

THE SOUND OF SILENCE:
FIRST NATIONS AND
BRITISH COLUMBIA
EMERGENCY MANAGEMENT

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By

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ABSTRACT

In this thesis I offer a brief overview of the current legislative, regulatory and treaty frameworks impacting emergency management in British Columbia, with a particular emphasis on Crown-identified First Nation roles. I show that the regime overwhelmingly positions non-First Nation governments, contractors and other organizations to manage emergencies on behalf of First Nations. I explore emergency management as a manifold process that includes protracted planning, mitigation and recovery phases, which, unlike emergency response, are carried out with lower levels of urgency. I consider Canadian *Constitution Act, 1982* (s. 35) Aboriginal rights in light of the lack of statutorily prescribed inclusion of First Nations in off-reserve emergency management, particularly at the planning, mitigation and recovery phases concluding that the jurisprudence to date (including the duty to consult and Aboriginal title) does not appear to have revolutionized the regime. While the constitutional status of Aboriginal rights should operate to insure adequate First Nation direction in each stage of emergency management, the regime continues to restrictively prioritize other constitutional priorities, such as division of powers and civil liberties. To better understand the omission, I theorize the lack of Crown implementation of s. 35 Aboriginal rights generally as an ‘obligation gap’, highlighting how an analysis of s. 35 Aboriginal rights as ‘negative rights’ fails to compel implementation of the full scope of Crown obligations implicit within the jurisprudence to date. I then offer a new framework for s. 35 as justiciable ‘recognition rights’ and juxtapose ‘recognition rights’ with the idea of justiciability of government inaction through a brief comparative analysis of socioeconomic rights in South Africa’s constitution and Canada’s constitutional Aboriginal rights.

With a decided emphasis on the obligations of the Crown, this thesis attempts to offer fodder to First Nations and legal practitioners seeking to challenge the emergency management landscape where First Nations seek an enhanced role in protecting and restoring their respective territories in anticipation of, and in the wake of, disaster. For convenience and clarity, contemporary geographical and jurisdictional references to the areas now known as Canada and British Columbia are used throughout the thesis without intention to detract from the integrity of First Nation claims to their traditional and ancestral territories.

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DEDICATION

I dedicate this work to my two beautiful children
Samson and Guillaume
who have learned along with me
struggled with me
and rejoiced with me
as we completed this journey
together

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SECTION 1 – INTRODUCTION

Emergencies and disasters occupy a significant amount of media attention when they occur and fuel the imagination in otherwise nondescript times. Large-scale disasters frequently take on global interest and often trigger international cooperative response and recovery efforts. Popular culture fantasies exploring human response to ‘Armageddon’ abound in film, television and literature.¹ Details of smaller scale emergencies grace news outlets on practically an hourly basis, with journalists covering everything from local automobile accidents to house fires. Coverage of larger emergencies can dominate news broadcasts for days or even weeks, resulting in an almost continuous account of Canadian experience with all manner of emergencies and disasters.

In the last two years alone, we have watched the massive devastation wrought by earthquake in Nepal, typhoon in the Philippines, pandemic in Africa, and industrial accident in Canada, to name only a few sensational disasters. The Nepalese massive earthquake in April 2015 killed nearly nine thousand people, injured over 22 thousand more and affected over one third of that nation’s entire population (8 of 28 million).² Nepal’s recovery costs will likely exceed 5 billion US dollars.³ Typhoon Haiyan (known in in the Philippines as Typhoon Yolanda) was one of the strongest tropical cyclones ever recorded and killed at least 6300 in the Philippines with an estimated damage of nearly two billion US dollars.⁴ On April 4, 2014 Imperial Metals’ Mount

¹ See e.g. *2012*, 2009, DVD: (Culver City, Cal: Columbia Pictures Industries, 2010); 2012 Movie Review, online: IMDb <<http://www.imdb.com/title/tt1190080/>> (“A frustrated writer struggles to keep his family alive when a series of global catastrophes threatens to annihilate mankind”); see e.g. “Apocalypse Preppers” (podcast), online: The Discovery Channel <<http://www.discovery.com/tv-shows/apocalypse-preppers/>> (a television program also available online, features some individuals’ infatuation with emergency/disaster planning); see e.g. “Doomsday Preppers” online: National Geographic Channel <<http://channel.nationalgeographic.com/doomsday-preppers/>> (another television program that similarly explores various individuals’ disaster preparation efforts); and see “‘Doomsday Preppers,’ the Truth about the Prepper Movement” *PRWeb Newswire* (14 Feb 2012) *General Reference Center GOLD* online:

<<http://go.galegroup.com/ps/i.do?id=GALE%7CA279973546&v=2.1&u=usaskmain&it=r&p=GRGM&sw=w&asid=5c7c5661d1a88a0dfc636c1cac490864>> (“The truth is ‘Doomsday Preppers’ is not about the apocalypse, Mayan Calendar or end of the world but rather about the lives ordinary Americans who are preparing for life’s uncertainties. Disasters and emergencies can happen at anytime; they can happen today or 1000 years from now,” says Ralston).

² Nepal, Nepal Disaster Risk Reduction Portal, online: <http://drrportal.gov.np/> at <<http://apps.geoportal.icimod.org/ndrrip/profile?id=Country&Lang=en>>.

³ “Narrow Minded: Asia can do more to protect itself from the risk of natural catastrophes”, *The Economist* (13 June 2015) online: *The Economist* <<http://www.economist.com/news/leaders/21654056-asia-can-do-more-protect-itself-risk-natural-catastrophes-narrow-minded>>.

⁴ Republic of the Philippines, National Disaster Risk Reduction and Management Council, “NDRRMC Update: Updates re the Effects of Typhoon ‘Yolanda’ (Haiyan) PDNA Report” (17 April 2014) online: <[http://ndrrmc.gov.ph/attachments/article/1329/Update_on_Effects_Typhoon_YOLANDA_\(Haiyan\)_17APR2014.pdf](http://ndrrmc.gov.ph/attachments/article/1329/Update_on_Effects_Typhoon_YOLANDA_(Haiyan)_17APR2014.pdf)> (The government of the Philippines estimates the total damage in PhP at 89 598 068 634.88 which converts to approximately 2 billion US dollars. Other estimates range upward of 3 billion US dollars).

Polley tailings pond breached, dramatically spilling 4.5 million cubic meters of slurry and over 10 million cubic meters of contaminated water into Polley Lake (British Columbia) and triggering a local state of emergency.⁵ The World Health Organization reports that the current outbreak of Ebola in West Africa “is the largest and most complex Ebola outbreak since the Ebola virus was first discovered in 1976. There have been more cases and deaths in this outbreak than all others combined”.⁶

While other oil spills have recently occurred, it was only five years ago that the largest accidental marine oil spill in the history of the petroleum industry took place – the BP oil spill flowed for three months, spilling 210 million gallons of crude into the Gulf of Mexico.⁷ While the environmental devastation and loss of animal and marine life was enormous, the results were reportedly constrained to killing 11 people and injuring 17 others.⁸ The Tohoku earthquake and tsunami in Japan occurred as recently as 2011, killing 15891, injuring over 6000 and causing the disappearance of over 2500 people. The Japanese quake and tsunami caused an immense amount of damage (estimates sit at \$235 billion US dollars) along with nuclear accidents, positioning Tōhoku as the costliest natural disaster in world history.⁹

United Nations statistics summarizing disasters losses over the last 10 years put our global experience with disaster into stark context:

⁵ British Columbia, News Release, “Mount Polley Tailings Pond Situation Update” (8 August 2014) online: Environment <<https://news.gov.bc.ca/stories/friday-aug-8---mount-polley-tailings-pond-situation-update>>.

⁶ World Health Organization, Media Release, “Ebola Virus Disease, Fact Sheet no 103”, (updated April 2015) online: <http://www.who.int/mediacentre/factsheets/fs103/en/>; and see The World Bank, Brief, “World Bank Group Ebola Response Fact Sheet” (7 July 2015) online: <<http://www.worldbank.org/en/topic/health/brief/world-bank-group-ebola-fact-sheet>> (“This includes restoring basic health services, helping countries get all children back in school, farmers back planting in their fields, businesses back up and running, and investors back into the countries. We are helping countries reignite their economies, strengthen their health systems, and build back better”. Further, The World Bank reports that it continues to respond to the Ebola crisis by “working closely with the affected countries, the United Nations, WHO, bilateral, civil society and private sector partners to support response and recovery” demonstrating the large scale international cooperative efforts that continue to inform the demands that the pandemic has created.).

⁷ “10 Largest Oil Spills in History” The Telegraph (7 October 2015) online: The Telegraph <<http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/newzealand/8812598/10-largest-oil-spills-in-history.html>> (Note: The Telegraph credits [popularmechnics.com](http://www.popularmechanics.com) as the source of their article).

⁸ *Ibid.* (According to the Telegraph: “[t]he spill caused extensive damage to marine and wildlife habitats and to the Gulf’s fishing and tourism industries. Skimmer ships, floating containment booms, anchored barriers, sand-filled barricades along shorelines, and dispersants were used in an attempt to protect hundreds of miles of beaches, wetlands, and estuaries from the spreading oil. Scientists also reported immense underwater plumes of dissolved oil not visible at the surface as well as an 80-square-mile “kill zone” surrounding the blown well”).

⁹ Bo Zhang, “Top 5 Most Expensive Natural Disasters in History”, *AccuWeather.com* (30 March 2011) online: [AccuWeather.com http://www.accuweather.com/en/weather-news/top-5-most-expensive-natural-d/47459?partner=](http://www.accuweather.com/en/weather-news/top-5-most-expensive-natural-d/47459?partner=).

Over 700 thousand people have lost their lives, over 1.4 million have been injured and approximately 23 million have been made homeless as a result of disasters. Overall, more than 1.5 billion people have been affected by disasters in various ways, with women, children and people in vulnerable situations disproportionately affected. The total economic loss was more than \$1.3 trillion. In addition, between 2008 and 2012, 144 million people were displaced by disasters... Evidence indicates that exposure of persons and assets in all countries has increased faster than vulnerability has decreased, thus generating new risks and a steady rise in disaster-related losses, with a significant economic, social, health, cultural and environmental impact in the short, medium and long term, especially at the local and community levels. ... All countries – especially developing countries... are faced with increasing levels of possible hidden costs and challenges in order to meet financial and other obligations.¹⁰

Escalating disaster experience worldwide occupying domestic and internal governance regimes coupled with the ever-broadening forums for public information exchange (such as social media and real time event coverage etc.) insures that catastrophes will continue to capture global attention and imagination.

As a society, it would seem then that we think a great deal about calamity. Yet arguably, that thought does not extend far beyond our personal and emotive experience with emergencies as transmuted through the sensational lens of media. There is relatively little public debate in Canada on the messy governance mechanics of managing large-scale emergencies, particularly as to the balancing of competing interests and equitably distribution of management resources. Terrorism intelligence debates dominate critical analysis of Public Safety Canada’s enabling legislation, policies and strategic priorities, while wide scale funding cuts to provincial disaster recovery assistance receive relatively little public scrutiny.¹¹ Yet, all populations in Canada have an interest in effective emergency management, as no one is immune from the potentially destructive forces of nature, the onset of new disease, or the occasional catastrophic outcomes of technical failures and human error causing industrial accidents.

As a nation, Canada has not yet experienced a “catastrophe”. In the disaster planning literature, a catastrophe is understood as “a disaster that results in an economic loss of 2% of a

¹⁰ *Sendai Framework for Disaster Risk Reduction 2015-2030*, GA Res 69/283, UNGAOR, 69th Sess, A/Res/69/283, (2015) 1/24 at 3/24 para 4, online: <<http://www.preventionweb.net/files/resolutions/N1516716.pdf>> [*Sendai Framework*].

¹¹ Paul Withers, “Nova Scotia to be hit by federal disaster assistance cut” CBC News (23 January 2015) online: CBC News <<http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-to-be-hit-by-federal-disaster-assistance-cut-1.2928829>>.

country's Gross Domestic Product", meaning that "a [two] trillion dollar economy such as Canada experiences a catastrophe at a 40 billion dollar event."¹² Yet Canada is a geographically large nation that faces many hazards. In disaster planning terms, hazards are those physical threats produced by nature that can develop into disasters particularly where people are vulnerable or unprepared.¹³ Not only has Canada not yet experienced a catastrophe, according to the Institute for Catastrophic Loss Reduction, Canada is unprepared: "current recovery programs are insufficient given they were not designed to manage catastrophic events".¹⁴

We know through observation of global experience with catastrophes that planning, prevention and mitigation reduce vulnerability to hazards, which can in turn lessen the costs of a given disaster event in every respect (i.e. lives saved, injuries avoided, infrastructure stability, economic loss minimized, social order maintained, etc.). In fact, the new United Nations *Sendai Framework for Disaster Risk Reduction 2015-2030* emphasizes 'disaster risk management as opposed to disaster management'.¹⁵ Governments are increasingly interested in disaster risk reduction the world over in part because of the growing costs of disaster recovery; since 2000, international disaster costs have reached two and half trillion US dollars.¹⁶ The Economist recently reported on the "insurance protection" gap, which is "the difference between insured and uninsured losses when natural catastrophes strike", stating that of the "\$101 billion in global economic losses in 2014, nearly half stemmed from floods, cyclones and other disasters in Asia.

¹² Public Safety Canada, Fifth Annual National Roundtable on Disaster Risk Reduction, *Rethinking Roles in Disaster Risk Reduction: Canada's Platform for Disaster Risk Reduction* (Final Report 2014) at 12-13 [*Canada RoundTable*] (Moderator: Paul Kovacs) (Parallel Session 1: Case Studies: Canadian Extreme of Extremes, Institute for Catastrophic Loss Reduction - "Canada hasn't had a catastrophe yet, but we could. It would most likely be a severe earthquake in Vancouver or in Montreal. The scale would be far beyond what Canadians have ever seen. Current recovery programs [...] will be insufficient because they are not designed for this magnitude.").

¹³ But see *Sendai Framework*, *supra* note 10 at 3/24 fn 4 (providing a much more expansive definition of hazard as "A potentially damaging physical event, phenomenon or human activity that may cause the loss of life or injury, property damage, social and economic disruption or environmental degradation. Hazards can include latent conditions that may represent future threats and can have different origins: natural (geological, hydrometeorological and biological) or induced by human processes (environmental degradation and technological hazards)").

¹⁴ *Canada RoundTable*, *supra* note 12 at 12 (current recovery programs are insufficient given they were not designed to manage catastrophic events).

¹⁵ United Nations Office for Disaster Risk Reduction, Proceedings, Third UN World Conference on Disaster Risk Reduction in Sendai City, Miyagi Prefecture, Japan (18 March 2015) at 9 [*emphasis added*] [*UN Disaster Conference*] online: <http://www.preventionweb.net/files/45069_proceedingsthirdunitednationsworldc.pdf>.

¹⁶ *Canada RoundTable*, *supra* note 12 at 13 (at the time of this writing, the total of two and a half trillion dollars constitutes 15 cumulative years of disaster losses. The UN figures cited earlier only go back 10 years).

Of these, only 8% were covered by insurance.... compared with 60% in America".¹⁷ The result of the insurance gap in Nepal, according to the Economist, means that while the earthquake is thought to have produced around \$5 billion in damage (about 25% of that nation's GDP), the insurance bill will only reach about \$160 million dollars. The article alludes to the serious and growing problem worldwide of financing disaster recovery. While interagency cooperatives are developing and testing new international private insurance schemes to assist governments in transferring risk in various spots around the world,¹⁸ another significant cost saving measure governments are increasingly adopting is serious investment in sound prevention strategies before disasters strike.¹⁹

When we understand law and governance as vehicles of social harmony and security, we can posit emergency management in its broadest sense as an interesting and compelling area of law that merits our attention and diligent public scrutiny. Disaster risk reduction, another phrase for reduced hazard vulnerability, is a growing objective around the world. There are strong reasons to minimize injury and loss of life, lower costs and reduce social and economic disruption arising from a given population's experience with hazards. When considered in this light, diligent emergency management practices are arguably an important, if not an essential, component of peace, order and good governance.²⁰

When we speak of managing emergencies, particularly when we speak of responding to an emergency, urgency and gravity are implied. Outcomes are uncertain, stakes can be high and expediency in offering and procuring assistance can be determinative in minimizing destruction

¹⁷ "Insurance in Asia: Narrow Minded", *The Economist*, (13 June 2015) online: The Economist <<http://www.economist.com/news/leaders/21654056-asia-can-do-more-protect-itself-risk-natural-catastrophes-narrow-minded>>.

¹⁸ *Ibid.*

¹⁹ Intuitively we can reason that sound prevention requires thoughtful assessment of hazard risk, careful planning and wise investment of resources according to a given government's priorities for mitigation.

²⁰ The POGG power is often referenced in terms of a residual power of Parliament to generally make laws outside of those areas enumerated as exclusively within the provincial sphere of governance. However, the peace, order and good governance clause also speaks to an important central aim of governance, and is likewise echoed as such in the South African constitution (of significance later in this thesis). See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 at s 91 [*Constitution Act, 1867*] ("It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada..."); and see *Constitution of the Republic of South Africa, 1996*, No 108 of 1996 s 41 [*Constitution, South Africa*] ("All spheres of government and all organs of state within each sphere must a. preserve the peace, national unity and the indivisibility of the Republic; b. secure the well-being of the people of the Republic; c. provide effective, transparent, accountable and coherent government for the Republic as a whole...").

and loss of life. Canada's democratic institutions, entrenched rights, and *Charter* values arising from both the written and unwritten portions of Canada's constitution are not particularly conducive to the idea of efficacy in governance, even in emergencies. Canadians must grapple with the question of whether some rights can legally and ethically be defied in the interest of effective emergency response and disaster recovery. The question is not novel, and the answer has varied over time and with changing political sentiment.²¹ Today, Parliament strikes a balance of priorities in the *Emergencies Act* by outlining specific emergency powers along with specific constraints in order to protect *Charter* rights, Canada's division of powers, and continued democratic governance.

As I later explore in-depth, completely absent from the statutory framework that seeks to protect some of Canada's key constitutional values during a state of emergency is any overt language that speaks to ensuring the priority of s. 35 Aboriginal rights. In fact, as I will demonstrate, First Nations are for the most part absent from the regulatory and statutory frameworks that operate to manage emergencies generally within British Columbia. While the government of Canada has recently set new budgetary priorities on enhancing emergency planning and mitigation *on-reserve*, the landscape is basically silent on the role of First Nations in managing emergencies off-reserve, whether within their ancestral territories generally or their Aboriginal title territories specifically. As this thesis will explore, there are some nuances where there is a measure of First Nation inclusion in emergency management off reserve.²² However,

²¹ See H. D. Munroe, "Style within the centre: Pierre Trudeau, the War Measures Act, and the nature of prime ministerial power" (2011) 54.4 *Canadian Public Administration*: 531; and see Library and Archives Canada, "Notes for a national broadcast, October 16, 1970", online: Library and Archives Canada <<https://www.collectionscanada.gc.ca/primeministers/h4-4065-e.html>> (for a copy of Prime Minister Trudeau's speech regarding invocation of the *War Measures Act*); *War Measures Act, 1914*, RSC 1927 c 206, as repealed by *Emergencies Act*, RSC 1985, c 22 (4th Supp).

²² A handful of modern treaties have emergency management provisions. See e.g. *Tla'amin Final Agreement*, Tla'amin Nation and British Columbia and Canada, 21 October 2011 [enters into force April 2016] online: <http://www.bctreaty.net/nations/agreements/Tlaamin-Final-Agreement_Initialled.pdf> at s 130 [*Tla'amin Final Agreement*] ("The Tla'amin Nation has: a. the rights, powers, duties and obligations; and b. the protections, immunities and limitations in respect of liability of a local authority under Federal and Provincial Law in relation to emergency preparedness and emergency measures on Tla'amin Lands"); *Tla'amin Final Agreement Act*, SC 2014 c 11; *Tla'amin Final Agreement Act*, SBC 2013 c 2. In addition, there are some arrangements for mutual aid in fire suppression. See British Columbia, Emergency Management BC, *EMBC Interim Policy and Procedures Bulletin Fire Season 2015*, "Reimbursement for local government fire services during wildland urban interface fires", online: <<http://www.embc.gov.bc.ca/ofc/interface/pdf/reimbursbull.pdf>> [*BC Fires Bulletin*] (where on-reserve First Nation fire suppression bodies are characterised as 'local authorities' for the purposes of delivery of and compensation for fire suppression services); but see British Columbia, Emergency Management BC, *Addendum to EMBC Interim Policy and Procedures Bulletin Fire Season 2015*, "Response Claim Procedures and Eligibility", online: <<http://www.embc.gov.bc.ca/ofc/interface/pdf/reimbursad.pdf>> (note in particular bulletin no 4 "Pay Invoices –

the general all-hazards emergency management statutory and regulatory framework offers practically no guidance to public servants, or the public itself, as to the priority of s. 35 Aboriginal rights in the execution of emergency management activities.

Perhaps the ultimate test of the strength of rights arises in periods of crisis. Scrutiny as to what can be ignored and what is to be upheld at all costs can provide a naked view of the core values of society. In practical terms, it might be said that it is easier to ignore poorly understood rights than enforce them, especially during an emergency. In examining Canada's and British Columbia's relationship to First Nations, what is ignored and what is upheld at all costs can provide valuable insight into the strength of rights First Nations hold under Canada's *Constitution Act, 1982*.²³

In line with our social conditioning from popular media's obsession with disasters, it is perhaps tempting to focus on the dramatic aspect of emergencies and our emotive experience with response efforts. However, from a law and governance perspective, particularly when evaluating the suspension of rights, it is extremely important to understand emergency management as a much larger and longer process, as I will set out in detail later in this thesis. Planning and mitigating for emergencies requires careful prudence in the allocation and use of resources, a measured process that ideally reflects efficacy but does not take place at an urgent pace. Risk reduction (through effective planning and mitigation) is currently a central focus globally on improving emergency management regimes and those processes occur in *advance* of an emergency event without any of the urgency required during a response effort. Disaster recovery likewise can take months, even years.

As I have indicated above, disasters are extremely economically relevant as well. Not only can (uninsured) astronomical costs arise from a single disaster event, the expenditures involved in disaster recovery and even protracted mitigation efforts can distort local micro-economies and

local authorities are expected to pay response costs first and then submit a claim"). So while First Nations are to some extent included in fire suppression management off-reserve being characterised as 'local authorities' for the purposes of the policy bulletin, the remuneration for those services is at the behest of available funds overseen by the federal Department of Indian Affairs and Northern Development as the expectation is that First Nations are *fiscally able* to deliver the services and collect compensation after the fact, as is commonplace in the provincially orchestrated emergency fire management strategy. Fiscal exclusion can be a potent barrier operating to exclude First Nation from emergency management generally, irrespective that individual policies, such as the one outlined here, suggests First Nations are included as 'local authorities'.

²³ *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*].

actually operate to stimulate an otherwise depressed local economy. For example, in some remote communities where resource economies have slowed, boosts in local employment and services can arise from largescale recovery efforts where (say) a major highway is rendered unusable or other major infrastructure damage has taken place. Or, a boost to a local economy can arise from a largescale mitigation project (for example construction of a floodway) with the job creation potential and service delivery requirements largescale industrial projects demand. The potential for micro-economy stimulation raises important issues as to whether emergency management practices could dually serve economic development and capacity building agendas currently directed at (and arguably faltering in) remote First Nation communities.

The timing is ripe to more deeply consider and address First Nation roles in Canada's emergency management framework for many reasons, not least of which is escalating interest in emergency management globally. Disaster risk among indigenous populations has captured the particular interest of the United Nations Economic and Social Council Permanent Forum on Indigenous Issues regarding more inclusive engagement of 'indigenous peoples in the disaster risk reduction process.'²⁴ The (3rd) UN World Conference on Disaster Risk Reduction recently convened in Sendai Japan and pointedly included priorities respecting indigenous peoples within the conference results.²⁵ The outcome of the global conference was the adoption of the new *Sendai Framework for Disaster Risk Reduction 2015-2030*²⁶ that replaces the *Hyogo Framework for Action 2005-2015*.²⁷ Key sections addressing indigenous peoples in the new framework include:

s. 24(i) Ensure the use of traditional, indigenous and local knowledge and practices, as appropriate, to complement scientific knowledge in disaster risk assessment and

²⁴ Permanent Forum on Indigenous Issues, *Study on engaging indigenous peoples more inclusively in the process of disaster risk reduction by respecting linguistic and cultural practices of indigenous peoples known to be at risk*, UNESCOR, 12th Sess, E/C.19/2013/14 (2013), (Item 3 on the provisional agenda, follow up on the recommendations of the Permanent Forum) online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/237/85/PDF/N1323785.pdf?OpenElement>>.

²⁵ *UN Disaster Conference*, *supra* note 15; *contra Report of the World Conference on Disaster Reduction Kobe, Hyogo, Japan, 18-22 January 2005*, UNGAOR, 2005, A/CONF.206/6, 6 at 14 s 3(i) (a) 'Priorities for Action', online: <<http://www.unisdr.org/2005/wcdr/intergover/official-doc/L-docs/Final-report-conference.pdf>> [*Hyogo Framework 2005-2015*] (There is only one reference to indigenous peoples in the Hyogo Framework found in s.3(i)(a): "Provide easily understandable information on disaster risks and protection options, especially to citizens in high-risk areas, to encourage and enable people to take action to reduce risks and build resilience. The information should incorporate relevant traditional and indigenous knowledge and cultural heritage and be tailored to different target audiences, taking into account cultural and social factors".).

²⁶ *Sendai Framework*, *supra* note 10.

