Recognition, Self-Determination and Treaty Federalism: Understanding Indigenous-State Relationships in Co-Management Regimes in Canada

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Abstract

The nature of the relationship between Indigenous peoples and the Canadian state has continuously evolved. Alongside this, different and often conflicting legal perspectives have arisen in order to better understand this relationship. This thesis considers how such perspectives can be grouped into identifiable frameworks which act as a blueprint for the relationship. Three frameworks will be analysed in this paper: recognition, self-determination, and treaty federalism. Where a particular model is applied, its associated objectives, assumptions, and limitations form the legal foundation of the relationship. To demonstrate how these frameworks can be used as a model to inform the Indigenous-state relationship and how such framework choice is reflected in the final relationship, three co-management regimes are analysed: the Nunavut Wildlife Management Board, Cowichan Watershed Board, and agreements establishing co-management on Haida Gwaii. It is argued that, in order to improve communication, notice must be taken of these frameworks to allow conversations and negotiations between Indigenous peoples and the state to be more effective. This will improve the Indigenous-state legal relationship and lead to beneficial environmental practices.

Au fil des années, la relation entre les peuples Autochtones et l'État canadien a évolué. En parallèle, de différentes perspectives juridiques, souvent contradictoires, sont apparues. Cette thèse considère comment ces perspectives peuvent être regroupées dans des structures identifiables, qui agissent comme un schéma pour la relation. Trois structures sont analysées dans ce texte : la reconnaissance, l'autodétermination, et le fédéralisme par traité. Quand un modèle est appliqué, les buts, hypothèses et limitations associés forment la fondation juridique de la structure. Pour démontrer comment ces structures peuvent être utilisées en tant que modèle pour informer la relation Autochtone-État, trois régimes de cogestion sont étudiés : le conseil de gestion des ressources faunique de Nunavut, la commission du bassin hydrographique de Cowichan, et l'accord de cogestion sur Haida Gwaii. Il est avancé que, pour améliorer la communication, il faut se rendre compte de ces structures pour permettre des conversations et négociations efficaces entre l'État et les peuples Autochtone. Ceci améliorera la relation juridique Autochtone-État et mènera à des pratiques environnementales bénéfiques.

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List of Abbreviations

AMB	Gwaii Haanas Archipelago Management Board
CHN	Council of the Haida Nation
CWB	Cowichan Watershed Board
IQ	*Inuit Qaujimajatuqangit*
NWMB	Nunavut Wildlife Management Board
RCAP	Royal Commission on Aboriginal Peoples
SCC	Supreme Court of Canada
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

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1. Introduction

Although the existence of Indigenous constitutional orders within Canada has been broadly accepted by individuals and institutions, their specific conceptions of these constitutional orders greatly differ. Moreover, and central to the focus of this work, there is an ongoing debate regarding the relationship between Indigenous constitutional orders and the constitutional order of Canada itself. This debate raises questions related to making space for Indigenous law, law revitalization, and the role of legal pluralism. Additionally, there is discord concerning the authoritative nature of these orders compared to state law. Although Indigenous and non-Indigenous constitutional orders are supported by specific worldviews, these worldviews are arguably as incompatible as the orders themselves.

As institutions begin to develop methods for reconciling Indigenous and Canadian constitutional orders, the complexity and locality of law, as well as the diversity amongst Indigenous peoples in Canada suggests taking a non-uniform approach. To better understand the intentions of institutions and individuals, it is necessary to distinguish concepts that are often confounded—a task made more difficult by the lack of agreed-upon definitions of commonly used terms. For example, the Truth and Reconciliation Commission defines reconciliation as "an ongoing process of establishing and maintaining respectful relationships"[1], while the Supreme Court of Canada (SCC) has linked reconciliation with maintaining federalism and state sovereignty through reconciling the "pre-existence of Aboriginal societies with the sovereignty of the Crown".[2] When these phrases and terms are used within the same context, it is easy to see why confusion exists. While a barrier, this confusion is not insurmountable and work towards reconciling constitutional orders can continue.

Diverse approaches to reconciling the Indigenous-state legal relationship would prove beneficial. Each people has a different historic and current relationship with the state. Diversity in approaching reconciliation allows for the unique needs of each Indigenous people to be met in a respectful manner by honouring their perspectives. It is helpful to focus on the ideas, goals, and priorities of those who take these approaches to develop frameworks or models through which the

[1] Truth and Reconciliation Commission of Canada, ed, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada* (Montreal: McGill-Queen's University Press, 2015) at 11.
[2] *R v Van der Peet*, [1996] 2 SCR 507 at para 21; See also Kim Stanton, "Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission" (2017) 26 JLSP 21.

relationship can be expressed. These frameworks are distinct models which can be used in combination with each other to reflect the diversity, and support the autonomy, of various Indigenous groups within Canada. As these frameworks are not hermetically separate from each other, their underlying premises are often clouded due to the inability of actors to conceptually distinguish amongst them. This in turn leads to confusion and creates difficultly in reaching mutually supported conclusions. One purpose of this thesis is to provide clear descriptions of some of these frameworks to facilitate a better understanding of the models that actors may be implicitly working with while navigating the Indigenous-state relationship.

This thesis addresses three frameworks: recognition, self-determination, and treaty federalism. Drawing on a broader politics of recognition, the recognition framework considers how assertions of Indigenous sovereignty can be reconciled with state sovereignty through the accommodation of Indigenous peoples within existing legal structures and foundations. Recognition is largely a liberal approach—accommodating social diversity without challenging the premises of liberal constitutionalism. The second framework, self-determination, can be considered from both a rooted and liberal orientation. The liberal orientation, underpinned by principles of freedom and individualism, remains dominant in international and domestic law. When self-determination is rooted, it is grounded in logic common to Indigenous worldviews including principles such as interdependence and relationality. The recognition and liberal self-determination frameworks can be directly contrasted to that of treaty federalism, which seeks to understand the Indigenous-state relationship as one built on a nation-to-nation basis.

Interplay between these frameworks is particularly evident in natural resource management. Since the 1980s there has been a greater acknowledgement that environmental management is a concern in Canada, driven by mismanagement and depletion of resources, as well as Indigenous resistance to resource extraction projects.[3] Calls for better environmental management regimes have coincided with the broader goal of reconciliation and the demand to recognize Indigenous peoples as self-determining nations. One response to these calls has been the adoption of co-management regimes. Co-management broadly refers to combining local- and

[3] See generally Council of Canadian Academics, *Greater Than the Sum of Its Parts: Toward Integrated Natural Resource Management in Canada.* (Ottawa: The Council of Canadian Academics, 2019) at 13–28; Donald Grinde & Bruce Johansen, *Ecocide of Native America: Environmental Destruction of Indigenous Lands and Peoples* (Santa Fe: Clear Light, 1995).

state-level environmental management systems.[4] This development is motivated by factors such as the nature of the resources being managed, and how the parties envisage the relationship amongst themselves. However, some co-management agreements may not be compatible with certain frameworks. By understanding which frameworks have been/continue to be utilized (as analysed through the case studies presented), and through an evolution of their respective efficacies, the Indigenous-state relationship can be enhanced. This knowledge, from the case studies and more generally, will contribute to positive legal and environmental outcomes in the future. As co-management agreements become more prominent in the legal landscape, there needs to be awareness of the impacts of the frames chosen to express ideas and goals, and how one can limit or avoid the harms associated with colonialism. For example, proponents of a new co-management may select a framework which places Indigenous peoples in authoritative decision-making roles. In this thesis I will further this understanding by presenting the frameworks alongside each other. Presenting the frameworks in this manner will allow for ease in comparing their approaches. I will bring together approaches which are typically siloed, thereby addressing an identified gap in the literature.

Through exploring the frameworks of recognition, self-determination, and treaty federalism, this thesis analyses how each framework enhances or inhibits the legal relationship between Indigenous peoples and the state. By revealing the theoretical underpinnings, assumptions, and goals of the applied frameworks, transparency of the Indigenous-state relationship will be increased. Conversations regarding the relationship can then move forward with a common understanding. To reach solutions that are supported by both Indigenous peoples and the Canadian state, it is necessary to recognize where these frameworks are employed and ground a party's position. In examining the co-management agreements presented, it becomes clear how each framework is explicitly manifested and quantifiable through the objectives, limitations, and effect on the parties. To this end, the case studies analysed confirm that the recognition framework results in a predetermined relationship which subjects Indigenous peoples to the existing structures of the state. This subjection fails to grant Indigenous peoples substantive power based on equality between parties. To achieve a relationship that is sustainable and based

[4] See Fikret Berkes, Peter George & Richard J Preston, "Co-management: The Evolution in Theory and Practice of the Joint Administration of Living Resources" (1991) 18:2 Alternatives 12 at 12.

upon mutuality of respect, it is necessary to incorporate the treaty federalism or rooted self-determination models throughout redefining the Indigenous-state relationship.

1.1. Nature of the Co-Management Relationship

Before the arrival of European settlers, Indigenous peoples managed their environments guided by legal traditions rooted in their worldviews.[5] However, colonialism, and the states which practice it, deemed Indigenous practices associated with environmentalism to be ineffective. Thus, the general approach to environmental management changed to reflect western ontologies.[6] Despite decades of forced removal from land—often in the name of conservation[7]—Indigenous peoples continued to manage their lands according to their ontologies. It is now widely recognized that Indigenous peoples, through the application of their legal traditions, can contribute positively to environmental management and influence current state practices to promote sustainability and protection.[8] While colonial-based theories of environmentalism persist, both within Canada and globally, the appropriateness of such approaches is being routinely questioned by both Indigenous peoples and environmental scientists.[9]

One response to resolving this disconnect has been the shift towards managing natural resources through co-management. Co-management is not a new idea; it has existed since the 1970s as a method to decentralize government control of resources and respond to calls for stakeholder participation.[10] In its broadest understanding, co-management imagines a regime through which some degree of decision-making power and management capacity is transferred

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[5] See Jessica Clogg et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 JELP 227 at 230.

[6] See Joe Karetak, Frank J Tester & Shirley Tagalik, eds, *Inuit Qaujimajatuqangit: What Inuit Have Always Known To be True* (Halifax ; Winnipeg: Fernwood Publishing, 2017) at 93; See generally Ellen van Holstein & Lesley Head, "Shifting Settler-Colonial Discourses of Environmentalism: Representations of Indigeneity and Migration in Australian Conservation" (2018) 94 Geoforum 41 at 42.

[7] See Stéphane Héritier, "Parcs Nationaux et Populations Locales dans l'Ouest Canadien : de l'Exclusion à la Participation" (2011) 55:2 The Canadian Geographer 158 at 159–164; See generally Daniel Brockington & James Igoe, "Eviction for Conservation: A Global Overview" (2006) 4:3 Conservation and Society 424 (global perspective).

[8] See Clogg et al, *supra* note 5 at 254; See generally Theresa McClenaghan, "Why Should Aboriginal Peoples Exercise Governance Over Environmental Issues?" (2002) 51 UNBLJ 211.

[9] See William Adams & Martin Mulligan, eds, *Decolonizing Nature: Strategies for Conservation in a Post-Colonial Era* (London: Earthscan Publications, 2003) c 1.

[10] See Claudia Notzke, "A New Perspective in Aboriginal Natural Resource Management: Co-Management" (1995) 26:2 Geoforum 187 at 188.

from a government to a community or group of stakeholders.[11] The process itself is often understood as having two elements: management of the resource and the management of the parties' relationship.[12]

Implementing co-management aims to increase the participation of marginalized stakeholders.[13] By increasing participation, a collaborative and constructive relationship can be developed.[14] This relationship can have different purposes depending on the overarching goal which the co-management board serves; it can allow easier access to resources or enhance environmental protection.[15] Where Indigenous peoples are impacted, co-management serves to ensure participation in decision-making processes through including Indigenous knowledge and placing Indigenous peoples in decision-making roles.[16]

In the literature reviewed, and depending on the case studies in question, different terms are employed to describe the collaborative relationship between parties—co-management, joint decision-making, and co-governance. While each term can denote a different relationship between parties, this thesis uses the term "co-management" as its broad interpretations facilitate its application to the cases examined. In what follows, I use the term co-management to refer to models through which both state and Indigenous actors are involved in the decision-making process pertaining to the use and/or conservation of natural resources.

1.2. Methodology

When analysing the different approaches to the Indigenous-state relationship, I have included both Indigenous and state understandings of each framework. Both Indigenous peoples and the state are equal partners as a result of treaties and modern agreements which create consensual relationships.[17] Indigenous peoples are also acknowledged as original partners in

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[11] See Evelyn Pinkerton, "Overcoming Barriers to the Exercise of Co-Management Rights" in Monique Ross & Owen Saunders, eds, *Demands on a Shrinking Heritage: Managing Resource-Use Conflicts* (Calgary: Canadian Institute of Resource Law, 1992) at 277.
[12] See Tara Goetze, "Empowered Co-Management: Towards Power-Sharing and Indigenous Rights in Clayoquot Sound, BC" (2005) 47:2 Anthropologica 247 at 248.
[13] See Sari M Graben, "Assessing Stakeholder Participation in Sub-Arctic Co-Management: Administrative Rulemaking and Private Agreements" (2011) 29 WYAJ 195 at 196.
[14] See Shin Imai, "Indigenous Self-Determination and the State" in Kent McNeil, Benjamin Richardson & Shin Imai, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 280 at 301.
[15] See Ryan Plummer & Derek Armitage, "Crossing Boundaries, Crossing Scales: The Evolution of Environment and Resource Co-Management" (2007) 1:4 Geography Compass 834 at 843–844.
[16] See Graben, "Assessing Stakeholder Participation in Sub-Arctic Co-Management", *supra* note 13 at 197.
[17] James Sákéj Henderson, "Sui Generis and Treaty Citizenship" (2002) 6:4 Citizenship Studies 415 at 422

Confederation.[18] By including these perspectives on equal footing, this thesis seeks to rebalance and further the Indigenous-state relationship. Selecting only the state's understanding of the relationship and ignoring Indigenous perspectives would result in continued harm to Indigenous peoples and maintain existing colonial attitudes and approaches. Additionally, considering these perspectives together clarifies the limitations and motivations of each framework, and it is easier to see how the framings impact the Indigenous-state relationship itself.

When considering each of the proposed frameworks, this thesis utilises different theoretical perspectives. Part of this includes addressing liberalism and liberal legality in Canadian and international law. The liberal legality is particularly evident in the framework of recognition and liberal self-determination. Alternative theoretical perspectives are also brought into the frameworks. Aaron Mills' theory of rooted constitutionalism and Sákéj Henderson's and James Tully's theories of treaty federalism are particularly important in developing the treaty federalism framework. In analyzing self-determination as a non-liberal principle, theories on rootedness and interdependence are fundamental. Elsewhere, I turn to Indigenous legal theory discourse to demonstrate how a specific form of recognition is reflective of Indigenous law. For example, I use this scholarship to identify how Indigenous knowledge can be considered an expression of law, and to consider how the inclusion of Indigenous law is reflective of deeper integration of governance and constitutional orders.

Part of the analysis for the framework of recognition considers judicial recognition of Aboriginal rights and Indigenous law. This case analysis is not an exhaustive evaluation of judicial recognition but demonstrates how key aspects of recognition theory play out in judicial institutions. As s.35(1) of the *Constitution Act, 1982*[19] does not specify the rules for recognition nor what rights are included within its ambit, it is prudent to consider how the courts interpret and recognize rights and law. This doctrinal approach allows for a comprehensive and quantitative understanding of recognition theory. Through supplementing the discussion on recognition with case law, my objective is to clarify the limitations of recognition theory and how it influences decisions regarding the Indigenous-state relationship.

[18] Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Canadian Communication Group, 1993) at 29

[19] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Constitution Act 1982].

The co-management case studies in Chapter III serve two purposes. First, they demonstrate how a co-management agreement, when modelled on a particular framework, results in a pre-determined scope within which the Indigenous-state relationship can develop. Second, the case studies reveal how Indigenous law and governance can be integrated into co-management structures, such as through the inclusion of Indigenous principles of interconnectedness. These case studies were chosen due to their diverse grounding in the Canadian legal order: mandated under land claim agreements (Nunavut Wildlife Management Board), independent government-to-government negotiations (Haida Gwaii agreements), and local initiatives (Cowichan Watershed Board). Although there are benefits to selecting case studies which are grounded in the same legal arrangement (for example, land claim agreements), this would limit the motivation which lies behind the choice of a particular co-management structure. By broadening the scope of the case studies, this thesis demonstrates that the Indigenous and state constitutional order can be integrated within the context of co-management.

One of the limitations in choosing case studies is the literature available. Often legal literature itself does not provide enough information to understand all elements of these management regimes. As these case studies have non-legal elements, an important consideration for each was whether sufficient literature from different academic disciplines existed. Each discipline offers a different perspective on the effectiveness and goals of the management systems, which in turns allows for a more complete understanding of how co-management operates within a specific system.

1.3. Outline of Chapters

Chapter II begins by setting forth and describing three distinct frameworks for understanding the Indigenous-state relationship. First, the recognition framework considers how the Canadian state recognizes Aboriginal rights and Indigenous law within the existing structure of the state. This section considers the prominence of recognition theory in Canada, as well as the judiciary's role as the primary recognition agent. Secondly, the framework of self-determination is considered from both a liberal and rooted perspective. Each understanding of self-determination is determined by theoretical underpinnings and differs in its conceptualization of the Indigenous-state relationship. The third framework, treaty federalism, addresses the nation-to-nation model and issues such as the interpretation of treaties, the federal relationship, and the connection

between treaty federalism and rooted legality. The analysis of these three frameworks clarifies the theoretical groundings, assumptions, and objectives associated with each framework to ensure their coherent and transparent application in Chapter III.

Chapter III applies these frameworks to selected co-management regimes in Canada. Three case studies, reflective of a range of co-management practices in Canada, are examined: the Nunavut Wildlife Management Board, Cowichan Watershed Board and Haida Gwaii agreements. The jurisdiction, legal and governmental structure and special features of each co-management regime are first outlined before analysing how each agreement is embedded in a particular framework and vision of the Indigenous-state relationship. When these frameworks are used to create a co-management regime, they dictate processes and solutions which are reflective of a particular understanding of the Indigenous-state relationship. By applying these frameworks to case studies, the legal nature of the Indigenous-state relationship becomes more transparent.

Chapter IV concludes that it is necessary to acknowledge the existence of these frameworks to effectively understand, evaluate, and strengthen the Indigenous-state relationship. In implementing co-management regimes, the use of these frameworks is not always explicit, as multiple models are often used simultaneously. Each party approaches the process with different motivations which influence the structure of the regime itself. By identifying these frameworks in action, it is possible to understand how the relationship is approached by each party, which in turn will improve interparty communication and enhance the co-management relationship. A stronger relationship based upon mutuality and consensus will ensure the sustainability of the co-management regime and broader resource management.

2. Foundational Frameworks of the Indigenous-State Relationship

Understanding the relationship between Indigenous peoples and the Canadian state requires one's acceptance of the reality that multiple Indigenous legal and political systems exist, and that they are created and maintained by their respective constitutional orders.[20] Keira Ladner explains these constitutional orders: "each Indigenous constitutional order set forth a system of government, provided a defined and limited ability to make, interpret and enforce 'law' within a territory and set forth the rules of the 'political game' and the roles and responsibilities of all

[20] See Kiera Ladner, *Indigenous Governance: Questioning the Status and the Possibilities for Reconciliation with Canada's Commitment to Aboriginal and Treaty Rights* (National Centre for First Nations Governance, 2006) at 3.

members of the nation."[21] Despite centuries of government denial of their existence, Indigenous constitutional orders continue to exist independently of the state.[22] These constitutional orders are grounded in "lifeworlds"—how peoples situate themselves—and respect for the earth.[23] Within the lifeworld, emphasis is placed on the interdependencies between people, the earth, and other beings which foster the relationships necessary for a good life.[24] Therefore, a particular lifeworld shapes the development of a constitutional order, and the legal institutions which follow.

