how municipalities, as delegates of the provincial Crown, could increase their respectful treatment of Indigenous communities as part of their long-term infrastructure and community planning. Such research could open up opportunities for municipalities to work towards providing their Indigenous neighbours, with which they share watersheds, with more power over water governance as well as self-determination.

Second, it would be useful to find examples where IR has in fact occurred; this could support Indigenous communities in retrieving power over their water sovereignty. Third, investigations on how to enable better political and social connections between Indigenous peoples and the Canadian state and political organizations could aim to

⁸⁵⁰ Truth and Reconciliation Commission of Canada, “Calls to Action”, (Winnipeg: Truth and Reconciliation Commission, 2015).

⁸⁵¹ *Ibid.* The “Reconciliation Section” calls for the following: “43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation. Royal Proclamation and Covenant of Reconciliation...47...We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts... 57. Professional Development and Training for Public Servants. We call upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.”

discover ways to avoid the unnecessarily compartmentalized political deadlock Indigenous peoples face in their attempts to assert water sovereignty.

Colonization is ongoing in Canada and continues to affect Indigenous-state relations in numerous areas (including resource extraction, governance, and social issues). While various Canadian governments have attempted to improve Indigenous-state relations, state actions indicate other priorities such as retaining power and prioritizing the economy outweigh promises on reconciliation. Ongoing colonialism favours Eurocentric values and processes and correspondingly perpetuates disrespect of Indigenous worldviews, imbalances of power, inequality, injustice, and racism both in Indigenous water governance and other social and political areas. Canada should work with Indigenous peoples in order to reconcile. I assert that Canada needs to keep working with Indigenous peoples to decolonize and work towards further reconciliation. If Canada does not continue to make concrete steps towards reconciliation, Indigenous peoples and their allies will persevere and keep fighting to protect their lands, waters, values, and ways of life.

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APPENDICES

Appendix A: Halalt First Nation Interview Questions

Location

- 1) How long have you (and your family if applicable) lived on the Halalt First Nation reserve?
- 2) When was the Halalt First Nation reserve created?
- 3) Describe your life on the reserve.
 - a. Where do you live?
 - b. Do you like living on reserve?
 - i. Why or why not?
- 4) How do you relate to/experience water within the Halalt First Nation?
- 5) Why is clean water important to you?
- 6) Is there anything unique about the relationship between you or other Halalt First Nations members and water?
 - a. Can you describe that to me?

Water Quality

- 7) What is the quality and quantity of water like in Halalt First Nation?
- 8) Has the water quality and quantity always been the same in Halalt First Nation?
 - a. If not, what has changed? What happened?
 - i. How do you remember how it used to be?
 - ii. How do you know this?
 - iii. Is this opinion shared with other community members?
 - iv. What caused the change?
 - v. Did you or anyone you know do anything about the change?
 - vi. Do you feel like it could have been prevented?
 - vii. How do you feel about this change? Do you have an emotional reaction to it?
- 9) Have you experienced a "Drinking Water Advisory" where you could not drink you water out of the tap?
 - a. If so,
 - i. Can you describe it to me?
 - ii. How did you find out about it?
 - iii. How did it affect you?
 - iv. How do you feel about the situation?
 - v. Do you think it will happen again?
 1. If so, do you wish to prevent it from happening again?
 - a. Are there steps being taken by you or someone you know to prevent future Drinking Water Advisories/water contamination?
 - vi. Do you know other First Nations with drinking water problems?
 1. Can you describe this/these situation(s)?
 2. Are these situations similar to the situation in Halalt First Nation?

- 10) Are there any current problems with water quality on the Halalt First Nations reserve?
 - a. If so, how does that make you feel?
 - b. Do you think anything stands in the way of improving the water?
 - c. Have you or anyone you know done anything about this?
- 11) Do you have any fears about the water in Halalt or how it is governed?

Decision-making

- 12) Can you describe how the water is managed in Halalt First Nation?
 - a. Who is able to make decisions over the water?
 - i. Do you think that's the way it should be?
 1. Why/why not?
 - ii. Would you change who controls decision-making over the water?
 1. Why/why not?
- 13) Do you know how the water treatment system is funded in Halalt First Nation?
 - a. If so, do you think that funding is adequate?
 - i. If so, can you describe how it meets the needs of the Halalt First Nation?
 - ii. If not, why not?
- 14) Would you say that any individual, group, or organization owns or is entitled to the water on Halalt First Nation?
 - a. If so, who?
- 15) Can you describe how Canadian governments (municipal/provincial/federal) are involved in the management of water in the Halalt First Nation?
 - a. What are these governments' priorities for water management in Halalt First Nation?
 - i. How do you know these are their priorities?
 - b. Do you have first hand experience with these governments?
 - i. If so, how?
 - c. Has the relationship between the Canadian government(s) and Halalt First Nation changed over time?
 - d. Do you see a connection between these relationships and how water is managed in Halalt First Nation?
- 16) Are there any hereditary chiefs in Halalt First Nation or Elders' Council?
 - a. What is their role in the community?
 - b. Do they make any decisions regarding water?
- 17) Is water managed the same way in other First Nations communities?
 - a. If so, how? In what ways?
 - b. If not, how does it differ?
 - c. If things have improved at any point, do you know what motivated those changes?
- 18) Do you think ways in which water is managed relate to other (social, economic, political) aspects of life in Halalt First Nation?
 - a. Are other resources (e.g. land, forestry, fish) managed in a similar way to water?
 - i. How? In which ways? Can you provide examples?
- 19) Does the Hul'qumi'num Treaty Group have anything to do with the quality of water and/or how water is managed in Halalt First Nation?
 - a. If so, how? In which ways?
 - b. If not, why not?