²⁷ *Hyogo Framework 2005-2015*, *supra* note 25.

the development and implementation of policies, strategies, plans and programmes of specific sectors, with a cross-sectoral approach, which should be tailored to localities and to the context;²⁸

s. 27(h) Empower local authorities, as appropriate, through regulatory and financial means to work and coordinate with civil society, communities and indigenous peoples and migrants in disaster risk management at the local level;²⁹

s. 36(v) Indigenous peoples, through their experience and traditional knowledge, provide an important contribution to the development and implementation of plans and mechanisms, including for early warning;³⁰

More analysis could be done contemplating whether the *Sendai Framework* reflects the content of the *United Nations Declaration on the Rights of Indigenous Peoples*.³¹ Section 7 of the *Sendai Framework*, for example, adopts language that seems to contradict Indigenous self-governance and self-determination:

While recognizing their leading role, regulatory and coordination role, Governments should engage with relevant stakeholders, including women, children and youth, persons with disabilities, poor people, migrants, indigenous peoples, volunteers, the community of practitioners and older persons in the design and implementation of policies, plans and standards.³²

The unfortunate implication of section 7 of the *Sendai Framework* is that it categorizes indigenous peoples as ‘stakeholders’, which is inconsistent with the language and commitments implicit in the *United Nations Declaration on the Rights of Indigenous Peoples*. More analysis is needed to determine the degree of consistency of the *Sendai Framework* with the *United Nations Declaration on the Rights of Indigenous Peoples*. Further analysis will likely demonstrate that current ideas on the execution of government engagement with Indigenous Peoples in disaster management fall short of respecting the *United Nations Declaration on the Rights of Indigenous Peoples*.³³ However, for the purposes of this thesis, it is enough to note the growing international

²⁸ *Sendai Framework*, *supra* note 10 at s. 24 (i).

²⁹ *Sendai Framework*, *supra* note 10 at s. 27 (h).

³⁰ *Sendai Framework*, *supra* note 10 at s. 36 (v).

³¹ *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR Res. 61/295, U.N. Doc. A/RES/61/295 (13 September 2007) [UNDRIP].

³² *Sendai Framework*, *supra* note 10 at s. 7.

³³ And see *International Day for Disaster Reduction 2015: ‘Knowledge for Life’*, UNISDR, Concept Note, online: <<http://www.unisdr.org/2015/iddr/documents/IDDR15ConceptNoteFINAL.pdf>> (Currently, the United Nations Office for Disaster Risk Reduction is framing the “International Day for Disaster Reduction 2015” as ‘Knowledge for Life’ as part of using the day to: “(1) Raise awareness of the use of traditional, indigenous and local knowledge and practices, to complement scientific knowledge in disaster risk management; (2) Highlight approaches for engaging local communities and indigenous peoples in implementation of the Sendai Framework for Disaster Risk Reduction”. The desired outcomes are “1. Greater global awareness of the importance of traditional, indigenous and

consciousness of the need for governments to better engage with Indigenous peoples in disaster risk reduction governance processes

On the domestic front, Canada is demonstrating increased awareness of the need to better integrate indigenous perspectives in domestic disaster risk reduction. At Public Safety Canada's most recent round table on disaster risk reduction, a session was devoted to "Enhancing Aboriginal Planning and Preparedness".³⁴ The Panel identified that "Aboriginal (First Nations, Metis and Inuit) involvement in planning and preparing for disasters varies widely across Canada, depending on jurisdiction, cultural group, geography and capacities".³⁵ The Panel further identified that "more personnel are needed to work in First Nation communities on [Disaster Risk Reduction, DRR] issues, especially in mitigation and preparation as well as in the provision of psycho-social support. Working with the community as a whole was recognized as highly important, rather than limiting discussions to selected community representatives".³⁶ Consistent with the view of other collaborative bodies, the Panel predicted that the "[f]requency of humanitarian crises due to disasters is expected to continue to rise".³⁷ Yet, highlighting the heightened vulnerability of First Nations, the Panel suggested that "[t]he situation for First Nations [is]...*in a constant state of disaster*, where current conditions are not acceptable, let alone when faced with disaster".³⁸ The Panel offered concluding thoughts that hinted at some discord:

local knowledge and practices to disaster risk reduction; 2. Inclusion of indigenous people / local communities in the design and implementation of national DRR programmes; 3. Public discourse to promote attitudinal and behavioural changes towards inclusion of indigenous peoples and consultation at the community level").

³⁴ *Canada RoundTable*, *supra* note 12 at 15-16 ("Parallel Session 2: Enhancing Aboriginal Planning and Preparedness", Aboriginal Affairs and Northern Development Canada & Resilient Communities Working Group – Aboriginal Resilience Sub-group).

³⁵ *Ibid.* at 15.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.* [emphasis added] ("The circle discussion provided the airing of grief and frustration over conditions such as waste disposal, potable water, and emergency care. It was strongly voiced that funding for ongoing delivery of emergency care training should be made available"); and see James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya – Addendum – The situation of indigenous peoples in Canada* UNHRC, 27th Sess, A/HRC/27/52/Add.2 (4 July 2014), online: <<http://unsr.jamesanaya.org/docs/countries/2014-report-canada-a-hrc-27-52-add-2-en.pdf>> [Anaya, *UNHRC Report*] at para 15 ("15. The most jarring manifestation of those human rights problems is the distressing socioeconomic conditions of indigenous peoples in a highly developed country. Although in 2004 the previous Special Rapporteur recommended that Canada intensify its measures to close the human development indicator gap between indigenous and non-indigenous Canadians in health care, housing, education, welfare and social services, there has been no reduction in that gap in the intervening period in relation to registered Indians/First Nations, although socioeconomic conditions for Métis and non-status Indians have improved, according to government data. The statistics are striking. Of the bottom 100 Canadian communities

There was agreement on a larger systemic problem but willingness *among some* to work with the resource envelope available. DRR education was highlighted as a priority with a focus on learning coming from aboriginal peoples. Although following the traditional ways had worked for centuries, current Aboriginal approaches need to be adapted to make local community level emergency plans considerate of regional geographic differences and traditional knowledge. The Five Feather program in Ontario was noted as an example train-the-trainer program relying on First Nations ownership of their individual emergency plans.³⁹

The panel outcomes demonstrate heightened awareness around systemic issues pertaining to First Nation (Aboriginal) roles within current emergency management strategies; however, the Panel offered limited corrective guidance. Extensive change may be difficult due to the limitations of the current governance frameworks themselves, as explored in depth in this thesis.

With disaster events on the rise globally, the economic consequences of those disasters reaching epic proportions, and the United Nations providing some supportive leadership on systemic issues in disaster recovery, governments around the world are wisely reviewing their emergency management protocols in order to reduce disaster risk and commensurate disaster costs.⁴⁰ Canada is no exception. In 2005 the Government of Canada established a new federal department called “the Department of Public Safety and Emergency Preparedness, over which the Minister of Public Safety and Emergency Preparedness, appointed by commission under the Great Seal, presides”.⁴¹ Following the establishment of the new ministry, Parliament repealed the *Emergency Preparedness Act*⁴² in 2007 and replaced it with the now authoritative *Emergency Management Act*.⁴³

I have divided this thesis into two distinctive parts. In the first part, I look to the legislative and regulatory frameworks to get a sense of how much guidance is offered to Canada’s, and British Columbia’s, public service with respect to the constitutional status of First Nations. I look for particular reference to First Nation roles in decision-making (including budgetary and financial oversight) and service delivery (emergency management execution as in the

on the Community Well-Being Index, 96 are First Nations and only one First Nation community is in the top 100.” [footnotes omitted]).

³⁹ *Canada RoundTable*, *supra* note 12 at 15-16.

⁴⁰ *Ibid.* at 12-14 (“Although not much can be done to change the hazard, vulnerability can be reduced” at 12).

⁴¹ *Department of Public Safety and Emergency Preparedness Act*, RSC 2005, c 10 s 2 [emphasis added] [*Emergency Department Act*].

⁴² *Emergency Preparedness Act*, RSC 1988, c 11, repealed by *Emergency Management Act*, RSC 2007, c 15 s 13.

⁴³ *Emergency Management Act*, RSC 2007, c 15.

employment and contract as well as the training and capacity building opportunities). To that end, I provide a cursory exploration of British Columbia's emergency management framework, specifically emphasizing gaps in First Nation inclusion within the regime. I also provide examples throughout the thesis of current fiscal approaches to financing emergency management that can actually work against First Nation inclusion particularly in off-reserve emergency management. Notably, I have not accessed the internal documents of statutory bodies such as the British Columbian Provincial Emergency Program, which may well provide some public servant guidance on First Nation engagement (particularly framed as consultation objectives). Nor have I undertaken an exhaustive survey of any existing First Nation-specific protocols and the status of their implementation. Within the current regime, such protocols would likely mostly exist between local authorities and First Nations, with local authorities being a creature of provincial statute. Rather, again for the sake of scoping, I have limited my analysis to statutes and regulations given their prescriptive function over Crown administration generally and given their status as reflective of the constitutional bodies of Parliament and legislatures.

In the second part of this thesis, I suggest that the relative exclusion of First Nations from emergency management off reserve is part of a larger 'obligation gap' of the Crown failing to implement Aboriginal rights generally, touching on modern treaties as a potential source of remedies that remains currently problematic. I also briefly consider the utility of current Aboriginal rights jurisprudence toward improving Crown inclusion of First Nations in emergency management. I conclude that within the current trend of judicial thought, that approach would likely only formalize First Nations in a passive role as 'the consulted' instead of positioning First Nations in their rightful place as self-determining and self-governing governing bodies in their own right. Even the recent *Tsilhqot'in* decision on Aboriginal title is of limited promise as a stopgap solution. That said, its heightening of jurisdictional conflicts over management of Aboriginal title territories may offer further legal incentives to clarify First Nation emergency management roles off-reserve.

To understand the 'obligation gap' I analyze and critique what appears to be the standing philosophical approach to Aboriginal rights in Canadian jurisprudence, which treats those rights as 'negative rights'. I offer a theoretical alternative that philosophically frames s. 35 Aboriginal rights as 'recognition rights'. I then argue for the precedential application of South African

socioeconomic constitutional rights jurisprudence, likening South Africa's socioeconomic rights to Canada's s. 35 Aboriginal rights as both could be understood as 'recognition rights'. The proposition is aimed at challenging Canada's obligation gap in implementing and enforcing First Nations' Aboriginal rights. This ultimately has implications not only for emergency management but also for other governance areas where the Crown does not offer statutory or regulatory implementation of s. 35 priorities. I conclude that the missing key in Canada's current paradigm of s. 35 Aboriginal rights and Crown goals of reconciliation is accountability for government *inaction*, which I argue the judiciary could provide if the courts adopted a 'recognition rights' approach to Canadian Aboriginal rights jurisprudence.

The focus of my analysis throughout the thesis is confined to the federal and British Columbia provincial legislative schemes impacting emergency management of what is commonly known as natural disasters within the boundaries of British Columbia. I further consider Crown emergency management governance relations with First Nations (government to government) specifically, as opposed to offering a more broad analysis that considers Aboriginal peoples generally. Each province and territory of Canada has an emergency management legislative scheme and specific protocols and agreements with the Government of Canada. Some of the British Columbia practices will be consistent with other provinces and territories, and others will not. And, of course, all Aboriginal peoples, not just First Nations, have an interest in inclusive emergency management structures. As such I hope that parts of this thesis may be useful to invoke further critical analysis of the emergency management legal landscape throughout Canada as well as informing some further thought and commentary on the current status of Aboriginal inclusion in emergency management regimes more broadly.

SECTION 2 – FIRST NATION EMERGENCY MANAGEMENT IN LEGISLATIVE AND TREATY FRAMEWORKS (BRITISH COLUMBIA)

2.1 EMERGENCY MANAGEMENT COMPONENTS

The idea of ‘an emergency’ implies crisis and urgency. Citizens typically call upon governments to prepare for, respond to and recover from emergencies that are public in nature and scope. As in most areas that involve collective efforts and a pooling of resources, parameters of engagement are essential to delineate roles and responsibilities. It is therefore not surprising that there exists an entire body of statutory law devoted to categorizing emergencies and authorizing their management. In the past decade alone several international and domestic changes in emergency management philosophy and practice have emerged.

Throughout Canada, emergency management is generally understood to involve four distinct phases: emergency *mitigation* (or prevention), emergency *preparation* (or planning), emergency *response*, and emergency *recovery*. In *An Emergency Management Framework for Canada*, the federal, provincial and territorial governments of Canada collaborated to produce a common approach to various emergency management initiatives and provide a universal definition of each component of emergency management.⁴⁴

That *Emergency Management Framework for Canada* clarifies the purpose of emergency ‘mitigation (or prevention)’ as follows:

to eliminate or reduce the risks of disasters in order to protect lives, property, the environment, and reduce economic disruption. Prevention/mitigation include structural mitigative measures (e.g. construction of floodways and dykes) and non-structural mitigative measures (e.g. building codes, land-use planning, and insurance incentives). Prevention and mitigation may be considered independently or one may include the other.⁴⁵

Mitigation, as such, prioritizes reducing (or eliminating) disaster risk.

Emergency ‘preparation (or planning)’ according to *An Emergency Management Framework for Canada* is: “to be ready to respond to a disaster and manage its consequences through

⁴⁴ Federal-Provincial-Territorial Ministers Responsible for Emergency Management, *An Emergency Management Framework for Canada*, 2nd ed., January 2011 (Ottawa: Emergency Management Policy Directorate Public Safety Canada, 2011) online: Public Safety Canada <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/mrgnc-mngmnt-frmwrk/mrgnc-mngmnt-frmwrk-eng.pdf>> [FPT Framework 2011].

⁴⁵ *Ibid.* at 4.

measures taken prior to an event, for example emergency response plans, mutual assistance agreements, resource inventories and training, equipment and exercise programs”.⁴⁶ A vast range of activities aimed at disaster preparedness could thus fall under the umbrella of emergency preparedness.

According to *An Emergency Management Framework for Canada*, emergency ‘response’ is limited to acting “during or immediately before or after a disaster to manage its consequences through, for example, emergency public communication, search and rescue, emergency medical assistance and evacuation to minimize suffering and losses associated with disasters”.⁴⁷ Obviously, effective emergency mitigation and preparedness will deeply impact the effectiveness of emergency response. Much emergency preparedness is targeted at effective emergency response whereas mitigation focuses on minimizing the final component of emergency management, emergency recovery.

Emergency ‘recovery’, according to the Framework, is: “to repair or restore conditions to an acceptable level through measures taken after a disaster, for example return of evacuees, trauma counselling, reconstruction, economic impact studies and financial assistance”.⁴⁸ As the Framework explains, the recovery stage (particularly in the area of reconstruction) could itself serve as a component of future emergency mitigation.⁴⁹

When assessing emergency management regimes, it is important to orient a given conversation to the specific emergency management component (mitigation/prevention, preparation/planning, response, or recovery) under discussion. As outlined above, each area of emergency management has different central objectives and therefore requires distinct regulatory considerations and funding strategies. For example, preparation/planning and mitigation activities are typically more thoughtful and protracted processes aimed at wisely using current resources to offset or minimize future disaster risk, whereas emergency response and recovery put emergency plans into action and test mitigation efforts.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* (“There is a strong relationship between long-term sustainable recovery and prevention and mitigation of future disasters. Recovery effort should be conducted with a view towards disaster risk reduction.”).

In order to posit First Nation engagement in emergency management activities, it is not only important to delineate legislative regimes informing all four components of emergency management, but also to achieve clarity on legislated conditions that trigger temporary, irregular governance processes. For example, emergency response and recovery might require simplified decision-making processes for the sake of efficacy—particularly where lives depend on emergency responders’ empowerment to act. Careful consideration of what constitutes an emergency is necessary to further effective emergency management from a governance perspective.

Honourable Crown consultation with First Nations potentially impacted by a given emergency risk requires a mutually informed premise of what constitutes an emergency and the measures that will best effect emergency response and recovery. As will later be explored, some emergency mitigation and emergency planning requirements are not identified explicitly as such in various regulatory schemes, particularly in the area of industrial resource extraction, transport and use (processing). First Nation engagement is critical and constitutionally required in all four phases of emergency management and could be impaired by the obfuscation of regulatory objectives pertaining to emergency management, particularly in the areas of prevention and preparedness.

Given that a central aim of this thesis is to demystify emergency management impacting First Nations and their territories, the following sections explore how Canada and British Columbia currently define emergencies and surveys legislative decrees on who brokers the responsibility and authority over and within the four components of emergency management. The following introductory survey of emergency definitions and emergency management jurisdictions is limited to federal statutes and acts of the British Columbia legislature. Similar legislated parameters governing what is an emergency and how emergencies are governed can be found in the laws and regulations of each province and territory of Canada, though they are not explored *per se* in this thesis. For convenience and clarity, contemporary geographical and jurisdictional references to the areas now known as Canada and British Columbia are used throughout the thesis without intention to detract from the integrity of First Nation claims to their traditional and ancestral territories.

2.2 CROWN CONCEPTS OF EMERGENCY MANAGEMENT JURISDICTION

2.2.1 CATEGORIZING EMERGENCIES

2.2.1.1 FEDERAL EMERGENCIES

As earlier related, in 2005 the Government of Canada established a new federal department called the Department of Public Safety and Emergency Preparedness.⁵⁰ Following the establishment of the new ministry, Parliament repealed the *Emergency Preparedness Act* in 2007 and replaced it with the *Emergency Management Act*.⁵¹ The repeal and enactment of new legislation governing emergency response at the federal level was significant on several grounds. Most notably, the newer *Emergency Management Act* in decreeing the powers of the new Minister of Public Safety and Emergency Preparedness created an official planning and implementation oversight government body.⁵² Under the older *Emergency Preparedness Act*, the Minister of Public Safety and Emergency Preparedness did not exist. Development and implementation of emergency plans as well as coordination of emergency preparedness and response among federal “government institutions and in cooperation with provincial governments, foreign governments and international organizations” was handled by any given minister designated by the Governor in Council⁵³, provided that minister was a member of the Queen’s Privy Council for Canada.⁵⁴

Other changes between the older and newer federal emergency legislation include a shift in emphasis from ‘preparedness’ to ‘management’. Not only has the name of the governing statute been changed to specify ‘management’ as opposed to ‘preparedness’,⁵⁵ ‘emergency management’ as a concept is now defined in the federal legislation.⁵⁶ The definition is important

⁵⁰ *Emergency Department Act*, *supra* note 41 at s 2 [emphasis added].

⁵¹ *Emergency Management Act*, *supra* note 43.

⁵² *Ibid.* at ss 3, 4.

⁵³ See *Constitution Act, 1867*, *supra* note 20, ss. 11, 13 (“The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen’s Privy Council for Canada”; “There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen’s Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General”).

⁵⁴ *Emergency Preparedness Act*, *supra* note 41 at ss 2, 4 [repealed].

⁵⁵ See *Emergency Management Act*, *supra* note 43 at s 1; see also *Emergency Preparedness Act*, *supra* note 41 at s 1 [Repealed].

⁵⁶ *Emergency Management Act*, *ibid.* at s 2 “emergency management”.

as emergency management is now the defining legislative priority driving federal accountability to our national population as a whole in the preparation of, response to and recovery from emergencies. According to the *Emergency Management Act*, “emergency management” is *holistic* and means “the prevention and mitigation of, preparedness for, response to and recovery from emergencies”.⁵⁷

The responsibilities of the new Minister of Public Safety and Emergency Preparedness are expansive. Their extent reflects the deepened attention to emergency management *per se* under the newer legislation. Under the broad heading of “exercising leadership relating to emergency management in Canada by coordinating, among government institutions and in cooperation with the provinces and other entities, emergency management activities”,⁵⁸ the Minister’s particular responsibilities are detailed at length in the *Emergency Management Act*,⁵⁹ although even its enumeration is not exhaustive.

The introduction of a specific office to oversee emergency management as well as the enactment of refined duties specific to that office conveys a parliamentary intent to streamline emergency management in Canada. In fact, a specific responsibility of the Minister of Public Safety and Emergency Preparedness is to promote “a common approach to emergency management”⁶⁰ with particular reference to the “adoption of standards and best practices”.⁶¹ This is aided by:

1. the particular responsibility to establish policies, programs and other measures respecting the preparation, maintenance, testing and implementation of emergency management plans by federal government institutions;⁶²
2. the broad responsibility to establish policies and programs respecting emergency management;⁶³
3. the authorization to coordinate the Government of Canada’s response to an emergency;⁶⁴

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* at s 3.

⁵⁹ *Ibid.* at s 4.

⁶⁰ *Ibid.* at s 4(1)(o).

⁶¹ *Ibid.*

⁶² *Ibid.* at s 4(1)(a).

⁶³ *Ibid.* at s 4(1)(m).

⁶⁴ *Ibid.* at s 4(1)(e).

4. the authorization to coordinate with, and support the emergency management of, provinces and local authorities,⁶⁵ including providing assistance to said provinces⁶⁶ and providing financial aid to provinces (as regulated);⁶⁷ and
5. the responsibility to promote public awareness,⁶⁸ conduct research⁶⁹ and exercises,⁷⁰ and provide education and training⁷¹ related to emergency management.

The Minister of Public Safety and Emergency Preparedness also carries global obligations to participate in international emergency management activities in accordance with Canada's foreign relations policies⁷² and may develop joint plans with the relevant United States emergency management authority and likewise coordinate Canada's response and provisioning of assistance to emergencies in the United States.⁷³

Of particular relevance to this thesis, both the current *Emergency Management Act* and the older *Emergency Preparedness Act* outline unequivocally a ministerial responsibility to establish "the necessary arrangements for the continuity of constitutional government in the event of an emergency"⁷⁴ and to "include in an emergency management plan... any programs, arrangements or other measures to provide for the continuity of the operations of the government institution in the event of an emergency".⁷⁵ The *Emergency Management Act* as such explicitly contradicts any supposition that an emergency might justify the suspension of constitutional government or the *prima facie* discontinuity of government operations.

⁶⁵ *Ibid.* at s 4(1)(f).

⁶⁶ *Ibid.* at s 4(1)(i).

⁶⁷ *Ibid.* at s 4(1)(j).

⁶⁸ *Ibid.* at s 4(1)(q).

⁶⁹ *Ibid.* at s 4(1)(p).

⁷⁰ *Ibid.* at s 4(1)(n).

⁷¹ *Ibid.*

⁷² *Ibid.* at s 4(1)(k).

⁷³ *Ibid.* at s 5; (Though the more recent federal *Emergency Management Act* empowers the new Minister of Public Safety and Emergency Preparedness with a refined scope of responsibilities and authorities, all other federal ministers retain the responsibility to prepare, maintain, test and implement emergency management plans specific to the self-identified risks (including risks to critical infrastructure) within their respective scopes of authority (*Ibid.* at s 6). It follows that the Minister of Public Safety and Emergency Preparedness does not have exclusive powers to liaise with provinces under the auspices of emergency management. In fact, each minister is likewise statutorily responsible to include in their emergency management plans "any programs, arrangements or other measures to assist provincial governments and local authorities" (*Ibid.* at s 6(2)(a)) and "any federal-provincial regional plans" (*Ibid.* at s 6(2)(b)).).

⁷⁴ *Ibid.* at s 4(1)(l).

⁷⁵ *Ibid.* at s 6(2)(c).

A potentially important question is what Parliament means by “constitutional government” in requiring the Minister of Public Safety and Emergency Management to establish the necessary arrangements to ensure its continuity. Another important question is how the ‘continuity of constitutional government section’ in the *Emergency Management Act* is to be read with the *Emergencies Act*. As alluded to above, Canada’s emergency management statutory framework is basically silent on the constitutional priority of s. 35 Aboriginal rights, irrespective that a whole new federal department devoted to elevating and improving emergency management throughout Canada has been established and well resourced.

Governance jurisdictions in Canada are notoriously complex and fluid. Rather than act as a barrier to First Nation inclusion in emergency management, that fluidity should allow for any necessary adjustment of the current roadmap toward First Nation decision-making in emergency management to be routed toward ensuring Canada’s s. 35 obligations are met and reconciliation objectives achieved. As will be explored later in the thesis, some thought has been put into First Nation emergency management within the few modern treaties that have been completed between First Nations, British Columbia and Canada.

Treaty or interim-measures agreements constitute one avenue toward remedying the exclusion of First Nations from emergency management within their own respective territories. However, on its own, that strategy could place an undue corrective onus on First Nations. Negotiations can be long, agreement elusive, and implementation measured at best.

Implementation in fact is perhaps the most contentious piece of the utility in negotiated outcomes. There is a troubling lack of honourable implementation on the Crown’s part of established Aboriginal rights, which informs the scope of the omission of s. 35 constitutional Aboriginal rights from emergency management frameworks in the first place. In essence, throughout this thesis I query whether public servants and contractors who are employed by Canada and British Columbia to manage emergencies are even aware of the existence of Aboriginal rights, let alone what they should *do* with those rights as servants of the Crown.

Canada’s emergency management regime categorizes emergencies rather than trying to offer a single expansive definition.⁷⁶ As such, several ‘emergency’ definitions triggering different

⁷⁶ Contra *Emergency Program Act*, RSBC 1996, c 111, s 1.

response strategies are organized under Canada's *Emergencies Act*.⁷⁷ Universal to all emergencies categorized under the *Emergencies Act* is that their character must be that of a 'national emergency'. As such, the *Emergencies Act* almost immediately introduces the fundamental category of a 'national emergency' as:

an urgent and critical situation of a temporary nature that

- (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
- (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada.⁷⁸

Each type of emergency categorized under the *Emergencies Act* must fit within the parameters of a 'national emergency' in order for the Act to be triggered.⁷⁹ The *Emergencies Act* specifies four types of emergencies: 'public welfare emergencies'; 'public order emergencies'; 'international emergencies'; and 'war emergencies'. The definition of a 'national emergency' is important as it *prima facie* restricts the triggering of this exceptional legislation that works to suspend ordinary government measures in favour of temporary 'emergency measures' that "may not be appropriate in normal times".⁸⁰ Another crucial piece of limiting language within the definition of a national emergency is the requirement that the situation "cannot be effectively dealt with under any other law of Canada".⁸¹ While the concept of "effectively dealt with" is subjective at best, one could interpret the national emergency definition as restricting the powers under the *Emergencies Act* to a 'regime of last resort'.