Of course, it is not only Indigenous peoples that have constitutional orders and lifeworlds. Canada's constitutional democracy has emerged from its own lifeworld, although the term is not used in Eurocentric culture. This lifeworld is based in legal liberalism. These concepts and practices underpin the state's approach to their relationship with Indigenous peoples, providing what has been called a "snare" for Indigenous worldviews.[25] Such underpinning is acknowledged as one reason for the incommensurability of Indigenous and Canadian constitutional orders. There are different perspectives on the theory of liberalism. These theories will not be explored in depth; however it is useful to consider Dale Turner's three pillars of liberalism: the individual is prioritized "as the fundamental moral unit…[and] fundamental notions about freedom and equality, with both attached to and measured between individuals."[26] Liberal legalism considers the "theoretical construct which purports to inform and uphold the structure of the law".[27] Liberalism thus influences ideas of how law, legal argument, and legal decisions ought to be made.[28]

In this chapter, focus is placed on three frameworks which have informed and influenced the Indigenous-state relationship: recognition, self-determination, and treaty federalism. Each framework understands the relationship between Indigenous peoples and the Canadian state in a

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[21] *Ibid*.
[22] See *ibid* at 4.
[23] See Aaron Mills, "Rooted Constitutionalism" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 144 at 136.
[24] See Aaron James Mills (Waabishki Ma'iingan), Miinigowiziwin: all that has been given for living well together: one vision of Anishinaabe constitutionalism (PhD Dissertation, University of Victoria, 2019) [unpublished] at 74.
[25] See Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6 Indigenous LJ 13 at 15.
[26] Dale A Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 13.
[27] Gordon Christie, "Critical Theory and Aboriginal Rights" in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: Oxford University Press, 2013) 123 at 127.
[28] See Lewis Sargentich, *Liberal Legality: A Unified Theory of Our Law* (Cambridge: Cambridge University Press, 2018) at 12.

certain manner. Addressing an issue through a specific model requires the establishment of particular objectives, assumptions, and viable solutions. Throughout this chapter, each model is analysed to identify its respective limitations and opportunities as a foundational framework for the Indigenous-state relationship.

2.1. Recognition Theory

The first model upon which the Indigenous-state relationship has been based is recognition. Recognition theory, or the politics of recognition, derives from Hegel's idea of "self-consciousness" which must be recognised or affirmed by another in order to achieve freedom.[29] Recognition has been understood as the paradigmatic language of justice since the 1980s. Theorists such as Charles Taylor identified recognition as a "vital human need"[30], as one's identity is shaped by one's relations with others, leading to harm when misrecognition or non-recognition occurs.[31] For example, the non-recognition of Indigenous peoples as equal citizens in Canada resulted in state-led assimilation programs in an effort to "get rid of the Indian problem"[32] has had genocidal effects.[33] To support equal recognition of people, Taylor cites the politics of difference, which calls for the recognition of unique identity, as it can justify the protection of cultural minorities through the establishment of rights and respect for cultural beliefs.[34] Recognizing cultural protection allows for authentic identity and minority survival. Nancy Fraser offers a similar account, viewing individuals as systematically oppressed through social structures which value particular group identities over others.[35] She argues that to provide justice, all members of society must be recognized as having equal participation in life.[36] Within this context of justice, Yellowknives Dene scholar Glen Coulthard has concisely defined the politics of recognition as it applies to Indigenous peoples: "recognition-based models of liberal pluralism that seek to

[29] See generally Mattias Iser, "Recognition" in *Stanford Encyclopedia of Philosophy*, summer 2019 ed.
[30] Charles Taylor, "Politics of Recognition" in *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1994) at 26.
[31] See *ibid* at 25–73.
[32] Duncan Campbell Scott, Record Group 10, vol. 6810, file 470-2-3, vol. 7, 55 (L-3) and 63 (N-3) (National Archives of Canada).
[33] See generally Ken Coates, *The Indian Act and the Future of Aboriginal Governance in Canada* (National Centre for First Nations Governance, 2008).
[34] See Taylor, *supra* note 30 at 41.
[35] See Nancy Fraser & Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (London: Verso, 2003) at 16.
[36] See *ibid* at 36.

'reconcile' Indigenous assertions of nationhood with settler state sovereignty via the accommodation of Indigenous identity claims in some form of renewed legal and political relationship with the Canadian state".[37] In summary, the framework claims that through the establishment of this renewed relationship, based on the politics of recognition, Indigenous peoples can be afforded equal participation in Canadian society.

Notwithstanding the proliferation of recognition theory, the framework has been widely criticized. The goal of recognition is understood as the evolution of colonial structures from domination and inequality to a peaceful co-existence which is premised on reciprocity.[38] However, the politics of recognition diverts from the objective of reconciling Indigenous and state sovereignty. Indigenous peoples are not recognized as being independent of the Canadian constitutional order whereby a renewed relationship would see negotiations at a mutual constitutional level. Instead, any effects of misrecognition and non-recognition are resolved through solutions which support established state legal and political structures.[39] Coulthard in particular argues that rather than developing a peaceful co-existence based on reciprocity,[40] recognition simply reproduces the colonial state power.[41] As the state legal institutions remain firmly based on liberal values and principles such as individualism,[42] any recognition which occurs will seek to reproduce this grounding—which is not shared by Indigenous peoples.[43] Additionally, there are concerns that, as a result of misrecognition, Indigenous peoples will experience institutionalized violence.[44] Mills identifies this level of violence not as substantive but abstract;[45] violence as a result of misrecognition targets "Indigenous peoples' capacity to understand the world" and organize themselves according to their own worldviews.[46] For Mills, where recognition does not derive from Indigenous peoples own views of the world, recognition results in the erasure

[37] Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6:4 Contemporary Political Theory 437 at 438.
[38] See *ibid* at 441.
[39] See generally Michelle Daigle, "Awawanenitakik: The Spatial Politics of Recognition and Relational Geographies of Indigenous Self-Determination" (2016) 60:2 The Canadian Geographer 259 at 263.
[40] See Coulthard, "Subjects of Empire", *supra* note 37 at 438.
[41] See Glen Sean Coulthard & Gerald R Alfred, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*, Indigenous Americas (Minneapolis: University of Minnesota Press, 2014) at 3.
[42] See Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 72.
[43] See *ibid* at 91.
[44] See Taylor, *supra* note 28 at 25 and 64.
[45] See Mills, *supra* note 24 at 5.
[46] *Ibid*.

of Indigenous peoples own understandings of the world.[47] It is therefore understandable why Indigenous peoples approach the recognition framework with caution as it requires their participation in a system which does not support their worldviews.

Despite these criticisms, recognition as a model for informing the Indigenous-state relationship remains prevalent in Canada. The state has adopted the role of the recognizer and is therefore responsible for the protection of Indigenous interests.[48] Since the adoption of s.35 of the *Constitution Act, 1982*,[49] which is often regarded[50] as the roots for the application of recognition theory due to the specification that rights are "recognized and affirmed", the state has progressively recognised Aboriginal rights and its obligations to obligations to protect them. Examples include the right to fish for a moderate livelihood,[51] the right to self-government,[52] and the Crown's duty to consult Indigenous peoples.[53] Through its role as recognizer, the state is able to maintain and justify the continuance of a paternalistic Indigenous-state relationship.[54] In response to the controlling nature of state recognition, Indigenous peoples have sought alternatives methods to protect their own interests and constitutional orders. As an example, the Mi'kmaq have continuously sought clear and fulsome recognition of fishing rights. This has led them to pursue their own fishing governance regimes.[55] Although Indigenous groups push for a mutual relationship, the state has been reluctant to modify the liberal constitution and recognition remains the model of choice for reconciliation in Canada.

2.1.1. Judicial Role in Recognition

The recognition of Indigenous peoples, including their rights and constitutional orders, has been carried by the judiciary as opposed to through Indigenous-state negotiations. Due to the open-ended wording of s.35, the judiciary has controlled the specific definition and meaning of

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[47] See *ibid*.
[48] See generally Christina Yui Iwase, "Fiduciary Relationship as Contemporary Colonialism" (2012) 3:2 Arbutus 98–115.
[49] *Constitution Act, 1982, supra* note 19.
[50] See generally Kiera Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" in François Rocher & Miriam Catherine Smith, eds, *New Trends in Canadian Federalism*, 2nd ed (Peterborough: Broadview Press, 2003) 167 at 168.
[51] See *R v Marshall*, [1999] 456 SCR 3.
[52] See *R v Pamajewon*, [1996] 2 SCR 821.
[53] See e.g. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388.
[54] See Matthew V W Moulton, "Framing Aboriginal Title as the (Mis)Recognition of Indigenous Law" (2016) 67 UNBLJ 336 at 39.
[55] See Assembly of Nova Scotia Mi'kmaw Chiefs, *Moderate Livelihood Fishery Update* (2020).

Aboriginal rights through the process of recognition.[56] The judiciary has come a long way towards recognizing Indigenous peoples since the decision in *St Catherine's Milling* as rights and title are now understood as the product of reconciling prior occupation, sovereignty and jurisdiction as opposed to a "personal, usufructuary right, dependent upon the good will of the sovereign".[57] Reconciliation has been defined as needing to harmonize the prior occupation by Indigenous peoples with assertions of Crown sovereignty[58] and more broadly, between "aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[59] Reconciliation has come to shape the recognition discourse by placing reconciliation as a primary objective in recognizing rights and law. Like recognition, reconciliation is focused on increasing Indigenous participation in society and acknowledging the diversity amongst Indigenous peoples. A primary reason for creating co-management agreements has been to reconcile competing environmental interests and claims over territory. However, the interpretation of reconciliation maintained by the judiciary[60] is problematic as it requires reconciliation within rather than with crown sovereignty and the Canadian legal order. Any alternative interpretations of reconciliation, such as retaining two interdependent constitutional orders, has been abandoned in favour of a relationship which is one-sided and lacks mutuality.

This one-sided approach sees the judiciary framing issues related to recognition in a manner which aligns with the cosmology of the liberal state.[61] For example, the creation and assessment of Aboriginal title, which recognizes Indigenous peoples as the historical occupants of the land which has been claimed by Canada as a result of sovereignty,[62] is based in common law conceptions of property. To prove title, an Indigenous nation must prove the sufficiency, continuity and exclusivity of occupation.[63] For title, occupation requires "evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation…demonstrating that the land in

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[56] See Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood, 1999) at 56.
[57] *St Catherine's Milling and Lumber v R*, [1887] 13 SCR 577, s 5.
[58] See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 81.
[59] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *supra* note 53 at para 1.
[60] See e.g. *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020] 2020 SCC 4.
[61] See Moulton, *supra* note 54 at 37; Toby Rollo, "Mandates of the State: Canadian Sovereignty, Democracy, and Indigenous Claims" (2014) 27:1 Can J Law Jurisprud 225–238 at 229; See generally Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon" (1997) 42 McGill LJ 1011.
[62] See Moulton, *supra* note 54 at 342.
[63] See *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257.

question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group."[64] Similarly, occupation in the conventional liberal property sense requires proof of possession which can be established through evidence of resource exploitation, dwellings, or regular use of definite tracts.[65] In evaluating these requirements, the court takes into account the "Aboriginal perspective".[66] This suggests that, due to the *sui generis* nature of title—its unique character deriving from both the common law and Indigenous perspectives[67]—there is room to consider different conceptualizations of land ownership and use, such as using land for the transmission of Indigenous knowledge as was a feature of the successful claim in *R v. Sioui*.[68] However, these perspectives are only recognized to the extent that they are "cognizable" to the common law structure of property.[69] Indigenous peoples must transform their concepts of property use and ownership—which pointedly do not share a liberal foundation—in order for this recognition to occur.

Of course, framing Indigenous rights within liberal property theory has been criticized in dissenting opinions of the SCC. In *R v. Marshall*; *R v. Bernard*, Lebel and Fish JJ voiced their concerns with the majority's approach to Aboriginal title. They argued the Court must place greater emphasis on "Aboriginal conceptions of territoriality, land-use and property" than the common law, as "otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit with Euro-centric conceptions of property rights."[70] Despite assurances from the court that the "source of rights and title is not state recognition but rather the realities of prior occupation, sovereignty, and control",[71] the issue of fit and translation continues to underlie this debate as these "realities" are the definition of common and civil law rights. The reality of how Indigenous peoples understand issues, such as the interdependencies associated with land use, is not fully encompassed by the state constitutional order.

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[64] *Ibid* at para 38.
[65] See *Delgamuukw v. British Columbia*, *supra* note 58 at para 149.
[66] *Ibid* at para 147; *Tsilhqot'in Nation v. British Columbia*, *supra* note 63 at paras 34–36.
[67] See John Borrows & Leonard Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36:1 Alta L Rev 9.
[68] *R v Sioui*, [1990] 1 SCR 1025.
[69] See *R. v. Van der Peet*, *supra* note 2 at para 49.
[70] *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 127.
[71] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, *supra* note 60 at para 49.

In the paradigm of recognition, the requirement of transformation into a liberal legality supports the overarching goal of protecting the liberal legality. This can be seen in the creation of the justifiable infringement doctrine for Aboriginal rights and title in *R v. Sparrow,*[72] and *Delgamuukw v. British Columbia*.[73] Justifiable infringement acts as a limitation on recognition as it allows for the development of Aboriginal rights so long as they do not threaten the legal, social and economic aspects of the colonial project.[74] For example, infringing upon Aboriginal rights related to hunting, forestry, or traditional practices, may be justified if a project, such as harvesting timber, would provide further economic and social prosperity. The implicit endorsement of prioritizing the development of the state over Indigenous peoples is visible in *Delgamuukw* where rights are recognized within the liberal framework and a clear exception to overriding these rights is established. The effect of this development is that rights which would effectively limit growth should not be given absolute protection as to do so would jeopardize the fundamental principles of liberalism such as individual prosperity. The promotion of the liberal state in the recognition framework does not further an Indigenous-state relationship which is based in equality and reciprocity.

The interpretation of Aboriginal rights in a manner which co-exists within the existing state structures has led to criticisms that in its role as the recognizer, the judiciary has failed to fundamentally change the Indigenous-state relationship. One such critique is that recognition pays lip-service to Indigenous legal traditions and worldviews although they are not meaningfully incorporated into judicial recognition. This is a critique prevalent in the context of land recognition statements and the recognition of inherent rights. As Claude Denis points out, an initial statement recognizing inherent rights has little implication for the state, as it maintains the ability to shape any real recognition which occurs later on.[75] Lip-service can be seen in McLachlin CJC's approach to the Aboriginal perspective in *Marshall; Bernard.*[76] After emphasising the need to include and be sensitive to Aboriginal perspectives in proving title, the SCC held that occasional entry to and use of land was inconsistent with the court's approach to title, meaning that title was not proven

[72] *R v Sparrow*, [1990] 1 SCR 1075.
[73] *Delgamuukw v. British Columbia*, *supra* note 58.
[74] See Coulthard, "Subjects of Empire", *supra* note 37 at 451.
[75] See Claude Denis, "The Nisga'a Treaty: What Future for the Inherent Right to Aboriginal Self-Government" (2002) 7:1 Rev Const Stud 35 at 49.
[76] See Arif Bulkan, "Disentangling the Sources and Nature of Indigenous Peoples: A Critical Examination of Common Law Jurisprudence" 61:4 ICLQ 823 at 837.

for lands used seasonally.[77] Despite reference to Aboriginal perspectives on land use such as seasonal hunting, McLaughlin failed to include these as valid uses of land which would be sufficient to prove title. A less superficial inclusion of the Aboriginal perspective would understand the nature of traditional land use and adapt the understanding of title to allow for a declaration that seasonal use could count as proof of title. When recognition occurs in a manner which is superficial, it does not reconcile the Indigenous and state positions, nor does it contribute to furthering the parties' relationship. In order for the recognition model to establish a meaningful Indigenous-state relationship, recognition must be substantial and reflective of Indigenous and state constitutional orders.

2.1.2. The Snare of Translation

An additional aspect of recognition theory is the inevitability of translation, which drives concerns for constitutional capture. Where Indigenous constitutional orders interact with the Canadian constitutional order, this leads to Indigenous legal traditions becoming distorted, through the act of translation, from their original meanings.[78] State institutions undertake the recognition and translation of Indigenous understandings and peoples in an unequal manner[79] leading Nigel Bankes to aptly term it a "one-way street" due to the priority given to European conceptualizations of law.[80] These institutions translate an Indigenous practice into something comprehensible by that institution without consideration for the core Indigenous perspective on that practice.[81] For example, *adawx* in the Gixtaan language lacks a single equivalent English-language phrase due to its multiple meanings (oral traditions about ancestors and territories, oral records, or oral histories which are property of particular groups) yet a specific interpretation must be chosen.[82] Any recognition of Indigenous law, whether it be though accommodation, incorporation or delegation,[83] is accompanied by translation in order to ensure Western institutions understand what

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[77] *R. v. Marshall; R. v. Bernard*, *supra* note 70 at para 247.
[78] See Chief Justice Lance Finch, *The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice* (Continuing Legal Education Society of British Columbia, 2012) at 2.1.6.
[79] See Coulthard, "Subjects of Empire", *supra* note 37 at 444.
[80] Nigel Bankes, "Ignoring the Relevance of Customary Property Laws" (2006) 55 UNBLJ 120 at 127.
[81] See Marie Ann Battiste & James Sákéj Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich, 2000) at 79–82.
[82] See Finch, *supra* note 76 at 2.1.6.
[83] See Kirsten Anker, "Law, Culture, and Fact in Indigenous Claims: Legal Pluralism as a Problem of Recognition" in Rene Provost, ed, *Culture in the Domains of Law* (Cambridge: Cambridge University Press, 2017) 127 at 143–144.

is being recognized. For example, the Tla'amin self-government agreement recognizes the Tla'amin Nation's authority to make laws[84] but only insofar as the legal system operates within the Canadian state.[85] Through requiring the Tla'amin to create a constitution similar in form and substance to the Canadian Constitution, Tla'amin laws and practices are removed from their original context and recreated in one which is identifiable to state institutions.