Court Case

- 20) What happened in the court case between the Halalt First Nation and the District of North Cowichan?
- 21) How do you feel about that?
- 22) Can you describe how the trial level court case went? Court of Appeal case?
- 23) If the information is public, what are the factors that lead to your recent decision to appeal the Court of Appeal decision to the Supreme Court of Canada?
- 24) Do you know of other First Nations that are in court cases trying to protect their water rights?

Solutions

- 25) What would you say is or should be the biggest priority/ies for water in Halalt First Nation?
- 26) Is there something you would change about the quality of water in Halalt First Nation?
 - a. If so, why would you take that action?
 - i. Are there tools, strategies, or resources that you or the Halalt First Nation has to change the quality of water?
 - 1. If so, are any of these resources Aboriginal organizations (e.g. advocacy or health organizations)? Can you describe them?
 - b. Are there other things you would change? How and why?
- 27) Is there something you would change about how water is managed?
 - a. If so, what and why?
- 28) Are there other First Nations that have good quality of water or have had no boil water advisories that you know of?
 - a. Can you describe the size and location of those First Nations communities?
 - b. Why do you think they are able to have clean drinking water?

Conclusion

- 29) Is there any question you want to go back to and discuss further?
- 30) Is there something else you wish to share that you think will shed light on this topic?
- 31) Is there anyone else that you recommend I could speak with about this topic?

Appendix B: Non-Halalt Interviewee Participant Interview Questions

Location

- 1) How do you relate to/experience water in First Nations communities?

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- 2) Why is clean water important to you?
- 3) Is there anything unique about the relationship between you or others (e.g. First Nations persons) and water?
 - a. Can you describe that to me?
- 4) Have you or family members ever lived on an Aboriginal reserve?
- 5) Describe your life on the reserve?
 - a. Where do you live?
 - b. Do you like living on reserve?
 - i. Why or why not?

Water Quality

- 6) What is the quality and quantity of water like in First Nations communities in Canada?
- 7) Reserve creation: Has the water quality and quantity always been the same in First Nations communities?
 - a. If not, what has changed? What happened?
 - i. How do you remember how it used to be?
 - ii. How do you know this?
 - iii. Is this opinion shared with other community members/academics/experts?
 - iv. What caused the change(s)?
 - v. Did you or anyone you know do anything about the change(s)?
 - vi. Do you feel like it could have been prevented?
 - vii. How do you feel about this change? Do you have an emotional reaction to it?
- 8) What is your experience with/knowledge of “Boil Water Advisories”?
 - a. How do they affect First Nations communities?
 - b. How do issues with water quality on Aboriginal reserves make you feel?
 - c. Do you think anything stands in the way of improving the water?
 - d. Have you or anyone you know done anything about this?
- 9) Do you have any fears about the water on Aboriginal reserves or how they it is governed?

Decision-making

- 10) Can you describe how the water is managed on Aboriginal reserves?
- 11) Who makes decisions over water management on reserves?
 - a. Do you think that's the way it should be?
 - i. Why/why not?
 - b. Would you change who controls decision-making over the water?
 - i. Why/why not?
- 12) Do you know how the water treatment system is funded on Aboriginal reserves?

- a. If so, do you think that funding is adequate?
 - i. If so, can you describe how it meets the needs of Aboriginal reserves?
 - ii. If not, why not?
- 13) Would you say that any individual, group, or organization owns or is entitled to the water on Aboriginal reserves?
 - a. If so, who?
- 14) Can you describe how Canadian governments (municipal/provincial/federal) are involved in the management of water on Aboriginal reserves?
 - a. What are these governments' priorities for water management?
 - i. How do you know these are their priorities?
 - b. Do you have first hand experience with these governments?
 - i. If so, how?
 - c. Has the relationship between Canadian government(s) and Indian Band Councils changed over time?
 - d. Do you see a connection between these relationships and how water is managed on Aboriginal reserves?
- 15) Do hereditary chiefs or Elders' Councils play any role in water management on Aboriginal reserves?
- 16) Is water managed the same way on all Aboriginal reserves?
 - a. If so, how? In what ways?
 - b. If not, how does it differ?
 - c. If things have improved at any point, do you know what motivated those changes?
- 17) Do you think ways in which water is managed relate to other (social, economic, political) aspects of life for persons living on reserve?
 - a. Are other resources (e.g. land, forestry, fish related) managed in the same way?
 - i. How? In which ways? Can you provide examples?
- 18) Do treaty/land claim negotiations have anything to do with the quality of water and/or how water is managed on Aboriginal reserves?
 - a. If so, how? In which ways?
 - b. If not, why not?

Court Cases

- 19) Do you know of First Nations that are in court cases trying to protect their water rights/quality/quantity of water?
- 20) What arguments are being made?
- 21) Are these arguments successful?

Solutions

- 22) What would you say is or should be the biggest priority/ies for water on Aboriginal reserves?

- 23) Is there something you would change about the quality of water on Aboriginal reserves?
- a. If so, why would you take that action?
 - i. Are there tools, strategies, or resources that you, your organization, or other First Nations communities have to change the quality of water?
 1. If so, are any of these resources Aboriginal organizations (e.g. advocacy or health organizations)? Can you describe them?
 - b. Are there other things you would change? How and why?
- 24) MAGIC WAND: Is there something you would change about how water is managed?
- a. If so, what and why?
 - i. Can you name your top priorities you have for water on Aboriginal reserves?
- 25) Are there other First Nations that have good quality of water or have had no boil water advisories?
- a. Can you describe the size and location of those First Nations communities?
 - b. Why do you think they are able to have clean drinking water?

Conclusion

- 26) Is there any question you want to go back to and discuss further?
- 27) Is there something else you wish to share that you think will shed light on this topic?
- 28) Is there anyone else that you recommend I could speak with about this topic?