⁷⁷ *Emergencies Act*, *supra* note 21.

⁷⁸ *Ibid.* at s 3.

⁷⁹ *Ibid.* at ss 3, 5, 16, 27, 37 (to meet the definition requirements, the attributes of each of public welfare emergencies, public order emergencies, international emergencies, and war emergencies must be "so serious as to be a national emergency").

⁸⁰ See *ibid.* at Preamble.

⁸¹ *Ibid.* at s 3.

1. Types of Emergencies Illustrative Figure

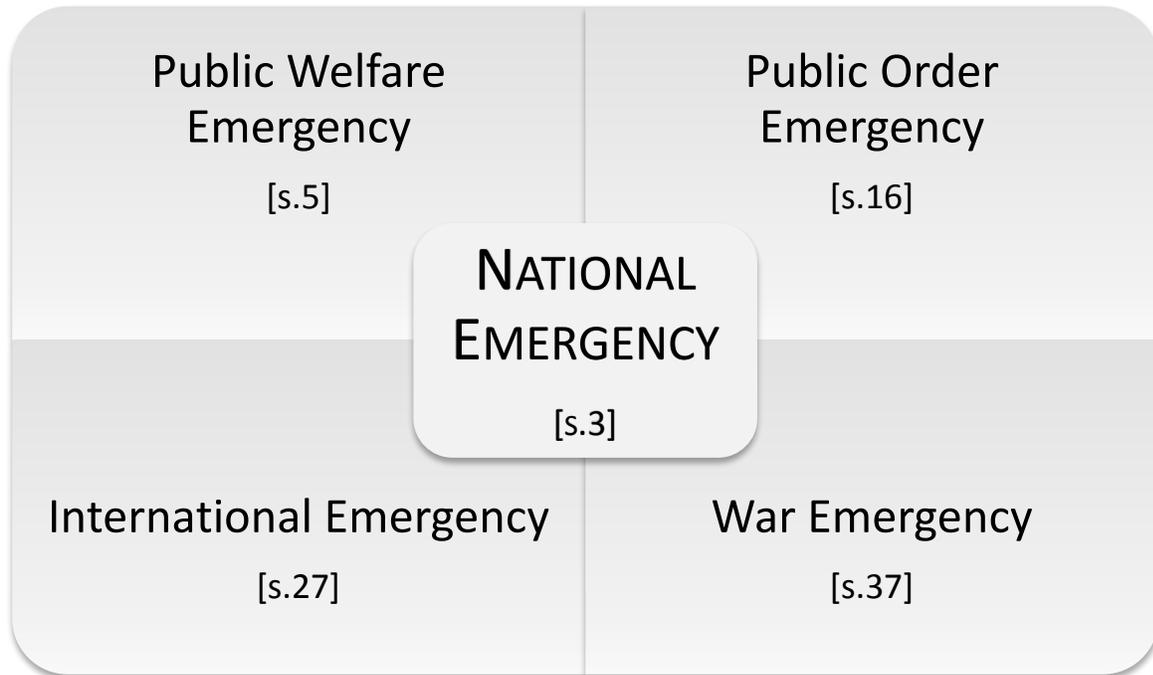


Figure 1 – Types of Federal Emergencies Categorized under Canada’s *Emergencies Act*.⁸²

A “public order emergency” is an “emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency”.⁸³ One must look to the meaning assigned to ‘threats to the security of Canada’ under section 2 of the *Canadian Security Intelligence Service Act*.⁸⁴ Again as discussed above, a situation does not constitute a public

⁸² *Ibid.*

⁸³ *Ibid.* s 16.

⁸⁴ *Ibid.*; and see *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 s 2 “threats to the security of Canada” (“threats to the security of Canada’ means (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage, (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person, (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada, but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d)).

order emergency unless it meets the threshold found in the s. 3 definition of a ‘national emergency’.⁸⁵

The definition of an ‘international emergency’ can be found in Part III of the *Emergencies Act* as “an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence that is so serious as to be a national emergency”.⁸⁶

Part IV of the *Emergencies Act* details the meaning of a “war emergency” as “war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency”.⁸⁷

The *Emergencies Act* defines a ‘public welfare emergency’ as:

an emergency that is caused by a real or imminent
(a) fire, flood, drought, storm, earthquake or other natural phenomenon, (b) disease in human beings, animals or plants, or (c) accident or pollution
and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, *so serious as to be a national emergency*.⁸⁸

Each of public order emergencies, international emergencies, and war emergencies involves conflict in one form or another while public welfare emergencies expansively include natural disasters, epidemics and pandemics, as well as industry related accidents.⁸⁹ The following legislative survey focuses on the specific category of public welfare emergencies within the British Columbia regional context. However, it should be noted that parallel concerns on the lack of inclusion of Aboriginal perspectives in the understanding and management of public order emergencies, international emergencies and war emergencies would necessarily inform any treatment of First Nation engagement within management of conflict driven emergencies generally.

⁸⁵ *Emergencies Act, ibid.* at s 3.

⁸⁶ *Ibid.* at s 27.

⁸⁷ *Ibid.* at s 37.

⁸⁸ *Ibid.* at s 5.

⁸⁹ See Public Safety Canada, *The Canadian Disaster Database*, online: Public Safety Canada <<http://www.publicsafety.gc.ca/cnt/rsrscs/cndn-dsstr-dtbs/index-eng.aspx>> (The Canada Disaster Database provides an index of a wide plethora of public welfare emergencies experienced throughout Canada).

As alluded to above, while the *Emergencies Act* is the authoritative federal statute defining a ‘national public welfare emergency’, other pieces of legislation contribute important content to the overarching legislative parameters informing formal emergency management governance activities. As will later be explored, the mitigation and preparedness components of public welfare emergencies associated with accident or pollution events are typically managed under various pieces of industry-specific legislation, often without explicit reference to emergency management terminology. The *Canadian Environmental Protection Act* however does define ‘environmental emergencies’, thereby adding to the federal repertoire of emergency categories and *prima facie* providing for environmental emergency management outside the *Emergencies Act*.⁹⁰

The *Canadian Environmental Protection Act, 1999* delineates an ‘environmental emergency’ as “an uncontrolled, unplanned or accidental release, or release in contravention of regulations or interim orders...of a substance into the environment” or as “the reasonable likelihood of such a release into the environment”.⁹¹ Integral to a situation falling within the legislative parameters of an environmental emergency, the released substance must fall within the regulated list of substances found in the *Environmental Emergency Regulations*.⁹²

Depending on the potential scope of impact of a release, an ‘environmental emergency’ under the *Canadian Environmental Protection Act* could also constitute a national public welfare emergency as the *Emergencies Act* definition includes “*accident or pollution*” “that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency”.⁹³ However, as mentioned above, the situation must also be outside the ability of any other law of Canada to effectively deal with the situation.⁹⁴ Further, as will later be explored, an emergency localised within provincial boundaries and constituting an aspect of a provincial head of power requires

⁹⁰ *Canadian Environmental Protection Act, 1999*, RSC 1999, c 33 s. 193 [CEPA].

⁹¹ *Ibid.*

⁹² *Ibid.* (“‘substance’ means...a substance on a list of substances established under regulations or interim orders made under this Part”); *Environmental Emergency Regulations*, SOR/2003-307 s.2 (“For the purposes of the definition “substance” in section 193 of the Act, the list of substances consists of the substances set out in column 1 of Schedule 1 in their pure form or in a mixture that has a concentration equal to or greater than the applicable concentration set out in column 2...”).

⁹³ *Emergencies Act*, *supra* note 21 at s 5 [emphasis added].

⁹⁴ *Ibid.* at s 3.

the invitation or authorization of the Lieutenant Governor in Council prior to federal execution of the *Emergencies Act*.⁹⁵ As such, provincial law and resources may be sufficient to manage a situation that otherwise might constitute a national public welfare emergency.

Further complicating the categorisation of a given emergency situation, the *Canadian Environmental Assessment Act's Environmental Emergency Regulations* exclude substances dealt with under the *Transportation of Dangerous Goods Act* and the *Canada Shipping Act*.⁹⁶ That renders these acts as yet additional significant federal pieces of legislation governing the parameters of what constitutes an emergency for the purposes of identifying the appropriate regulatory regime governing a particular emergency's management. So, while certain spills could potentially constitute an environmental emergency under the *Canadian Environmental Protection Act, 1999*, if the spill involves oil or one of the other 1200 or so substances listed in the *Transportation of Dangerous Goods Regulations*,⁹⁷ the situation does not necessarily trigger the environmental emergency protocols per the *Canadian Environmental Protection Act* legislative regime—in essence, the *CEPA* operates as a statute of last resort with respect to environmental emergencies.⁹⁸

The *Transportation of Dangerous Goods Act, 1992* and regulations do not define 'emergency' *per se*. Instead the Act speaks of 'intervention'⁹⁹ rather than 'emergency management' where there may be an actual or anticipated 'compromise of public safety'.¹⁰⁰ That

⁹⁵ *Ibid.* at s 14 (see particularly s 14(2) "The Governor in Council may not issue a declaration of a public welfare emergency where the direct effects of the emergency are confined to, or occur principally in, one province unless the lieutenant governor in council of the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it".).

⁹⁶ *Environmental Emergency Regulations*, SOR/2003-307, s 2 (e) ("...unless the substance is being loaded or unloaded at a facility") [*CEPA Emergency Regulations*]; *Transportation of Dangerous Goods Act, 1992*, SC 1992, c 34 [*TDG Act*]; *Canada Shipping Act, 2001*, SC 2001 c 26.

⁹⁷ *Transportation of Dangerous Goods Regulations*, SOR/2008-34, Schedule 1, online: Transport Canada <<http://wwwapps.tc.gc.ca/Saf-Sec-Sur/3/sched-ann/schedule1form.aspx>> [*TDG Regulations*] (controlled substances database).

⁹⁸ *CEPA*, *supra* note 90 at s 200 (2) ("The Governor in Council shall not make a regulation under subsection (1) in respect of a matter if, by order, the Governor in Council states that it is of the opinion that (a) the matter is regulated by or under any other Act of Parliament that contains provisions that are similar in effect to sections 194 to 205; and (b) that Act or any regulation made under that Act provides sufficient protection to human health and the environment or its biological diversity"); but see *CEPA Emergency Regulations*, *supra* note 96 at s 2 (e) ("...unless the substance is being loaded or unloaded at a facility").

⁹⁹ *TDG Act*, *supra* note 96 at s 19 (outlining the intervention powers of an 'inspector' (s 10, 15) who believes on reasonable grounds that there is an actual or potential risk to public safety); and see *TDG Act* at s 7.1 (identifying where the Minister may direct the implementation of an approved emergency response assistance plan).

¹⁰⁰ *Ibid.* at s 2 ("public safety" means the safety of human life and health and of property and the environment).

Parliament intended the *Transportation of Dangerous Goods Act* to regulate emergency management is evidenced by the legislative prescription of which substances and minimum quantities require an “emergency response assistance plan” prior to transport, as well as regulating where the implementation of those plans and ‘incident reporting’ is necessary.¹⁰¹

Although the *Transportation of Dangerous Goods Act, 1992* does not define emergencies explicitly, again because the federal *Emergencies Act* provides for “accident or pollution” in its definition of a ‘public welfare emergency’,¹⁰² an ‘unplanned release’ under the *Transportation of Dangerous Goods Act, 1992* could potentially trigger the declaration of a national emergency.¹⁰³ Once again, the *Emergencies Act* would not come into play unless the situation could not “be effectively dealt with under any other law of Canada”.¹⁰⁴ Yet, if the emergency impacts moved beyond the response capacity of the regulatory body of first resort then potentially the *Emergencies Act* could be triggered.

The *Fisheries Act* provides another federal legislative example of governance situations that would otherwise fall under the specific protocols of ‘emergency management’ but for the substantial regulatory authorization under the *Fisheries Act* stipulating controlled or deliberate pollution activities.¹⁰⁵ Further, the *Fisheries Act* offers a poignant example of obfuscation of disaster management. The terms “deleterious substances” and “deposit” are preferred over “pollution” in the *Fisheries Act*.¹⁰⁶ The phrase “serious harm to fish” is a gentler representation of “death of fish or any permanent alteration to, or destruction of, fish habitat”.¹⁰⁷ Likewise “fish habitat” is a deceptively all-encompassing phrase for “spawning grounds and any other areas,

¹⁰¹ See *TDG Regulations*, *supra* note 97 at Part 7 and Schedule 1 (Part 7 (ss 7.1-7.13) details: where an Emergency Response Assistance Plan (ERAP) is required (s. 7.1); ERAP approval process (s 7.2) of particular note are ss 7.2(g) and (h) detailing response capabilities and accidental risk assessment requirements for ERAP approval. There is absolutely no mention of First Nation Aboriginal rights protection protocols or delegation of consultation requirement in these sections. The omission is significant as industry does not hold the consultation obligation and receives its regulatory guidance with respect to its legal requirements for emergency management in the transportation of dangerous goods (including any First Nation engagement) through the regulations. TDG regulated substances will invariably be transported through First Nation traditional territories putting First Nation communities, and their Aboriginal rights, at risk).

¹⁰² *Emergencies Act*, *supra* note 21 at s 5.

¹⁰³ *TDG Act*, *supra* note 96 at s 19.

¹⁰⁴ *Emergencies Act*, *supra* note 21 at s 3.

¹⁰⁵ *Aquaculture Activities Regulations*, SOR/2015-177 s 3 (“An owner or operator of an aquaculture facility may, subject to the conditions set out in sections 4 to 14, deposit a deleterious substance specified in section 2 in any water or place referred to in section 36(3) of the Act”.); *Fisheries Act*, RSC 1985, c F-14.

¹⁰⁶ *Fisheries Act*, *ibid.* at s 34.

¹⁰⁷ *Ibid.* at s 35 (1).

including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes” (consider the potential enormity of marine areas where fish populations carry out these various phases and activities of their life cycles).¹⁰⁸ As such, adopting the language of the *Fisheries Act*, one could describe the total destruction of a community’s essential food fishery from an accidental pollution event as mere ‘serious harm to fish from the deposit of a deleterious substance’ as opposed to language connoting a public welfare emergency requiring urgent commiserative government action. As with other areas of federal jurisdiction contemplating potential emergencies, scope matters. Where the *Fisheries Act* provisions on management of serious harm to fish prove inadequate to manage a particular situation,¹⁰⁹ then potentially other pieces of emergency directed legislation could be triggered as generally outlined above.

To some extent, the *Fisheries Act* also functions as a regime of last resort with respect to *Fisheries Act* sanction and enforcement of marine pollution activities, as the Act explicitly defers to other Parliamentary acts and regulations that permit the otherwise unlawful pollution activities.¹¹⁰ Such an interpretation is of significance where one would otherwise posit the destruction of a food fishery as a public welfare emergency.¹¹¹ In contest with other federal

¹⁰⁸ *Ibid.* at s 2 “fish habitat”; but see *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19 s. 141 repealing *Fisheries Act*, *ibid.* at s 34 (1) “fish habitat”, (as such the definition used for the purposes of the text is from the general definitions section of the *Fisheries Act*).

¹⁰⁹ *Fisheries Act*, *ibid.* at ss 38(4)-(7.2) (s. 38 (4)-(5) prescribes the notification requirement where either an actual or serious and imminent danger of an ‘unauthorized deposit of deleterious substance in water frequented by fish takes place; s. 38 (6) prescribes requirement that any person described in subsections (4) and (5) “take all reasonable measures consistent with public safety and with the conservation and protection of fish and fish habitat to prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result from the occurrence or might reasonably be expected to result from it.”; s.38(7.1) empowers inspectors and fisheries officers to respond to a situation of (or risk to) serious harm to fish even in the absence of a notification or report on the situation while s.38 (7.2) gives paramouncy to a *Canada Shipping Act* response “Any direction of an inspector or fishery officer under this section that is inconsistent with any direction under the *Canada Shipping Act, 2001* is void to the extent of the inconsistency.”); and see *Canada Shipping Act*, *supra* note 96.

¹¹⁰ See e.g. *Fisheries Act*, *ibid.* at ss 35 (2); 36 (4) (“No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of (a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council *under any Act other than this Act*” (s 36(4)(a) [emphasis added])).

¹¹¹ See *ibid.* at s 36 (3)-(4) (“Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water”(s.36(3)) and “No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of (a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; (b) deleterious substance of a class and under conditions... authorized under regulations...” (s.36(4)).

statutes that are silent with respect to guidance on protections for s. 35 Aboriginal rights, the *Fisheries Act* does contain at least some promising language relative to Parliamentary respect for First Nations' s. 35 Aboriginal fishery rights at s 6:

Before recommending to the Governor in Council that a regulation be made in respect of ...[detailed enumerated list of sections all more or less pertaining to harm to fish]..., the Minister shall consider the following factors: (a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries; (b) fisheries management objectives; (c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and (d) the public interest.¹¹²

However, it does not appear that the section particularly respects First Nation self-governance or self-determination agency. Rather, it appears that the section essentially operates to inform risk assessment criteria in order to guide public servants in the execution of their statutory functions while constructively meeting the Crown's duty to consult. Irrespective that the language of the section could be much stronger in terms of respecting First Nations governance of fisheries resources, the inclusion of any language at all regarding Aboriginal fisheries is important. The inclusion of such language signals Parliamentary recognition that it is possible and perhaps necessary to include statutory language protecting and prioritizing Aboriginal rights within legislative frameworks. It is perhaps not surprising that the *Fisheries Act* might set a statutory precedent, given the early and prolific case law dealing particularly with the s. 35 makeup of Aboriginal fisheries.¹¹³ However, much more work is likely needed to achieve wording that sufficiently identifies the constitutional priority of s. 35 Aboriginal rights.

Arguably, section 6 as it is currently drafted reflects persistent dogma that First Nations are mere stakeholders (among an enumerated list of stakeholders) within their own territories. This is the tone even though section 37 of the *Fisheries Act* sets out a requirement that the Minister be provided information useful to assessing the potential scope of harm an activity may present to an Aboriginal food, social or ceremonial fishery, as well as prevention and mitigation strategies.¹¹⁴ The interpretive question remains whether otherwise regulated pollution activities are exempt from the section 37 requirement. The constitutional status of First Nations is not

¹¹² *Fisheries Act*, *ibid.* at s 6.

¹¹³ See e.g. *R v Sparrow*, [1990] 1 SCR 1075; and see e.g. *R v Van der Peet*, [1996] 2 SCR 507; and see e.g. *R v Gladstone*, [1996] 2 SCR 723.

¹¹⁴ *Fisheries Act*, *supra* note 105 at ss 6 and 37.

explicitly identified, nor are Aboriginal rights given the commensurate primacy within the language of the legislation.¹¹⁵

It is insufficient to statutorily prescribe concern for *state adduced* risks and management priorities and omit First Nation self-determination and self-governance agency—all while claiming to statutorily reflect the promise of s. 35 Aboriginal rights.¹¹⁶ Self-determination and self-governance likely requires First Nations to be their own authors, agents and enforcers of assessing and managing risks within their respective territories. While perhaps a step ahead from the status quo—federal legislation that generally omits reference to s. 35 Aboriginal and treaty rights—the *Fisheries Act* example would on critical analysis likely fall short as an example of statutory respect for s. 35.¹¹⁷

In line with other federal acts explicitly engaged in emergency management without express language referring to the concept, the *Canada Shipping Act, 2001* does not categorize emergencies. Rather, it administers and enforces marine “safety”,¹¹⁸ “incidents, accidents and casualties”,¹¹⁹ “wreck[s]”,¹²⁰ “pollution prevention and response”,¹²¹ and “safe operation of pleasure craft”.¹²² Rather than overtly regulating the management of a pollution-driven public welfare emergency, the legislative language of the *Canada Shipping Act, 2001* requires “arrangement with a response organisation” to manage ‘discharges of oil’ (subject of course to prescriptions of both vessels and waters as well as discretionary exemptions).¹²³ Evidence that

¹¹⁵ *Fisheries Act*, *ibid.* at s 37; and see *Constitution Act, 1982*, *supra* note 23 at s 52 (1) (“The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”); and see Paul L.A.H. Chartrand, “Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy in Canada” (2011) 19:2 *Waikato Law Review* 14 at 27 [Chartrand, Constitutional Legitimacy] (“... it is not only the *existence* of Aboriginal peoples, and the possession of their lands that matters in law and politics. The approach argues that the *political action* of Aboriginal people matters in law and politics [footnotes omitted, emphasis in original]).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Canada Shipping Act, 2001*, *supra* note 96 at Part 4 ss 104-121.

¹¹⁹ *Ibid.* at Part 6 ss 140-151.

¹²⁰ *Ibid.* at Part 7 ss 153-164.

¹²¹ *Ibid.* at Part 8 ss 165-191.

¹²² *Ibid.* at s 201.

¹²³ *Ibid.* at s. 167 ((1) Subject to subsection (2), every prescribed vessel or vessel of a prescribed class shall (a) have an arrangement with a response organization in respect of a quantity of oil that is at least equal to the total amount of oil that the vessel carries, both as cargo and as fuel, to a prescribed maximum quantity, and in respect of waters where the vessel navigates or engages in a marine activity; and (b) have on board a declaration, in the form specified by the Minister, that (i) identifies the name and address of the vessel’s insurer or, in the case of a subscription policy, the name and address of the lead insurer who provides pollution insurance coverage in respect of the vessel,

emergency management is in fact contemplated in the legislative scheme may be inferred from the statutory provision that “no person or vessel shall discharge a prescribed pollutant, except in accordance with the regulations made under this Part or a permit granted under... the *Canadian Environmental Protection Act, 1999*)” and that if “a vessel is required by the regulations to have a *shipboard oil pollution emergency plan*, the vessel shall take reasonable measures to *implement the plan in respect of an oil pollution incident*”.¹²⁴ If however, the situation escalated beyond the Act’s management scope it appears the *Emergencies Act* could be triggered and a national public welfare emergency declared.

Thus, there are still other federal statutes that may operate in the spectrum of emergency management without necessarily adding to emergency categories. The following section looks at the legislative language of the British Columbia legislature in the area of emergency management.

2.2.1.2 PROVINCIAL (BRITISH COLUMBIA) EMERGENCIES

As outlined above, the federal *Emergencies Act* defines a ‘public welfare emergency’ as an emergency that is caused by either some kind of natural phenomenon (such as fire, flood, or earthquake etc.), disease (in any of humans, animals or plants), accident or pollution.¹²⁵ To qualify as an emergency, the situation must either have the potential to present a danger to life or property, cause social disruption or disrupt the flow of essential goods, services or resources.¹²⁶ The scenarios envisioned as a federal public welfare emergency are in line with the kind of events contemplated in the British Columbia *Emergency Program Act*.¹²⁷ An “emergency” under the British Columbia legislation is:

- a present or imminent event or circumstance that
- (a) is caused by accident, fire, explosion, technical failure or the forces of nature,
- and

(ii) confirms that the arrangement has been made, and (iii) identifies every person who is authorized to implement the arrangement.

¹²⁴ *Ibid.* at ss 187-8 [emphasis added].

¹²⁵ *Emergencies Act*, *supra* note 21 at s 5.

¹²⁶ *Ibid.*

¹²⁷ See *Emergency Program Act*, *supra* note 76 at s 1 “emergency”.

- (b) requires prompt coordination of action or special regulation of persons or property to protect the health, safety or welfare of a person or to limit damage to property¹²⁸

The legislature of British Columbia therefore understands an emergency as circumstances requiring swift action and/or special governance due to any of: the forces of nature, fire, explosion, technical failure, or an accident, in order to limit property damage and/or to protect the health, safety and welfare of persons.

A major distinction between the British Columbia conception of an ‘emergency’ and the federal definition of a ‘public welfare emergency’ lies in the exclusion of explicit language referencing *disease* in the British Columbia *Emergency Program Act* definition. One must turn to the *Public Health Act* of British Columbia for legislative language dealing with public health emergencies for guidance on what qualifies as an emergency in the sphere of disease and other public health related concerns.¹²⁹ An ‘emergency’ under the *Public Health Act* is defined as:

a localized event or regional event that meets the conditions set out in section 52(1) or (2) [conditions to be met before this Part applies], respectively;

“localized event” means an immediate and significant risk to public health in a localized area;

“regional event” means an immediate and significant risk to public health throughout a region or the province.¹³⁰

The conditions that must be met in order for a situation to qualify as an emergency under the *Public Health Act* are as follows:

- (1) A person must not exercise [emergency powers under the Part 5 of the *Public Health Act*] in respect of a localized event unless the person reasonably believes that
 - (a) the action is immediately necessary to protect public health from significant harm, and

¹²⁸ *Ibid.*

¹²⁹ *Public Health Act*, SBC 2008 c 28; and *c.f. Wildfire Act*, SBC 2004 c 31; and *c.f. spar Wildfire Regulation*, BC Reg 190/2014 (The *Wildfire Act* and regulations are devoted exclusively to emergency management provisions specific to forest and grass fires. As both the *Public Health Act* and the *Wildfire Act* contain specific regimes to manage specific hazards within the general framework of public welfare emergencies, a detailed critical analysis was not done on each legislative regime as part of this thesis as I am attempting to demonstrate a perceived general theme of legislative omission of the constitutional priority of First Nations from the emergency management frameworks generally and not seeking to necessarily deconstruct here every legislative apparatus involved in public welfare emergencies. Further work however could be done to explore critical emergency management regulations and statutes in order to ascertain whether and how more can be done within the legislation and regulations to prioritize, protect and acknowledge First Nation Aboriginal and treaty rights).