It is helpful to approach this issue using Mills' "tree" to distinguish types of translation. Stories of creation form the roots and condition the constitutional order (trunk) which in turn shapes the legal traditions (branches) and ultimately what is considered law (leaves).[86] At first glance, the translation may be understood as occurring at the level of individual laws (i.e. translating Wet'wet'sun laws on access to territory to trespass). However, translation distortion is not simply at the level of leaves but goes down to the roots of a constitutional logic. The liberal legality is not rooted but is freestanding.[87] In a rooted legality, lifeworlds are rooted in reciprocal networks of relations with the non-human world which provides the logic that structures the legal order. In contrast, the liberal legality is created through human reason and separated from the natural world as a conceptually distinct realm. Therefore, to translate a law across these logics requires the removal of Indigenous ways of knowing from their rooted logic and placing them in a foreign logic which does not share the same foundational underpinnings. While this translation allows for understanding to be accessible for Canadian institutions and English speakers generally, translation results in damage to the Indigenous institutions and understandings themselves due to its assimilative effects.[88]

One incident of this distortion is where Indigenous law is recognized in substance but not form. The clearest example of this type of recognition is in claims for Aboriginal rights where the courts treat Indigenous practices as facts of such practices or perspectives rather than having normative significance.[89] This can be seen in *Coastal GasLink Pipeline Ltd. v. Hudson* where the Court held that Wet'suwet'en customary laws pertaining to entry to territory had not been recognized as an "effectual part of Canadian law", and therefore could not be applied as law

[84] See *Tla'amin Final Agreement* (2014) c 15.1.
[85] See *ibid* cs 2 and 15.8.
[86] See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 863.
[87] See *ibid* at 864.
[88] See Rollo, "Mandates of the State", *supra* note 61 at 230.
[89] See generally Bankes, *supra* note 80 at 125.

determinative of the questions at hand.[90] Wet'suwet'en laws would however be admissible as fact evidence of the Indigenous legal perspective.[91] The effect of this distinction is twofold: Indigenous issues are not to be judged by their own laws, and these laws are mistranslated into fact evidence due to the failure to recognize the legitimacy of Indigenous constitutional orders. As a result, Indigenous law is not recognized as law but fact which is considered within the common law structures.[92] If law is taken as law, it is considered a normative source[93] and must be recognized as authoritative by an external legal system—the Canadian legal system.[94] However, the state retains control over recognition, which results in Indigenous law being considered subsidiary to state law due to pre-existing ethnocentric assumptions and biases regarding the nature of law.[95] The state resists recognizing the normativity of Indigenous law, instead reducing it to a social fact which ultimately undercuts its autonomy as law.[96] Therefore, Indigenous legal orders, while technically existing independently of the state,[97] must defer to the state if they are to be recognized and applied in some form to a particular situation. Once again, this results in asymmetrical recognition as Indigenous law is put on a lower footing than state law.[98]

The judiciary is aware of the challenges in recognizing Indigenous law but has opted to defer the issue rather than address the underlying constitutional snare. In *Coastal GasLink v. Hudson*, the court avoided making pronouncement on Indigenous law due to the "infancy" of the reconciliation between the common law and Indigenous law.[99] While it is understandable that courts are hesitant to start this reconciliation process (judges often lack training in specific Indigenous legal traditions, and parties are critical of the judiciary's role),[100] there will not be any

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[90] *Coastal GasLink Pipeline Ltd v Hudson*, [2019] BCSC 2264 at 128.
[91] See *ibid* at para 129.
[92] See Jacob T Levy, "Three Modes of Incorporating Indigenous Law" in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 297 at 297.
[93] See Kirsten Anker, "Postcolonial Jurisprudence and the Pluralist Turn: From Making Space to Being in Place" in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* (Cambridge: Cambridge University Press, 2017) 261 at 279.
[94] See *ibid* at 278.
[95] See *ibid* at 277.
[96] See *ibid* at 279.
[97] See generally Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013) 229 at 1–11 (source and nature of Indigenous laws).
[98] See Ralf Michaels, "The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge From Global Legal Pluralism" (2005) 51 Wayne L Rev 1209 at 1234; See also Anthony J Connolly, "Legal Pluralism and the Interpretive Limits of Law" in Rene Provost, ed, *Culture in the Domains of Law* (Cambridge: Cambridge University Press, 2017) 23 at 46.
[99] *Coastal GasLink Pipeline Ltd. v. Hudson*, *supra* note 90 at para 139.
[100] See generally Finch, *supra* note 78.

progress towards reconciling these legal orders until courts begin to make pronouncements recognizing Indigenous law *as law*. In practice, this entails judicial acknowledgement that Indigenous constitutional orders produce authoritative law of their own accord. Judicial acknowledgement is necessary, as the alternative—to merely recognize its authoritative nature—would require translation, and necessitate the impossible task of transposing Indigenous constitutional orders from a rooted to a liberal legality. Moreover, the lack of pronouncement results in a cyclical process: law is not previously recognized as law, so it must be used as fact to assert its existence, but the court will not recognize it as law in that decision, so in the next case, it must be presented again as fact. The nature of this recognition does not serve to dismantle colonial structures or achieve justice; it maintains these structures and continues to identify Indigenous legal orders as inferior. The maintenance of these colonial structures supports Coulthard's assertion that recognition simply reproduces state power.[101]

2.1.3. Implicit Requirements of the Liberal Constitution

Where recognition appears to be at issue, the liberal constitution remains a neutral host. It entertains different ideas about the claim in question, or different cultural entities, and is then the impartial arbiter between them rather than a participant in the web of interdependencies. In *Mitchell v. M.N.R.*., Binnie J's work regarding the Two Row Wampum evidences the implicit work of the liberal constitutional order. Binnie acknowledged the Wampum, submitted by the Mohawk, as supporting the principle of two sovereigns co-existing without interference.[102] After entertaining this interpretation, Binnie J returned to and adopted a "modern" understanding of the Two Row Wampum as an idea of "a "merged" or "shared" sovereignty" which is reflective of "some of the realities of a modern state."[103] If Binnie had taken the roots of the wampum seriously as opposed to misinterpreting and rewriting it,[104] this would have recognized two distinct sovereignties (the state and the Mohawk) which exist independently but interdependently with one another. Such an interpretation would have acknowledged the judiciary, and therefore the state, as part of a lifeworld of interdependent beings which are subject to the Wampum as opposed to it only being relevant

[101] Coulthard, "Subjects of Empire", *supra* note 37 at 451.
[102] See *Mitchell v MNR*, [2001] 1 SCR 911 at para 128.
[103] *Ibid* at para 129.
[104] See Larry Chartrand, "Indigenous Peoples: Caught in a Perpetual Human Rights Prison" (2016) 67 UNBLJ 167 n 47.

for the Mohawk in the case. However, by remaining a neutral arbiter in the case, Binnie and the liberal constitution watch the case play out in an arena confined by the liberal constitution.

Moreover, when seeking to recognize Aboriginal rights or Indigenous law, western epistemological orders are maintained.[105] Their retention ensures the continuity of the ethnocentric and colonial nature as ways of knowing within liberal constitutionalism. Ways of proving or recording information must meet the criteria of western institutions, such as by evidence being contained and presented in writing. This limitation can be seen in the development of polar bear conservation plans whereby Inuit knowledge was not considered sufficient as it was not contained in writing or recorded in informational sessions.[106] Regardless of its form, the ease of recognition is prioritized by maintaining these epistemological aspects, resulting in the liberal framework of the state remaining untouched.[107] This forces Indigenous constitutional orders to comply with an epistemology which is foreign and also limits how Indigenous perspectives can be recognized within existing constitutional structures.

This trend of forced compliance exists even where Indigenous law is recognized as authoritative for a particular matter as there is an implicit requirement to conform to the state legal order. Recognition here is subtle and intricate, seeming to embrace Indigenous legal orders as autonomous and on equal footing. However, when closely analyzed, the autonomy which results is subject to significant restraints.[108] For example, the *James Bay and Northern Quebec Agreement Complementary Convention Nº 18* provides that in determining who is an Inuk for the purposes of beneficiary status, "Inuit customs and traditions" can be considered.[109] From the outset, this appears to be a positive development as Inuit law is not required to be immediately translated into common law understandings of identity, nor is it considered non-authoritative. At a deeper level, the politics of recognition are still at work to recognize Inuit customary law within the liberal legal framework. Sébastien Grammond explains that *Complementary Convention Nº 18* has implicitly required the codification of such traditions and customs to ensure they are non-discriminatory and

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[105] See Kirsten Anker, "Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" (2017) 33:2 WYAJ 15 at 27.
[106] See *Final Revisions to the Nunavut Polar Bear Co-Management Plan, Appendix 1* (Nunavut Wildlife Management Board, 2019).
[107] See generally Mark Bennett, "Indigenous Autonomy and Justice in North America" (2004) 2:2 New Zeal& J of Public & Int'l L 203 at 320.
[108] See Sébastien Grammond, "L'Appartenance aux Communautés Inuit du Nunavik: Un Cas de Réception de l'Ordre Juridique Inuit?." (2008) 23:1–2 Can J L & Soc'y 93 at 117. [translated by author]
[109] Reproduced in *Convention de la Baie James et du Nord Quebecois et Conventions Complementaires* (Québec: Publications du Québec, 2006) , s 3A.3.1(c).

therefore compliant with the *Charter*, as well as create Western style administrative tribunals to ensure democratic legitimacy.[110] As such, to obtain any merit, Inuit customs and traditions were required to be transformed and expressed in a Western form recognizable to the Canadian institutions.[111] Grammond concludes that as a result of this underlying recognition requirement, the resulting paradigm remains similar to delegation albeit with a greater degree of Inuit control over content.[112] Despite advancements to recognize Indigenous constitutional orders, it remains that in order to have this recognition, Indigenous orders must take up the logics of western institutions by transforming themselves into the liberal legal framework. In doing so, the recognition model does not consistently allow for peaceful co-existence based on reciprocity.

2.2. Self-Determination

The second framework through which the Indigenous-state relationship can be understood is self-determination. This framework is inherently connected to recognition because the state deems self-determination to be the object of recognition. Calls for self-determination in the 1980s were reframed in the language of recognition, due in part to the Royal Commission on Aboriginal Peoples (RCAP) pushing for the recognition of a renewed relationship, and the Assembly of First Nations' adoption of this language.[113] Yet, this language shift does not mean the framework of self-determination is no longer relevant. The enactment of the *United Nations Declaration on the Rights of Indigenous Peoples*[114] (UNDRIP) has recast the right to self-determination as a foundation upon which other Indigenous rights are be realized.[115] This has led to a notable uptake in using the language of self-determination.

Despite the widespread use of the term self-determination, there is a diverse understanding of its meaning, and the term lacks a definite legal characterization.[116] This thesis proposes that such diversity is not due to a lack of agreement on the end-goals associated with self-determination

[110] Grammond, "L'Appartenance aux Communautés Inuit du Nunavik", *supra* note 108 at 115–116.
[111] See *ibid* at 118.
[112] *Ibid*.
[113] See Coulthard, "Subjects of Empire", *supra* note 37 at 437.
[114] *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, UN GAOR, 2 October 2007.
[115] See *Aspirana Mahuika et al v New Zealand*, HRC Communication No 547/1993 at para 9.2.
[116] See Christie, *supra* note 25 at 20; See also Malgosia Fitzmaurice, "The Question of Indigenous Peoples' Rights: A Time for Reappraisal?" in Duncan French, ed, *Statehood and Self-Determination* (Cambridge: Cambridge University Press, 2013) 349 at 353.

but due to the interpretation of the word itself. If a word's meaning is shaped by its use,[117] it follows that self-determination has two different conceptualizations when used by the state and by Indigenous peoples. By using the term within different ontologies and epistemologies, contrasting assumptions, connotations and implications associated with a particular meaning are produced. For both parties, self-determination is focused on determining one's own future, yet, how this is oriented and achieved differs. For the state, self-determination is pursued according to liberal principles of sovereignty, territorial integrity, and equality. Conversely, epistemological and ontological orders which form the roots of Indigenous society are not grounded in liberal values. As previously noted, Indigenous constitutional orders are rooted in lifeworlds and respect for the earth.[118] Self-determination is thus focused on enhancing capacities for decision-making that are themselves grounded in the rooted constitutional order.

2.2.1. Liberal Understandings of Self-Determination

In international law, self-determination originated as a response to European decolonization,[119] albeit to the exclusion of Indigenous peoples.[120] Where colonial powers vacated colonies, such as in Africa, emphasis was placed on the end-state goal of, typically, independence. Settler-colonial states, including Canada, focused on the establishment of a sustainable relationship between the peoples and the colonizing state.[121] Through lobbying international organizations in the 1980s, Indigenous peoples were successful in establishing a working group at the United Nations, and eventually passing the UNDRIP in 2007. Indigenous peoples are now recognized in international law as possessing a collective right to self-determination,[122] which is distinct from

[117] See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 103–116.
[118] See Mills, *supra* note 23 at 136.
[119] See e.g. *Declarations on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, Res 2625 (XXV), 24 October 1970.
[120] See Sheryl Lightfoot & David MacDonald, "The United Nations as both Foe and Friend to Indigenous Peoples and Self-Determination" in Jakob Avgustin, ed, *United Nations: Friend or Foe of Self Determination?* (Bristol: E-International Relations, 2020) at 34.
[121] See Benedict Kingsbury, "Reconstructing Self-Determination: A Relational Approach" in Pekka Aikio & Martin Scheinin, eds, *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Åbo: Åbo Akademi University, 2000) at 24.
[122] See *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 114 Art. 3 .

the general right to self-determination,[123] and encompasses the "right to freely determine their political status and freely pursue their economic, social and cultural development".[124]

This version of self-determination has been traditional conceptualized as a form of liberal legality. The League of Nations in the *Aaland Islands,* and later the International Court of Justice in the *Western Sahara* and *Kosovo* advisory opinions endorsed self-determination as right founded in the values of freedom and justice.[125] While not always explicit, self-determination, as manifested in international and domestic law, has been and continues to be grounded in liberalism. As discussed previously, liberal theory focuses on individualism, freedom, and equality. At first glance, it would appear that self-determination—a group right which creates a distinct status—could not be supported by a liberal legality as its exercise would result in the loss of equal citizenship. However, Indigenous rights including self-determination can be justified by liberal multiculturalism.[126] To protect cultural differences of peoples who were subsumed by the state, the state can recognize and grant those peoples a right of self-government.[127] Scholars such as Will Kymlicka,[128] Martin Papillon,[129] and Sandra Tomsons[130] therefore argue that liberalism can support self-determination by subsuming it as a right within the existing state structure. As a result of this incorporation, any claims to sovereignty are resolved through requiring Indigenous self-determination and sovereignty to become subject to and lesser than the state's sovereignty.[131] This is endorsed in *Cherokee Nation v. Georgia* which views Indigenous peoples as forming "domestic dependent nations" which remain subject to the state and has remained the foundational concept

[123] See Jessie Hohmann & M Weller, eds, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, 1st ed, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2018) at 132.
[124] *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 114 Art. 3.
[125] *Aaland Islands*, [1920] 1920 LNOJ Spec Supp No 3 at 317–318; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, [2010] 403 ICJ Reports 2010; *Western Sahara (Advisory Opinion)*, [1975] ICJ Reports 1975 12 at paras 54–59.
[126] See generally Kirsty Gover, "Indigenous Jurisdiction as a Provocation of Settler State Political Theory" in Lisa Ford, Tim Rowse & Anna Yeatman, eds, *Between Indigenous and Settler Governance* (New York: Routledge, 2012) 187 at 191.
[127] See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford Political Theory (Oxford: Clarendon Press, 1995) at 75.
[128] Will Kymlicka & W J Norman, "Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts" in Will Kymlicka & W J Norman, eds, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) at 31.
[129] Martin Papillon, *Federalism From Below? The Emergence of Aboriginal Multilevel Governance in Canada: A Comparison of The James Bay Crees and Kahnawá:ke Mohawks* University of Toronto, 2008) [unpublished] at 35.
[130] Sandra Tomsons, "Liberal Theory and Aboriginal Sovereignty" in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: Oxford University Press, 2013) 254 at 258.
[131] See Bennett, *supra* note 107 at 250.

for Indigenous sovereignty in the United States.[132] This case has been persuasive in Canadian jurisprudence on Indigenous sovereignty and self-government.[133]

Explaining self-determination through liberal theory's notion of sovereignty draws support from the international law internal/external distinction of self-determination. This distinction understands that a people's claim to self-determination can "normally be fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development *within the framework of an existing state*".[134] By limiting exercises of self-determination to the internal sphere, questions relating to Aboriginal sovereignty and secession are set aside,[135] instead redirecting focus to the protection of territorial integrity and Crown sovereignty.[136] As a result, expressions of self-determination are confined to the existing liberal state structure, as seen in the recognition model. Christie explains that "where self-determination is continuously defined and limited by liberal underpinnings, the structure and form of colonialism are maintained."[137] The continuance of colonialism is a primary criticism of self-determination as enunciated by the state, and brings into question the appropriateness of the framework for establishing the Indigenous-state relationship.

When seeking to enforce a right to self-determination, Indigenous peoples often reference the right as expressed in international law.[138] Yet, the right itself is a product of an international legal order, the architecture and institutions of which are grounded in a liberal legality and justified through theories of maintaining stability and justice.[139] As international human rights developed, these too were grounded in, and spoke to, liberal ideals which promoted individualism, freedom and equality.[140] For self-determination, this grounding has led to the right being based on an

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[132] *Cherokee Nation v Georgia*, 30 U.S. 1 at 2.
[133] See *Campbell v British Columbia (Attorney General)*, [2000] 1123 BCSC at para 88.
[134] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 126 [emphasis added].
[135] See Thomas Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000) at 80.
[136] See Michael A Murphy, "Representing Indigenous Self-Determination" (2008) 58:2 UTLJ 185 at 186.
[137] Robert Murray, "Liberalism, Aboriginal Rights, and the Canadian Moral Identity" in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: Oxford University Press, 2013) 123 at 143.
[138] See *Affirming First Nations Rights, Title and Jurisdiction* (Assembly of First Nations National Policy Forum, 2018); Dorothée Cambou, "The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination" (2019) 23:1 IJHR 34; See also John Borrows et al, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Ottawa: CIGI Press 2019) (UNDRIP in Canada).
[139] See Michael Freeman, "The Right to Self-Determination in International Politics: Six Theories in Search of a Policy" (1999) 25:3 Review of International Studies 355 at 358.
[140] See generally Craig Scott, "Indigenous Self-Determination and Decolonization of the International Imagination: A Plea" (1996) 18:4 Human Rights Quarterly 814 at 815.

ontology of autonomous individuals who act independently of others to secure their own future. This foundation is characterised by centralized government, legitimacy, territorial integrity and sovereignty. Throughout the exercise of self-determination, the principles of territorial integrity and sovereignty are prioritised. This results in the creation of states while maintaining the underlying liberal state structure.

In exercising this right, Indigenous peoples have a right of autonomy or self-government pertaining to internal and local affairs.[141] In Canada, self-government is the hegemonic expression of self-determination, yet, these terms are not synonymous. Gordon Christie offers a distinction: self-government exists within and under the sovereignty of the state, whereas self-determination co-exists with state contentions of sovereignty.[142] This distinction is relevant, but has been somewhat superseded by Article 4 of the UNDRIP, which explicitly states self-government to be an expression of self-determination.[143] Asch argues that splitting self-determination over Article 3 (self-determination) and 4 (self-government) leaves the determination of the state-Indigenous relationship to be decided by the state, and as such, the UNDRIP legitimizes the state's power over Indigenous peoples.[144] When self-government rights are exercised in Canada, the state maintains control over the recognition of Indigenous authority and subjects Indigenous constitutional orders to the Canadian constitutional order.[145] Under this construction of self-determination vis-à-vis self-government, Indigenous peoples are unable to escape the snare of liberalism despite the ability to control their internal affairs.

Legislation, which includes the constitutional amendment recognizing the right to self-government,[146] has not come to fruition[147] since release of the *Report on Indian Self-Government*.[148] Instead, self-government negotiations have occurred through modern treaties as

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[141] See *ibid* Art. 4.
[142] Gordon Christie, *Aboriginal Nationhood and the Inherent Right to Self-Government* (National Centre for First Nations Governance, 2007) at 4.
[143] *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 114.
[144] Michael Asch, "UNDRIP, Treaty Federalism, and Self-Determination" (2019) 24:1 Rev Const Stud 1 at 3–4.
[145] See Stephanie Irlbacher-Fox, *Finding Dahshaa: Self-government, Social Suffering and, Aboriginal Policy in Canada* (Vancouver: University of British Columbia Press, 2009) at 7.
[146] *Consensus Report on the Constitution: Final Text, Charlottetown Accord* (Charlottetown: Government of Canada, 1992) at 14–15.
[147] See generally Diana Ginn & Nicholas Hooper, "Recognition of Aboriginal Self-Government in Canada: The Changing Landscape" (2017) 46:4 AQ 395 at 400–401 (detailing legislation).
[148] Keith Penner, *Report of the Special Committee: Indian Self-Government in Canada* (Ottawa: House of Commons Canada, 1983).

federal policy; thereby embedding the right within the constitutional legitimacy of s.35(1).[149] Driven by viewing the right as a strong claim for recognition,[150] this top-down approach to self-determination and inclusion of the right within s.35(1) has effectively subsumed self-determination into the liberal legality of rights. Self-government agreements and exercises of the right are thus restricted to development within the Canadian Constitution. For example, despite Indigenous peoples being perceived as exercising internal self-determination through self-government agreements, these agreements place limits on jurisdiction and the subject matter of law-making. Returning to the *Tla'amin Final Agreement*, the federal and provincial government retains jurisdiction over the management and conservation of fish and aquatic habitat.[151] By linking valid exercises of self-government (the exercise of harvesting rights for fish) with adherence to the decisions of state institutions, the liberal project is furthered. Self-determination is restricted to ensure compatibility with the overarching state framework. Due to this restriction, claims for self-government and the establishment of self-government agreements are often focused on the legal and political recognition of self-government and its effects, such as establishing jurisdictions, as opposed to fundamentally restructuring the understanding of self-government.[152]

2.2.2. Rooted Understandings of Self-Determination

The above discussion suggests that self-determination, when expressed as a human right grounded in liberalism, is incompatible with Indigenous ontological and epistemological beliefs. Relationships with land and other nations are central to Indigenous understandings of self-determination.[153] However, constitutional dialogue has required Indigenous claims, including self-determination, to be phrased in the dominant normative language, which "may distort or misdescribe the claim [Indigenous peoples] would wish to make if it were expressed in their own languages".[154] Using the language of self-determination to describe the rooted conception may not

[149] See Turner, *supra* note 24 at 78–79; Also see *Campbell v. British Columbia (Attorney General)*, *supra* note 132 at para 139.
[150] See Jakeet Singh, "Recognition and Self-Determination: Approaches from Above and Below" in Avigal Eisenberg et al, eds, *Recognition versus Self-determination: Dilemmas of Emancipatory Politics* (Vancouver: University of British Columbia Press, 2015) 47 at 63.
[151] *Tla'amin Final Agreement*, *supra* note 84 c 9.5.
[152] See Jeff Corntassel, "Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse" (2008) 33:1 Alternatives 105 at 107.
[153] See Daigle, "Awawanenitakik", *supra* note 39 at 264.
[154] Tully, *supra* note 117 at 39; Monture-Angus, *supra* note 56 at 22.

be helpful due to the liberal connotations associated with the term; liberal philosophies have used it to refer to a contained individual who exercises their autonomy through decision-making to improve their own interest. Mills is correct in stating that speaking in terms of self-determination uses settler language.[155] Tracey Lindberg is also critical of the use of such terms, arguing that it is not readily compatible with Indigenous understandings of reciprocity and obligations.[156]

Notwithstanding these language hurdles, it is possible to understand self-determination from a rooted perspective. Indigenous conceptions of self-determination are holistic and based on the principle of "all my relations", and can therefore be distinguished from liberal interpretation which understands only individuals as constituting a "self".[157] If different ontological underpinnings between Indigenous and settler notions of self-determination are not acknowledged, claims for self-determination will be restricted to its dominant conceptualization by the state and remain unfulfilled.[158] Each rooted logic has a unique perspective on self-determination—as not all Indigenous peoples are homogenous—yet, certain concepts are shared. It is therefore necessary to explore what an Indigenous understanding of self-determination entails before it can be established as a framework.

A primary distinction between rooted and liberal self-determination is the language of *rights*. Under international and domestic law, self-determination is constructed using the language of liberal human rights.[159] Despite adoption of this language by some Indigenous peoples, Mills asserts that rooted logics operate through claims of *responsibility* as opposed to rights.[160] Bettina Koschade and Evelyn Peters raise a valid concern that if self-determination is understood as a responsibility, the normative nature of self-determination will be reduced due to the heavier normative weight associated with the language of rights.[161] While valid, this concern should not

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[155] Mills, *supra* note 23 at 160.
[156] Tracey Lindberg, *Critical Indigenous Legal Theory* University of Ottawa, 2007) [unpublished] at 44; Monture-Angus, *supra* note 56 at 35–38.
[157] See Leroy Little Bear, "An Elder Explains Indigenous Philosophy and Indigenous Sovereignty" in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: Oxford University Press, 2013) 6 at 7.
[158] See Daigle, "Awawanenitakik", *supra* note 39 at 267.
[159] See generally Government of Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government", online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>.
[160] Mills, *supra* note 23 at 152.
[161] Bettina Koschade & Evelyn Peters, "Algonquin Notions of Jurisdiction: Inserting Indigenous Voices into Legal Spaces" (2006) 88:3 Geografiska Annaler 299 at 302; Cf John Borrows, "Contemporary Traditional Equality: The Effects of the Charter on First Nation Politics" (1994) 43 UNBLJ 19 at 23 ("The parlance of "rights" has meaning to

lead to the prioritization of a rights-based framework. In using a rooted understanding of self-determination, it is necessary to make the ideological shift from a rights-based to a responsibility-based notion; anything less fails to understand and accept a basic underpinning of the rooted logic. Part of this shift requires acknowledgement of and respect for a different theory of "rights" as legitimate and co-existing.[162] This suggests a need to broaden normative language used in Canadian law by including language associated with Indigenous constitutional orders.

Mills recognizes these concerns and notes the shift by both elders and Indigenous scholars towards interpreting rights *as* responsibilities. This sees rights emerging through the fulfillment of responsibilities and obligations which individuals are vested with and owe to all of creation.[163] Self-determination must be understood as creating relationships with and responsibilities owed to other beings. An example of this can been seen in the Algonquin perspective on jurisdiction. Under the traditional liberal expression, exercising rights to self-determination results in the granting of exclusive or concurrent jurisdiction regarding law-making and governance.[164] In contrast, the Algonquin associate jurisdiction with the responsibility to take care of the land and continue practices which create relationships with the land.[165] When understood in the responsibility-based framework, the relationality and interdependence between peoples and beings is clear.[166] If self-determination is perceived as a "right" which is claimed against a specific institution, the importance of relationality is lost and it becomes difficult to see how the claimant holds any obligations to other beings.

Interdependence and interrelatedness are important elements of Indigenous constitutional orders. Respect for these principles requires the acknowledgement that an individual's decisions and actions affect other beings. When applied to an understanding of self-determination, Michael Murphy uses the term relational self-determination which:

> encompasses a sphere of autonomy for self-determining groups, but also recognizes that relations of complex interdependence place both practical and ethical limitations on autonomy, creating the need for shared or co-operative

many people. People can partially understand us when we speak this language. It is true that something gets lost in the translation, but what else do we have? In reconstructing our world we cannot just do what we want. We require a measure of our oppressors' cooperation to disentangle ourselves from the web of enslavement they created.").

[162] See Monture-Angus, *supra* note 56 at 55.

[163] See Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 166.

[164] See Asha Kaushal, "The Politics of Jurisdiction" (2015) 78:5 The Modern Law Review 759 at 764.

[165] See Koschade & Peters, "Algonquin notions of jurisdiction", *supra* note 160 at 307.

[166] See *ibid* at 306; Mills, *supra* note 23 at 152.

> forms of governance to manage this interdependence in a manner which is both effective and democratic.[167]

Self-determination is thus holistic as it connects independence with dependency on others.[168] This connection embodies the principle of non-domination, which supports interdependence and relationality, rather than non-interference.[169] Where self-determination is expressed, governing through processes of consensus will ensure all parties' responsibilities and duties are met. This can be seen in the co-management processes on Haida Gwaii, as the Council of the Haida Nation, along with provincial and federal governments are able to comply with their pre-existing obligations while maintaining a management plan focused on interdependencies.

As with liberal self-determination, freedom and independence are integral to the rooted understanding of self-determination, albeit exercised in conjunction with interdependence.[170] Indigenous nations should be independent—not absorbed into the Canadian body politic[171]—while establishing a healthy relationship with the different levels of Government.[172] John Borrows summarizes that within a "respectful relational context, the quest for freedom to live a good life becomes a self-governing activity, a simultaneously individual and collective practice…In this respect, freedom is pursued inter-subjectively".[173] These principles promote dialogue and engagement with others as part of an ongoing relationship,[174] which eliminates the possibility of self-determination leading to separation from the state. Similarly, this is the foundation for relationships with other nations, and as Laurelyn Whitt argues, is not dependent upon a binding treaty.[175] Therefore, if self-determination is employed in its rooted conceptualization,

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[167] Michael Murphy, "Indigenous Peoples and the Struggle for Self- Determination: A Relational Strategy" (2019) 8 Can J Hum Rts 67 at 71.
[168] See Little Bear, *supra* note 157 at 7.
[169] See Roderic Pitty, "Restoring Indigenous Self-Determination through Relational Autonomy and Transnational Mediation" in Marc Woons, ed, *Restoring Indigenous Self-Determination: Theoretical and Practical Approaches* (Bristol: E-International Relations, 2015) 65 at 70; See generally Iris Young, "Two Concepts of Self-Determination" in Stephen May, Tariq Modood & Judith Squires, eds, *Ethnicity, Nationalism, and Minority Rights* (Cambridge: Cambridge University Press, 2005) 176 at 181 (non-interference and self-determination).
[170] See John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 47–48.
[171] *Contra* Canada, Indian and Northern Affairs, *Statement of the Government of Canada on Indian Policy* (Ottawa: Department of Indian and Northern Affairs, 1969).
[172] See *ibid* at 47.
[173] John Borrows, *supra* note 170 at 10
[174] See Scott, "Indigenous Self-Determination and Decolonization of the International Imagination", *supra* note 140 at 819.
[175] Laurelyn Whitt, "Transforming Sovereignties" in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: Oxford University Press, 2013) 181 at 185.

independency and relationality should overcome the lack of a pre-existing Indigenous-state treaty to ensure a continued relationship.

Despite strong foundations for self-determination in this rooted logic, it is necessary to consider any impacts colonialism has had on its expression. Christie in particular raises concerns regarding these impacts on identity and Indigenous understandings of self-determination.[176] In explaining Omushkegowuk self-determination, Michelle Daigle is critical that as knowledge and understanding of places disappears, the ability to understand self-determination will also be lost.[177] Colonial violence has resulted in the destruction of Indigenous languages, places for land-based practices to occur, and the separation of communities from their traditional lands. All of this hinders the ability of Indigenous peoples to exercise self-determination which is lived and relational. It is therefore critical to ensure the Indigenous peoples have the means and space to foster their lifeworlds and territories to effectually exercise self-determination.

An Indigenous perspective of self-determination can be reduced to an increase in decision-making abilities within the context of interdependence.[178] A precise future cannot be prescribed because it is contingent on others. Therefore, focus is turned to key ideals of fostering the "good life" and everything which is related to that life.[179] When based upon this model, the purpose of self-determination is neither to separate from the state, nor destroy it (as some fear), but instead to allow Indigenous peoples to make their own decisions, reflective of their own worldviews, while ensuring the continuity of relationships.

2.3. Treaty Federalism

A third framework on which it is possible to base the Indigenous-state legal relationship is the nation-to-nation model vis-à-vis treaty federalism. This framework outlines a model whereby Indigenous and state constitutional orders can be distinct but act interdependently. For scholars such as Henderson, Ladner, and Tully, the recognition and inescapable translation of Indigenous law into Canadian legal structures in its current manifestation is not sufficient as it fails to recognize the distinct relationship between Indigenous nations and the Crown. This failure is an underlying theme for proponents of treaty federalism.

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[176] Christie, *supra* note 142 at 20.
[177] Daigle, "Awawanenitakik", *supra* note 39 at 267.
[178] See Little Bear, *supra* note 157 at 7.
[179] See Monture-Angus, *supra* note 56 at 29.

Treaty federalism denotes the existence of a "plurality of constitutional orders within and across state boundaries".[180] It recognizes Indigenous governing institutions as distinct constitutional orders, which exist in parallel with the Canadian constitution and federalism.[181] This may be understood, in some circumstances, as creating a relationship with the state which also allows for Indigenous peoples to express their rooted self-determination. Premised on historic treaties formed between the Crown and Indigenous nations, treaty federalism identifies distinct constitutional orders[182] which are said to have created nation-to-nation relationships. Importantly, this model does not require the creation of modern treaties, only an acknowledgement of Canada's "pluriconstitutional nature".[183] A nation-to-nation relationship is premised upon principles of interdependence, mutual recognition, and consent[184] and acknowledges Indigenous peoples as self-determining polities.[185] Such treaties included affirmations of a commitment to such relationships and entailed mutual recognition of self-determination, sovereignty, and jurisdiction by confirming the right of each nation to govern itself.[186] When the nation-to-nation relationship is construed in this manner, traditional Canadian federalism remains intact. The goal of treaty federalism is not the destruction of the state, as critics such as Thomas Flanagan argue,[187] but the improvement of the relationship with the state.[188] It requires the "consolidation of treaty federalism and provincial federalism" to create a "legitimate Canadian partnership".[189]

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[180] Patrick Macklem, "The Constitutional Identity of Indigenous Peoples in Canada: Status Groups or Federal Actors?" in Jean Cohen, Andrew Arato & Astrid von Busekist, eds, *Forms of Pluralism and Democratic Constitutionalism* (New York: Columbia University Press, 2018) 117 at 3.
[181] See Martin Papillon, "Nation to Nation? Canadian Federalism and Indigenous Multi-Level Governance" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 4th ed (Toronto: University of Toronto Press, 2020) at 404.
[182] See James (Sa'ke'j) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241 at 250.
[183] John Borrows, "Canada's Colonial Constitution" in Michael Coyle & John Borrows, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17 at 17; See also Kiera Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" *supra* note 55 at 187.
[184] See Frances Abele & Michael J Prince, "Four Pathways to Aboriginal Self-Government in Canada" (2006) 36:4 American Rev Can Stud 568 at 583.
[185] See Martin Papillon, "The Two Faces of Treaty Federalism" in Alan Gagnon & James Bickerton, eds, *Canadian Politics*, 7th ed (University of Toronto Press, 2019) 217 at 8; See Henderson, *supra* note 182.
[186] See generally Kiera Ladner, "Take 35: Reconciling Constitutional Orders" in Annis May Timpson, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (Vancouver: University of British Columbia Press, 2009) 279 at 282; Ladner, *supra* note 55 at 175.
[187] Flanagan, *supra* note 129 at 80–81.
[188] See Gerald R Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills: Oxford University Press, 1999) at 53.
[189] Henderson, *supra* note 182 at 245.

A key distinction between treaty federalism and the recognition framework is noted in how each framework understands treaty. For treaty federalism, treaties are not interpreted as land cession or specific trade agreements,[190] but as the foundation for a nation-to-nation relationship.[191] To understand treaties as the latter, it is necessary to consider them from Indigenous perspectives. Again, there are multiple interpretations of treaty, and often specific interpretations of a treaty depend on a particular historical context and the needs of the parties.[192] Despite these variances, there are commonly shared core characteristics of the Indigenous understanding of treaty.

One such characteristic is the nature of the treaty process itself. From an Indigenous perspective, treaties were signed as an act of peace and to develop relationships with settlers.[193] Such a perspective stands in direct contrast to the Eurocentric theory of "treaty as conquest" and/or the purchase of land—a theory which is simply historically inaccurate.[194] A non-Eurocentric understanding identifies treaties as grounded in sacred law, from whence constitutional and political orders are derived.[195] Mills puts forward a particular vision of treaty, termed *treaty mutualism*, as a model for supporting the Indigenous-state relationship. Treaty mutualism understands treaty as dynamic, and based on the principles of mutual aid and extending kinship relationships amongst peoples.[196] Similarly, Sarah Mainville recognizes that treaties are premised on kinship and relationship, as opposed to western contractual understandings.[197] Carrying this conceptualization of treaty forward is necessary as it encompasses the original intent of treaty and influences the development of the Indigenous-state relationship.

Attention must also be given to the intent of both Indigenous peoples and the state when seeking a *nation-to-nation* relationship. Currently, the state supports the status of Indigenous nations within the Canadian state in a manner similar to which it understands Québec as a nation.[198] This interpretation is problematic as Indigenous nations have been historically recognized as

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[190] See *Simon v The Queen*, [1985] 2 SCR 387 at para 33.
[191] See Assembly of First Nations, *supra* note 132 at 6.
[192] See e.g. Walter Hildebrandt, Dorothy First Rider & Sarah Carter, eds, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996) at 116–117 (Siksiska and Stoney Nakoda interpretations).
[193] See *ibid* at 114.
[194] See Ladner, *supra* note 55 at 171.
[195] See Mills, *supra* note 24 at 235; See also Sarah Mainville, "Treaty Councils and Mutual Reconciliation Under Section 35" (2007) 6:1 Indigenous LJ 141 at 177.
[196] See Mills, *supra* note 24 at 234–243.
[197] *Ibid* at 157.
[198] See *Tsilhqot'in Nation v British Columbia*, [2007] BCSC 1700 at 458 (trial decision) endorsed by Canada in Jodie Wilson-Raybould, *Speech: Realizing a Nation-to-Nation Relationship with the Indigenous Peoples of Canada* (Cambridge, United Kingdom, 2017).

sovereign nations and treaty partners in Confederation.[199] It also stands in direct contrast to the RCAP statement that "parties to the treaties must be recognized as nations, not merely as 'sections of society'".[200] Part of the state's reluctance to adopt the RCAP interpretation stems from a liberal perception of "nation" which advocates for the absolute autonomy of nationhood and sovereignty. While it is possible that some Indigenous peoples, such as the Six Nations historically,[201] may share this liberal understanding of nation and argue to be engaged as a nation on such level, these voices do not form the majority. However, it is possible to reconcile competing ideas of what a nation-to-nation relationship should entail if Heidi Stark's interpretation is adopted. Stark recognizes that Indigenous nationhood allows for, and is determined by, both kinship relationships and independence.[202] When the concept of a "nation" is understood in this manner, the treaty federalism model envisages maintaining interdependent relationships while also recognizing the autonomy of each party.

Just as there is no single Indigenous perspective, advocates for treaty federalism vary in their approach to the revitalization of a treaty-based relationship. Tully's suggestion of deep constitutional pluralism is premised upon distinct constitutional orders which exist in parallel to Canada's constitution.[203] As a result, Canada would be governed by two equal regimes: the division of powers set out in the *Constitution Act, 1867*, and Crown-Indigenous treaties.[204] Using s.35 and international law, Henderson similarly advocates for the implementation of treaties in a manner which is consistent with their promises and in conjunction with Canadian federalism.[205] This can be compared to the RCAP model and Andrew Bear Robe's position, which advocates using treaties as the basis for negotiating Indigenous governments as a third order of government (federal, provincial, and Indigenous).[206] While the third order of government approach to

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[199] See *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Canada Communication Group, 1996) at 2; Sarah Mainville, "Nation-to-Nation and why it matters", online: *OKT LLP* <https://www.oktlaw.com/nation-nation-matters/>.
[200] Royal Commission on Aboriginal Peoples, *ibid* at 16.
[201] See also Rick Monture, *We Share Our Matters: Two Centuries of Writing and Resistance at Six Nations of the Grand River* (Winnipeg: University of Manitoba Press, 2014) c 2.
[202] Heidi Kiiwetinepinesiik Stark, "Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada" (2012) 36:2 Am Ind Q 119 at 128–129.
[203] Tully, *supra* note 117; James Tully, "Modern Constitutional Democracy and Imperialism" (2008) 46:3 Osgoode Hall LJ 461 at 486.
[204] See generally Papillon, *supra* note 185 at 9.
[205] Henderson, *supra* note 182 at 246 and 311.
[206] Andrew Bear Robe, *Treaty Federalism – A Concept for the Entry of First Nations into the Canadian Federation* (Gleichen: Siksika Nation Tribal Administration, 1992) at 45; Andrew Bear Robe, "Treaty Federalism" (1992) 4:1

reconciliation is potentially easier to fit into the existing constitutional framework, Ladner argues that it subjects Indigenous peoples to a constitutional framework to which they did not consent.[207] Treaty federalism recognizes this lack of consent "in relation to the manner and form of co-existence",[208] and articulates a framework through treaty in which consent can be obtained. Notwithstanding the variety of solutions proposed, these interpretation are reconcilable as each is premised on returning to a nation-to-nation relationship whereby Indigenous nations are self-determining. However, for such a relationship to redevelop, its proponents argue the current model of federalism in Canada must be reconceived.