¹³⁰ *Public Health Act*, *ibid.* at s 51.

- (b) compliance with this act, other than this Part, or a regulation made under this Act would hinder that person from acting in a manner that would avoid or mitigate an immediate and significant risk to public health
- (2) Subject to subsection (3), a person must not exercise powers under this Part in respect of a regional event unless the provincial health officer provides notice that the provincial health officer reasonably believes that at least 2 of the following criteria exist:
 - (a) The regional event could have a serious impact on public health;
 - (b) The regional event is unusual or unexpected;
 - (c) There is a significant risk of the spread of an infectious agent or a hazardous agent;
 - (d) There is a significant risk of travel or trade restrictions as a result of the regional event.
- (3) If the provincial health officer is not immediately available to give notice under subsection (2), a person may exercise powers under this Part until the provincial health officer becomes available.¹³¹

Summarizing the definition of an emergency triggering Part 5 ‘emergency powers’ under the British Columbia *Public Health Act*, we find that a public health emergency contemplates significant harm to public health from an event that is either unusual or unexpected, or involves an infectious or hazardous agent that is likely to spread, or regionally will likely result in restriction of trade or travel. Like the federal *Emergencies Act* qualifying a ‘national emergency’ as beyond the scope or capacity of any other enactment to deal with the event, the *Public Health Act* limits the triggering of emergency powers to situations where application of the other parts of the *Public Health Act* would actually hinder emergency management.¹³²

Like the federal regime, British Columbia has passed particular statutory language that defines an “environmental emergency”.¹³³ An environmental emergency means “an occurrence or natural disaster that affects the environment and includes the following: (a) a flood; (b) a landslide; and (c) a spill or leakage of oil or of a poisonous or dangerous substance”.¹³⁴

In order to effectively explore First Nation roles in emergency management of hazards and events that fall within the spectra of ‘natural disasters’ as the primary focus of this thesis, it is

¹³¹ *Ibid.* at s 52.

¹³² *Emergencies Act*, *supra* note 21 at s 3; *contra Public Health Act*, *ibid.* at s 52 (1) (b) (“A person must not exercise powers under this Part in respect of a localized event unless the person reasonably believes that...compliance with this Act, other than this Part, or a regulation made under this act would hinder that person from acting in a manner that would avoid or mitigate an immediate and significant risk to public health”).

¹³³ *Environmental Management Act*, SBC 2003 c 53 at s 87 (1).

¹³⁴ *Ibid.*

useful to delineate the British Columbia statutes that would apply to such a situation at the provincial level. As outlined above, the *Emergency Program Act* and the *Public Health Act*, along with particular subjects dealt with in the *Wildfire Act* and the *Environmental Management Act*, together outline the legislative parameters of what would constitute a ‘public welfare emergency’¹³⁵ at the federal level which includes all manner of natural disasters and pandemics that can flow from such events. The British Columbia legislature provides additional terminology in its legislative contemplation of emergency management. In British Columbia, a disaster is:

a calamity that

- (a) is caused by accident, fire, explosion or technical failure or by the forces of nature, and
- (b) has resulted in the serious harm to the health, safety or welfare of people, or in widespread damage to property¹³⁶

A disaster under the British Columbia *Emergency Program Act* is specific to the outcome of an emergency event, and this better relates to the response and recovery components of emergency management whereas mitigation and planning might be framed as ‘disaster risk reduction’.

British Columbia legislation and regulations sparsely define emergencies outside the *Emergency Program Act* and *Public Health Act*, with many acts and regulations referring to the *Emergency Program Act* as definitive of the meaning of ‘emergency’.¹³⁷ Like the federal regime, clear parameters defining an emergency are critical to enabling or limiting (as the case may be) specific temporary powers designed to effect emergency management governance. Also like the federal regime, emergency mitigation and preparedness in industry related accident or pollution risk are muddled provincially by regulatory language that largely evades terminology specific to emergency management. For example, permit holders under the *Oil and Gas Emergency Management Regulation* qualify situations requiring emergency response by referencing an elaborate matrix that uses moderate terms such as ‘incident’, and ‘escalation possible’ and ‘uncontrolled, with control unlikely in near term’.¹³⁸

¹³⁵ *Emergency Program Act*, *supra* note 76; *Public Health Act*, *supra* note 129; *Wildfire Act*, *supra*, note 129; *Environmental Management Act*, *ibid.*

¹³⁶ *Emergency Program Act*, *ibid.* at s 1 “disaster”.

¹³⁷ *Ibid.* at s 1.

¹³⁸ *Oil and Gas Activities Act Emergency Management Regulation*, BC reg 204/2013, Schedule D ‘Incident Classification Matrix’.

As will later be explored, division of powers considerations stemming from the *Constitution Act, 1982* inform emergency management authorities federally, territorially and provincially. Within the province of British Columbia, emergency response authorities are divided between ministries (with respect to a particular ministry’s area of authority), and between the Lieutenant Governor in Council and ‘local authorities’. The following section explores what constitutes a ‘local emergency’.

2.2.1.3 LOCAL EMERGENCIES

As outlined above, the British Columbia *Emergency Program Act* defines ‘emergency’ and ‘disaster’ generally. Under the provincial legislation, a ‘local emergency’ exists based on the standing legislated definitions of emergency and disaster applied to a more restricted geographical and jurisdictional boundary. The *Emergency Program Act* defines the types of situations that constitute emergencies and disasters and then provides additional guidance on who constitutes a local authority and the powers of a local authority to declare a state of local emergency or respond to a local disaster. Therefore, to understand what constitutes a local emergency, one has to appreciate what constitutes a local authority.

A local authority means any of a municipal council, the board of a regional district, or a national park superintendent.¹³⁹ Municipalities and regional districts obtain their general authorizations through British Columbia’s *Local Government Act*.¹⁴⁰ Regional districts are unique decision-making bodies with a specific set of legislatively conveyed authorities over large landmasses as opposed to municipal councils whose authorities are limited to municipalities.¹⁴¹

¹³⁹ *Emergency Program Act*, *supra* note 76 at s 1 “local authority”.

¹⁴⁰ *Local Government Act*, RSBC 1996 c 323 at s 5 (“In this Act: ... ‘local government’ means (a) the council of a municipality, and (b) the board of a regional district”); and see *Local Government Act*, at s 1-2 (“The purposes of this Act are (a) to provide a legal framework... of local governments to represent the interests and respond to the needs of their communities, (b) to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and (c) to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities” s 2 “Recognizing that regional districts are an independent, responsible and accountable order of government within their jurisdiction, the purposes or a regional district include (a) providing good government for its community, (b) providing services and other things that the board considers are necessary or desirable for all or part of its community, (c) providing for stewardship of the public assets of its community, and (d) fostering the current and future economic, social and environmental well-being of its community”).

¹⁴¹ *Ibid.*

A ‘local emergency’ is therefore an emergency¹⁴² declared by a local authority “relating to all or any part of the jurisdictional area”.¹⁴³

Notably, under the *Emergency Program Act*, a local authority is *not* a band council or other First Nation government body. Later in this thesis, I will explore further the jurisdictional implications of the absence of a mechanism for First Nation governments to declare the equivalent of an *Emergency Program Act* local state of emergency within their traditional and Aboriginal title territories (off reserve). It warrants noting at this stage however that regional districts largely encompass the totality of First Nation traditional and Aboriginal title territories collectively in British Columbia. The implication of the powers to declare and manage local states of emergency conferred restrictively to regional districts, municipalities and national park superintendents could result in the overt exclusion of First Nations from managing critical disasters in their own territories.

2.2.1.4 FEDERAL/PROVINCIAL/TERRITORIAL COLLABORATIVE GUIDANCE ON EMERGENCIES

The Government of Canada, in cooperation with Canadian provinces and territories, provides further guidance on the elements of emergency and disaster in their most recent inter-jurisdictional cooperative effort to streamline emergency response throughout Canada. Notably, First Nations were not part of this cooperative effort, irrespective of the vast areas and populations falling under various First Nations’ jurisdiction throughout Canada.

In *An Emergency Management Framework for Canada*, an emergency is defined as “[a] present or imminent incident requiring the prompt coordination of actions, persons or property in order to protect the health, safety or welfare of people, or to limit damage to property or to the environment”.¹⁴⁴ The definition is essentially the same as that provided in the British Columbia legislation with the notable addition of specific concern for damage to the environment. The federal/provincial/territorial Ministers Responsible for Emergency Management define disaster, however, in much more colourful terms:

¹⁴²*Emergency Program Act*, *supra* note 76 at s 1 (1) “emergency” (“means a present or imminent event or circumstance that (a) is caused by accident, fire, explosion, technical failure or the forces of nature, and (b) requires the prompt coordination of action or special regulation of persons or property to protect the health, safety or welfare of a person or to limit damage to property”).

¹⁴³ *Ibid.* at s 12 (1).

¹⁴⁴ *FPT Framework 2011*, *supra* note 44 at 14.

Essentially a social phenomenon that results when a hazard intersects with a vulnerable community in a way that exceeds or overwhelms the community's ability to cope and may cause serious harm to the safety, health, welfare, property or environment of people; may be triggered by a naturally occurring phenomenon which has its origins within the geophysical or biological environment or by human action or error, whether malicious or unintentional, including technological failures, accidents and terrorist acts.¹⁴⁵

Again, particular reference to harm of the environment distinguishes the Canadian confederate conception of disaster from that of British Columbia emergency management statutory law. Examination of the inclusion or lack thereof of environmental harm in conceptions of 'emergency' and 'disaster' could have interpretive consequences as to the scope of response and recovery required by statute and regulation regarding catastrophic harm to specific environmental resources.

I explore statutory processes for declaring a state of emergency later in this thesis. The purpose of this section has been to orient my readers as to what constitutes an emergency triggering emergency management acts federally and within British Columbia respectively. As outlined above, emergency management can be necessary at any of the individual, local, regional, national or international level. Emergency definitions are important insofar as they trigger a commensurate governance process to cope with the emergency event.

2.2.2 MANAGING EMERGENCIES

As discussed above, a universal definition of 'emergency' among federal, provincial and territorial governments is "[a] present or imminent incident requiring the prompt coordination of actions, persons or property in order to protect the health, safety or welfare of people, or to limit damage to property or to the environment".¹⁴⁶ We have seen that the parameters of what constitutes 'an emergency' impact governance activities posited to manage emergencies. That is to say, emergency definitions operate to limit or trigger certain pieces of enabling emergency management legislation. We have further seen that emergency management constitutes all of mitigation, planning, response and recovery. Many considerations inform emergency management jurisdiction, including the type of emergency being managed, the component of

¹⁴⁵ *Ibid.* at 14.

¹⁴⁶ *Ibid.* at 14.

emergency management being executed and the scope of the emergency itself (whether local, regional, provincial, national, or international in character).

As previously stated, the focus of this thesis is limited to examining First Nation inclusion in the management of federally defined ‘public welfare emergencies’ in British Columbia. A public welfare emergency can arise from any of various categories of natural disasters, disease outbreak, accidents or pollution. Public welfare emergencies can and should be managed at all of the mitigation, planning, response and recovery phases. As a result, there is a relatively unlimited scope of international organizations, federal and provincial ministries, agencies and regulatory bodies potentially involved in the management of public welfare emergencies. Again, given thesis scope restrictions, the following section only cursorily explores the various legislative, regulatory, policy and conventional frameworks that inform emergency management by various agencies in order to more effectively identify general gaps in First Nations engagement where a given First Nation may be impacted by a public welfare emergency.

2.2.2.1 INTERNATIONAL CONSIDERATIONS

British Columbia falls along the west coast of what is now known as Canada. Canada’s economy is driven in large part by natural resource extraction. Trade in, and the requisite transport of, natural resources has always defined the make-up of the Canadian (settler) state from the time of colonization to the present day.¹⁴⁷ Canada’s constitutional make-up has been substantially influenced by the extraction, transport and trade in natural resources, as is particularly reflected in the division of powers section. However, international treaties and conventions are also highly significant to the governance and execution of Canada’s international natural resource trade.

The transport of resources to international destinations takes place by all of ground, rail, air, pipeline and water. Where risk is borne by more than one nation state jurisdiction, international mechanism are necessary to coordinate risk management. Canada is party to several treaties,

¹⁴⁷ See Dwight Newman, *Natural Resource Jurisdiction in Canada* (Markham, ON: LexisNexis Canada, 2013) at 4 – 8. [Newman, *Resource Jurisdiction*] (For a brief survey of historic and current legal dialogues informing emerging natural resource jurisdictional conflicts).

conventions, protocols, United Nations working groups and the like that operate to coordinate and streamline emergency response efforts at an international scale.¹⁴⁸

For example, the International Civil Aviation Organization is a United Nations specialized agency that provides (among other mandates) operational procedures for the dissemination of information on volcanic eruptions and associated volcanic ash clouds in areas which could affect routes used by international flights through its International Airways Volcano Watch.¹⁴⁹ The International Civil Aviation Organization further provides crisis management support through the Collaborative Arrangement for the Prevention and Management of Public Health Events in Civil Aviation that “exists to prevent and manage the spread of communicable diseases that cause, or have the potential to cause, a public health emergency of international concern”.¹⁵⁰ The *Convention on International Civil Aviation* (also known as the *Chicago Convention*) created the International Civil Aviation Organization in 1944 with Canada as a signatory.¹⁵¹ The International Civil Aviation Organization “works with... Member States and global aviation organizations to develop international Standards and Recommended Practices (SARPs) which States reference when developing their legally-enforceable national civil aviation regulations”.¹⁵²

While Canada’s *Transportation of Dangerous Goods Act, 1992*¹⁵³ is the prevailing instrument controlling the safe transportation of dangerous goods and thus affects emergency plans, international relations play a role in how dangerous goods are handled in Canada. For example,

¹⁴⁸ I thank Stafford Reid (EnviroEmerg Consulting) for enlightening conversations and materials on international resolutions that impact Canadian domestic environmental emergency protocols.

¹⁴⁹ United Nations, International Civil Aviation Organization, online: UNICAO <<http://www.icao.int/safety/Pages/crisis-management.aspx>>; United Nations, International Civil Aviation Organization, *Terms of Reference of the IAVWOPSG*, online: UNICAO <<http://www.icao.int/safety/meteorology/iavwopsg/Quick%20Launch%20Menu%20Documents/Terms%20of%20reference.PDF>>.

¹⁵⁰ United Nations, International Civil Aviation Organization, *Safety, Crisis Management*, online: <<http://www.icao.int/safety/Pages/crisis-management.aspx>> (United Nations International Civil Aviation Organization crisis management page); and see *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295 online: UNICAO <http://www.icao.int/publications/Documents/7300_orig.pdf> [*Chicago Convention*] (for the most recent version, including amendments see ICAO Doc. 7300/9 (9th ed. 2006)) (Article 14 “Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of cholera... and such other communicable diseases...”).

¹⁵¹ *Chicago Convention*, *ibid.* at 143.

¹⁵² United Nations, International Civil Aviation Organization, *About ICAO*, online: <<http://www.icao.int/about-icao/Pages/default.aspx>>.

¹⁵³ *TDG Act*, *supra* note 96.

in addition to the more recent *Basel Convention*,¹⁵⁴ in 1986 Canada and the United States entered into an agreement concerning the transboundary movement of hazardous wastes¹⁵⁵ which specifies a mere 30 day window to review and reply to notices of hazardous waste movement from export country to import country.¹⁵⁶ While the agreement indicates that the “export may take place conditional upon the persons importing the hazardous waste and other waste complying with all the applicable laws of the country of import”, the agreement assumes tacit consent to the hazardous waste import where no response is given within the 30 day window.¹⁵⁷

While outside the scope of this thesis, the impact of international agreements on the Crown’s execution of its consultation and accommodation obligations to First Nations is ripe for exploration. At an international level, another interesting area of analysis would be the collective and/or specific risk(s) assumed *de facto* by indigenous peoples by way of the international transport of natural resources, hazardous materials and waste. In the example of Canada and the United States transboundary movement of hazardous wastes agreement, one might be challenged to surmise how the Crown could possibly fulfill its consultation obligations alone within the 30-day window that the agreement specifies before tacit consent to the import of the hazardous waste is presumed. Further challenging First Nation inclusion in the permitting process, Article 8

¹⁵⁴ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 27 May 2014, UNEP/BRS/2014/3, online:

<<http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf> > (note: Article 11 allows countries to enter into bilateral/multilateral agreements or arrangements); see Environment Canada, “Canada-US Agreement Concerning the Transboundary Movement of Hazardous Waste”, online: Environment Canada <<https://ec.gc.ca/gdd-mw/default.asp?lang=en&n=EB0B92CE-1#section3>> “[t]he Canada-U.S. Agreement, together with its supporting regulatory framework, is compatible with the control procedures under the Basel Convention”).

¹⁵⁵ *Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste*, Canada and United States, 28 October 1986, online: (consolidated, unofficial text) <<http://www.ec.gc.ca/gdd-mw/default.asp?lang=En&n=C59BCC26-1>> [*Can-US Waste Agreement*].

¹⁵⁶ *Ibid.* at Article 3 ((c) “The designated authority of the country of import shall have 30 days from the date of receipt of the notice provided pursuant to the date of receipt of the notice provided pursuant to paragraphs (a) and (b) of this article to respond to such notice, indicating its consent (conditional or not) or its objection to the export. Such response will be transmitted to the designated authority of the country of export. The date of receipt of the notice will be identified in an acknowledgement of receipt made immediately by the designated authority of the country of import to the country of export.”).

¹⁵⁷ *Ibid.* at Article 3 ((d) “If no response is received by the designated authority of the country of export within the 30 day period referred to in paragraph (c) of this article, the country of import shall be considered as having no objection to the export of hazardous waste and other waste described in the notice and the export may take place conditional upon the persons importing the hazardous waste and other waste complying with all the applicable laws of the country of import.”).

of the Agreement specifies a mutual commitment to protect the confidentiality of parties executing the import and export of a given shipment of hazardous waste.¹⁵⁸

Of particular political interest at this time are conversations regarding the risk associated with increasing marine traffic along the west coast of British Columbia in order to support the international trade in crude oil originating from Alberta's tar sands. The International Maritime Organization operates as the international umbrella organization streamlining conventions and protocols governing marine safety.

The International Maritime Organization (IMO)¹⁵⁹ came into existence in 1948 and self-defines as "the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine pollution by ships".¹⁶⁰ The IMO sets global standards for international shipping governing "safety, security and environmental performance" through its role of creating "a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented".¹⁶¹ As the IMO describes its own measures, "IMO measures cover all aspects of international shipping – including ship design, construction, equipment, manning, operation and disposal".¹⁶² The IMO's primary operational mechanism is through the development of international conventions and is responsible for "more than 50 international conventions and agreements and has adopted numerous protocols and amendments".¹⁶³

The majority of conventions adopted under the auspices of IMO...fall into three main categories. The first group is concerned with maritime safety, the second with the prevention of marine pollution; and the third with liability and compensation,

¹⁵⁸ *Ibid.* at Article 8: ("If the provision of technical information pursuant to articles 3 and 4 would require the disclosure of information covered by agreement(s) of confidentiality between a Party and an exporter, the country of export shall make every effort to obtain the consent of the concerned person for the purpose of conveying any such information to the country of import or transit. The country of import or transit shall make every effort to protect the confidentiality of such information conveyed").

¹⁵⁹ *Convention on the International Maritime Organization*, 6 March 1948, 4214 UNTS 289 at 3, 4214 UNTS 1520 at 297, [IMO Convention] online: <<https://treaties.un.org/doc/Publication/UNTS/Volume%20289/volume-289-I-4214-English.pdf>>; United Nations, International Maritime Organization, online: <<http://www.imo.org/en/Pages/Default.aspx>>.

¹⁶⁰ United Nations, International Maritime Organization, "Introduction to IMO", online: IMO <<http://www.imo.org/en/About/Pages/Default.aspx>>.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ United Nations, International Maritime Organization, "Introduction: Adopting a convention, Entry into force, Accession, Amendment, Enforcement, Tacit acceptance procedure", online: IMO <<http://www.imo.org/About/Conventions/Pages/Home.aspx>>.

especially in relation to damage caused by pollution. Outside these major groupings are a number of other conventions dealing with facilitation, tonnage measurement, unlawful acts against shipping and salvage, etc.¹⁶⁴

Of particular importance to the management of a public welfare emergency are the following IMO conventions¹⁶⁵:

- *International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997(MARPOL)*¹⁶⁶
- *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) as amended, including the 1995 and 2010 Manila Amendments*¹⁶⁷
- *International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), 1990*¹⁶⁸
- *Protocol on Preparedness, Response and Cooperation to pollution incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol)*¹⁶⁹

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*; (This list is not exhaustive but only highlights some of the many conventions pertinent to maritime emergency management. Please refer to the IMO's website for further information on the Conventions).

¹⁶⁶ (2 November 1973); see United Nations, International Maritime Organization, "International Convention for the Prevention of Pollution from Ships (MARPOL)", online: IMO <[http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx)> ("The International Convention for the Prevention of Pollution from Ships (MARPOL) is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes"..." The Convention includes regulations aimed at preventing and minimizing pollution from ships - both accidental pollution and that from routine operations - and currently includes six technical Annexes. Special Areas with strict controls on operational discharges are included in most Annexes"..." Annex I Regulations for the Prevention of Pollution by Oil"; "Annex II Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk"; "Annex III Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form"; "Annex IV Prevention of Pollution by Sewage from Ships"; "Annex V Prevention of Pollution by Garbage from Ships"; "Annex VI Prevention of Air Pollution from Ships".).

¹⁶⁷ *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) as amended, including the 1995 and 2010 Manila Amendments*; see United Nations, International Maritime Organization, "International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978", online: IMO <<http://www.imo.org/en/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx>>.

¹⁶⁸ *International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), 1990, 30 November 1990*; see United Nations, International Maritime Organization, "International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC)", online: IMP <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-\(OPRC\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-(OPRC).aspx)>.

¹⁶⁹ *Protocol on Preparedness, Response and Cooperation to pollution incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol), 15 March 2000*; see United Nations, International Maritime Organization, "Protocol on Preparedness, Response and Cooperation to pollution incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol)", online IMO: <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Protocol-on-Preparedness,-Response-and-Co-operation-to-pollution-Incidents-by-Hazardous-and-Noxious-Substances-\(OPRC-HNS-Pr.aspx\)](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Protocol-on-Preparedness,-Response-and-Co-operation-to-pollution-Incidents-by-Hazardous-and-Noxious-Substances-(OPRC-HNS-Pr.aspx))>.

- *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* (INTERVENTION), 1969¹⁷⁰
- *International Convention on Civil Liability for Oil Pollution Damage (CLC)*, 1969¹⁷¹
- *1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*¹⁷²
- *Convention on Limitation of Liability for Maritime Claims (LLMC)*, 1976¹⁷³
- *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea(HNS), 1996 (and its 2010 Protocol)*¹⁷⁴
- *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*¹⁷⁵
- *Nairobi International Convention on the Removal of Wrecks, 2007*¹⁷⁶

¹⁷⁰ See United Nations, International Maritime Organization, “International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties”, 29 November 1969, online: IMO <<http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-Relating-to-Intervention-on-the-High-Seas-in-Cases-of-Oil-Pollution-Casualties.aspx>> (“The Convention affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from pollution by oil or the threat thereof, following upon a maritime casualty”. Subsequent conventions and amendments expand the application to chemicals that “if released, cause serious hazard to the marine environment”. Last amended in 2002 “to update the list of substances attached to it”).

¹⁷¹ *International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969*, 29 November 1969; see United Nations, International Maritime Organization, “International Convention on Civil Liability for Oil Pollution Damage (CLC)”, online: IMO <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-\(CLC\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx)>.

¹⁷² *1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (18 December 1971); see United Nations, International Maritime Organization, “International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage”, online: IMO <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-\(FUND\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-(FUND).aspx)>.

¹⁷³ *Convention on Limitation of Liability for Maritime Claims (LLMC)*, 19 November 1976; see United Nations, International Maritime Organization, “Convention on Limitation of Liability for Maritime Claims (LLMC)”, online: IMO <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-\(LLMC\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-(LLMC).aspx)>.

¹⁷⁴ *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea(HNS), 1996 (and its 2010 Protocol)*, 3 May 1996; see United Nations, International Maritime Organization, “International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea(HNS)”, online: IMO <<http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Liability-and-Compensation-for-Damage-in-Connection-with-the-Carriage-of-Hazardous-and-Noxious-.aspx>>.

¹⁷⁵ *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, 23 March 2001; see United Nations, International Maritime Organization, “International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER)”, online: IMO <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Bunker-Oil-Pollution-Damage-\(BUNKER\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Bunker-Oil-Pollution-Damage-(BUNKER).aspx)>.

¹⁷⁶ *Nairobi International Convention on the Removal of Wrecks*, (18 May 2007); see United Nations, International Maritime Organization, “Nairobi International Convention on the Removal of Wrecks” online: IMO <<http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Nairobi-International-Convention-on-the-Removal-of-Wrecks.aspx>>.