Development towards a re-conception of federalism has been slow and primarily advocated for by Indigenous peoples. An opportunity for a breakthrough exists as a result of *Newfoundland and Labrador v. Uashaunnat* which addressed issues of title and rights arising from resource development projects.[209] The decision recognized that trans-provincial-boundary claims under s.35 were supported by the constitutional principles of access to justice and the honour of the crown.[210] Of particular significance within the decision was the Court's conceptualization of the relationship between Indigenous peoples, and the federal and provincial governments. Based on this decision, it can be argued that the majority implicitly endorsed some of the principles embraced by the treaty federalism framework, namely, the existence of two distinct federal orders. Specifically, the Court appeared to accept that due to the *sui generis* nature of Aboriginal rights, it is necessary to reduce the airtight protection of federalism to acknowledge the Indigenous-state relationship dynamics. Although the majority does not go so far as to explicitly endorse such a reading or the nation-to-nation approach as outlined by Henderson and Tully, it does acknowledge provincial boundaries were imposed without the consent of Indigenous peoples.[211] Through this decision, the majority begins to pierce the veil of federalism and provincial sovereignty, while also noting the limited application of the case to s.35 claims.

Of course, there is not unanimous support from the Court to reconfigure federalism. The dissent maintains an approach to reconciliation which does not see federalism bending: "…the

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Constitutional Forum 6 at 10–11; *Report of the Royal Commission on Aboriginal Peoples*, *supra* note 198 at 4, 48, 61 and 103 onwards; Contra Abele & Prince, *supra* note 184.

[207] Ladner, *supra* note 55 at 178.

[208] Bear Robe, *supra* note 206 at 8.

[209] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, *supra* note 60.

[210] See *ibid* at paras 50–52.

[211] See *ibid* at para 49.

goal of reconciliation cannot be achieved by recognizing prior occupation by Indigenous peoples on the one hand while disregarding the constitutional principle of federalism and of the sovereignty of the provincial Crown on the other...".[212] The minority fails to adopt an approach reconciling the Indigenous-state legal relationship which is based on the treaty federalism model. While this shift to treaty federalism is significant and still perceived as a threat to the Canadian project, it provides relief for both parties as a system is imagined whereby each version of federalism is cooperative rather than competitive. Moreover, this case is part of a larger jurisprudential shift towards cooperative federalism.[213] A similar trend is evident in the proliferation of co-management regimes (for instance, the pilot program for the Nicola Watershed),[214] which seek a cooperative relationship between provincial, federal and Indigenous decision-makers to allow for innovative and creative environmental management. Cooperatively approaching reconciliation is key to ensuring mutuality.

Within treaty federalism, the principles of interdependence and mutual recognition, contained within the model, also support and respect different lifeworlds. As Thomas Hueglin explains, the "basic concepts, metaphors and principles inherent in the Aboriginal view of treaty relations, then, are in reality nothing other than the basic concepts of how Aboriginal people understand themselves and their life worlds".[215] Mills describes the lifeworld as the "roots of a society…the story it tells of creation, which reveals what there is in the world and how we can know."[216] It is vital to understand that Indigenous constitutional orders are built upon a lifeworlds that are rooted in an understanding of the earth[217] as this grounding is not shared by liberal legality. Treaty federalism, therefore, respects the grounding of a nation-to-nation relationship within different lifeworlds as it includes respect for diversity in philosophical understandings.

Despite its support and respect for lifeworlds, the treaty federalism framework fails to consider the necessity of reconciling lifeworlds with one another. Although treaty federalism does have a reconciliatory aim, it only focuses on reconciling the diversity between Indigenous and non-Indigenous peoples through treaty. While this is an important aspect of reconciliation, Tully

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[212] *Ibid* at para 212.
[213] See generally Eric Adams, "Judging the Limits of Cooperative Federalism" (2016) 76 SCLR 27.
[214] See *Nicola Watershed Pilot (Memorandum of Understanding)* (2018).
[215] Thomas Hueglin, *Exploring Concepts of Treaty Federalism: A Comparative Perspective* (Royal Commission on Aboriginal Peoples, 1994) at 30.
[216] Mills, "The Lifeworlds of Law", *supra* note 86 at 862.
[217] See *ibid* at 863–864.

understands it as only partial reconciliation. He identifies a second aspect: reconciling Indigenous and non-Indigenous peoples with the living earth.[218] A similar argument is advocated by Mills in which he understands this second reconciliation to be required to begin a non-violent relationship.[219] What is particularly interesting is Tully's assertion that these types of reconciliation are interdependent.[220] If focus was turned to only one type of reconciliation, he asserts that the overarching goal of reconciliation will fail as we have not addressed the unsustainability which underlies the Indigenous-state relationship. Currently, the relationship between Indigenous and non-Indigenous peoples is unsustainable and littered with crises, of which the Trans-Mountain expansion project is just one example.[221] For Tully, this is a consequence of the ongoing unsustainable relationship between people and the earth.[222] Until the relationship with the earth is resolved, any attempts to reconcile diversity between peoples will not be successful, as the root problem in the relationship is not addressed. This is the primary concern neglected by the treaty federalism framework. The model does not require that principles of interdependence and reciprocity, applicable between the parties, be adopted into the state's lifeworld. Rather than addressing the need to reconfigure each party's relationship with the earth—essentially re-evaluating liberalism—treaty federalism seeks to recreate the original nation-to-nation relationship.

Utilising the treaty federalism model to approach the Indigenous-state relationship is not a difficult task. What becomes more demanding are the practical changes required to ensure respect for the framework itself. Fully adopting a relationship based on the Indigenous understanding of the nation-to-nation relationship is both challenging and essential. As with any framework, the ideas and motivations for its adoption differ and further complicate the framework itself. These differences should not be used as a justification for discarding the treaty federalism framework or dismissing the opportunities it presents.

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[218] James Tully, "Reconciliation Here on Earth" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation* (Toronto: University of Toronto Press, 2018) 83 at 83.
[219] Mills, *supra* note 23 at 156.
[220] Tully, *supra* note 218 at 84.
[221] See e.g. *Squamish Nation v British Columbia (Environment)*, [2019] 321 BCCA ; See generally Nigel Banks, "Provincial Environmental Appeal Boards: A Forum of Choice for Environmental (and First Nation) Plaintiffs?", (11 September 2015), online: *University of Calgary Law School Blog* <https://ablawg.ca/2015/09/11/provincial-environmental-appeal-boards-a-forum-of-choice-for-environmental-and-first-nation-plaintiffs/>.
[222] James Tully, "Reconciliation Here on Earth", *supra* note 218 at 84.

In concluding this chapter, it should be remembered that these frameworks are fluid. There is overlap between recognition and self-determination, as well as self-determination and treaty federalism. Recognition remains the dominant framework through which the state and judiciary continue to view the Indigenous-state relationship. Although there is growing support for the framework of treaty federalism, it too is an imperfect solution, as demonstrated by analysis of the disconnect between treaty federalism and a lifeworlds approach. Self-determination too remains an important framework. To ensure transparency, parties must be clear as to whether they are using that approach in its rooted or liberal form as each can result in immensely different Indigenous-state relationships. Turning to how these frameworks can be used to establish the Indigenous-state relationship in the context of co-management, it should be remembered that the frameworks have yet to be concretely defined (although this thesis attempts to further that understanding), and in fact, have multiple layers which affect degrees of the relationship.

3. The Use of Frameworks to Inform Co-Management Regimes

When each party enters the Indigenous-state co-management relationship, they have an identifiable perception of how this relationship should be developed and implemented. As explored in the previous chapter, this perception is often associated with particular frameworks or models of that relationship. These perceptions and motivations drive the choice of a model upon which to base the co-management regime. In some co-management regimes, a single dominant framework may be immediately identifiable. However, it is necessary to consider whether additional frameworks have influenced the parties—even if they only contribute to minor details.

The relevance in recognizing that multiple frameworks may be used within a single co-management regime relates back to the core characteristics of the Indigenous-state relationship which acknowledges the diversity of Indigenous peoples. Due to the diversity in motivations, priorities, and historic relationships with the state, multiple frameworks are used across Canada, and indeed within individual situations, to inform co-management regimes. When examining whether a particular framework has been influential in establishing a co-management regime, attention should be placed on factors such as the constituting documents, final structure of the regime and the jurisdiction which has been afforded. Additionally, it is relevant to consider the initial views and submissions of the parties as they may be reflective of initial concerns or objectives which are associated with the motivation behind a chosen model.

Much of the literature surrounding co-management is critical of the inadequacy of the mechanisms for including Indigenous perspectives and seeks to highlight the failures of co-management regimes.[223] It is also critical of inadequate co-management regimes (for instance, those which would take a tokenistic or tick-box approach to consultation[224]) as opposed to co-management as a whole. This is because such regimes themselves are not structured to achieve deeper integration of Indigenous and state management processes. There is no doubt that when a regime is structured in this superficial manner, it is not reflective of true co-management.

To explore how these frameworks can be used to inform an Indigenous-state relationship, this chapter considers three co-management regimes: Nunavut Wildlife Management Board, Cowichan Watershed Board, and Haida Gwaii management regimes. These case studies are demonstrative of a range of motivations and practices adopted to address environmental and social issues. To better analyse how the frameworks of understanding are reflected through the creation of a regime, the background for each case study is first analysed. Focus is then placed on how each case study exhibits a particular model for understanding the Indigenous-state relationship. These case studies demonstrate how a co-management regime, when created using a particular model for the Indigenous-state relationship, is reflective of the motivations and limitations of that model. These characteristics become imbedded in the regime and affect its ability to manage resources.

3.1. Nunavut Wildlife Management Board

Co-management has not developed uniformly, and some regimes—particularly those formed in the early days of interest in co-management—have been described as weak and not expressive of meaningful Indigenous participation. In 1994, the Nunavut Wildlife Management

[223] See Paul Nadasdy, "The Anti-Politics of TEK: The Institutionalization of Co-Management Discourse and Practice" (2005) 47:2 Anthropologica 215; David C Natcher, Susan Davis & Clifford G Hickey, "Co-Management: Managing Relationships, Not Resources" (2005) 64:3 Human Organization 240; Douglas Clark & Jocelyn Joe-Strack, "Keeping the 'Co' in the Co-Management of Northern Resources" *Northern Public Affairs* (2017), online: <http://www.northernpublicaffairs.ca/index/volume-5-issue-1/keeping-the-co-in-the-co-management-of-northern-resources/>; See also Tara C Goetze, *Sharing the Canadian Experience with Co-Management: Ideas, Examples and Lessons for Communities in Developing Areas* (Ottawa: International Development Research Centre, 2004); Michael McClurg, "A Pragmatic Approach The Nunavut Wildlife Management Board and the Duty to Operationalize Consultation" (2010) 9 Indigenous LJ 77.

[224] See Goetze, "Empowered Co-Management", *supra* note 12 at 256; Cf Camilla Sandström & Camilla Widmark, "Stakeholders' Perceptions of Consultations as Tools for Co-Management — A Case Study of the Forestry and Reindeer Herding Sectors in Northern Sweden" (2007) Forest Policy and Economics 11.

Board (NWMB) was established as a result of the *Nunavut Agreement*.[225] In the *Nunavut Agreement* negotiations, concerns for wildlife and conservation were driven by the need to define Inuit hunting rights and privileges and ensure conservation could occur while supporting economic growth in the North.[226] As a result, the NWMB possesses both recommendatory and regulatory powers to address access to and management of wildlife in the Nunavut settlement area—in what is modern-day Nunavut.[227] An important distinction between the NWMB and the other co-management regimes discussed in this chapter is the NWMB's status as constitutionally protected under s.35 of the *Constitution Act, 1982*,[228] and its classification as an institution of public government rather than self-government arrangement. This status is important within the context of boards created through land claims. Mandated boards, such as the NWMB, are the product of an unequal compromise between the parties.[229] They are a response to calls for Indigenous influence in decision-making combined with refusal from the Canadian government to entertain significant Indigenous control of valuable resources.

While the establishment of the NWMB was a significant step towards co-management at its time of creation, the reality of the Board is that of an advisory management system premised upon western conceptions of governance.[230] Graham White has analysed the NWMB in great detail, and notwithstanding involvement of the Inuit, he identifies the structure of the board as maintaining "classic Weberian bureaucracy".[231] This classification is due to the structure and the decision-making process of the Board. It is composed of nine members, who are appointed to the board as experts from their respective Inuit and government organizations. However, when acting in their capacity as board members, they act independently of their appointing organization.[232] The NWMB renders decisions by majority vote.[233] The decision-making process of the Board is

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[225] *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada (as amended)* (2018) c V [*Nunavut Agreement*].
[226] See Terry Fenge, "Political Development and Environmental Management in Northern Canada: The Case of the Nunavut Agreement" (1992) 16:1 Inuit Studies 115.
[227] See Thierry Rodon, "Co-Management and Self-Determination in Nunavut" (1998) 22:2 Polar Geography 119 at 125.
[228] *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*, *supra* note 19, s 35(3).
[229] See Graham White, "Issues of Independence in Northern Aboriginal-State Co-management Boards" (2018) 61:4 Canadian Public Administration 550 at 554.
[230] See Rodon, *supra* note 227 at 129.
[231] Graham White, *Indigenous Empowerment through Co-Management: Land Claims Boards, Wildlife Management, and Environment Regulation* (Vancouver: UBC Press, 2020) at 284.
[232] See *Governance Manual* (Nunavut Wildlife Management Board, 2012), s 1.2.4.1.
[233] See *Nunavut Agreement, supra* note 225, s 5.2.10.

complex as all final decisions are non-binding but are also influential because they are referred to the relevant Minister of the Federal government. Thereafter, the Minister has the authority to accept, amend, or reject the Board's decision.[234] The structure of this process assigns significant power to the Government of Canada, and from that perspective, it does not represent a strong form of co-management. Yet, a small loophole exists in the framework. There is a time-limit on rejecting or amending a NWMB decision and if that time limit passes, the Board's initial decision comes into force.[235] This loophole does not establish stronger co-management as it does not fundamentally alter the relationships within the regime, nor does it automatically grant the NWMB significant power. However, it does shift responsibility back to the federal government by creating obligations of efficiency and accountability to ensure that progress is made regarding the Board's objectives.

An additional aspect of the NWMB is its mandate to use western scientific data and Indigenous knowledge in the form of *Inuit Qaujimajatuqangit* (*IQ*) when in the decision-making process.[236] The NWMB is required consider both types of information when making a decision.[237] Compared to decision-making which does not receive input from Indigenous voices or is not overly receptive towards the inclusion of Indigenous knowledge, this is a significant step. It is possible for Indigenous peoples to share knowledge of migration patterns, populations and management practices. Nevertheless, the significance of this achievement is diminished due to the incorporation of knowledge as fact as opposed to law. Additionally, when the knowledge incorporated is presented as data as opposed to taboos or responsibilities, it leads to a cross-epistemic translation issue. This is a criticism which will resurface as it is clear evidence of the recognition framework at play in the co-management regime. It is difficult to ascertain how the NWMB is influenced by the use of Indigenous knowledge because its constituting documents are vague regarding the consideration of Indigenous knowledge and the Board's decisions are not accompanied by explicit reasons.

A commendable aspect of the NWMB is its use of Inuktitut in its proceedings. Article 5.2.17 of the *Agreement* provides that the Board is to conduct its business in both Inuktitut and as

[234] See *ibid*, s 5.3.13-5.3.23.
[235] See White, *supra* note 231 at 69.
[236] See e.g. *Wildlife Act*, SNu, 2003, c 26, ss 8 and 9.
[237] See *Governance Manual*, *supra* note 232, s 1.2.4.6 and 4.4.2.

well as the official languages of Canada.[238] While most Boards allow for the use of Indigenous languages, the NWMB is one of the only regimes mandated to operate in an Indigenous language in an official capacity.[239] The use of Inuktitut is an important step towards a more inclusive relationship as it offers an expression of worldviews without immediate translation. The connection between law, ontologies and language is well established in the scholarship. The use of language impacts our understandings of the world, including legal commitments,[240] and the normative element of languages as they root legal orders.[241] However, this connection is not something that can be translated easily between languages, as to do so loses the perspective in which that language situates itself.[242] By allowing Indigenous participation in Inuktitut, there is potential for inclusion of Indigenous perspectives and practices due to the inherent connection between law, ontologies and language.

3.1.1. The Primacy of Recognition Theory

The NWMB is an example of a co-management regime whose Indigenous-state relationship is structured using a recognition-based framework. The presence of such a framework is identifiable through the development of the NWMB within the existing liberal institutions, the recognition and inclusion of Indigenous knowledge, and the translation which the Board depends upon in reaching its decisions.

First, Inuit involvement within the NWMB is recognized within the existing structure of the Nunavut Government as the NWMB is a public institution. During the negotiations of the *Nunavut Agreement*, the Government of Canada recognized the importance of Inuit involvement in the context of (amongst other areas) wildlife management and conservation. The NWMB allows for Inuit participation, but this involvement is subject to acceptance of participation in a liberal, western style of co-management. The co-management regime which exists under the NWMB largely replicates western styles of decision-making. Decisions are made by actors which are non-partisan and delivered through a majority-vote system. Despite the existence of non-Indigenous

[238] *Nunavut Agreement*, supra note 225, s 5.2.17.
[239] See White, *supra* note 231 at 57.
[240] See Aimée Craft, "Treaty interpretation - A Tale of Two Stories" (2011) [unpublished] at 15; Battiste & Henderson, *supra* note 82 at 74.
[241] See Michael Coyle, "Indigenous Legal Orders in Canada - A Literature Review" (2017) Law Publications 92 at vi; See also Robert Clifford, "Listening to Law" (2016) 33:1 WYAJ 47 at 53.
[242] See also Mills, *supra* note 24 at 13.

and Indigenous actors sharing a decision-making space, the decision-making process serves to erase opinions of Indigenous peoples by removing the issues from an Indigenous context to one which seeks to make decisions for all peoples in the territory. Indigenous members within the NWMB act as individuals and are not fully representative of their organizations and broader community. This results in the denial of space for collective Indigenous voices in the decision-making process. Actively choosing this method and structure of decision-making cements the Board's foundation within the recognition model.