Again, while outside the scope of this thesis, it is important to note that what all these conventions have in common is a deafening silence on the role of Indigenous peoples in prescribed decision-making/permitting processes all governing, in one manner or another, risk and risk response to the marine transport of dangerous or deleterious materials. The *United Nations Declaration on the Rights of Indigenous Peoples* acknowledges that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.¹⁷⁷ The Declaration further acknowledges that “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”. Yet, few mechanisms operate to include Indigenous peoples in risk management processes, even though a particular Indigenous population might be the most vulnerable to the risks that a given convention is geared toward.

The purpose of this section has been to provide a brief glimpse into the array of international instruments that operate to manage risk at an international scale and that might impact the execution of Canadian domestic public welfare risk management in British Columbia. Other areas potentially impacted by international instruments include nuclear safety, air traffic control, pipelines, border crossings, disease outbreak, wildfire, and pest management (pine beetle, invasive species generally). As previously mentioned, an international law analysis is well outside the scope of this writing. However, international relations undoubtedly influence Indigenous Peoples’ participation in risk management at the domestic level and scrutiny of international instruments for adherence to the *United Nations Declaration on the Rights of Indigenous Peoples* will likely accelerate in the future. In fact, a white paper was recently tabled at the United Nations Permanent Forum on Indigenous Issues entitled “Engaging Indigenous Peoples in Disaster Risk Reduction”, followed by language encouraging better inclusion of Indigenous peoples in disaster risk reduction within the new *Sendai Framework*.¹⁷⁸ The authors

¹⁷⁷ *UNDRIP*, *supra* note 31 at Article 3.

¹⁷⁸ John C. Scott, Daniel Cabello-Llamas, Patricia Bittner “Engaging Indigenous Peoples in Disaster Risk Reduction” (a white paper prepared for the United Nations Permanent Forum on Indigenous Issues, 19-23 May 2013 (Centre for Public Service Communications, Maryland USA) online: Global Platform for Disaster Risk Reduction <<http://www.preventionweb.net/globalplatform/2013/programme/sideevent/view/501>> ; and see *Sendai Framework*, *supra* note 10.

professed that an immediate objective of the paper was to ensure that “issues, articulated by indigenous people themselves, are considered in the planning and outcomes of the Global Platform for Disaster Risk Reduction in 2013 and the World Conference on Disaster Reduction in 2015”.¹⁷⁹ The White Paper, and *Sendai Framework* that followed, demonstrates an escalating conversation at the international level on the participation of Indigenous Peoples in disaster risk management.

2.2.2.2. FEDERAL EMERGENCY MANAGEMENT POWERS

Domestic jurisdiction to manage natural disaster, accident or pollution public welfare emergencies in Canada reflects to a certain degree jurisdictional boundaries governing management of natural resources in Canada generally. Dwight Newman provides a ‘black letter law’ exploration of the legal framework determining “which government has the authority to regulate and make decisions about the development, management and/or conservation of natural resources” that embraces the significant complexity of natural resource management jurisdiction in Canada.¹⁸⁰ Just as complex as natural resource management jurisdiction in general, the substantially interwoven acts and regulations prescribing for the preparation for, mitigation of, response to and recovery from public welfare emergencies caused primarily by natural resource extraction or use constitutes an enormously complicated jurisdictional regime.

As previously noted, the determinative federal act outlining which circumstances might constitute a statutory public welfare emergency is the *Emergencies Act*.¹⁸¹ The *Emergencies Act* goes on to specify the steps required to *declare* a public welfare emergency and trigger the special provisions under the Act.¹⁸² Section 6 specifies that the declaration of a public welfare emergency is: (1) made by proclamation by the Governor in Council¹⁸³; (2) based on ‘reasonable

¹⁷⁹ Scott, Cabello-Llamas, Bittner, *ibid.* at 2.

¹⁸⁰ Newman, *Resource Jurisdiction*, *supra* note 147 at 1.

¹⁸¹ *Emergencies Act*, *supra* note 21 at ss 3, 5, 16, 27, 37 (as substantially explored in section 2.1 of this thesis, to meet the definition requirements, the attributes of each of public welfare emergencies, public order emergencies, international emergencies, and war emergencies must be “so serious as to be a national emergency”).

¹⁸² *Ibid.* at s 6 (1) (“When the Governor in Council believes, on reasonable grounds, that a public welfare emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 14, *may, by proclamation, so declare*”). [emphasis added].

¹⁸³ See Canada, Privy Council Office, “Process Guide for Governor in Council Submissions (Other than Regulations)”, online: Privy Council Office <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=secretariats&sub=oic-ddc&doc=gic-gec-eng.htm#II>> (Note: the ‘Governor in

grounds’; and (3) dependant, in some circumstances, on consultation with the Lieutenant Governor in Council of a province.¹⁸⁴ A valid public welfare emergency declaration must specify: (1) “concisely the state of affairs constituting the emergency”,¹⁸⁵ (2) “the special temporary measures that... may be necessary for dealing with the emergency”,¹⁸⁶ and (3) “if the direct effects of the emergency do not extend to the whole of Canada, the area of Canada to which the direct effects of the emergency extend”.¹⁸⁷ Legislated public welfare emergencies are not indeterminate but rather are time sensitive and expire by statute at the end of 90 days, unless previously revoked or continued in accordance with the *Emergencies Act*.¹⁸⁸

The *Emergencies Act* itemizes the special types of orders and regulations at the disposal of the Governor in Council should a public welfare emergency be declared.¹⁸⁹ As with the proclamation requirements for a public welfare emergency, a standard of reasonableness is required by statute before the Governor in Council may effect a special order or regulation to deal with the emergency.¹⁹⁰ Specific areas of emergency orders or regulations may include: a) regulation of travel, and/or area containment;¹⁹¹ b) evacuations and area security;¹⁹² c) requisition, use or disposition of property;¹⁹³ d) requisition of essential services;¹⁹⁴ e) distribution and availability of essential goods, services and resources;¹⁹⁵ f) emergency payments;¹⁹⁶ g)

Council’ is a common reference to the Governor General of Canada acting on the advice of Cabinet, Cabinet ministers, or a Cabinet committee).

¹⁸⁴ *Emergencies Act*, *supra* note 21 at s 6(1) “...after such consultation as is required by section 14...”; s. 14 “...before the Governor in Council issues, continues or amends a declaration of a public welfare emergency, the lieutenant governor in council of each province in which the direct effects of the emergency occur shall be consulted with respect to the proposed action”. (2) “The Governor in Council may not issue a declaration of a public welfare emergency where the direct effects of the emergency are confined to, or occur principally in, one province unless the lieutenant governor in council of the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it”).

¹⁸⁵ *Ibid.* at s 6 (2)(a).

¹⁸⁶ *Ibid.* at s 6 (2)(b).

¹⁸⁷ *Ibid.* at s 6 (2)(c).

¹⁸⁸ *Ibid.* at s 7 (2).

¹⁸⁹ *Ibid.* at s 8.

¹⁹⁰ *Ibid.* at s 8 (“While a declaration of a public welfare emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency...”).

¹⁹¹ *Ibid.* at s 8 (1) (a).

¹⁹² *Ibid.* at s 8 (1) (b).

¹⁹³ *Ibid.* at s 8 (1) (c).

¹⁹⁴ *Ibid.* at s 8 (1) (d).

¹⁹⁵ *Ibid.* at s 8 (1) (e).

¹⁹⁶ *Ibid.* at s 8 (1) (f).

establishment of emergency shelters and hospitals;¹⁹⁷ h) the assessment of damage to any works or undertakings and the repair, replacement or restoration thereof;¹⁹⁸ i) the assessment of damage to the environment and the elimination or alleviation of the damage.¹⁹⁹

The *Emergencies Act* provides for notable limitations to the emergency regulatory powers itemized in s. 8. Any emergency orders or regulations issued to respond to a public welfare emergency expire at the expiration or revocation of an emergency declaration.²⁰⁰ Further, should the Governor in Council deem a continuance of a public welfare emergency necessary, all emergency orders and regulations made under section 8 must be reviewed, and the Governor in Council must determine, on reasonable grounds, whether they continue to be necessary for dealing with the emergency, revoking or amending to the extent that they do not so continue.²⁰¹ Parliament does eventually play a role in governing a public welfare emergency in that proclamations must be laid out before the House of Commons within seven sitting days after the proclamation is issued, with the House of Commons having the power of amendment or revocation of any of the emergency proclamation itself, emergency orders and/or emergency regulations.²⁰²

In addition to the consultation requirements with the lieutenant governor in council of an emergency impacted province,²⁰³ strict limitations on the Governor in Council's emergency declaratory and regulatory powers, apparently aimed at respecting the jurisdictional competence of the provinces, are specified under the *Emergencies Act*. For example, the Act specifies that: "[t]he power... to make orders and regulations... shall be exercised or performed... in a manner that will not unduly impair the ability of any province to take measures, under an Act of the legislature of the province, for dealing with an emergency in the province".²⁰⁴ Further, the authority of provinces and municipalities over their police forces are strictly protected under the Act.²⁰⁵

¹⁹⁷ *Ibid.* at s 8 (1) (g).

¹⁹⁸ *Ibid.* at s 8 (1) (h).

¹⁹⁹ *Ibid.* at s 8 (1) (i).

²⁰⁰ *Ibid.* at s 15.

²⁰¹ *Ibid.* at s 12 (2).

²⁰² *Ibid.* at ss 7, 10, 12 (4), 58, 59, 60, 61.

²⁰³ *Ibid.* at ss 6, 14.

²⁰⁴ *Ibid.* at s 8 (3) (a)(i).

²⁰⁵ *Ibid.* at s 9.

The Act appears to prioritize inter-jurisdictional cooperation, stating: “[t]he power... to make orders and regulations...shall be exercised or performed...with the view of achieving, to the extent possible, concerted action with each province with respect to which the power, duty or function is exercised or performed”.²⁰⁶

It is important to note that the *Emergencies Act* deals with emergency response and recovery restrictively. Emergency mitigation, planning and preparation, all increasingly important in disaster management strategies, fall outside the scope of the *Emergencies Act*. In fact, the mitigation and planning phases of emergency management are *widely dispersed* within the purview of the myriad respective federal ministries, provincial and territorial authorities purporting to exercise any authority over any given area with the potential to experience a public welfare emergency. So while a disaster event would theoretically trigger a specific chain of events of federal governance response to a specific disaster, preparation for said disaster operates in the nebula of multiple government departments and agencies who play various, sometimes competing roles in the management of resources, populations and health.

“Environmental emergencies” are another sort of legislatively defined federal emergency, as outlined above. While the *Emergencies Act* governs response to and recovery from federally legislated ‘public welfare emergencies’, the *Canadian Environmental Protection Act, 1999* governs ‘environmental emergencies’, the distinctions of which are outlined above. The federal government’s regulatory powers over environmental emergencies is outlined in s. 200 (1) with an important limitation declared in subsection (2):

[t]he Governor in Council shall not make a regulation under subsection (1) in respect of a matter if, by order, the Governor in Council states that it is of the opinion that (a) the matter is regulated by or under any other Act of Parliament that contains provisions that are similar in effect...and (b) that Act or any regulation made under that Act provides sufficient protection to human health and the environment or its biological diversity.²⁰⁷

In other words, the environmental emergency regulatory powers under the *Canadian Environmental Protection Act* are subservient to any other Act or regulation that provides a response mechanism adequate in the discretionary view of the Governor in Council to protect human health and the environment or its biological diversity. So, even if an environmental

²⁰⁶ *Ibid.* at s 8 (3) (a)(ii).

²⁰⁷ *CEPA, supra* note 90 at s 200 (2).

emergency regulation developed in consultation with the statutorily defined ‘aboriginal people’ is in place, that regulation may be overridden at the discretion of the Governor in Council if another Act or regulation is identified that could manage the environmental emergency.

Given the relative low-level status of the *Canadian Environmental Protection Act* environmental emergency provisions, the few existing statutory requirements to include First Nations in any capacity in environmental emergency response are restrictive at best. Further complicating First Nation inclusion in the existing statutory emergency management regime generally is the sheer complexity of resource and emergency management generally.

Another complication potentially inhibiting honourable inclusion of First Nation governments in particularly the first two stages of disaster management (planning and mitigation) at the national level is the tendency of both the federal and British Columbia governments to prioritize industry self-regulation in natural resource management legislation. Whether in the area of transportation, extraction or export, statutes frequently set out a requirement for compliance with professional, industry or regulatory standards without requiring direct government supervision or oversight of the implementation—and sometimes even development—of those standards. Without a clear statutory requirement to include impacted First Nations in the industry-driven emergency management strategies, First Nations have little direct leverage with industry to ensure that their communities are sufficiently considered in emergency management protocols, particularly in the areas of planning and mitigation where government bodies have a lesser direct role. The gap expands as a result of s. 35 Aboriginal rights jurisprudence that holds the consultation and accommodation obligations to be exclusively the responsibility of the Crown.²⁰⁸ So, for example, a given transport company whose regular business is in the transport of dangerous goods is not under a clear and direct obligation to include a potentially impacted First Nation in either its emergency planning or its reporting structure. Because of the obligation gap, First Nation governments may be the last to know and

²⁰⁸ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 53 [*Haida*] (“The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments... However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.”).

the last to be involved in the management of a given disaster even when that Nation's population might be the most devastated by the impact.

2.2.2.3. PROVINCIAL (BRITISH COLUMBIA) EMERGENCY MANAGEMENT POWERS

Understanding British Columbia's public welfare emergency management regime begins with understanding the role of 'local governance' in emergency management. As briefly considered above, under British Columbia's *Emergency Program Act*, a "local authority" means a municipal council,²⁰⁹ the board of a regional district,²¹⁰ or a park superintendent.²¹¹ The statutory definition of a local authority is in line with the Act's identification of "jurisdictional area[s]" as municipalities, electoral areas and national parks.²¹² Also as previously noted, First Nation reserves (as defined under the *Indian Act*²¹³) are not recognized as a "jurisdictional area" nor are Band Councils or other forms of indigenous governance identified as a "local authority" under the provincial Act.

There is a political component to this point, which is outside the scope of this thesis, pertaining to the efforts of First Nations seeking to distinguish themselves from statutory 'local governments', with good cause. In British Columbia, the *Local Government Act* is the enabling legislation of regional districts and municipalities and conveys specific powers, at the behest of

²⁰⁹ *Local Government Act*, *supra* note 140 at s 5 ("municipality" means, in relation to a regional district, a municipality in the regional district and, in the case of the Greater Vancouver Regional District, includes the City of Vancouver").

²¹⁰ *Ibid.* at s 2 ("Recognizing that regional districts are an independent, responsible and accountable order of government within their jurisdiction, the purposes of a regional district include (a) providing good government for its community, (b) providing the services and other things that the board considers are necessary or desirable for all or part of its community, (c) providing for stewardship of the public assets of its community, and (d) fostering the current and future economic, social and environmental well-being of its community").

²¹¹ *Emergency Program Act*, *supra* note 76 at s 1 "local authority" ("local authority" means (a) for a municipality, the municipal council, (b) for an electoral area in a regional district, the board of the regional district, or (c) for a national park, the park superintendent or the park superintendent's delegate if an agreement has been entered into with the government of Canada under section 4(2) (e) in which it is agreed that the park superintendent is a local authority for the purposes of this Act"); and see *Local Government Act*, *supra* note 140 at s. 5 ("local government" means (a) the council of a municipality, and (b) the board of a regional district"); and see *Canada National Parks Act*, SC 2000 c 32 s 2 ("superintendent" means an officer appointed under the Parks Canada Agency Act who holds the office of superintendent of a park or of a national historic site of Canada to which this Act applies, and includes any person appointed under that Act who is authorized by such an officer to act on the officer's behalf").

²¹² *Ibid.* at s 1 "jurisdictional area" ("jurisdictional area means any of the following for which there is a local authority: (a) a municipality; (b) an electoral area; (c) a national park").

²¹³ *Indian Act*, RSC 1985 c. I-5, s. 2(1) "reserve" ("reserve (a) means a tract of land, the legal title to which is vested in Her Majesty that has been set apart by Her Majesty for the use and benefit of a band...").

the British Columbia legislature, onto ‘local authorities’.²¹⁴ Essentially local governments are creatures of statute and not creatures of the constitution, which is likely part of the objection to framing First Nations as local authorities.²¹⁵ A local authority’s powers are by nature extremely restricted when considered in light of the broad governance and jurisdictional implications of the *United Nations Declaration on the Rights of Indigenous Peoples* which speaks to self-government and self-determination,²¹⁶ and are even restricted when the self-governance implications of Aboriginal title are considered.²¹⁷ The void created by conveying emergency management powers to ‘local authorities’ over First Nation aboriginal title and traditional territories is concerning. First Nations are currently in the position of having to depend on lesser governments to execute local emergency response and recovery within their Aboriginal title and traditional territories. This is in spite of the fact that (even Crown-identified) First Nation interests in their territories are far broader than those afforded to ‘local authorities’ under the *Local Government Act*. Particularly if they were more effectively resourced, First Nations are also arguably much better positioned as stewards of their territories since time immemorial, and as self-governing bodies, to execute the local governance functions of emergency management themselves.²¹⁸

Further troubling to the current British Columbia emergency management framework that premises emergency management through local authorities (and that excludes language protecting First Nation constitutional rights) is the standing case law holding that municipal governments do *not* have a duty to consult. As related by Dwight G. Newman:

²¹⁴ *Local Government Act*, *supra* note 140.

²¹⁵ See also Chartrand, *Constitutional Legitimacy*, *supra* note 115.

²¹⁶ *UNDRIP*, *supra* note 31.

²¹⁷ See *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 at para 73 [*Tsilhqot’in*] (“*Aboriginal title confers ownership rights similar to those associated with fee simple*, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land” para 73 [Emphasis added]) ; and see *UNDRIP*, *supra* note 31 generally and at Articles 3, 4 (“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. (Article 3); Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” (Article 4). Aboriginal title is arguably more restrictive from a self-governance and self-determination standpoint than the scope *UNDRIP* instructs).

²¹⁸ *Local Government Act*, *supra* note 140; and see *Environmental Management Act*, *supra* note 133 (for powers delegated to municipalities impacting “environmental emergency” disaster risk assessment, response and recovery provisions).

In Canadian constitutional terms, municipal governments do not have separate constitutional status but are creations of the provincial governments. An interesting, and possibly even surprising, decision was rendered by the British Columbia Court of Appeal concerning municipal governments and the duty to consult in the case of *Neskonlith Indian Band v. City of Salmon Arm* in late 2012. The broad reading of the case is that the British Columbia Court of Appeal held that municipal governments do not have a duty to consult....The British Columbia Court of Appeal was not ready to read in a role of the municipal government to engage in consultation where its originating statute did not leave enough room to establish such a role... In a case concerning the actions of a municipal board carrying out land development, the Alberta Court of Appeal suggested that a municipal entity is not expected to carry out a more extended consultation than that within the processes set out for it within its statutes.²¹⁹

It is possible then that local authorities in the British Columbia *Emergency Program Act* and the British Columbia *Local Government Act* would not be held to have a duty to consult with First Nations in the execution of emergency management within all of a given First Nation's traditional, Aboriginal title and on-reserve territories, based on the findings in *Neskonlith Indian Band v. City of Salmon Arm* and the broader duty to consult doctrine.²²⁰

The deafening silence respecting First Nations' constitutional rights within the emergency management framework legislation, as will be explored further below, has the added impact that even the protections that a s. 35 duty to consult challenge might render are unavailable to First Nations impacted by emergency management executed by 'local authorities' within those First Nations' own territories. The potential result is disturbing given that the provincial government is essentially delegating most of its emergency

²¹⁹ Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, (Saskatoon: Purich Publishing, 2014) at 73-74 [Newman, *Consultation*].

²²⁰ *Ibid.* at 73-74 [footnotes removed]; and see *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379, [2012] 4 CNLR 218 generally and at para 10-11, 13, 28, 46-7 [*Neskonlith*] (detailing the decision's particular implication to First Nation hazard risk management, as the Neskonlith were concerned that the development under question would increase their risk to adverse effects from flooding); *Emergency Program Act*, *supra* note 76; *Local Government Act*, *supra* note 140.

management powers to local authorities through the *Emergency Program Act* (and other statutes).²²¹ It would seem logical that the duty to consult would likewise be delegated.²²²

However, as the Act and regulations are silent on respecting First Nations constitutional rights in the execution of emergency management through a local authority, a court may well construct a ‘local authority’ duty to consult as outside the processes set out for it.²²³ First Nations are essentially hemmed in to governing emergency management restrictively within their on-reserve boundaries. This is irrespective of whether a given First Nation has an Aboriginal title claim or other Aboriginal rights potentially impacted within that First Nation’s broader traditional territories. First Nations’ limited governance scope over emergency management throughout their traditional territories is directly tied to provincial delegation of environmental management to ‘local authorities’.²²⁴ ‘Local authorities’ are not First Nations within the emergency management statutory language, and even where First Nations are accorded a governance priority over on-reserve emergency management, that authority may be overstepped by a ‘local authority’ acting in a response capacity.

The jurisdictional scope of a local authority in relation to emergency management can be both quantitatively and qualitatively significant.²²⁵ Obviously, some municipalities will

²²¹ *Environmental Management Act*, *supra* note 133 at ss 4, 5, 39(1), 87 (the *Environmental Management Act* is a long and complex piece of provincial legislation that directs land management planning, including environmental impact assessments and environmental emergency response over jurisdictional areas constructed to be provincial, irrespective that many of the areas contemplated in the Act in fact fall within First Nation traditional and specific Aboriginal title territories. In common with other statutes explored in this thesis, there is little to no language prioritizing and protecting Aboriginal rights in the statutory and regulatory frameworks).

²²² *Emergency Program Act*, *supra* note 76; *Local Government Act*, *supra* note 140; *Environmental Management Act*, *ibid.*; *Wildfire Act*, *supra* note 129 (note this legislative list is exemplary, not exhaustive); and see *Neskonlith*, *supra* note 220 at para 61 (“The argument of the Neskonlith in favour of a municipal duty to consult can be described fairly succinctly...the honour of the Crown imposes a constraint on the exercise of authority delegated by the Province. If it were otherwise, the Province would be in a position to eliminate or avoid this core principle by delegating the decision to its statutory creature, a local government. Such avoidance would not be consistent with the honour of the Crown”).

²²³ *Neskonlith*, *ibid.* at paras 70, 78 (as creatures of statute, municipalities do not in general have the authority to consult with and if indicated, accommodate First Nations as a specific group in making the day-to-day operational decisions that are the diet of local governments” (para 70);... In my view, even if one assumes that a municipal law regulating flood risk for the protection of private property was the kind of law that could engage the duty to consult, the potential adverse effect on the Neskonlith is at this stage only speculative”.(para 78)).

²²⁴ *Emergency Program Act*, *supra* note 76 at s 1 “local authority”.

²²⁵ See *Local Government Act*, *supra* note 140 at s 176 (As per the language of s. 176, the “corporate powers” of a regional district include contractual powers for the provision of the regional district’s services, operation and enforcement of the regional district’s exercise of its regulatory authority, and to further contractual powers with a public authority respecting activities, works or services, operation and enforcement, and the management of property or interest in property. In addition to its contractual powers, a regional district can: provide assistance for the

encompass enormous populations whose needs and interests become paramount during a disaster event. For example, earthquake planning is an increasingly pressing political topic within the Greater Vancouver Regional District²²⁶, which is actually composed of 19 municipalities and an electoral area.²²⁷ The Greater Vancouver Regional District currently houses a population of approximately 2 300 000 people with an average population density of 802.5 persons per square kilometer.²²⁸ Natural Resources Canada reports that the west coast of Canada is one of the few areas in the world where all three types of tectonic plate movement (convergent, divergent, and transform) take place, situating the west coast as the most earthquake-prone region of Canada.²²⁹ In the offshore region west of Vancouver Island alone, “more than 100 earthquakes of magnitude 5 or greater (large enough to cause damage had they been closer to land) have occurred during the past 70 years”.²³⁰ Given the relatively high population density and scope of seismic activity in and around the Greater Vancouver Regional District, earthquake risk management could reasonably be considered an important governance responsibility requiring careful forethought and coordination.²³¹

While not at the same population scale, remote rural municipalities and regional district boards, as well as national park superintendents, are legislatively entrusted with a wide scope of emergency response considerations. Those considerations arise in large part from the sheer magnitude of land base under a local authority’s emergency management jurisdiction and the consequential necessity for consideration of the elements that must be coped with to effect life-saving emergency response plans. For example, the Central Coast Regional District is the only

purpose of benefiting the community; acquire, hold or manage and dispose of land, improvements, personal property or other property; delegate several of its powers, duties and functions; engage in commercial, industrial and business undertakings; and establish commissions); but see *Local Government Act*, *ibid.* at s 175 (“A board may only exercise or perform its powers, duties and functions within the boundaries of the regional district unless authorized under this or another Act.”).

²²⁶ Hereinafter GVRD.

²²⁷ BCStats, Reference Maps, “Interactive Census Geographies”, online: BCStats <<http://www.bcstats.gov.bc.ca/statisticsbysubject/geography/referencemaps/rds.aspx>> [*BCStats Map*] (for profiles of all regional districts in British Columbia.).

²²⁸ Statistics Canada, Focus on Geography Series, 2011 Census, “Census metropolitan area of Vancouver, British Columbia”, online: Statistics Canada <<http://www12.statcan.gc.ca/census-recensement/2011/as-sa/fogs-spg/Facts-cma-eng.cfm?LANG=Eng&GK=CMA&GC=933>>.

²²⁹ Natural Resources Canada, Seismic zones in Western Canada, “Background on Earthquakes in Western Canada”, online: Natural Resources Canada <<http://earthquakescanada.nrcan.gc.ca/zones/westcan-eng.php>> [*NRC Earthquakes Canada*].