Furthermore, the wider structure of the NWMB results in recognition being asymmetrical. The NWMB is only advisory, and thus the state remains in control of wildlife management as a whole.[243] While decisions can be adopted without ministerial approval, this is an exception to the norm which applies in limited circumstances. The reality is that the Minister has the authority to override a decision of the Board—a decision which has been thoroughly researched and includes input from Indigenous voices. This leads to a final decision-making process which is unilateral and is not required to be informed by the Inuit. As a result, the NWMB is unlikely to result in significant changes to management practices.[244]

The existence of a paternalistic relationship also contributes to concerns that the Board, through its role, only pays lip service to *IQ*. Including Indigenous knowledge of wildlife management is a positive step towards co-management. However, true co-management requires that this inclusion be meaningful by genuinely considering Indigenous input throughout the decision-making process. In their field research, both White[245] and Dominique Henri[246] have documented reports from the Inuit elders and organization officials that western science continues to be favoured over *IQ* and that the recognition and inclusion of *IQ* are only for purposes of the NWMB "looking good". More recently, measures have been taken to improve the use of *Inuit Quajmajatuqangit* in the NWMB. These include defining aspects of *IQ*, specifying how it is applied in the *Wildlife Act*,[247] and creating a fund to facilitate *IQ* based research activities.[248] White

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[243] *Nunavut Agreement*, *supra* note 225, s 5.1.2(i).
[244] See Killularк Arngna'naaq et al., *Realizing Indigenous Law in Co-Management* (The Gordon Foundation, 2020) at 11–12.
[245] White, *supra* note 231 at 294–296.
[246] Dominique Henri, *Managing Nature, Producing Cultures: Inuit Participation, Science and Policy in Wildlife Governance in the Nunavut Territory, Canada* University of Oxford, 2011) [unpublished] at 145, 240–242.
[247] *Wildlife Act*, *supra* note 236, s 8.
[248] See "Inuit Qaujimajatuqangit Research Fund", online: *Nunavut Wildlife Management Board* <https://www.nwmb.com/en/funding/inuit-qaujimajatuqangit-research-fund>.

concludes that while the Board has taken measures to improve its use of *IQ*, such improvements are nonetheless limited by the NWMB existing in as a liberal and bureaucratic institution.[249]

Despite these efforts to meaningfully include *IQ*, describing it as traditional knowledge in an attempt to draw comparisons with scientific data is a mischaracterisation. *IQ* ("what the Inuit have always known to be true") is a worldview which offers laws, beliefs, and values, as well as processes for applying these laws. It is an ethical framework for living a good life where laws are better understood as ethical principles centred around holistic living and relationships rather than a set of independently proven facts.[250] Ecologists Fikret Berkes et al. highlight that the knowledge provided speaks to the relationships between living beings and their environment.[251] It is nonetheless necessary to build upon this work by acknowledging that that respectful relationships and balance with all living things are defining principles of Inuit law. Moreover, this "knowledge" speaks to the constitutional orders which ground the law. For example, principles of hunting without malice and waste[252] reflect the ethical framework which is centred in maintaining a respectful relationship with living beings and balance. Where these principles are expressed, they are grounded in the constitutional order and worldview of the Inuit and are more correctly understood as law. For instance, when considering narwhal harvesting quotas, the NWMB received information from representatives who were considered to possess in-depth *IQ* concerning narwhal.[253] Aspects of the knowledge pertaining to migration patterns and the nature of the mammal were integrated; however, no consideration was given to other values such as whether it reflected beliefs as to harvesting. By failing to fully embrace *IQ*, the NWMB remains firmly set in limiting its recognition of *IQ* to admissible fact where it is supported by, or equivalent to, western science.

Additionally, the NWMB does not have the ability to distinguish between law and knowledge, or to begin the process of recognizing such knowledge as law where it is appropriate to do so. Often co-management processes are commended for the simple incorporation of

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[249] White, *supra* note 231 at 295
[250] See Karetak, Tester, & Tagalik, *supra* note 6 at 33–34.
[251] Fikret Berkes, *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (Philadelphia, PA: Taylor & Francis, 1999) at 8.
[252] See *Wildlife Act*, *supra* note 236, s 8(i) and (j).
[253] See *Decision Concerning Proposed Modifications to Total Allowable Harvest Levels for Eclipse Sound and Admiralty Inlet Narwhal* (20 March 2017), online: Nunavut Wildlife Management Board <https://www.nwmb.com/en/list-all-site-files/decision-documents/marine-mammals/narwhal/7583-public-170320-nwmb-ltr-to-min-dfo-decision-tah-es-ai-narwhal-eng-inuk/file>.

Indigenous knowledge into the decision-making process;[254] the concern here is that recognition itself is insufficient to ensure the inclusion of Indigenous law. In theory, s.5(1)(2)(e) of the *Nunavut Agreement* empowers the NWMB to receive Indigenous law and recognize it as a valid consideration in the decision-making process.[255] However in practice, as demonstrated in the narwhal harvesting decision, the Board does not appear to recognize Indigenous law and instead limits the scope of integration of Indigenous knowledge.

In truth, both elder evidence[256] and the language of the *Nunavut Agreement*[257] supports the prior existence of Inuit methods of wildlife management. However, such methods—whether considered law or simply knowledge—are viewed as subordinate to western science. As a result, they are not permitted to exist and apply independently.[258] For example, in outlining its Polar Bear management plan, the NWMB referenced *IQ* and western science supporting the effects of seal populations on polar bears. However, the Minister's response was to request the removal of references to *IQ* evidence, as there was no recorded *IQ* of such effects, and that such effects could not be taken as conclusive.[259] Yet, the request (and therefore requirement) for written *IQ* overlooks a history of oral tradition and concerns of reducing it to writing.[260] Through the imposition of western stylistic evidentiary requirements (i.e. contained in writing) in order for something known to be recognized as fact, Inuit methods and lifeworlds continue to be considered as lesser than western thought and science. Despite no requirement in the *Nunavut Agreement* for *IQ* to be contained in writing for the purposes of the NWMB, its recognition will only occur where it is expressed in a certain form recognizable by western institutions. By failing to fully recognize Inuit methods, the state is able to maintain the upper hand throughout the co-management process and ensure that western methods of management and conversation remain dominant. While altered slightly through Indigenous participation, once again it is possible to see how the colonial method

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[254] See Nadasdy, "The Anti-Politics of TEK", *supra* note 223 at 220.
[255] *Nunavut Agreement*, *supra* note 225, s 5.1.2(e).
[256] See Arngna'naaq et al, *supra* note 241; White, *supra* note 231; Nadasdy, "The Anti-Politics of TEK", *supra* note 223.
[257] *Nunavut Agreement*, *supra* note 225, s 5.1.2(e) and (h), 5.1.3(a)(i).
[258] See Paul Nadasdy, "Boundaries among Kin: Sovereignty, the Modern Treaty Process, and the Rise of Ethno-Territorial Nationalism among Yukon First Nations" (2012) 54:3 Comp Stud Soc'y & Hist 499 at 529 ("This…paternalistic subtext is evident in by now taken-for-granted calls in the Canadian self-government discourse for First Nations to "build capacity," a euphemism for Euro-Canadian-style training that will enable them to serve as the bureau- cratic functionaries increasingly required by land claim and self-government agreements—as if they had not had the "capacity" to govern themselves before the arrival of Euro-Canadians…").
[259] See *Nunavut Polar Bear Co-Management Plan, supra* note 106 at 4.
[260] See Karetak, Tester, & Tagalik, *supra* note 6 at 55.

of management largely remains in place regardless of state recognition. The nature of the NWMB is reflected in Paul Nadasdy's research which indicates that where recognition occurs within the overarching western methodology, co-management serves as an extension of the colonial project due to the requirement that Indigenous peoples adopt Euro-Canadian forms of governance.[261]

Further, the Board's use of Inuktitut in proceedings raises an interesting question of what is being recognized and why. An optimistic reading of the clauses regarding the use of languages would see the inclusion of proceedings in Inuktitut as a positive step towards recognition of languages carrying normative weight and a particular worldview. The inclusion of Inuktitut implicitly allows different ontological understandings to enter the process, and thus increases the ability for beliefs, values and laws to be influential within the NWMB. Through allowing proceedings and submissions to take place in Inuktitut, the NWMB would be exposed to and hopefully incorporate a pluralistic worldview. However, the Board, in its constituting documents, does not make the connection between language and normativity, nor does it recognize the existence of such a connection. The more realistic reason, albeit limited, for recognizing the use of Inuktitut is to ensure the Board remains accessible to Inuit and has the capacity to operate in an inclusive manner.

It is of course inevitable that some translation must occur within the NWMB—the Board is trilingual. In this case, there is nothing that can be done to overcome the concerns surrounding translation as it must occur at some point in the decision-making process. It does offer some comfort that, at the very least, the Board can receive submissions and information in Inuktitut. This means that translation from Inuktitut to English does not have to occur from the moment an individual begins to engage with the co-management process, such as through sharing *IQ* at a meeting. Ideally, translation can be done at a level where members work together to find the meaning that best fits what is expressed in Inuktitut.

The structure, decision-making process, and limited recognition of *IQ* as traditional knowledge emphasise the NWMB as founded in the recognition model. Despite creating a co-management process which involves the Inuit, the NWMB largely reproduces the existing paternalistic colonial approach to co-management. Rather than establishing a renewed relationship based upon equality and reciprocity as is the goal of recognition, the NWMB maintains a

[261] Nadasdy, "Boundaries among Kin", *supra* note 253 at 529; See also Clark & Joe-Strack, *supra* note 223.

relationship which is inequitable and continues to prioritise the state's understanding of resource management.

3.1.2. Alternative Foundations of the NWMB

Is it possible to understand the NWMB as based in a model other than that of recognition? Unfortunately not. Although the Board was created under the *Nunavut Agreement* as a result of the land claims process, the *Agreement* and NWMB Governance Manual do not contemplate the establishment of a nation-to-nation based approach to wildlife management. The involvement of the Inuit is to enhance the decision-making processes as regards wildlife management and to respond to research[262] which acknowledges the value of hearing Inuit-based evidence. This involvement is inadequate to form the basis of a mutual and inclusive relationship. Regardless of the fact that the NWMB came into being as a result of a land claim agreement, the structure of the Board itself does not support the principles of treaty federalism. The NWMB would need to be fundamentally restructured to reflect these principles. Examples of such restructuring include a removal of the state's responsibility to recognize the validity of the Board's decisions, and understanding Inuit participation as representatives and authorities of their communities at the nation level.

As to the framework of self-determination, the goals of the NWMB are not related to either a rooted or liberal self-determination framework. It is possible to understand the creation of the NWMB, when situated in the broader *Nunavut Agreement*, as motivated by the desire for self-government in the form of public institutions. However, the NWMB's construction does not reflect the key characteristics of the self-determination models. The Board maintains a strong connection to and dependency on the state and does not grant a sphere of autonomy or self-government over wildlife management to the NWMB. As a result of this dependency, the Board does not hold a foundation in rooted self-determination as it is not directed by principles of interdependence and relationality. It, therefore, cannot be understood to be based on either the rooted or liberal self-determination models due to the lack of autonomy.

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[262] See Samantha Hatfield, "The Importance of Traditional Ecological Knowledge (TEK) When Examining Climate Change", (10 January 2017), online: *Union of Concerned Scientists* <https://blog.ucsusa.org/science-blogger/the-importance-of-traditional-ecological-knowledge-tek-when-examining-climate-change>; See generally Jordan Hoffman, *AVATIMIK KAMATTIARNIQ: Arctic Ecology and Environmental Stewardship.* (Contoocook: Nunavut Arctic College, 2017).

While Inuit knowledge may be considered in making a decision, the Board itself is not structured upon principles of interdependence and relationality and it remains entrenched in a colonial approach to wildlife management. Despite amendments to the *Wildlife Act* to include *IQ* in decision making, such as the principle of *Avatimik Kamattiarniq/Amiginik Avatimik* (treating nature holistically and with respect as it is inter-connected with consequences) in s.9(2), these new methods of management and conservation can only evolve within the existing structure of the NWMB. Therefore, recognition is the primary model which can be said to have informed the establishment of the NWMB. The creation of the Board itself remains a step towards better co-management; however, its end-goals and use of knowledge are constrained due to its grounding in liberalism and failure to recognize Indigenous input beyond traditional knowledge.

3.2. Cowichan Watershed Board

Co-management regimes are unique in their lack of a single, or universally agreed upon, method or prescription by which it must be created. As seen with the NWMB, joint resource management may result from a land claim agreement. While early co-management boards were created under such agreements,[263] resource management approaches have developed to allow for collaborative practices, which neither emanate from land claims nor direct negotiations between an Indigenous community and the state. Instead, these co-management relationships are Indigenous-driven and rooted in sustainable community partnerships which seek to resolve crises at a local community level.[264] One example of such a co-management regime is the Cowichan Watershed Board (CWB).

The CWB oversees the Cowichan Watershed, located on Vancouver Island, north of Victoria, British Columbia. Following a series of droughts in the early 2000s, the Cowichan Basin Water Management Plan was enacted and overseen by a multitude of parties including the Cowichan Valley Regional District, British Columbia Ministry of Environment, Fisheries and Oceans Canada, local pulp mills, and Cowichan Tribes.[265] The Management Plan recommended the creation of a permanent board to continue its work, and thus the CWB was established in 2010.

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[263] See e.g. *Sahtú Dene and Métis Comprehensive Land Claim Agreement* (1993) c 13.8 (Sahtú Renewable Resources Board).
[264] See David C Natcher, "Co-Management: An Aboriginal Response to Frontier Development" (2001) 23 The Northern Review 146–163 at 150.
[265] See *Cowichan Basin Water Management Plan* (Cowichan Watershed Board, 2007).

The CWB is mandated to protect the health of the Cowichan and Koksilah watersheds and to "provide leadership for sustainable water management".[266] Key issues addressed by the Board include water flow, riparian habitat, flood management, and fish populations.[267] Composition of the CWB is diverse, bringing together the Cowichan Tribes, as well as representatives of the Provincial and Federal governments, and community representatives.[268] Unfortunately, as with the NWMB, the effects of the Board's decisions are limited by its advisory nature and lack of statutory decision-making powers.[269] Once again, decisions of the CWB only result in recommendations to relevant authorities, such as Fisheries and Oceans Canada, with the goal being one of collaboration in order to base water-related decisions on the Board's knowledge and recommendations.[270]

Differentiating the CWB from other regimes is that it serves as an example of how the Indigenous-state relationship can develop through a co-management regime without a pre-existing legal agreement. Despite working with the British Columbia Treaty Commission since 1999, the Cowichan Tribes do not have an agreement in principle.[271] However, this has not diminished the value of the established co-management regime. As will be discussed below, a lack of a formalized agreement may, in practice, widen the scope of a regime by embodying a willingness to base the parties' relationship on different frameworks simultaneously. The CWB embraces its institutional circumstances, with its Governance Manual stating that legal authority over the watershed is contested but rests in Government statues and Indigenous laws.[272] Moreover, Indigenous laws are carried over and embedded in the Board's mandate and guiding principles. Hunter et al. point to the inclusion of these laws as the result of ongoing collaboration with Cowichan elders.[273] To ensure the competence of Board members in using these normative principles, the co-chairs are tasked with the responsibility of providing guidance on Cowichan teachings and orientating members on Cowichan principles used by the Board.

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[266] *Governance Manual* (Cowichan Watershed Board, 2018), s 2.1 and 2.2.
[267] See *ibid*, s 1.1.
[268] See *ibid*, s 3.1.1.
[269] See *ibid*, s 1.2.
[270] See *ibid* at para 1.2.
[271] See generally "Hul'qumi'num Treaty Group", online: *BC Treaty Commission* <http://www.bctreaty.ca/hulquminum-treaty-group>.
[272] See Cowichan Watershed Board, *supra* note 266, s 1.2.
[273] Rodger Hunter, Oliver M Brandes & Michele-Lee Moore, *The Cowichan Watershed Board: An Evolution of Collaborative Watershed Governance* (POLIS Project on Ecological Governance, 2014) at 13.

When providing leadership over water management and ecosystem protection, the Board is guided by the teaching of *Muks 'uw'slhilhukw'tul* ("we are all inter-connected").[274] The Governance Manual does not provide further details on this teaching, so it is not entirely clear how it is applied in practice. Teachings and principles of interconnectedness and relationality are recognized as a normative principle amongst Coast Salish[275] and many other Indigenous peoples.[276] Additionally, the CWB is committed to acting in accordance with the principle of *Nutsamat kws yaay'us tth qa'* ("we come together to be stronger as partners for the watershed"). *Nutsamat* is described as an ancient Cowichan principle and while it literally means working together, it also involves more complex ideas.[277] In coming together to collaborate on watershed management, *Nutsamat* recognizes shared or common spaces, but that each party maintains a distinct role.[278] Similarly, in a co-management regime, regulation, jurisdiction and decision-making can be collaborative. At the same time, it should be acknowledged that a specific decision may need to be made by, for example, the provincial government. Elsewhere, the teaching requires demonstrating respect for common interests and connections between partners.[279] This includes working with community members, such as elders and emergency services to coordinate shared jurisdictions (for example, flood responses by the City of Duncan and Cowichan Tribes) and build sustainable partnerships.[280]

A distinctive feature of the CWB (compared to other co-management regimes) is its increasing inclusion of Indigenous law. The principle of *Nutsamat* was introduced to the Board's Governance Manual in 2018 along with the Cowichan Tribes recognition statement.[281] When integration of constitutional orders becomes static (for example, in co-management agreements created through land claims agreements which are not easily amended), it is less responsive to changing needs or goals of the parties. This points to another beneficial aspect of the CWB as a

[274] Cowichan Watershed Board, *supra* note 266, s 2.2.
[275] See also Andrée Boisselle, *Law's Hidden Canvas: Teasing Out the Threads of Coast Salish Legal Sensibility* University of Victoria, 2017) [unpublished] at iv, 95 and 103; Sarah Noël Morales, *Snu'uyulh: Fostering An Understanding of the Hul'quim'num Legal Tradition* University of Victoria, 2014) [unpublished].
[276] See also John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795 at 839.
[277] See *Pathways and Partnerships: Framework for Collaboration and Reconciliation in the Cowichan Watershed* (Cowichan Watershed Board, 2018) at 3.
[278] See generally Lydia Hwitsum, *Nutsamat* (2018) at 7.
[279] See *ibid* at 4.
[280] See *Annual Report* (Cowichan Watershed Board, 2019) at 8.
[281] See *Guide to Key Proposed Revisions from Original Manual (March 2010)* (Cowichan Watershed Board, 2018) at 1.

non-claims-related board. To make revisions to the Governance Manual there need not be an amendment to a treaty and/or other agreement documents.

An additional aspect of integration in the CWB is the use of consensus in reaching decisions. Making decisions through consensus is a primary characteristic of Indigenous law. Consensus-based decision-making enhances collaborative discussions by considering all viewpoints and seeking to choose a decision which furthers the need of the collective.[282] As Kahente Horn-Miller explains, this style of decision making supports a bottom-up approach and avoids issues of the Weberian bureaucracy which plague other decision-making processes.[283] The Governance Manual of the CWB requires that the co-chairs will "make their best effort" to achieve full consensus and sets out a process of how consensus can be achieved. However, if it is not possible to achieve consensus, the Board defaults to *Roberts Rules of Order*.[284] These rules derive from the liberal parliamentary process and are based upon the belief that prescribed rules are required for deliberations which the majority will make on behalf of the group.[285] As Hunter et al. explain, this process of consensus is based on Cowichan worldviews and is thus a decision-making process which was naturally comfortable and easily adopted into the co-management regime.[286] The ease with which the parties use census can be identified in the reports that all major decisions have been reached by consensus, as it is recognized by the parties that decisions which lack consensus are not robust long term solutions.[287] The sustainability of a decision is important as it not only provides enhanced environmental management but also supports governance which is driven by principles of community rather than individualism.[288]

The integration of Indigenous law which occurs in the CWB is distinguishable from that in the NWMB. While its decisions are still non-authoritative, the CWB goes beyond simply including Indigenous knowledge of the watershed by incorporating Cowichan principles of decision-making and holistic management. While there is no explicit requirement that decisions be based directly on these principles, it is clear from the Governance Manual and its decisions that these principles play a fundamental role. Reasons for the shift towards meaningful inclusion of

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[282] See generally Kahente Horn-Miller, "What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke's Community Decision Making Process" (2013) 18:1 Rev Const Stud 22 at 116.
[283] *Ibid* at 117–118.
[284] See Cowichan Watershed Board, *supra* note 266, s 3.3.
[285] See generally Horn-Miller, *supra* note 282 at n 13.
[286] Hunter, Brandes & Moore, *supra* note 273 at 12.
[287] *Ibid*.
[288] Horn-Miller, *supra* note 282 at 117.

Indigenous law, which thus mitigates the "lip service" criticisms referenced earlier, may be accounted for by a generational shift in conceiving co-management agreements in the last decades.[289] The similarity between the Cowichan principles and common principles of environmentalism[290] also supports this shift. Finally, dedicating the role of integration to the co-chairs increases the protection of Cowichan laws and principles by ensuring they are understood and used in a culturally appropriate manner.

3.2.1. Implicit Recognition

While not its primary framework, the CWB maintains a strong foundation in the recognition model. In coming to a decision, the CWB makes explicit reference to Cowichan norms and principles alongside Canadian law. While these principles and teachings are recognized as a form of Indigenous law within the co-management regime, they serve the purpose of guiding decisions as opposed to necessitating a particular outcome. It is helpful to apply Dworkin's distinction between principles (reasoning in one direction but which does not require a particular decision) and rules (dictating a certain result) to the CWB's use of Cowichan principles and teachings. When interacted with by the CWB, such teachings are better conceptualized as Dworkian principles. Sections 2.2 and 2.3 of the Governance Manual support this interpretation as the Cowichan principles are referred to in the broad decision-making process but do not necessitate arrival at a particular decision.[291]

When such incorporation of Indigenous law is analysed through the framework of recognition, it is necessary to engage with the translation critiques. One aspect of translation which may have occurred is the recognition of abstract norms. This translation problem occurs where elements of Indigenous law, which may be difficult to conceptualise at a lifeworld level, are reduced through recognition and translation into an identifiable norm.[292] For example, the principle

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[289] See generally Marc Stevenson, "Decolonizing Co-Management in Northern Canada" *Cultural Survival Quarterly* (March 2004), online: <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/decolonizing-co-management-northern-canada>.
[290] See generally Nathan J Bennett et al, "Environmental Stewardship: A Conceptual Review and Analytical Framework" (2018) 61:4 Environmental Management 597.
[291] *Governance Manual*, *supra* note 266.
[292] See generally Gina Starblanket & Heidi Kiiwetinepinesiik Stark, "Towards a Relational Paradigm - Four Points for Consideration: Knowledge, Gender, Land, and Modernity" in Michael Asch, James Tully & John Borrows, eds, *Resurgence and Reconciliation: Indigneous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 175 at 181 (translating Indigenous ideas to academic language).

of *Nutsamat*, as it is described by the CWB, may not be a core norm of Indigenous law. Thus, before a linguistic translation begins, the form of Indigenous law would already have been altered. While this translation can aid in ensuring that law is recognized as law, the damage to the Indigenous legal tradition and Indigenous lifeworld has already begun. However, some of the concerns regarding translation, such as linguistic interpretation, may be minimized given the supervisory role of Cowichan elders over the teaching such of such principles.[293] Nonetheless, the structure of the CWB requires that decisions be based upon explicit norms, and that Cowichan knowledge and law be translated for use alongside western approaches to management.

While the structure of the CWB is more reflective of Indigenous decision-making processes, the non-binding nature of the decisions themselves suggests that a degree of recognition must also occur between the CWB and the institution with jurisdiction over the ultimate decision—in most cases, the provincial government. In a rooted order, such as Anishinaabe constitutionalism, a non-binding decision would be in line with Indigenous law due to Indigenous law's force being derived from persuasive compliance.[294] However, as the liberal constitutional requires external coercion to apply law,[295] the CWB finds itself in a battle to have its decisions recognized as legitimate and valuable. Moreover, the CWB requires recognition in order to be considered as a valid decision-making body for watershed management. It follows that the body with jurisdiction over the watershed controls which elements of recognition will occur (for example, the degree of recognition it will provide, and whether a CWMB recommendation is adopted or merely endorsed). Due to recognition remaining unilateral, the Board faces an externally imposed limitation on aspects of decisions which it may implement. For example, a decision regarding timber harvesting in the watershed is constrained by the existing mandates and structure of the relevant provincial Ministries. As these state institutions do not require Indigenous influence or principles to guide their decision-making processes, the institution may or may not agree with a CWB decision based on its own perception of the Board and/or the Indigenous-state relationship. It is, therefore, possible that this implicit recognition matrix may have influenced the style of the Board, for instance, by a reversion to western styles of decision-making and reduction of Indigenous law to mere guiding principles. As to why such a recognition matrix exists for the

[293] See *Pathways and Partnerships supra* note 277 at 13.
[294] See Karen Drake, "Indigenous Constitutionalism and Dispute Resolution Outside the Courts: An Invitation" (2020) 48:4 Federal Law Review 570 at 577–578.
[295] See *ibid*.

CWB, it is likely due to the Board being a grassroots body rather than one which is state-mandated or the result of Indigenous-state negotiations.

3.2.2. Emergence of Rooted Self-Determination

Aspects of the CWB may also be understood as grounded in the rooted self-determination model. The CWB was not formed as a result of an explicit claim to self-determination in either its liberal or rooted understanding. Rather, it was formed through the acknowledgement that local control was needed over the watershed to effectively manage resources, and importantly, that a distanced and siloed approach to watershed management escalated challenges.[296] This background influences how control was sought by the CWB and how control is manifested by the Board. By considering the motivations behind the CWB and its subsequent actions, a model of rooted self-determination becomes coherent.

Recall from the discussion on rooted self-determination that the overarching objective or goal for self-determination is that of enhancing capacity to make decisions about one's future. In this case, it is the CWB that controls the future of the watershed, and thereby impacts both the Indigenous and non-Indigenous communities who inhabit it and rely on its sustainability. In order to achieve effective control, the CWB is guided by, and committed to, principles related to interconnectedness and relationality. This connection between the parties reduces fears that partially grounding the CWB in the rooted self-determination framework will lead to a degree of separation from the state. In fact, such connection results in the opposite. Principles of relationality and interconnectedness are applied to both the management decisions, and the partnership between the Cowichan Tribes and Cowichan Valley Regional District. To address shellfish recovery and harvesting, the CWB, recognizing the interconnectivity between water quality and shellfish health, focused on reducing water pollutants, managing boating activity, repairing shellfish habitats, and growing shellfish in the Cowichan tradition.[297] Through building strong community partnerships and holistically approaching issues, the CWB can address these individual concerns, and in doing so, revive the shellfish industry and benefit the watershed as a whole. Moreover, rooted self-determination focuses on both the relationship between Indigenous peoples and the state—or in

[296] See *Governance Manual*, *supra* note 266 at 1.
[297] See *On Target: A Guide to the Cowichan Watershed Board's Aspirational Targets for Watershed Health* (Cowichan Watershed Board, 2018) at 12.

this case, the Cowichan Valley Regional District—and on their connection to the land. Such connection is explicitly addressed in through the CWB's attention to Cowichan teachings such as *Muks 'uw'slhilhukw'tul* and *Nutsamat*. This strong connection to land and making relationality-based decisions can best be understood as an effect of the rooted self-determination model influencing the establishment of the CWB.

One further example of the grounding of the CWB within the rooted self-determination framework is the balance it draws between interdependence and independence. The CWB has demonstrated decision-making which respects and acknowledges the importance of these principles. This degree of interdependence does not result in the loss of distinct, individual jurisdictions of the Cowichan Tribes and the Cowichan Valley Regional District. The Board explicitly recognizes that each party maintains its decision-making authority for management decisions within its individual jurisdiction and that the CWB exists within the "interplay of these jurisdictions".[298] The importance of such independence cannot be underestimated. By explicitly endorsing the principle of independence, the Cowichan Tribes have not been absorbed into the state politic as a result of the co-management regime, nor has their jurisdiction been diminished. Therefore, the CWB is an example of a co-management regime successfully built upon the rooted self-determination framework.

3.2.3. Considerations for Treaty Federalism

Finally, it is possible to understand parts of the relationship produced by the CWB by modelling it in the treaty federalism framework. The CWB is interesting as its mandating documents do not firmly establish the existence of a nation-to-nation relationship, yet the CWB possesses two characteristics of such a relationship. First, the CWB recognizes that the authority of the Cowichan Tribes and the Cowichan Valley Regional District flows from different sources. The Governance Manual cites the Cowichan Valley Regional District's authority as delegated from the province under the *Local Government Act*, while the Cowichan Tribes authority derives from unextinguished rights and title.[299] An equally important acknowledgement by the Board is that legal authority over the water itself lies in both Crown statutes and Indigenous legal traditions. Understanding different sources of authority, which are not interdependent, removes the need for

[298] *Governance Manual*, *supra* note 266, s 2.2.
[299] See *ibid* at 2 see fig. 2.

recognition to establish the CWB's authority and is conducive to establishing a mutual relationship between the parties.

Application of this framework is limited due to the lack of direct involvement from the federal or provincial governments in the CWB. The Board's membership policy provides that provincial and federal governments may recommend members to sit on the Board, but it is not mandatory.[300] Where these members do sit, they do so in an advisory capacity without the ability to implement Board decisions through their respective institutions. The Cowichan Valley Regional District is a local government, and while it is important for changes within the relationship to occur at a local level, some Indigenous peoples believe the Indigenous-state relationship is with the Crown itself rather than other levels of government.[301] Additionally, as jurisdiction over Indigenous peoples is divided between the Federal and Provincial governments,[302] significant changes to the Indigenous-state relationship, such as implementing treaty federalist principles, require the agreement of at least one Crown jurisdiction. It is, therefore, possible to argue that CWB reflects a nation-to-nation relationship in substance rather than form. This lack of state involvement halts the complete development of a true nation-to-nation relationship in form, and the necessary establishment of a pluriconstitutional state which it entails. It thus follows that the changes for which treaty federalism advocates, such as the realignment of federalism, are neither relevant to nor brought under the scope of the CWB. However, the lack of involvement of the Federal and Provincial governments does raise a question related to the degree of change which has occurred within the CWB: is the regime overarchingly colonial due to it only operating at a non-binding regional level? If persuasive compliance were to be adopted by Federal and Provincial governments, this could negate concerns of colonial decision-making. In answering this question, concerns raised under the recognition framework including translation and the decision-making process should be bracketed.[303]

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[300] See *ibid*, s 3.1.1.

[301] See Thomas Isaac & Anthony Knox, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2005) 23:4 Journal of Energy & Natural Resources Law 427 at 443–446; See also Felix Hoehn & Michael Stevens, "Local Governments and the Crown's Duty to Consult" (2018) 55:4 Alta L Rev 971.

[302] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 *s* 91(24); *Indian Act*, RSC 1985 c I-5, s 88.

[303] I recognize that the framework of recognition does pose significant questions about the reoccurrence of colonialism. For the purposes of this question, I am more directly concerned with how the involvement of the state or lack thereof in a co-management regime seeks to reproduce colonial structures.

Turning to first considering the CWB itself, the Board has attempted to avoid any colonial underpinnings by carefully outlining each party's authority, and by recognizing that standard methods of management have failed thus far. The CWB has sought to establish a relationship that, while not perfect, is similar to one that is based on a nation-to-nation approach, and as such, is not likely to be considered overarchingly colonial. However, the issue remaining is that by not involving the Federal or Provincial government the CWB becomes situated under the larger colonial framework of environmental management. Due to the non-binding nature of its decisions, the CWB is limited in its authority to alter what is outside the jurisdiction of its parties, or where it does have such authority, it is reliant on voluntary, good faith co-management. This may be considered more appropriate due to the non-coercive nature of Indigenous law.[304] Nothing under the CWB constituting documents empowers the Board to address management concerns which are under the provincial or federal jurisdiction. As a result, it can only influence decisions which are made but does not possess the authority to change the colonial nature of resource management as a whole. If the federal or provincial government were a party to the CWB, and its decisions were binding, a true nation-to-nation relationship could possibly be established, which in turn would lead to the re-evaluation of the colonial management regime.

One assumption made within the CWB is that the Cowichan Tribes have authority over the watershed which is also governed according to their own legal traditions. Although the founding documents of the Board indicate that Indigenous authority over the watershed is derived from existing rights, they do not specify what these authorities entail. Such an assumption is made and accepted when establishing the Board via the treaty federalism framework. To begin questioning this assumption of authority raises concerns that one party is attempting to control the recognition of authority over the other. This speaks to the broader concern that a colonial mindset is imposed through the CWB, whereby Indigenous nations are not acknowledged as having inherent authority and the ability to govern according to Indigenous legal traditions..

The result of analysing and applying the treaty federalism framework to the CWB is the establishment of a strong partnership which is respectful of the authority of each party, and still capable of working effectively to reach decisions regarding the management of the watershed. While concerns remain regarding the lack of an overarching nation-to-nation relationship, the beneficial aspects of adopting parts of the treaty federalism framework are commendable.

[304] See Drake, "Indigenous Constitutionalism and Dispute Resolution Outside the Courts", *supra* note 294 at 577.

3.3. Haida Gwaii Management Regimes

This third case study is particularly interesting due to the praise it has received from both Indigenous peoples and state institutions as one of the most progressive co-management regimes in Canada.[305] Located off the coast of northern British Columbia, Haida Gwaii is a large archipelago traditionally inhabited by the Haida Nation. The islands are considered to be historically and culturally import to the Haida, and the area is also one of the remaining areas of coastal temperate rainforest and the location of UNESCO world heritage sites. However, both the Haida people and the islands have been the subjects of colonization. The Government of British Columbia claimed title to the islands and began privatizing the natural resources.[306] As a result, the islands have been the subject of extensive clear-cut logging which has destroyed the ecological and cultural value of the region to the Haida.[307]

Two agreements concluded between the Haida Nation and the Government of Canada are of relevance to this thesis: the *Gwaii Haanas Agremeent*[308] and the *Kunst'aa Guu – Kunst'aayah Reconciliation Protocol*.[309] Both agreements established environmental management processes based on co-management for the planning, management, and protection of Haida Gwaii. Importantly, neither are the product of a treaty or land claim agreement, but rather from the ongoing conflict and litigation between the Government of Canada and the Haida Nation concerning unsustainable logging on the archipelago.[310] The goal of these agreements is to reconcile competing land claims, to be achieved through management and protection of the land.[311] For this reason, the Haida Gwaii approach is considered a model for other Indigenous nations to follow and is one of the few agreements which provides parties with equal responsibility in decision-making.[312]

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[305] See generally Mark Dowie, *The Haida Gwaii Lesson: A Strategic Playbook for Indigenous Sovereignty* (Oakland: Inkshares, 2017) at 107 and 126.
[306] See generally *ibid*.
[307] See Louise Takeda, *Islands' Spirit Rising: Reclaiming the Forests of Haida Gwaii* (Vancouver: University of British Columbia Press, 2015) at 6–9.
[308] *Gwaii Haanas Agreement* (16 December 1993).
[309] *Kunst'aa Guu-Kunst'aayah Reconciliation Protocol* (2009) [*Reconciliation Protocol*].
[310] See e.g. *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511.
[311] See generally Ngaio Hotte, Stephen Wyatt & Robert Kozak, "Influences on Trust During Collaborative Forest Governance: A Case Study from Haida Gwaii" (2019) 49:4 Can J Forest Research 361 at 364.
[312] See Julian Griggs & Julia Dunsby, *Step by Step: Final Report for the Shared Decision Making in BC Project* (Simon Fraser University Centre for Dialogue, 2015) at 46.

The Archipelago Management Board (AMB), created under the *Gwaii Haanas Agreement*, is broadly responsible for the management and protection of the archipelago. The AMB governs traditional methods for harvesting renewable resource, protects resources of cultural significance, creates guidelines for permits, and carries out high-level strategic planning.[313] A notable aspect of the AMB is its structure. It is composed of six members: two representatives each from the Council of the Haida Nation (CHN) and the Government of Canada are selected to sit on the Board,[314] and two co-chairs, each nominated by the parties, to jointly govern the board.[315] These appointees are not required to act independently of their organizations (contrary to the role of their equivalents on the NWMB), as the purpose of members is for them to represent the needs and positions of their respective parties, rather than to act as an independent authority.

As to its decision-making structure, like the CWB, the AMB is required to make decisions by consensus. However, where consensus is achieved, the matter is referred to the Government of Canada and the Haida Nation to reach an agreement in good faith.[316] The AMB agreement does not specify what decision-making structure "good faith" adopts. If the SCC interpretation of good faith is utilized, it suggests that consensus is not required.[317] This suggests that normal procedures for negotiations would apply, and that the strict requirements for decision-making by consensus are displaced. As explained above, processes of consensus are a key feature of many Indigenous legal traditions. In this sense, the AMB truly adopts an Indigenous method of decision-making. It does not revert to *Roberts Rules* but seeks to maintain a collaborative approach by engaging the parties themselves directly in negotiations. By seeking to address issues about which consensus could not be reached through negotiations, the parties are given an opportunity to fully explore concerns and negotiate solutions rather than being forced to abide by a majority decision. That said, it should be recognized that requiring negotiations between the parties does not guarantee a perfect decision. It only gives the CHN and the Government of Canada an opportunity to engage directly with each other to resolve an issue. One further benefit of this approach is that these government-to-government negotiations are not limited by the *Gwaii Haanas Agreement*. As a result, it is possible to arrive at a solution which the AMB may not have had the ability to impose.

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[313] See *Gwaii Haanas Agreement*, *supra* note 308, s 4.3.
[314] See *ibid*, s 4.4.
[315] See *ibid*, s 4.5.
[316] See *ibid*, s 5.3.
[317] See also *Delgamuukw v. British Columbia*, *supra* note 58 at para 168.

In some cases, these solutions provide better outcomes than would be available to the parties under a different framework.

In addition to the AMB, the Haida Gwaii Management Council was established under Schedule B of the *Reconciliation Protocol* between the CHN and the Government of British Columbia. Its role is similar to the AMB—albeit operating at a higher strategic level (for example, total allowable cut oversight)—but it is structured differently. Each party has an equal number of representatives and rather than establishing co-chairs, a chairperson is jointly appointed by the parties following a period of consultations.[318] Once again, the Management Council makes decisions by consensus but rather than referring a matter to the respective government should consensus not be reached, the Council votes on the matter. Should there be a tie, the chairperson has the deciding vote.[319] Once again, this reintroduces elements of the liberal decision-making process.