²³⁰ *Ibid.*

²³¹ See also *Canada RoundTable*, *supra* note 12 at 13.

regional district in British Columbia that doesn't include a municipality. Instead the ~25000 km area is divided into five electoral areas with a reported census population of just under 3000.²³² With tourism amenities dispersed throughout the area, as well as ongoing resource extraction activities, there are likely challenges in ensuring emergency response is effective even in the context of the area's relatively low population density and rugged landscape.

In areas like the Central Coast, the impact of adhering to the *Emergency Program Act* and organizing local emergency management activities under a regime that patently excludes band councils and other forms of Indigenous governance potentially obstructs delivery of community-supported emergency management. Figure 2 is a map of the Central Coast Regional District that shows populated reserves relative to the expanse of the regional district area. The census-derived on-reserve population between the Heiltsuk, Nuxalk and Wuikinuxv nations is approximately 2000 (concentrated within tiny federal 'Indian reserves')²³³ of the 3000 people reportedly living in the entire central coast. Yet the Central Coast Regional District is afforded governance authority for emergency management for essentially the entire central coast land base, given that reserves constitute a tiny fraction of the land under discussion within the Central Coast Regional District area.²³⁴ The funding consideration is enormous given traditional cost recovery under the *Local Government Act*, the primarily enabling legislation for local authorities, is by way of property tax.²³⁵ On-reserve households fall outside the tax base, thus resulting in a flawed

²³² Statistics Canada, "Profile, Central Coast, RD, British Columbia, 2011", online: StatsCan <<http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/prof/details/page.cfm?Lang=E&Geo1=CD&Code1=5945&Data=Count&SearchText=Central%20Coast&SearchType=Begins&SearchPR=01&A1=All&B1=All&GeoLevel=PR&GeoCode=5945&TABID=1>>(Total population in private households by citizenship: 3175; Registered or treaty Indian: 2005).

²³³ Aboriginal Affairs and Northern Development Canada, "Welcome to the First Nation Profiles Interactive Map", online: AANDC <<http://fnpim-cippn.aandc-aadnc.gc.ca/index-eng.html>> (Population Characteristics Heiltsuk 538 on reserve population in 2011 1095; Nuxalk 539 on reserve population in 2011 850; Oweekeno/Wuikinuxv Nation 541 population 150; by adding the total AANDC reported First Nation on reserve population in the CCRD in 2011 I estimated a population total of approximately 2095); and see *Indian Act*, *supra* note 194 at s. 2(1) ("reserve" ("reserve (a) means a tract of land, the legal title to which is vested in Her Majesty that has been set apart by Her Majesty for the use and benefit of a band..." Note however on-reserve statistical information may be suppressed therefore Statistics Canada's and AANDC's population counts may not be accurate.)

²³⁴ See *BCStats Map*, *supra* note 227 (I estimate from a visual survey of the BCStats interactive maps that the reserves within the CCRD constitute around 1% of the regional district landmass).

²³⁵ *Local Government Act*, *supra* note 140 at ss 803, 804.3, 806.1, 807 ("803 (1) A regional district may recover the costs of its services by one or more of the following: (a) property value taxes imposed in accordance with Division 4.3 [*Requisition and Tax Collection*]; (b) subject to subsection (2), parcel taxes imposed in accordance with Division 4.3 [*Requisition and Tax Collection*]; (c) fees and charges imposed under section 363 [*imposition of fees and charges*]; (d) revenues raised by other means authorized under this or another Act; (e) revenues received by way of agreement, enterprise, gift, grant or otherwise. (2) Parcel taxes may not be used to recover all or part of the costs

funding scheme to finance emergency management, particularly at the planning and mitigation phases.

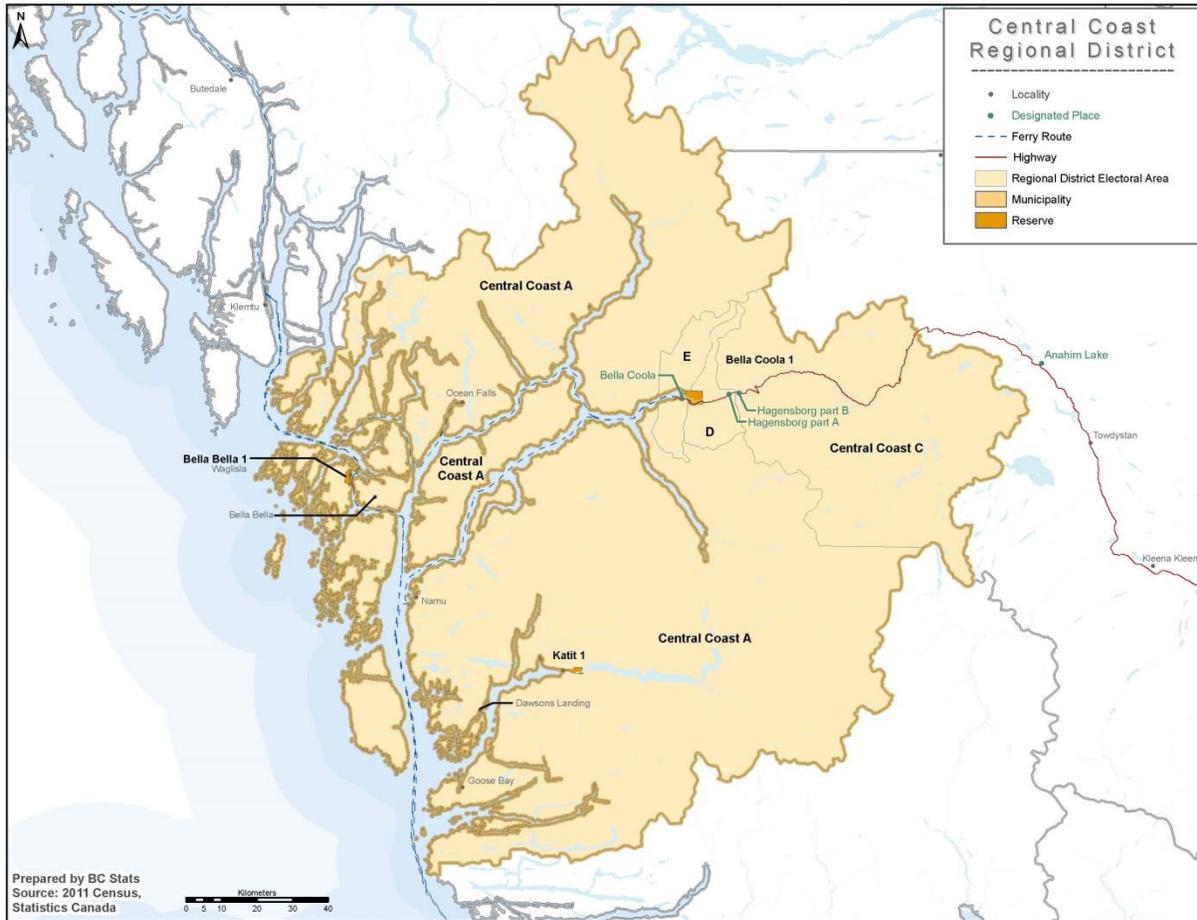


Figure 2 – Map of the Central Coast Regional District²³⁶

Outside of an Aboriginal law analysis, a question perhaps worth exploring is whether the situation is defensible using purely democratic and equalization principles, particularly in regard to population concentrations, the electoral boundaries in regional districts and statutory operational funding schemes. In any case, the division of powers between the federal

of a regulatory service. (3) In the case of a service for which an establishing bylaw is required, if all or part of the costs are to be recovered by one or more of the methods referred to in subsection (1) (a) to (c), the establishing bylaw must indicate which methods are to be used.”); *Taxation (Rural Area) Act*, RSBC 1996 c 448 at s 15(1)(h) “The following property is exempt from taxation: ... (h) land and improvements vested in or held by Her Majesty in trust for a band of Indians, and either unoccupied, or occupied by a person in an official capacity by the Indians”).

²³⁶ *BCStats Map*, *supra* note 227 (the depicted map is accessible by clicking on the PDF link entitled “45 Central Coast” located on the webpage indicated in the full citation above).

government assuming jurisdiction for on-reserve emergency management and the provincially defined regional districts assuming emergency management powers off-reserve creates a jurisdictional quagmire for those interested in the safety and wellbeing of their entire local community, particularly in those regions of British Columbia where significant proportions of a local population inhabit reserves. Earthquake risk, again as an example, is no less a concern in the central and northern coastal area than it is to the southern coastal area where the Greater Vancouver Regional District lies. In fact, according to Natural Resources Canada, risk of life threatening seismic activity is actually greater along the more northern sector of the west coast.²³⁷ However, the governance and funding strategies for emergency management appear to limit the relative earthquake preparation capacity of the central and perhaps north coast. While outside the scope of this thesis, a per capita analysis of spending in the area of earthquake risk management might provide an interesting comparison on disaster preparedness among communities along the entire coast.

Further complicating jurisdictional conversations governing emergency management is the fact of Aboriginal title. In the example of the central coast regional district, Aboriginal title claims could potentially encompass a substantial portion, if not all, of the territory provincially prescribed as being within the geographical scope of the local authority's (aka the Central Coast Regional District's) delegated powers. As mentioned, and as will be explored further, First Nation jurisdiction over emergency management is largely restricted to on-reserve activities except generally in the case where a First Nation has entered a modern treaty that contemplates emergency management. Given the scope of authority afforded to local authorities by British Columbia to manage emergencies and given the current state of precedent in British Columbia on the duty to consult, local authorities are poised to wield a tremendous amount of power over the very lives and wellbeing of First Nations—potentially in direct conflict with First Nation governance agency implicit in Aboriginal title.

Risk assessment, planning and mitigating for emergencies, and then rapid decisions around targeted response, and maximizing recovery dollars, all fall within the ambit of governance matters that not only directly tie to the legal nature of Aboriginal title,²³⁸ but also should be

²³⁷ *NRC Earthquakes Canada*, *supra* note 229.

²³⁸ *Tsilhqot'in*, *supra* note 217 at para 73 (“Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the

considered in the context of their purpose: minimizing harm and saving lives. From the outset, First Nations are constructively precluded from even defining for themselves what potential harms might arise during a natural disaster that would be of priority to a given First Nation for management in consideration of that First Nation's particular land and water base, the nature of that First Nation's territories generally, as well as the wellness status of its respective community.

Defining harm is the natural precursor to evaluating risk of that harm. That is part and parcel of assessing vulnerability. Planning, mitigation, response and recovery strategies all flow from the starting point of what harms we are concerned about and seeking to avoid. A potentially important political question is whether any of the risk reduction and recovery priorities laid out by the provincial and federal governments were informed by First Nations themselves, particularly in the disaster recovery fiscal regulations and guidelines.²³⁹ Notably, the priorities in the Disaster Financial Assistance Arrangements Guidelines do not necessarily reflect First Nation-specific 'survival' priorities. For example, recovery of a particular resource (say) a local fishery that is part of the identity and survival of a given First Nation might have more resonance within that First Nation than (say) recovery of a small business or farm. The food fishery might serve a similar economic purpose within that First Nation's customs and could potentially be more essential to the wellness of the community as a whole. Only First Nations themselves are positioned to identify priority potential harms to their being as Aboriginal peoples. Only First

land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land").

²³⁹ Public Safety Canada, "Guidelines for the Disaster Financial Assistance Arrangements" (Ottawa: Public Safety Canada, 2007) online: Public Safety Canada < <http://www.publicsafety.gc.ca/cnt/mrgnc-mngmnt/rcvr-dsstrs/gdlns-dsstr-ssstnc/gdlns-dsstr-ssstnc-eng.pdf> > (revised 2015) [*DFAA Guidelines*] at s 1.2 ("Provincial governments design, develop and deliver disaster response and assistance programs within their own jurisdictions. In doing so, they establish the financial assistance criteria they consider appropriate for response and recovery. The DFAA are intended to support the provinces in: a) providing or reinstating the necessities of life to individuals, including help to repair and restore damaged homes; b) re-establishing or maintaining the viability of small businesses and working farms; c) repairing, rebuilding and restoring public works and the essential community services specified in these Guidelines to their pre-disaster capabilities; and d) funding limited mitigation measures to reduce the future vulnerability of repaired or replaced infrastructure"; see Emergency Management BC, "Disaster Financial Assistance Guidelines for Private Sector: Home owners; Residential tenants; Small business owners; Farm owners; Charitable organizations" (Victoria: Emergency Management BC, 2012) online: Emergency Management BC < http://www.embc.gov.bc.ca/em/dfa_claims/PrivateSectorGuidelines.pdf > [*BC DFA Guidelines*] (for the British Columbia application of the federal Disaster Financial Assistance Arrangements application); and see Public Safety Canada, "Disaster Assistance Programs – List of all federal programs", online: Public Safety Canada < <http://www.publicsafety.gc.ca/cnt/mrgnc-mngmnt/rcvr-dsstrs/dsstr-ssstnc-prgrms/dsstr-ssstnc-prgrms-ll-eng.aspx> > (for a comprehensive list of federally funded emergency recovery fiscal programs categorized according to superseding ministry/department).

Nations themselves can be fully effective in planning for, mitigating, responding to, and recovering from disasters.

Not only do ‘local authorities’ assume the delegated authorities of a province around disaster management, they also assume the disaster management *priorities* constructed by the federal and provincial government as enshrined in the statutes governing emergency management. Those priorities do not necessarily reflect a given First Nation’s perspective on what areas constitute priority harms to address in the disaster risk management process and subsequent emergency management generally. Instead it would appear, as further laid out below, that First Nations must rely on ‘local authorities’ to deliver emergency management response strategies that they have had no part in constructing, and no part in executing, within their traditional and Aboriginal title territories. It is somewhat astonishing to consider that local authorities can apparently exercise this life and death power without having to consult with First Nations at all.²⁴⁰

As the conversation on Aboriginal title progresses, perhaps further directed dialogue addressing authority over emergency management throughout the expanse of Aboriginal title territories will take place. The question is an important governance issue, given the apparent shortcomings that limit First Nation inclusion within the current British Columbia emergency management regime.

2.2.2.3.1 LOCAL STATE OF EMERGENCY

According to the *Emergency Program Act*, “a local authority is at all times responsible for the direction and control of the local authority’s emergency response”.²⁴¹ As such, “a local authority must prepare or cause to be prepared local emergency plans respecting preparation for, response to and recovery from emergencies and disasters”.²⁴² Notably, the scope of powers afforded a local authority encompasses all four phases of emergency management, despite the fact that many emergency preparation and mitigation powers are distributed throughout both federal and provincial bodies pursuant to general jurisdiction on natural resources and resource

²⁴⁰ It is possible that in a regional district area, the electoral boundaries might allow for a majority First Nation population to hold a majority of seats on a given regional district board. However, such a situation merely bypasses the intrinsic constitutional problem of First Nations as respective self-determining and self-governing peoples in their own right having a steering voice in emergency management within their own respective territories.

²⁴¹ *Emergency Program Act*, *supra* note 76 at s 6 (1).

²⁴² *Ibid.* at s 6 (2).

extraction. So while a local authority might appear to have significant preparation and mitigation powers, those powers are fundamentally limited to disaster preparedness activities not already contemplated by other statutory regimes.

Clearly, a high degree of inter-jurisdictional cooperation is necessary in order to effect a reasonably well coordinated local emergency response strategy. This is particularly so when considering all four phases of emergency management. Powers to mitigate and prepare for emergencies are generally dispersed widely throughout several federal and provincial Crown sectors. Useful to coordination is the *Emergency Program Act*'s further requirement that "a local authority that is a municipal council or the board of a regional district must establish and maintain an emergency management organization to develop and implement emergency plans and other preparedness, response and recovery measures for emergencies and disasters...."²⁴³ Further, a local authority that is a municipal council or board of a regional district may appoint committees to advise and assist the local authority and appoint a coordinator for each emergency management organization established by the local authority.²⁴⁴ Logic suggests that devoted emergency management bodies have a better likelihood of achieving the necessary knowledge base and network to effect the best coordinated emergency management strategies possible.

Importantly, all of a local authority's powers and duties under the *Emergency Program Act* may be delegated to that local authority's emergency management organization, coordinator or committee(s), *except* the power to make a declaration of a state of local emergency.²⁴⁵ A declaration of a state of local emergency can only be made by a local authority through a bylaw or resolution, or by the head of a local authority through an order.²⁴⁶ Although emergency declaratory powers are limited, a local authority or even a person designated in a local authority's local emergency plan may cause an emergency plan to be implemented if an emergency exists or appears imminent or a disaster has occurred or threatens in the opinion of the local authority or designated person.²⁴⁷ The simplified procedure toward that emergency

²⁴³ *Ibid.* at s 6 (3).

²⁴⁴ *Ibid.* at s 6 (3.1) - (3.2).

²⁴⁵ *Ibid.* at s 6 (4).

²⁴⁶ *Ibid.* at ss 1 "declaration of a state of local emergency", 12; and see *Ibid.* at s. 12 (3) ("The head of a local authority must, before making a declaration under subsection (1), convene a meeting of the local authority to assist in directing the response to the emergency").

²⁴⁷ *Ibid.* at s 8.

response is as timely as possible appears aimed at prioritising efficacy over bureaucracy during a disaster event when time can be critical to save lives. Once again it is important to note that First Nations generally do not have a Crown-recognized authority to declare a state of emergency. So, they are constructively dependent on municipalities, regional district boards, or national park superintendents to make declarations of emergencies taking place within their traditional (and Aboriginal title) territories. Further, it may well be that those ‘local authorities’ do not have a duty to consult with First Nations regarding said emergency declarations or regarding their emergency management execution.²⁴⁸

Once a state of local emergency has been declared, the local authority is under a statutory obligation to make the contents of the declaration known to the population of the affected area by means of the most effective form of communication at the local authority’s disposal.²⁴⁹ The local authority is further obliged to forward a copy of the declaration to the minister.²⁵⁰ A local state of emergency expires after 7 days and requires another bylaw, resolution or order for renewal.²⁵¹ The minister’s or lieutenant governor in council’s approval is required to extend a local state of emergency beyond the seven day time limit and the minister or lieutenant governor in council likewise has the statutory discretion to unilaterally cancel a local state of emergency.²⁵²

After a declaration of a state of local emergency is made, the local authority “may do all acts and implement all procedures that it considers necessary to prevent, respond to or alleviate the effects of an emergency or disaster”, including: “implement its local emergency plan or any local emergency measures; ... exercise [some] power available to the minister...; ...authorize, in writing, any persons involved in the operation of a local emergency plan or program to exercise [some] power available to the minister...”.²⁵³

²⁴⁸ Newman, *Consultation*, *supra* note 219 at 73-74 [footnotes removed]; and see *Neskonlith*, *supra* note 220.

²⁴⁹ *Emergency Program Act*, *supra* note 76 at s 12 (4) (b).

²⁵⁰ *Ibid.* at s 12 (4) (a).

²⁵¹ *Ibid.* at ss 12 (5), (7), (4), (2), (5).

²⁵² *Ibid.* at s 12.

²⁵³ *Ibid.* at s 13 (“(1) After a declaration of a state of local emergency is made under section 12 (1) in respect of all or any part of the jurisdictional area for which a local authority has responsibility and for the duration of the state of local emergency, the local authority may do all acts and implement all procedures that it considers necessary to prevent, respond to or alleviate the effects of an emergency or a disaster, including any or all of the following: (a) implement its local emergency plan or any local emergency measures; (b) subject to this section, exercise, in relation to the part of the jurisdictional area affected by the declaration, any power available to the minister under section 10 (1) (d) to (l); (c) subject to this section, authorize, in writing, any persons involved in the operation of a local

The specific statutory powers of the minister that may be exercised, or delegated, by the local authority are:

- acquire or use any land or personal property considered necessary to prevent, respond to or alleviate the effects of an emergency or disaster;²⁵⁴
- authorize or require any person to render assistance of a type that the person is qualified to provide or that otherwise is or may be required to prevent, respond to or alleviate the effects of an emergency or disaster;²⁵⁵
- control or prohibit travel to or from any area...;²⁵⁶
- provide for the restoration of essential facilities and the distribution of essential supplies and provide, maintain and coordinate emergency medical, welfare and other essential services...;²⁵⁷
- cause the evacuation of persons and the removal of livestock, animals and personal property from any area ... that is or may be affected by an emergency or a disaster and make arrangements for the adequate care and protection of those persons, livestock, animals and personal property;²⁵⁸
- authorize the entry into any building or on any land, without warrant, by any person in the course of implementing an emergency plan or program or if otherwise considered by the [local authority] to be necessary to prevent, respond to or alleviate the effects of an emergency or disaster;²⁵⁹
- cause the demolition or removal of any trees, structures or crops if the demolition or removal is considered by the [local authority] to be necessary or appropriate in order to prevent, respond to or alleviate the effects of an emergency or disaster;²⁶⁰
- construct works considered by the [local authority] to be necessary or appropriate to prevent, respond to or alleviate the effects of an emergency or disaster;²⁶¹

emergency plan or program to exercise, in relation to any part of the jurisdictional area affected by a declaration, any power available to the minister under section 10 (1) (d) to (l)"); and see *ibid.* at s 10.

²⁵⁴ *Ibid.* at s 10 (d).

²⁵⁵ *Ibid.* at s 10 (e).

²⁵⁶ *Ibid.* at s 10 (f).

²⁵⁷ *Ibid.* at s 10 (g).

²⁵⁸ *Ibid.* at s 10 (h).

²⁵⁹ *Ibid.* at s 10 (i).

²⁶⁰ *Ibid.* at s 10 (j).

²⁶¹ *Ibid.* at s 10 (k).

- procure, fix prices for or ration food, clothing, fuel, equipment, medical supplies or other essential supplies and the use of any property, services, resources or equipment ... for the duration of the state of emergency.²⁶²

An important limitation on a local authority's emergency powers is the *Emergency Program Act's* caveat that the minister "may order a local authority to refrain or desist, either generally or in respect of any matter, from exercising any one or more of the powers" outlined above.²⁶³

While a substantial range of authority exists under the legislation, many of a local authority's executable powers are meaningless without sufficient resourcing to effect the outlined scope of authority. The *Emergency Program Act* contains a cost recovery section aimed at enabling compensation for a local authority (or the provincial government) that has expended emergency management costs for an emergency that was threatened or caused by the act(s) or omission(s) of a person.²⁶⁴

Simplified procedures to invoke emergency plan implementation are necessary for those plans to effectively serve their purpose. The challenge appears to be having sufficient checks and balances on the exercise of emergency response powers to ensure the democratic process is by and large upheld and sustained. As will further be explored, while the various emergency response statutory regimes across federal and provincial governments clearly contemplate constitutional principles invoking all of POGG, the *Charter* and Canada's division of powers, emergency management acts and regulations are silent with respect to upholding the honour of the Crown in effecting s. 35 constitutional principles in emergency management. A premise of this thesis is that just as a balance can be achieved between efficacy in emergency management and adherence to democratic and other essential Canadian constitutional principles, so too can an

²⁶² *Ibid.* at s 10 (1).

²⁶³ *Ibid.* at s 13.

²⁶⁴ *Ibid.* at s 17 ("If an emergency or a disaster is threatened or caused in whole or in part by the acts or omissions of a person and expenditures are made by the government or a local authority to prevent, respond to or alleviate the effects of the emergency or disaster, the person must, on the request of the minister or head of a local authority, pay to the Minister of Finance or the local authority the lesser of (a) the portion of the expenditures that is equal to the portion of the liability for the occurrence of the emergency or disaster that is attributable to the person, and (b) the amount demanded by the minister or head of a local authority. (2) Nothing in subsection (1) relieves a person from any other liability").

effective balance between efficient emergency management and adhering to s. 35 Constitutional principles be achieved.

2.2.2.3.2 PROVINCIAL STATE OF EMERGENCY:

At the provincial level, the minister or lieutenant governor in council may declare a state of emergency relating to all or any part of British Columbia by way of an order. The declaration must identify the nature of the emergency and the area where the emergency exists or is imminent. The minister is then obligated to make the details of the declared emergency known by publishing the details of the declaration through a means of communication that the minister considers most likely to make the contents known to the majority of the affected population. The clock starts ticking after the declaration is made and the emergency statutorily expires after 14 days, but can be renewed for further periods of not more than 14 days each.²⁶⁵

Whether or not an emergency has been declared, the minister (or designated person) may implement a provincial emergency plan, if, in the minister's opinion an emergency exists or appears imminent or a disaster has occurred or threatens.²⁶⁶ After the declaration of a state of emergency, the minister has all the same powers outlined for a local authority above. In addition to those powers, a minister may do all acts and implement all procedures that the minister considers necessary to prevent, respond to or alleviate the effects of an emergency or a disaster; may implement a provincial emergency plan or measure; and may authorize, and even require, a local authority to implement a local emergency plan or measures.²⁶⁷ In addition, the minister (or designated person) has the power to make an order requiring a person to provide assistance, and the person named in the order must provide the assistance required by the order.²⁶⁸

Contravention of the Act or regulations (or an order made in accordance with the Act) could cost the offender up to a year of imprisonment and \$10 000 fine.²⁶⁹

²⁶⁵ *Ibid.* at s 9.

²⁶⁶ *Ibid.* at s 7 (“The minister or a person designated in a Provincial emergency plan may, whether or not a state of emergency has been declared under section 9 (1), cause a Provincial emergency plan to be implemented if, in the opinion of the minister or the designated person, an emergency exists or appears imminent or a disaster has occurred or threatens”).

²⁶⁷ *Ibid.* at s 10.

²⁶⁸ *Ibid.* at s 25. The legislation attempts to protect those ordered to provide emergency assistance from losing their employment at *ibid.* at s. 25 (2) (“a person’s employment must not be terminated by reason only that the person is required to provide assistance under this section”).

²⁶⁹ *Ibid.* at s 27.

The *Emergency Program Act* deals explicitly with potential conflict of laws and affirms the Act's supremacy during a declared state of emergency.²⁷⁰ Additional powers are vested by way of the Act's regulations, which deal largely with the financial matters of an emergency and emergency response coordination.²⁷¹ First Nations are not mentioned, either directly or indirectly, throughout the *Emergency Program Act*.

The Lieutenant Governor in Council is empowered under the *Emergency Program Act* to make regulations assigning responsibilities to "ministries, boards, commissions or government corporations or agencies for the preparation or implementation of all or any part of plans or arrangements to deal with emergencies or disasters".²⁷² Under the *Emergency Program Management Regulations*, not only are First Nations not mentioned in any capacity, missing entirely from the list of "Ministers Responsible for Coordinating Government Response to Specified Hazards" under Schedule 1 and the "Duties of Ministers and Government Corporations in the Event of an Emergency" under Schedule 2 is the Ministry of Aboriginal Relations and Reconciliation.²⁷³ The omission is significant. The Ministry of Aboriginal Relations and Reconciliation is charged with:

...pursuing reconciliation with the First Nations and Aboriginal peoples of British Columbia. A key component of reconciliation involves building and maintaining relationships and partnerships, which create opportunities to collaborate on building a strong economy and a secure tomorrow so that all British Columbians, including First Nations and Aboriginal peoples, are able to pursue their goals.²⁷⁴

²⁷⁰ *Ibid.* at s 26 ("Unless otherwise provided for in a declaration of a state of emergency made under section 9 (1) or in an extension of the duration of a declaration under section 9 (4), if there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, this Act and the regulations made under this Act prevail during the time that the declaration of a state of emergency made under section 9 (1) and any extension of the duration of that declaration is in effect").

²⁷¹ *Ibid.* at s 28.

²⁷² *Ibid.* at s 28 (2) (a).

²⁷³ *Emergency Program Management Regulation*, BC Reg 477/94 at Schedules 1 & 2.

²⁷⁴ Ministry of Aboriginal Relations and Reconciliation, "2015/16-2017/18 Service Plan, February 2015 (Victoria: Ministry of Aboriginal Relations and Reconciliation, 2015) at 5 'Purpose of the Ministry' online: <<http://www.bcbudget.gov.bc.ca/2015/sp/pdf/ministry/arr.pdf>> [MARR Service Plan]; and see MARR Service Plan at 9-10 ("Goal 1... Performance Measure 5: Liquefied natural gas benefit agreements"—this section deals specifically with a potentially catastrophic dangerous good. There is no overt language committing to emergency or disaster management strategies, in spite of the fact that the federal government has made a budgetary commitment to bolstering on reserve emergency management through Aboriginal Affairs and Northern Development Canada's strategic priorities over the next few years. The Ministry of Aboriginal Relations and Reconciliation is arguably in line with the federal government's First Nation economic development priorities, but out of sync with respect to the federal priority in emergency management ("Further to the strategic agreements, the Ministry uses tools such as non-treaty agreements to support First Nations that may be impacted by natural gas development, pipelines or liquefied natural gas facilities to ensure they are provided with the ability to participate in this generational opportunity. These benefit agreements create greater certainty for all parties by obtaining early support from First Nations, creating

In spite of a broad mandate to build relationships and foster reconciliation with First Nations, with outcomes aimed at ‘security’ and ‘sustainable, healthy communities’, the Ministry of Aboriginal Relations and Reconciliation astonishingly has no explicit role in British Columbia’s coordination of government response to specific hazards. That the key British Columbian ministry charged with building relationships with First Nations constructively has no role in facilitating the province’s emergency program further challenges First Nations in leveraging an emergency management voice in decisions impacting their respective territories.²⁷⁵

The *Emergency Program Management Regulation* lays out ministerial responsibility to “develop emergency plans and procedures to be followed in the event of an emergency or disaster” and specifies that those plans “may include plans and procedures to assist local authorities with response to or recovery from emergencies or disasters that are of such magnitude that the local authorities are incapable of effectively responding to or recovering from them”.²⁷⁶ Notably, the *Emergency Program Management Regulation* specifies that each minister’s emergency plans and procedures must “be coordinated and consistent with the emergency plans and procedures of every other minister”²⁷⁷ but does not require that emergency management plans or procedures be coordinated and consistent with those of First Nation governments delivering emergency services on reserve.

The *Emergency Program Management Regulation* mandates the creation of an ‘Inter-Agency Emergency Preparedness Council’ consisting of at least one appointed representative from each of the ministries listed in Schedule 2 of the regulation, which as previously noted does not

partnerships for the development, transportation and liquefaction of natural gas. The Ministry will continue to use its innovative and flexible approach, including land, revenue and benefits sharing, strategic engagement and other agreements, to ensure First Nations are engaged on liquefied natural gas activities that may impact their Aboriginal rights. In addition, to complement liquefied natural gas related agreements, the Ministry will work with First Nations to support social and economic wellness such as skills training programs and an Environmental Stewardship Initiative.”).

²⁷⁵ *Emergency Program Management Regulation*, *supra* note 273 at ‘Schedule 1’ (for example, under the “Geological” hazard group, including hazards such as avalanches (highway and other), debris avalanches and debris flows, landslides (highways and other), submarines slides, and land subsidence, “Key Ministries” having an implicit regulatory role are “Transportation and Highways, Attorney General, Environment Lands and Parks, Energy Mines and Petroleum Resources. As with every other hazard group, listed (Accidents, Atmosphere, Dam Failure, Disease and Epidemics, Explosions and Emissions, Fire – Urban and Rural, General, Hazardous Materials, Hydrologic, Power Outage, Riots, Seismic, Space Object, Structural, Terrorism, Volcanic, and Wildfire), the Ministry of Aboriginal Relations and Reconciliation is *not* listed as a key ministry to coordinating government response).

²⁷⁶ *Ibid.* at s 3 (1)-(2).

²⁷⁷ *Ibid.* at s 3 (3)(a).

include the Ministry of Aboriginal Relations and Reconciliation.²⁷⁸ The Inter-Agency Emergency Preparedness Council is funded by the Provincial Emergency Program and is directed to:

- (a) recommend emergency preparedness, response and recovery measures to each minister, and
- (b) provide to each minister referred to in Schedule 2 the assistance necessary to ensure that that minister's emergency plans and procedures are coordinated and consistent with the plans and procedures of all other ministers and with the government's overall emergency preparedness strategies.²⁷⁹

Given that the Ministry of Aboriginal Relations and Reconciliation is off the list, the Ministry is also exempt from the funding strategy devised to coordinate emergency preparedness at the local and provincial level. Lack of funding could present another significant barrier to under-resourced First Nations struggling to meet the financial demands of regular governance requirements under the *Indian Act* regime—that regime of course is notoriously over-reported and under-funded.²⁸⁰ That the Province has not regulated a mandate to fund inclusion of First Nations at the Inter-Agency Emergency Preparedness Council, or even the Ministry charged with building relationships with First Nations, is another striking indication that First Nations are overtly excluded from emergency management decision-making that could well impact their very lives and well-being.²⁸¹

Given the statutory makeup of the provincial emergency program, it is perhaps not surprising that in British Columbia's current all-hazard emergency management plan, non-treaty First Nations' role in emergency management is qualified as on reserve and under the authority of Aboriginal Affairs and Northern Development Canada:

Aboriginal Affairs and Northern Development Canada (AANDC) holds legislated responsibility for emergency management on First Nation reserves. Through a Letter of Understanding with AANDC, EMBC has agreed to support the provision

²⁷⁸ *Ibid.* at s 5.

²⁷⁹ *Ibid.* at s 5 (7).

²⁸⁰ See Anaya, *UNHRC Report*, *supra* note 38.

²⁸¹ But see Emergency Management British Columbia, "The All-Hazard Plan, 4/11/2012" (Victoria: Province of British Columbia, 2012) online: <http://www.embc.gov.bc.ca/em/hazard_plans/All-Hazard_Plan.pdf> at 43 [BC All-Hazard Plan] ("The Ministry of Aboriginal Relations and Reconciliation (MARR) is responsible for aboriginal policy and coordination, including treaty and non-treaty agreements. If an agreement impacts the composition or responsibilities of emergency management on First Nations reserve land, EMBC of the Ministry of Justice is notified and consulted. Before, during and after an emergency the Ministry of Aboriginal Relations and Reconciliation could be called upon to provide expertise and/or policy direction regarding First Nations communities.").

of emergency response and recovery services to First Nations communities when requested by either AANDC or the local Band Council.

The primary link to the provincial emergency management structure for First Nation communities during an emergency response is Aboriginal Affairs and Northern Development Canada (AANDC).²⁸²

It appears that the ‘Letter of Understanding’ between AANDC and Emergency Management British Columbia referred to in the All-Hazard Plan is primarily concerned with fiscal responsibility and prescribes remuneration to the Province for its costs in delivering emergency management services on reserve.²⁸³

The Auditor General of Canada concluded in her fall 2013 report that responsibility for emergency management on reserves among stakeholders is unclear.²⁸⁴ The Audit recommended that “Aboriginal Affairs and Northern Development Canada, working with First Nations, the provinces, and other federal organizations, should take the lead role in clarifying federal roles and responsibilities so that these can be set out formally in agreements with the provinces and in the contribution agreements with First Nations and third-party providers”.²⁸⁵ The ambiguity identified by the Auditor General in on-reserve emergency management adds further to the complication of including First Nation governments in not only managing emergencies on reserves, but in managing emergencies that affect the entire scope of First Nations’ traditional territories.

²⁸² *Ibid.* at 35.

²⁸³ Ministry of Justice, “Financial Management of Emergency Response Costs during Provincial Activations” (5 April 2013) online: <http://www.embc.gov.bc.ca/em/hazard_plans/Financial_Management_Annex.pdf> at 22 (for a flow chart detailing recouping of costs from AANDC: “Where a local authority incurs emergency response costs on behalf of a FN community, the local authority can submit an emergency response claim with two task numbers such that EMBC is able to extrapolate the First Nations’ emergency response costs for submission to AANDC. In this case, the local authority will receive the proceeds of the two claims and distribute the proceeds. EMBC headquarters invoices AANDC for all emergency response costs incurred on behalf of FN communities.”); and see AANDC, “Emergency Management Information for BC First Nations” (Vancouver: AANDC BC Region, VANCOUVR#2314821 - v9) online: <http://www.snuneymuxw.ca/sites/default/files/news/VANCOUVR-%232314821-v9-EMU_-_AANDC_BC_REGION_EMERGENCY_MANAGEMENT_INFORMATION_FOR_BC_FIRST_NATIONS.pdf> at 4 (“AANDC also works collaboratively with Provincial and Territorial governments (who are responsible for operating overall emergency management programs within their respective jurisdictions) *for the provision of emergency management services to First Nations communities on-reserve.*”[emphasis added]).

²⁸⁴ Office of the Auditor General of Canada, *Report of the Auditor General of Canada, Chapter 6 Emergency Management on Reserves*, (Ottawa: Office of the Auditor General of Canada, 2013) at 6.25-6.37, online: <http://www.oag-bvg.gc.ca/internet/docs/parl_oag_201311_06_e.pdf> [*Audit Emergency Management*].

²⁸⁵ *Ibid.* at 6.37 “Recommendation”.

Under the British Columbia ‘All-Hazard Plan’, treaty First Nations are relegated to the status of ‘local authorities’, which as will be reviewed later in this thesis, is consistent with the language of modern treaties speaking to emergency management.²⁸⁶ It is also however highly *inconsistent* with the driving political message of individual First Nations and umbrella organizations representing First Nations that First Nations are not stakeholders, municipalities or other inferior governments to the province or Canada, but are Nations in their own right.

The Minister of Justice and Attorney General (Emergency Management Program) also enjoys a wide scope of temporary powers with respect to spending, extended to the minister during a declared state of emergency. The *Emergency Program Act* states: “Any expenditures under this Act considered necessary by the minister to implement a Provincial emergency plan or Provincial emergency measures, under section 7 or 10 (1)(a), may be paid out of the consolidated revenue fund without an appropriation other than this section. Further to discretionary emergency spending, the minister also has the power to seek recovery of costs if “an emergency or disaster is threatened or caused in whole or in part by the acts or omissions of a person and expenditures are made by the government or a local authority to prevent, respond to or alleviate the effects of the emergency or disaster”.²⁸⁷ In addition, the minister has the power to provide regulated disaster financial assistance to persons who suffer loss as a result of a disaster.²⁸⁸ Again, given the statutory absence of First Nation recognition – in this case to losses that might be particularly incurred by a First Nation impacted by a disaster that was the result of an act or omission of a person, First Nations appear to be left out entirely from the disaster management funding and cost-recovery cycles for emergencies that take place within their traditional territories.

²⁸⁶ *BC All-Hazard Plan*, *supra* note 281 at 33 (“First Nations communities with treaty agreements are local authorities under the Emergency Program Act and its regulations. Although not required, some treaty First Nations communities have formal agreements with neighbouring jurisdictions regarding emergency services and programs, such as the 2009 agreement between the Tsawwassen First Nation and the City of Delta.”).

²⁸⁷ *Emergency Program Act*, *supra* note 76 at s 17.

²⁸⁸ *Ibid.* at s 20.

2.3 FIRST NATION EMERGENCY MANAGEMENT JURISDICTION

2.3.1 FIRST NATION EMERGENCY MANAGEMENT JURISDICTION ON RESERVE

The *Indian Act* continues to empower the Minister of Indian Affairs and Northern Development²⁸⁹ to be “the superintendent general of Indian affairs”.²⁹⁰ Concomitantly, reserves continue to constitute an important jurisdictional parameter under the *Indian Act*. In the paternalistic language of the *Indian Act*, reserves are “held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to [the *Indian Act*] and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band”.²⁹¹ The statutory span of uses to which the Minister of Indian Affairs may authorize the use of lands in a reserve includes: Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects, or, with the consent of the council of the band, for any other purpose for the general welfare of the band.²⁹² The *Indian Act* instructs that a band is to “ensure that the roads, bridges, ditches and fences within the reserve occupied by that band are maintained in accordance with instructions issued from time to time by the superintendent”.²⁹³

In stark contrast to the scope of statutory powers afforded to municipalities, regional districts and national parks to declare and manage a local state of emergency under the *British Columbia Emergency Program Act*, First Nation band councils are not directly empowered to declare or manage a state of emergency, even on reserve.²⁹⁴ In fact, according to Aboriginal Affairs and Northern Development Canada’s National Emergency Management Plan, the ‘authorities and legislative requirements’ prescribing AANDC’s scope of responsibilities vests in the fact that “[s]ection 91(24) of the *Constitution Act 1867* prescribes the legislative authority of the Government of Canada for “Indians, and Lands reserved for the Indians”. This authority is delegated to the Minister of Aboriginal Affairs and Northern Development Canada pursuant to

²⁸⁹ The department is now known as Aboriginal Affairs and Northern Development Canada, however the express language of the *Indian Act* reflects the earlier department name of Indian Affairs and Northern Development; *Indian Act*, *supra* note 204.

²⁹⁰ *Indian Act*, *supra* note 213 at s 3 (1).

²⁹¹ *Ibid.* at s 18(1).

²⁹² *Ibid.* at s 18(2).

²⁹³ *Ibid.* at s 34(1).

²⁹⁴ *Emergency Program Act*, *supra* note 76 at ss 12-15, 16-28; *ibid.* at ss 81 and 83.

the *Indian Act*. Because the *Emergency Management Act 2007* “states that each federal minister is responsible for the identification of risks that are within or related to his or her area of responsibility, including those related to critical infrastructure”, AANDC is required to “prepare emergency management plans in respect of those risks; maintain, test and implement the plans; and conduct exercises and training in relation to the plans”.²⁹⁵ The Plan further clarifies that:

AANDC’s Treasury Board Program Authority #330 sets out the management terms and conditions for “Contributions for Emergency Management Assistance Activities on Reserve”. The Program structure recognizes that the provinces and territories have constitutional jurisdiction for emergency management, while the federal government has jurisdiction for Indians and lands reserved for Indians.²⁹⁶

So, the pervasive paternalism arising from the language of s. 91(24) and the continued assumption of federal Crown authority over the lives and wellbeing of registered Indians appears to restrictively inform the statutory extent of on-reserve emergency management, and disables any fundamental recognition of First Nation jurisdictional competency to manage emergencies within their own respective territories.

Further evidence of the overt exclusion of First Nations from any voice in emergency management appears in the language of the AANDC Internal Audit Report of the Emergency Management Assistance Program, which summarizes key legislation and recent inter-governmental emergency management milestones. The audit suggests that the collective body of federal and federal/provincial instruments characterises Canada’s approach to emergency management as:

an all-hazards, risk based approach to address both natural and human-induced emergency situations; four interdependent components (prevention/mitigation, preparedness, response and recovery); shared responsibilities among federal, provincial and territorial governments and their partners, including individual citizens and communities; *and recognition that most emergencies in Canada are local in nature and managed by municipalities or at the provincial or territorial level.*²⁹⁷

²⁹⁵ AANDC, *National Emergency Management Plan*, (Ottawa: Published under the authority of the Minister of Aboriginal Affairs and Northern Development, 2011 at s 1.2 ‘Authorities and Legislative Requirements’, online: <<https://www.aadnc-aandc.gc.ca/eng/1324572607784/1324572653216#c2>> [AANDC Emergency Plan].

²⁹⁶ *Ibid.*

²⁹⁷ AANDC, Audit and Assurance Services Branch, *Internal Audit Report: Audit of the Emergency Management Assistance Program* (Ottawa: April 2013), online: < http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/au_ema_1386615085800_eng.pdf > at 4 [emphasis added] [AANDC Internal Audit].

First Nations are not mentioned once in this AANDC summary characterizing Canada's approach to emergency management.

In the Aboriginal Affairs and Northern Development Canada and Canadian Polar Commission 2015-16 Report on Plans and Priorities, AANDC continues to express deference to provincial emergency management authorities by describing the AANDC Emergency Management Assistance Program as promoting efficiency through “accessing existing resources and service of provincial/territorial and First Nation emergency management partners to address on-reserve emergencies. EMAP reimburses these partners for eligible expenses”.²⁹⁸

AANDC's deference to a province's or local authority's jurisdictional authority for emergency management is patently clear. There is left little voice for First Nation populations who must live with the outcomes of others' emergency management strategies. The *Indian Act* effectively dispenses supreme powers to local authorities and provincial governments in instances where lands are needed for public purposes—a local authority, provincial government or other federal department has a statutory authority to uptake lands for said purposes.²⁹⁹ As outlined above, under the British Columbia *Emergency Program Act*, during a state of emergency, a local authority may “acquire or use any land or personal property considered necessary to prevent, respond to or alleviate the effects of the emergency or disaster”.³⁰⁰ The express language of the *Indian Act* only limits the supremacy of the local authority's jurisdictional capacity over a band council by requiring that the consent and terms of the Governor in Council must be adhered to.³⁰¹

It would appear by the language of the British Columbia *Emergency Program Act* read in conjunction with the *Indian Act* that not only does the Crown not recognize a First Nation statutory authority for emergency management in that Nation's Aboriginal title territories off reserve, but even *on reserve* a municipality, regional district, or national park superintendent can

²⁹⁸ AANDC, Aboriginal Affairs and Northern Development Canada and Canadian Polar Commission, *2015-16 Report on Plans and Priorities*, (Ottawa: AANDC, 2015) online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/15-16_rpp_pdf_1427220534464_eng.pdf> at 59 (Sub-Program 3.4.6: Emergency Management Assistance) [*AANDC 2015-16 Budget*].

²⁹⁹ *Indian Act*, *supra* note 213 at s 35(1).

³⁰⁰ *Emergency Program Act*, *supra* note 76 at s 10(d).

³⁰¹ *Indian Act*, *supra* note 213 at s 35(1).

direct the use of lands and property over the express authority of a band council in the case of a declared state of emergency. The statutory limitations on this particular power vests with the Governor in Council and not with the First Nation whose land base is afflicted by a disaster.³⁰²

Disaster resourcing for both on reserve and off reserve emergency management contributes to the alienation of a First Nation steering voice. As an initial premise:

AANDC enters into collaborative agreements with provincial governments to ensure that First Nations communities have access to comparable emergency assistance services available to other residents in their respective province. Through these agreements AANDC provides the funding to cover eligible costs related to emergency assistance in First Nations communities *while the provincial or territorial government provides the service.*³⁰³

While the intent of ensuring that First Nations have access to comparable emergency assistance available to other residents is necessary, that outcome does not necessarily have to be at the expense of denying First Nations any jurisdictional role in emergency management authority and/or delivery of emergency management services. Not only does AANDC's strategy overtly exclude First Nations from steering emergency management within their own territories, but it patently redirects resources that might otherwise be spent building capacity within First Nations communities for local emergency management while bankrolling provincial and local authority assertion of jurisdiction over First Nation lands.

AANDC's description of its Emergency Management Assistance budgetary priorities for 2015-16 assumes that existing emergency management services are adequate to meet current disaster risk.³⁰⁴ Contradicting that assumption is the budgetary priority that continues to be afforded to the relatively new ministry of Public Safety and Emergency Management in order to effect an overhaul of emergency management throughout Canada generally. AANDC itself has doubled its projected spending on Emergency Management Assistance for 2015 and beyond (from a projected \$37 768 388 to \$70 252 180 for the 2015-16 fiscal year and from a projected

³⁰² *Ibid.* (“Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the governor in Council, be exercised in relation to lands in a reserve or any interest therein”).

³⁰³ AANDC *Emergency Plan*, *supra* note 295 at 7.

³⁰⁴ C.f. AANDC *2015-16 Budget*, *supra* note 298.

\$37 768 388 to \$72 192 685 for the 2016-17 fiscal year).³⁰⁵ The budgetary and planning priorities collectively present emergency management throughout Canada as in a state of flux.

In what appears to be a more empowering strategy, AANDC is prioritising supporting First Nations “in their efforts to mitigate and prepare for emergencies” by allocating a proportion of preparedness funding (15% of the \$19.1 million allocated) towards the development and maintenance of Emergency Management plans.³⁰⁶ However, Public Safety Canada reports that it is “leading the development of a Disaster Recovery Strategy which will establish a blueprint for coordinating pre-disaster and post-disaster recovery activities, and will ensure that linkages will be made with existing and proposed preparation, mitigation and recovery planning. To advance the development of this Strategy, the Department will work with *federal partners, provincial and territorial counterparts and other key stakeholders*”³⁰⁷—but not First Nations, unless, of course, the Crown regards First Nations as mere stakeholders in their own territories.

In the case of an ‘environmental emergency’ under the *Canadian Environmental Protection Act, 1999*, the Act itself provides for some limited First Nation engagement in federal emergency management. Section 196 sets out that “[t]he Minister may issue guidelines and codes of practice respecting the prevention of, preparedness for and response to an environmental emergency and for restoring any part of the environment damaged by or during an emergency”.³⁰⁸ While the Minister is required to offer consultation with any Aboriginal government representatives who are part of the *Canadian Environmental Protection Act, 1999* National Advisory Committee in carrying out the responsibilities of s. 196, consultation with ‘aboriginal people’ is discretionary under the Act.³⁰⁹ Notably, a clock is built into the legislation, enabling on a *prima facie* basis

³⁰⁵ *Ibid.* at 59 (Sub-Program 3.4.6 Emergency Management Assistance).

³⁰⁶ However, it is not clear if AANDC intends to spend that money at the community level or (say) on internal department training to invoke an ‘incident command system’ among AANDCs regional staff. The budget priority is ambiguous, and based on the language of the audit it may be that AANDC will not spend the bulk of the money at a First Nation community level.

³⁰⁷ Public Safety Canada, The Honourable Steven Blaney, P.C, M.P. Minister of Public Safety and Emergency Preparedness, *2015-16 Report on Plans and Priorities*, (Ottawa: Public Safety Canada, 2015) at 58 (Sub-Program 1.4.4 Emergency Recovery, Planning Highlights) online: <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rprt-plns-prts-2015-16/rprt-plns-prts-2015-16-en.pdf>> [Public Safety 2015-16].

³⁰⁸ *CEPA*, *supra* note 90 at s 196.

³⁰⁹ *Ibid.* at s 197 (1) (“In carrying out the responsibilities conferred by section 196, the Minister shall *offer to consult* with the government of a province *and the members of the Committee who are representatives of aboriginal governments* and *may consult* with a government department or agency, *aboriginal people*, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment or environmental emergencies” [emphasis added]).

unilateral action where an offer to consult has not been accepted within 60 days. The clock applies to all phases of emergency management, including mitigation and preparedness.³¹⁰

Given that emergency management continues to be in a state of reorganization generally throughout Canada, and given that increasing attention regionally, nationally and internationally is being afforded to Indigenous populations as the most vulnerable in the world to escalating natural disaster risk, one might conclude that now is the ideal time to tackle dated governance structures that assume provincially constructed ‘local authorities’ should have governance priorities over First Nations in unsundered territories.

Logic dictates that First Nation governments are the best positioned to centralize emergency management, particularly at the ‘community level’,³¹¹ because both Canada and the Province of British Columbia have a constitutional obligation to consult with First Nations on any matter that might infringe their Aboriginal rights. Rather than ignoring the reality of s. 35 and excluding First Nations from the emergency management regime, the Crown could consider First Nations as the ‘tie that binds’ all Crown bodies, whether federal or provincial. Then it might position First Nations through agreement and provisioning of sufficient resourcing for training, infrastructure, and inter-agency collaboration as *central* to disaster preparedness regimes. The ripple effect of such a shift in perspective could be enormous, as significant capacity building and job creation opportunities would necessarily flow from such acknowledgement. Current federal objectives around First Nation economic development could also be nicely served.