Similar to the other co-management regimes discussed, Haida laws enter the decision-making process through reference by Haida-appointed committee members.[320] Members are able to shape the development of policies and practices, which in turn furthers a decision-making process informed by Haida legal traditions. Moreover, the processes set out in the Agreements recognize the legitimacy and authority of these Haida laws as normative. In establishing the Management Council, the foundational constitutional orders of each party are recognized and used together as its grounding. Both the CHN and the Government of British Columbia were responsible for obtaining the legal authority necessary to implement the Reconciliation Protocol. This was achieved through passage of the *Haida Gwaii Reconciliation Act*[321] by the Government of British Columbia, and the *KaayGuu Ga ga Kyah ts'as' Gin `inaas 'laas'waadluwaan gud tl'a gud giidaa* (Stewardship Law) by the Haida House of Assembly.[322]

By including both sources of authority to establish the Management Council, two important aspects of the regime are observed. The first lies in the parties' recognition and respect for the distinctive constitutional orders which each party holds. Both parties are acknowledged as having

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[318] See *Reconciliation Protocol*, *supra* note 309 Schedule B, s 1.6 and 1.7.
[319] See *ibid* Schedule B, s.1.6 and 1.7.
[320] See Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2018) 51:1 UBC L Rev 105 at 138.
[321] *Haida Gwaii Reconciliation Act*, SBC 2010 c 17.
[322] "Resolution Adopted at the 2010 House of Assembly", *Haida Laas* (October 2010), online: <http://www.haidanation.ca/wp-content/uploads/2017/03/oct.10.pdf> at 13.

the authority to enter the agreement, although this authority is derived from differing sources. This does not mean that the state recognizes the constitutional logic of the Haida; it simply accepts the CHN as the governing authority of the Haida Nation. Second, this mode of enactment integrates, through indirect means, Indigenous law. Critically, sourcing the AMB in the Stewardship Law entrenches Haida laws of respect.[323] This entrenchment adds a further layer to the Reconciliation Protocol whereby structures are created to ensure the protection and respect for all living things alongside the resolution of land claims issues.[324]

3.3.1. The Snare of Recognition

The recognition framework does not play a prominent role in informing the creation of either Haida agreement, as the Haida constitutional order is not forced to assimilate into a western bureaucratic institution as seen in other co-management regimes. However, this does not mean that the Haida agreements have escaped the snare of translation. The constituting documents of the agreements still adopt a western-legalistic form. This requirement is inevitable due to the existing liberal constitutional order which recognizes law only in written forms. Nonetheless, such translation still amounts to assimilation because the agreement must take the specific form of liberal constitutionalism to be recognized as authoritative. Despite the strong foundations of the Haida agreements in rooted self-determination and treaty federalism, as explored below, the strong liberal lifeworld of the Canadian constitution mandates a degree of recognition in order for the co-management regime to exist.

3.3.2. Considerations for Rooted Self-Determination

Comparatively, one framework which does shape the Haida Gwaii co-management regimes is rooted self-determination. The impacts of using this framework are subtle. The Haida Nation has a history of advocating for control of the islands and the resources, basing such arguments on its lack of surrender to the Crown.[325] It is, therefore, possible to understand the relationship created by the agreements as an exercise of self-determination by the Haida. As with

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[323] See Susanna Quail, "Yah'guudang: The Principle of Respect in the Haida Legal Tradition" (2014) 47:1 UBC L Rev 673 at 702.
[324] See *ibid*.
[325] See *Haida Nation v British Columbia,* Statement of Claim, 2002 BCSC; See generally P Whitney Lackenbauer & Yale Deron Belanger, eds, *Blockades or Breakthroughs? Aboriginal Peoples Confront the Canadian State* (Montreal: McGill-Queen's University Press, 2014) c 3.

the CWB, self-determination in the Haida context is best understood through the rooted framework as there is a continued relationship between the Nation and the state rather than a focus on separation and self-government.

Through signing the *Gwaii Haanas Agreement* and the *Reconciliation Protocol*, the CHN has taken steps to determine and control its own future. These agreements represent steps towards the removal of Haida Gwaii from colonial resource management regimes by ensuring that its management and protection occur in accordance with the understanding of the Haida Nation. While the agreements do not grant full control over the archipelago to the Haida Nation, the decision-making process created protects against the imposition of colonial management theories and structures. Additionally, the co-management regime is largely removed from the colonial, bureaucratic decision-making process which plagues other co-management regimes, such as in the NWMB. The CHN is treated as an equal partner with independently derived authority, and decisions made by consensus promote transparency and mutual accountability throughout the relationship. Unfortunately, there is still concern that some colonial structures may exist in scenarios where the AMB cannot reach consensus, and the issue is referred to intergovernmental negotiations. No information is provided by the AMB as to how such negotiations are to occur or will be structured. As such, it cannot be stated with certainty that the CHN has escaped the snare of liberal and colonial institutions.

Within the agreements, both the state and the CHN retain a degree of independence. Both parties were responsible for the enactment of the agreements through their own institutions—the validity of which was not questioned in the agreement. The agreements themselves also recognize that each party has a sphere of jurisdiction which is not impacted by the establishment of the relationships. However, in line with the rooted self-determination approach, this independence is restrained. Without limiting the obligations or jurisdictions of the parties, the AMB constrains party independence via its requirement to make all reasonable efforts to reach consensus.[326] The independence of all parties is thus limited by both consensus and interdependence. Although this is not to say that each party's independence has been removed, actions which require co-operation and consensus are subject to such limitations before independent obligations are met and jurisdictional authority is exercised. Elsewhere, the Haida Nation Management Council takes a

[326] See *Gwaii Haanas Agreement*, *supra* note 308, s 9.2.

similar approach, recognizing that each party operates under its respective jurisdiction.[327] Such a characteristic is recognized by the theory of rooted self-determination as necessary for the development of healthy relationships between the Indigenous people and the state.

While not considered in extensive detail within each agreement, there are traces of the principles of relationality and interdependence with the earth through reference to Haida legal traditions. As Susanna Quail points out, the Haida law *yah'guudang* (related to respect for all living things) was entrenched by the enactment of the *Reconciliation Protocol* by the CHN and is now reflected in the co-management regime established.[328] A question which such inclusion raises is whether reference to and guidance by principles of relationality is mutual amongst the parties. The Haida Gwaii agreements do not include specific Haida legal traditions upon which the regimes should base their decisions. Recognizing and strengthening interrelationships is also acknowledged in the *Reconciliation Protocol* but is not explicit regarding shared decision-making.[329] It is, therefore, possible that the state does not approach the decision-making process through reliance upon the same beliefs. However, despite the lack of explicit Haida principles related to relationality and interdependence, the structure of the relationship between the parties suggests that such principles will be an implicit consideration in the decision-making process.

3.3.3. Endorsing a Treaty Federalism Framework

Finally, the Haida Gwaii agreements can be understood as modelled upon the treaty federalism framework. This framework is relevant in understanding the development of a nation-to-nation relationship between the Haida, Government of Canada, and Government of British Columbia, and in the establishment of a pluriconstitutional approach to co-management.

In the first pages of both agreements, the parties assert their own and reject the other party's jurisdiction over Haida Gwaii. From the first page, both agreements reflect a stark conflict between different views on sovereignty, title and jurisdiction of Haida Gwaii. In one column, Haida Nation asserts its rights, jurisdiction, sovereignty and title over Haida Gwaii which will be managed in accordance with its "laws, policies, customs and traditions."[330] Haida Gwaii is the traditional territory of the Haida people and is subject to the exercise of the Haida constitutional

[327] See *Reconciliation Protocol*, *supra* note 309, s 6.3.
[328] Quail, *supra* note 323 at 702.
[329] See *Reconciliation Protocol*, *supra* note 309, s 5.1.
[330] *Ibid*, s A.

order. In the opposite column, the Government of British Columbia asserts that Haida Gwaii is crown land and subject to the jurisdiction of the Government of Canada and British Columbia. The difference between the statements and views could not be more obvious. Yet, the two parties are able to recognize these conflicting views and create a regime which will allow for the joint management of resources and environmental concerns. The conflict also serves to remove the need to view the co-management regimes as solely based on the recognition model. At no point does the Government of British Columbia or the Government of Canada attempt to recognize the Haida Nation as having title to and jurisdiction over islands. Despite the lack of recognition from the state, it still agrees that a nation-to-nation relationship has developed. This demonstrates that it is possible for a nation-to-nation relationship to develop without territorial and/or jurisdiction recognition. Recalling Stark's understanding of a nation-to-nation relationship as one based on mutuality, interdependence and party autonomy, the existence of these factors does not depend upon the resolution of jurisdictional question issues. Here the CHN and state enter the process as nations and create a relationship on the basis of accepting differing opinions which do not need to be resolved to address joint resource management. Through setting aside specific claims to title and sovereignty, focus can be turned to the larger issue regarding joint management of the archipelago.[331]

Notably, nowhere in the agreements is the issue of competing constitutional orders resolved, nor does one constitutional order prevail in the event of a conflict between the parties. These statements on conflicting views demonstrate not only the recognition of the legitimacy of the Haida constitutional order but more importantly, the willingness of the state to integrate these views into a co-management regime and build a productive relationship.[332] The recognition of these distinct constitutional orders is further demonstrated in clauses throughout both agreements. In defining the Haida Nation, the *Gwaii Haanas Agreement* specifically states that the Council of the Haida Nation is the governing body under the Constitution of the Haida Nation.[333] This is directly contrasted by the following clause which defines the Government of Canada pursuant to the *Constitution Act, 1867*.[334] The significance of these statements should not be underestimated as they are part of a broader realization of the autonomy of the Haida Nation to govern itself

[331] See *Gwaii Haanas Agreement*, *supra* note 308, s 1.3.
[332] See Quail, *supra* note 323 at 701.
[333] *Gwaii Haanas Agreement*, *supra* note 309, s 2.7.
[334] *Ibid*, s 2.8.

pursuant to its own constitutional order. The Government of Canada does not prescribe how the CHN should govern itself, or mandate the manner in which it responds within the management agreements. The statements are a clear acknowledgement of both the Haida's constitutional order and its self-determining nature.

Conversely, not all aspects of the framework of treaty federalism apply to the agreement. Despite the integration of Haida and Canadian constitutional orders in the agreements, the Canadian constitutional order remains applicable to Haida Gwaii. The *Gwaii Haanas Agreement* in particular preserves the jurisdiction and obligations of each party subject to the requirement of reasonable efforts to reach consensus.[335] These respective jurisdictions and obligations, in relation to the AMB, were considered by the Federal Court in *Moresby Explorers Ltd v. Canada (Attorney-General)*.[336] The case concerned an application for a tour-related license by Moresby Explores Ltd for activities located in the National Marine Park on Haida Gwaii. The licensing requirements and quotas were overseen jointly by Parks Canada and the AMB, which raised the question of whether, by consulting with the AMB through the licensing process, Parks Canada unlawfully delegated and/or fettered their discretion. Holding that there was no unlawful delegation or fettering of discretion, the Federal Court clarified the decision-making process of the AMB as regards the jurisdiction of the parties under the agreement; each party is permitted to act unilaterally within their own jurisdiction, pending an attempt via the Board to reach a decision by consensus.[337] Thus, while the obligations of each of the parties to their own constitutional order remain unchanged, how one goes about fulfilling these obligations is controlled by the principles of the nation-to-nation relationship which has been established.

Applying the treaty federalism framework to the Haida Gwaii agreements has led to the development of a stronger relationship between the state and the CHN. By continuing to develop practices established under the AMB and Reconciliation protocol, and by signing additional agreements for resource management, the parties reinforce their ability to provide effective resource management while maintaining respect for each other on a nation-to-nation basis. This relationship is possible due to the Haida Gwaii agreements providing for decision-making which is based on principles of mutuality and consensus, and supplemented with negotiations.

[335] *Ibid*, s 9.2.
[336] *Moresby Explorers Ltd v Canada (Attorney General)*, [2001] 208 FTR 189.
[337] See *ibid* at paras 75–77 and 85.

Additionally, the agreements anticipate the renewal and modification of the relationship to reflect the needs of both parties and to meet the objectives of the regime. This is a key characteristic of the treaty relationship.[338] It ensures that any issues are addressed to avoid the relationship breaking down, and allows for continued and effective resource management.

The case studies demonstrate that there has been a shift away from only using the recognition framework to establish co-management regimes. This shift is to be commended. The recognition framework, while offering one avenue to establishing co-management, has been ineffective at producing a mutual co-management regime. As seen in the NWMB, the framework did not allow for meaningful participation between state officials and Indigenous peoples, and did not incorporate Indigenous constitutional orders and lifeworlds into decisions on such basis. Translating elements of Indigenous lifeworlds and legal traditions still remains an issue as the recognition framework continues to be incorporated, albeit with less emphasis. The CWB continues to require translations of Indigenous principles of environmental management into a context understood by non-Indigenous partners and state officials. Such a requirement can be beneficial to non-Indigenous people wanting to better incorporate Indigenous epistemologies and ontologies into decision-making, but the process continues to be plagued by the colonial harms which come with translation. Despite the shift away from prioritizing the recognition framework, it will continue to be a snare. This was seen in the Haida Gwaii co-management regimes, where although recognition is not a foundational framework, the requirements inherent within the Canadian Constitution to have a decision recognized, such as producing a decision in written English, must be met. As co-management regimes continue to be created upon these frameworks, it is necessary to understand that recognition will exist as a shadow over the regime; yet, its everyday effects can be minimized by emphasising the use of alternative frameworks.

The benefits of this slow shift away from grounding co-management regimes in the recognition framework are noticeable in practice, in both the CWB and Haida Gwaii regimes. The use of rooted self-determination to establish regimes was notable as it allowed for each Indigenous people to shape the regime in accordance with their own traditions and priorities. For the CWB, placing an emphasis on rooted self-determination allowed the Board to base decisions on

[338] See *Report of the Royal Commission on Aboriginal Peoples: Looking Forward Looking Back*, vol 1 (Ottawa: Canada Communication Group, 1996) c 16.

Cowichan principles of relationality and interconnectedness. This in turn has led to sustainable and holistic environmental decision-making within the watershed. In contrast, the Haida Gwaii regimes use the framework of rooted self-determination to enhance decision-making authority over the islands in order to directly determine the peoples' future. Such control is acknowledged as independence which is limited by a degree of interdependence. A caveat to rooted self-determination under the Haida agreements is that there is no requirement for the state to adopt decisions in a manner which is respectful of these principles if the decision is one for which the state has sole discretion.

As proponents of co-management begin to turn away from the recognition framework, treaty federalism presents itself as an effective foundation for co-management regimes. One such reason for this is that the framework can be applied in substance rather than strictly in form, as seen through the CWB. This creates the potential for other community led co-management processes to adopt a nation-to-nation relationship without the need for a partnership with the federal or provincial government. However, by doing so, there is potential for the co-management body to lack jurisdiction which in turn opens the door for emphasis on recognition. Strongly grounding a co-management regime on treaty federalism also offers the opportunity to move past jurisdictional disputes by simply recognizing Indigenous constitutional orders as equal. The Haida Gwaii agreements are a success story; by overcoming decades of jurisdictional dispute and simply "agreeing to disagree" on constitutional jurisdiction, logging and fishing on the islands can be sustainably managed by both parties. This style of co-management not only leads to stronger environmental decision-making, but establishes a mutual and beneficial nation-to-nation relationship. Of course, it must be remembered that the treaty federalism framework is not perfect in its current conceptualization: neither the CWB nor the Haida have been able to remove themselves from the Canadian constitutional order.

Co-management has developed as a strategy with diverse forms for resource management. The process is motivated by specific environmental concerns, as well as an ideal of what the broader Indigenous-state relationship should envisage. As seen from analysing the case studies, evaluating a regime is not reducible to a simple question of whether Indigenous law is included in the co-management regime, or if specific rights are recognized. The analysis must also include reference to general legal considerations such as decision-making processes and styles of regime. Setting out a framework for understanding the resulting relationship formed is helpful when

considering the objectives of a specific regime, and the assumptions which are made in achieving them. A recognition-based approach is still favoured, as seen through the NWMB and CWB, but leads to a pre-determined and limited relationship. Rooted self-determination, while beginning to emerge in regimes such as the CWB and on Haida Gwaii, is not currently the primary approach to co-management. As present, it only serves to enhance the existing relationship and can further shape inclusion of Indigenous legal traditions. While offering different benefits, the case studies demonstrate that the use of multiple frameworks to inform the Indigenous-state relationship complicates development of co-management agreements. The co-management process becomes convoluted by the application of the multiple frameworks found within regimes. This in turn effects the sustainability of the regime, and more importantly, the efficacy of management practices.

4. Moving Forward

Returning to the initial question this thesis raised: If the Indigenous-state legal relationship can be understood as modelled upon different frameworks, what can be concluded by analysing cases where these frameworks have been used to develop an agreement to co-manage natural resources? Each of the case studies offered an opportunity for deeper analysis of the motivations which drive the choice of framework, and underscores the importance of acknowledging where multiple models are at work within the co-management regime.

In the second chapter, three different frameworks were outlined, and each explains how a particular perception of the Indigenous-state relationship may be formed by its use. These frameworks result in certain objectives, assumptions, and limitations being imposed on the conceptualization of the relationship. At present, the use of a recognition framework remains prevalent both by the judiciary, and for the establishment of co-management regimes. As to the self-determination frameworks, the resulting Indigenous-state relationship is highly dependent upon which framing is used. With rooted conceptualization beginning to become more prominent, it will be interesting to see how these framings of self-determination interact in the future. Treaty federalism offers the ability to reshape the Indigenous-state relationship in a manner which will also allow rooted self-determination to develop, yet its success requires acceptance that the state will remain underpinned by the liberal legality. It is evident that no framework is perfect. The value of each framework is, therefore, determined by the underlying biases of the party applying the framework.

The case studies explored in Chapter III demonstrated that the framework of recognition remains dominant throughout Canadian co-management regimes. Such prominence raises concerns of inaccuracy in the translation of Indigenous law, and that it ignores the constitutional orders which underpin its development. This results in the perpetuation of harm to Indigenous peoples and their lifeworlds. Treaty federalism, as a framework, is being used increasingly in co-management agreements, yet its effectiveness is predetermined by the status of the parties to the co-management regime, and the commitment of those parties to factors beyond the assertion of a nation-to-nation model. On a more positive note, the Haida Gwaii and CWB regimes demonstrate that rooted self-determination can be expressed through co-management. What is clear from these case studies is that using the framework of recognition predetermines the scope of the established relationship, whereas the other frameworks result in relationships that are based on flexibility and mutuality. Moving forward with the co-management process, it is equally important to recognize that the models which utilize decision-making by consensus, mainly rooted self-determination and treaty federalism, contribute towards a stronger relationship. This will ensure sustainability of the partnership and practices so resources are preserved for future generations.

Regarding further research, it is suggested that in-person and quantitative research be conducted to better define the frameworks which are used in the co-management process, and to expand upon what has been included in each of these frameworks. This would offer opportunities for researches to observe conversations and discussions between parties at the community level, which may further reveal limitations and benefits of the frameworks. From a legal perspective, this type of fieldwork would begin to address the gap in legal literature on co-management and Indigenous law, whereas such research was beyond the scope of this thesis. Indigenous and state perspectives on each framework and the co-management processes studied would enhance the understanding each framework, and aid in increasing transparency and communication between the parties. Moreover, as the case studies examined were not grounded in liberal self-determination, thus that framework was not relevant. Therefore, continued research could also evaluate if, and where, the liberal self-determination framework is being used to inform the foundations of the Indigenous-state relationship in a co-management context.

Moving forward, it is necessary to recognize that parties approach Indigenous-state relationships with diverse needs and motivations. The divergence in these perspectives assists in explaining why differences in goals, limitations, and assumptions arise when parties or scholars

discuss these relationships. As it is unlikely that a singular approach to the Indigenous-state relationship will develop in the immediate future, a better method of communication regarding the relationship is necessary to provide clarity in discussions. It is suggested that adopting a framework-based approach will provide such clarity.

While scholars and/or negotiating parties may disagree about the appropriateness of a framework for a particular situation, or about the issue of which framework best describes the Indigenous-state relationship as a whole, explicit identification of the framework has many advantages. Through this approach biases would be revealed (and could be addressed), and discussions between parties would be more coherent, and would ultimately lead to more transparent and honest communication. Such communication is vital in the context of co-management due to the environmental and social harms associated with colonial approaches. Moreover, explicit use of the frameworks in discussions would assist parties in conducting negotiations through a regime development process, and in the continued development and implementation of the regime. Reconciling constitutional orders through co-management represents a movement towards honouring different worldviews. This approach also aids the objective of co-management by establishing stronger partnerships between Indigenous and non-Indigenous institutions, which in turn will lead to the proliferation of sustainable environmental practices upheld by, and benefiting, all parties.

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