Because the scope of AANDC’s Emergency Management Assistance audit criteria were drawn from (and thus limited to) standing applicable legislation, the governance and coordination implications of First Nations as outside, and a passive recipient of, the (albeit transitional) federal provincial emergency management regime were never explored.³¹² As such

³¹⁰ *Ibid.* at s 197(2) (“At any time after the 60th day following the day on which the Minister offers to consult in accordance with subsection (1), the Minister may act under section 196 if the offer to consult is not accepted by the government of a province or members of the Committee who are representatives of aboriginal governments”).

³¹¹ Public Safety 2015-16, *supra* note 297 at 49 ‘Program 1.4 Emergency Management, Planning Highlights’ (“Public Safety Canada, in partnership with provinces and territories, has initiated a dialogue on fostering a modernized and more sustainable approach to emergency management in Canada. This shift aims at enhancing resilience at the community level by emphasizing a proactive approach to building safe and resilient communities”).

³¹² AANDC, Internal Audit *supra* note 297 at 9(‘2.2 Audit Scope’ “Audit criteria were drawn from applicable legislation, as well as from the AANDC National Emergency Management Plan (2009). An Emergency Management Framework for Canada (Second Edition, January 2011), the Federal Policy on Emergency Management (2011), the Federal Emergency Response Plan (2011), the Emergency Management Planning Guide

it appears there has been little scrutiny of the machinations of the regime itself as potentially exacerbating Indigenous community disaster risk vulnerabilities, when of course the objective should be reducing disaster risk as much as possible.

With the common law affirmation of Aboriginal title, particularly the milestone decision in *Tsilhqot'in*, where the first First Nation in common law history was held by the Supreme Court of Canada to have Aboriginal title over a claimed portion of their territories, the urgency of resolving the lack of First Nation steering capacity over emergency management throughout their Aboriginal title territories is ever more pressing. There exists an ethical as well as a legal problem in the breach. No matter that any change in the statutory scheme defining emergency management currently appears unlikely, it will be interesting to observe how AANDC deals with the question of who is responsible to finance emergency management in Aboriginal title territories and who has the commensurate authority to define how that funding will be spent, assuming the Crown preserves (at least a stated) priority of ensuring that First Nations have the same level of emergency management assistance as every other resident in Canada.

As will be further explored below, the scope of “consultation and accommodation” inventiveness required to overcome the obtusely unconstitutional implications of the statutory supremacy of (say) a regional district board over a First Nations government body in an area so grave as emergency management is perhaps impracticable. How can those (questionably) empowered, and resourced, to effect emergency management services effectively engage First Nations in whose territories the emergency management unilaterally takes place when the very enabling legislation of those authorities are silent, if not blatantly dismissive, of a First Nation’s governance voice? Further, if indeed *Neskonlith Indian Band v. City of Salmon Arm* stands, it may well be that British Columbia local authorities under the *Emergency Program Act* don’t have a duty to consult at all.³¹³ Effectuated First Nations appear to be in the position of having to fight for every level of recognition, from jurisdictional authority to commensurate emergency management resourcing. Crown public servants are potentially put in a hopeless position of

issued by Public Safety Canada and Program Authority #330 (Contribution for Emergency Management Assistance for Activities on Reserve). Audit criteria were also drawn from Canadian best practices for emergency management, including the Canadian Standards Association Standard Z1600 – Emergency Management and Business Continuity Programs”).

³¹³ *Newman, Consultation, supra* note 219 at 73-74 [footnotes removed]; and see *Neskonlith, supra* note 220.

managing emergencies within First Nations' territories (where a given recovery phase can take months, if not years) without any legislative protocols in place to guide their actions and prioritise the voice of the very population who is potentially most impacted by a given disaster. In this sense, the emergency management regime could be described as a simmering recipe for conflict, waste and alienation.

The perpetual call for 'negotiated outcomes' in Aboriginal rights jurisprudence offers some guidance to inform impending emergency management protocols, but as the old saying goes, you can't make a silk purse out of a sow's ear. Particularly at the federal level, the Crown has failed for over 30 years now to statutorily implement successive s. 35 Aboriginal rights cases.³¹⁴ The conversation is perpetually left to 'negotiated outcomes'. Though a philosophical tangent from the focus of this thesis, one could explore the question of whether s. 35 jurisprudence as a body merely fabricates a legal fiction of reconciliation, where talk is endless and implementation elusive as the courts never seem to grapple with the real facts of where First Nation jurisdictional authority stands and strike down problematic legislation (or read in First Nations Aboriginal rights protections), as is a common remedy in *Charter* cases.

2.3.2 FIRST NATION EMERGENCY MANAGEMENT JURISDICTION IN TREATY TERRITORY

[T]he nation-to-nation relationship became unbalanced when alliances with Aboriginal nations were no longer needed, the non-Aboriginal population became numerically dominant, and non-Aboriginal governments abandoned the cardinal principles of non-interference and respectful coexistence in favour of policies of confinement and assimilation — in short, when the relationship became a colonial one.³¹⁵

- Report of the Royal Commission on Aboriginal Peoples

Some First Nations whose ancestral territories fall within what is now widely known as British Columbia have a treaty relationship with the Crown. Treaties continue to be an extremely important dimension framing the current relationship between the Crown and First Nations.³¹⁶

³¹⁴ For example, as demonstrated by the lack of statutory acknowledgment of s. 35 constitutional priorities in the emergency management framework surveyed in this thesis.

³¹⁵ *Report of the Royal Commission on Aboriginal Peoples: Treaties*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 18 [*RCAP Report*] ("1.1 Treaties are Nation-to-Nation").

³¹⁶ See *ibid.* at 20-21 ("1.3 Treaties are Part of the Canadian Constitution"; "1.4 Fulfilment of the Treaties is Fundamental to Canada's Honour"); and see *ibid.* at 10, 17 ("We begin this volume, which concerns the restructuring of the relationship between Aboriginal and non-Aboriginal people, with an examination of the treaties because it has been through treaty making that relationships between Aboriginal and non-Aboriginal people have traditionally been formalized. In our view, treaties are the key to the future of these relationships as well. In this volume we address substantive issues such as governance, lands and resources, and economic development. Just as

While an investigative analysis of treaties and treaty making is outside the scope of this thesis, some consideration of what a treaty is and treaty impact on the governance quagmires that currently exist in First Nation emergency management is necessary. Given the purpose of the treaty section in this thesis is to provide depth to the broader discussion of the jurisdictional authority First Nations are currently ‘permitted’ or empowered to exercise in all four stages of the emergency management particularly within the expanse of their traditional territories, I have opted to rely primarily on the *Report of Royal Commission on Aboriginal Peoples*³¹⁷ to characterise treaties, and treaty history generally in Canada, given “[t]he Commission undertook historical and legal research on the treaties on a scale unprecedented in our country’s history”.³¹⁸ However, I recognize and value that there are other authors and texts that present other facets of contemporary views on treaties in Canada today.

The Royal Commission on Aboriginal People’s offered the following descriptive characteristics of treaties in Canada generally. “Treaties (...) are by their nature agreements made by nations”.³¹⁹ “The treaties constitute promises, and the importance of keeping promises is deeply ingrained in all of us and indeed is common to all cultures and legal systems.”³²⁰ “(...) [I]t has been through treaty making that relationships between Aboriginal and non-Aboriginal people have traditionally been formalized“(...)”³²¹ “[T]he treaties are constitutional documents,

those issues were addressed traditionally in the nation-to-nation context of treaties, it is in the making of new treaties and implementation of the existing treaties that these issues can be addressed in a contemporary context” (p 10); (“...the making of treaties in the future can and should be open to all Aboriginal nations that choose a treaty approach. Many of the future treaties may well be termed accords or compacts or simply land claims agreements. But the Commission believes that treaties, by any name, are a key to Canada’s future. .. It is within the treaty processes that our substantive recommendations on matters such as governance, lands and resources, and economic issues will ultimately be addressed.” (p17)).

³¹⁷ See *ibid.* at 9-10 (The Commission’s Terms of Reference required RCAP to investigate and make concrete recommendations concerning “[t]he legal status, implementation and future evolution of aboriginal treaties, including modern-day agreements”; and, “[a]n investigation of the historic practices of treaty-making may be undertaken by the Commission, as well as an analysis of treaty implementation and interpretation. The Commission may also want to consider mechanisms to ensure that all treaties are honoured in the future.”).

³¹⁸ *Ibid.* at 15 (footnote 4 details the expansive treaty related studies that were conducted as part of the research program of the Royal Commission on Aboriginal Peoples).

³¹⁹ *Ibid.* at 10.

³²⁰ *Ibid.* at 10; and see *ibid.* at 24 (quoting from Sioui “What characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.”); *R v Sioui*, [1990] 1 SCR 1025 at 1044 [*Sioui*].

³²¹ *RCAP Report, ibid.* at 10.

designed to embody the enduring features of the law of the country”.³²² The Commissioners summarized treaties as sharing the following fundamental attributes:

- They were made between the Crown and nations of Aboriginal people, nations that continue to exist and are entitled to respect. [Treaties are Nation-to-Nation]³²³
- They were entered into at sacred ceremonies and were intended to be enduring. [Treaties are Sacred and Enduring]³²⁴
- They are fundamental components of the constitution of Canada, analogous to the terms of union under which provinces joined Confederation. [Treaties are part of the Canadian Constitution]³²⁵
- The fulfilment of the spirit and intent of treaties is a fundamental test of the honour of the Crown and of Canada.³²⁶
- Their non-fulfilment casts a shadow over Canada’s place of respect in the family of nations.³²⁷

The Commissioners concluded that “the treaties describe social contracts that have enduring significance and that as a result form part of the fundamental law of the land. In this sense they are like the terms of union whereby former British colonies entered Confederation as provinces”.³²⁸

The Royal Commission on Aboriginal Peoples provided further insight on the role of treaties and treaty-making in the constitutional make-up of Canada. The Commissioners viewed treaties as having a central role “in fashioning a just and honourable future for Aboriginal peoples within Canada and an equitable reconciliation of the rights and interests of Aboriginal and non-Aboriginal peoples”.³²⁹ To the Commissioners “(...) treaties (...) represent[] a profound commitment by both parties to the idea of peaceful relations between peoples...”³³⁰ The Commissioners clarified that “[t]reaties were made in the past because the rights of Aboriginal

³²² *Ibid.* at 20.

³²³ *Ibid.* at 22, 18 (“1.1 ‘Treaties are Nation-to-Nation’” (p 18)).

³²⁴ *Ibid.* at 22, 18 (“1.2 ‘Treaties are Sacred and Enduring’” (p 18)).

³²⁵ *Ibid.* at 22, 20 (“1.3 ‘Treaties are Part of the Canadian Constitution’” (p 20)).

³²⁶ *Ibid.* at 22.

³²⁷ *Ibid.* at 22.

³²⁸ *Ibid.* at 20-21.

³²⁹ *Ibid.* at 10.

³³⁰ *Ibid.* at 11.

and non-Aboriginal people occupying a common territory could come into conflict unless some means of reconciliation was found”.³³¹ The Commissioners noted:

Treaty making can enable the deepest differences to be set aside in favour of a consensual and peaceful relationship. The parties to a treaty need not surrender their fundamental cultural precepts in order to make an agreement to coexist. They need only communicate their joint desire to live together in peace, to embody in their own laws and institutions respect for each other, and to fulfil their mutual promises.³³²

The Commissioners also offered an important caution respecting the view that treaties might condone subjugation, stating:

In entering into treaties with Indian nations in the past, the Crown recognized the nationhood of its treaty partners. Treaty making (whether by means of a treaty, an accord or other kinds of agreements) represents an exercise of the governing and diplomatic powers of the nations involved to recognize and respect one another and to make commitments to a joint future. It does not imply that one nation is being made subject to the other.³³³

The Commission reminds us that in contrast to ‘subjugation’, “[t]he parties to treaties must be recognized as nations, not merely as ‘sections of society’”.³³⁴ Further the Commission informs us that a treaty need not be named a treaty to be a treaty: “Many of the future treaties may well be termed accords or compacts or simply land claims agreements. But the Commission believes that treaties, by any name, are a key to Canada’s future”.³³⁵

The Royal Commission on Aboriginal Peoples generally categorizes treaties as either historic or modern.³³⁶ To the Commissioners the distinction is most important for the purposes of interpretation, particularly where there is conflict over implementation. As detailed in the Commission’s report, the courts seem to regard historic treaties as requiring “generous” interpretation principles in accordance to the principles set out in the *Sioui* case, whereas the ‘modern treaties’ would fall within the interpretive scope of cases in line with *Eastmain Band v.*

³³¹ *Ibid.* at 11.

³³² *Ibid.* at 13.

³³³ *Ibid.* at 18.

³³⁴ *Ibid.* at 18.

³³⁵ *Ibid.* at 17.

³³⁶ *Ibid.* at 27 (“To bring some clarity to our analysis of the jurisprudence, we refer to treaties that should benefit fully from the interpretive approach described in the *Sioui* case as historical treaties. Treaties to which these interpretive principles may not apply, such as the Howard and Eastmain cases, we refer to as modern treaties.”); *Sioui*, *supra* note 320; *R v Howard*, [1994] 2 SCR 299; *Eastmain Band v Canada*, [1993] 1 FC 501.

Canada.³³⁷ The Commissioners explain that jurisprudence since the *Sioui* decision suggests that “signatories of more recent treaties should not benefit from special rules of interpretation because of their growing sophistication in matters of negotiation”.³³⁸ The Royal Commission on Aboriginal Peoples clarifies however that there is no hard and fast line between historic and modern treaties, nor that treaty interpretation is mutually exclusive between the two types:

We do not suggest that there is a sharp dividing line between these classes of agreements. The historical context of the relationship between Aboriginal and non-Aboriginal people is relevant to all treaties, as is the general fiduciary relationship between Aboriginal peoples and the Crown described in *Sparrow*. The treaties made before the twentieth century are clearly historical, as are the numbered treaties made in relatively remote parts of Canada early in this century (Treaties 8, 9, 10 and 11). Treaties made in 1975 and later can be characterized as modern. However, each treaty is unique, and as the courts have said, the factual context of each treaty must be considered when approaching issues of interpretation.³³⁹

The Royal Commission on Aboriginal Peoples further emphasised that “if the logic of court decisions is accepted, it might be said that the written text of an historical treaty is but one piece of evidence to be considered with others in determining its true meaning and effect”.³⁴⁰ As the Royal Commission on Aboriginal Peoples noted “[i]t seems illogical to recognize the two-sided nature of treaty negotiations but to conclude that the one-sided technical language recorded by the Crown is the whole treaty”.³⁴¹ As such, if considering what implication Treaty 8 (as one of the few historic treaties within the jurisdictional boundaries of what is now known as British Columbia) has on the signatory First Nations’ involvement in emergency management within their traditional territories, the perspectives and oral histories of those impacted First Nations are essential to interpreting the commensurate emergency management treaty rights and obligations.

To this point, a historic treaty right respecting First Nation emergency management has not been tested in the jurisprudence.³⁴² It may be that Crown/First Nation treaty interpretation and

³³⁷ *Ibid.*

³³⁸ *RCAP Report*, *supra* note 315 at 26.

³³⁹ *Ibid.* at 27.

³⁴⁰ *Ibid.* at 27.

³⁴¹ *Ibid.* at 27.

³⁴² However, where mitigation is interpreted as ‘risk management’ in a general sense, for example, the risks a proposed large scale industrial project bears on the environment and on the exercise of Aboriginal and/or treaty rights, it may be that there are judicially defined s. 35 rights protecting (to some extent) First Nations ability to mitigate for potential disasters (differently framed along the consultation and accommodation line of cases). However, as a self-governance piece, where emergency management is understood as a process in keeping with the Constitutional POGG power, there is little in the way of legal authority to date in defining the parameters of what First Nation emergency management treaty or Aboriginal rights might look like; see *Mikisew Cree First Nation v*

implementation dialogues will become increasingly focused on emergency management if there is a need for resolution of any emergency management issues taking place in treaty territory. Historic treaty interpretation on this matter may become increasingly critical as conversations around disaster risk to Indigenous communities domestically and internationally continue to escalate and as the pressures from planned and existing resource extraction and transport within treaty territories continue to mount.

Treaty 8 is a historic treaty³⁴³ whose treaty territory includes a portion of British Columbia.³⁴⁴ The *written* component of Treaty 8 does not identify emergency management.³⁴⁵ The implications of Treaty 8 on a signatory First Nation's treaty rights in emergency management within its respective territory requires a broader review of the legal landscape of treaty interpretation and a survey of the oral histories and interpretive position of the signatory First Nations, which again is beyond the scope of this thesis. The Douglas Treaties (also known as the Vancouver Island Treaties) are likewise historic treaties that apply to a portion of territory of what is now known as British Columbia.³⁴⁶ Like Treaty 8, evaluation of a treaty right to both

Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 SCR 388 at para 55 -56 [*Mikisew Cree*] “The Crown has a treaty right to “take up” surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew ‘in good faith, and with the intention of substantially addressing’ Mikisew concerns (*Delgamuukw*, at para 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown’s duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question... the Crown’s right to take up lands under the treaty, which itself is subject to its duty to consult and, if appropriate, accommodate First Nations’ interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights.”); *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168.

³⁴³ *Treaty No 8*, 21 June 1899; see AANDC, “Treaty Texts – Treaty No. 8”, online: AANDC <<https://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853>> [Treaty 8 Area] (for online reprints of the Treaty 8 written text, Order in Councils pertaining to Treaty 8 and Reports of Commissioners pertaining to Treaty 8); and see *RCAP Report*, *supra* note 315 at 27 (“The treaties made before the twentieth century are clearly historical, as are the numbered treaties made in relatively remote parts of Canada early in this century (Treaties 8, 9, 10 and 11).”).

³⁴⁴ *Ibid.*; and see Treaty 8 Area *ibid.* online: AANDC <<https://www.aadnc-aandc.gc.ca/eng/1100100029841/1100100029845>> (Map from 1900 indicates that the Treaty 8 area includes a portion of the northeast corner of British Columbia).

³⁴⁵ But see *RCAP Report*, *supra* note 315 at 35 (“The Commission believes that the unique nature of the historical treaties requires special rules to give effect to the treaty nations’ understanding of the treaties. Such an approach to the content of the treaties would require, as a first step, the rejection of the idea that the written text is the exclusive record of the treaty”); and see *Mikisew Cree*, *supra* note 342 at para 54 (“Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 [concluding Treaty No. 8] was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it”).

³⁴⁶ See Douglas C Harris, *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008) at 21-22 [Harris, *Native Fisheries*] (“The agreements known as the Douglas

emergency management authority and resourcing under the Douglas Treaties is an interpretative question that is outside the scope of this thesis.

There are few modern treaties in British Columbia.³⁴⁷ Of those that exist, all share a common (more or less) approach to emergency management within the terms of the treaties. The Nisga'a Agreement was the first of the modern treaties in British Columbia and the first to qualify the signatory First Nation as a 'local authority' for the purposes of emergency preparedness and emergency measures: "Nisga'a Lisims Government, with respect to Nisga'a Lands, has the rights, powers, duties, and obligations of a *local authority* under federal and provincial legislation in respect of emergency preparedness and emergency measures".³⁴⁸ The modern treaty further specifies Crown supremacy in the event of a conflict: "Nisga'a Lisims Government may make laws in respect of its rights, powers, duties, and obligations under paragraph 122. *In the event of a conflict* between a Nisga'a law under this paragraph and a federal or provincial law of general application, *the federal or provincial law prevails to the extent of the conflict*".³⁴⁹ The modern treaty further clarifies that any emergency declaratory powers exercised by the Nisga'a Lisims Government are again subject to the supremacy of federal and provincial law:

Treaties are fourteen land purchases made by James Douglas in his capacity as the Hudson's Bay Company's chief trader, and then governor of the colony of Vancouver Island, between 1850 and 1854...After minimal discussions, Douglas asked the chiefs to place X's on blank sheets of paper. Following the conclusion of the first nine agreements at Fort Victoria between 29 April and 1 May 1850, Douglas wrote to the HBC to explain his understanding of what had transpired: "I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country." He forwarded the "signatures" of the chiefs and asked that the HBC supply the proper conveyancing instrument to which the signatures could be attached. Several months later, Barclay replied, approving the agreements and sending a template purchase agreement, based on New Zealand precedents, that would become the text of the Douglas Treaties." [footnotes and emphasis omitted]; and see Harris, *Native Fisheries* at 21, 22 ("The land, purchased from Native peoples on Vancouver Island, covered a small fraction of the island, including the area around Victoria, the Saanich Peninsula, the future town site of Nanaimo midway up the island, and an area near Fort Rupert at its northeastern end" (p 21); and see Figure 1.1 (map depicting Douglas Treaties) (p 22)).

³⁴⁷ BC Treaty Commission, "Negotiations Update", online BCTC <<http://www.bctreaty.net/files/updates.php> > ("The BC treaty negotiations process is voluntary and open to all First Nations in British Columbia. There are 65 First Nations that are participating in or that have completed treaties through the BC treaty negotiations process. The 65 First Nations represent 104 of the 203 Indian Act Bands in British Columbia. First Nations in the BC treaty negotiations process are self-determining, and there are several First Nations that govern or represent multiple Indian Act Bands, communities, or hereditary houses, clans or families, or combinations of these". The BC Treaty Commission's 'Negotiation Update' reports that there are 8 First Nations in Stage 6 [Implementation of the Treaty]; 4 First Nations in Stage 5 [Negotiation to Finalize a Treaty]; 44 First Nations in Stage 4 [Negotiation of an Agreement in Principle]; 2 First Nations in Stage 3 [Negotiation of a Framework Agreement]; and 6 First Nations in Stage 2 [Readiness to Negotiate]).

³⁴⁸ *Nisga'a Final Agreement, Nisga'a Nation and British Columbia and Canada*, 4 May 1999, at 180 ch 11 s 122 [emphasis added].

³⁴⁹ *Ibid.* at s 123 [emphasis added].

For greater certainty, Nisga'a Lisims Government may declare a state of local emergency, and exercise the powers of a local authority in respect of local emergencies in accordance with federal and provincial laws in respect of emergency measures, *but any declaration and any exercise of those powers is subject to the authority of Canada and British Columbia set out in those federal and provincial laws.*³⁵⁰

And finally, the treaty provides a general statement of the supremacy of Crown declaratory powers: “[n]othing in this Agreement affects the authority of: a. Canada to declare a national emergency; or b. British Columbia to declare a provincial emergency in accordance with federal and provincial laws of general application”.³⁵¹

It could well be that for the Crown negotiators working on subsequent treaties, the Nisga'a Agreement served as a precedent or even a template for subsequent agreements on the particular area of emergency management, given the similarity of the pertinent sections from agreement to agreement as indicated from the example of the later *Maa-Nulth First Nation Final Agreement*:

13.26.0 Emergency Preparedness

13.26.1 Each Maa-nulth First Nation Government may make laws in respect of its rights, powers, duties, and obligations under 13.26.2 a.

13.26.2 Each Maa-nulth First Nation Government:

- a. has the rights, powers, duties, obligations; and
- b. the protections, immunities and limitations in respect of liability, of a local authority under Federal Law or Provincial Law in respect of emergency preparedness and emergency measures on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation.

13.26.3 Federal Law or Provincial Law prevails to the extent of a Conflict with Maa-nulth First Nation Law under 13.26.1.

13.26.4 For greater certainty, each Maa-nulth First Nation Government may declare a state of local emergency on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation and exercise the powers of a local authority in respect of local emergencies in accordance with Federal Law and Provincial Law in respect of emergency measures on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation, but any declaration and any exercise of power is subject to the authority of Canada and British Columbia under Federal Law and Provincial Law.

13.26.5 Nothing in this Agreement affects the authority of:

- a. Canada to declare a national emergency; or
- b. British Columbia to declare a provincial emergency,

³⁵⁰ *Ibid.* at s 124 [emphasis added].

³⁵¹ *Ibid.* at s 125 [emphasis added].

in accordance with Federal Law or Provincial Law.³⁵²

Section 13.26.3 of the Maa-nulth treaty spells out the status of the Maa-nulth Nation within the emergency management framework as having “the powers of a local authority in respect of local emergencies... but any declaration and any exercise of power is subject to the authority of Canada and British Columbia”.³⁵³ Further, federal or provincial law prevails to the extent of a conflict with Maa-nulth First Nation law.³⁵⁴

Each of the *Tsawwassen Final Agreement*,³⁵⁵ *Lheidli T’enneh Final Agreement*,³⁵⁶ *Yale First Nation Final Agreement*,³⁵⁷ and the *Tla’amin Final Agreement*³⁵⁸ likewise have similar provisions for emergency management. The First Nations are each respectively characterised as a ‘local authority’ for the purposes of emergency management with similar powers of a local authority, confined to the treaty geographical area.

The emergency management provisions in the modern treaties are somewhat surprising given the framework constitutes a seeming political departure from the traditional position of many First Nations that First Nations are not municipalities or stakeholders.³⁵⁹ It bears noting as well

³⁵² *Maa-Nulth First Nations Final Agreement*, Huu-ay-aht First Nation, Ka:’yu:’k’t’h’/Che:k’tles7et’h’ First Nation, Toquaht Band, Uchucklesaht Band, Ucluelet First Nation (collectively Maa-Nulth First Nations) and British Columbia and Canada, 9 December 2006 [*Maa-Nulth Final Agreement*].

³⁵³ *Ibid.* at 13.26.4.

³⁵⁴ *Ibid.* at 13.26.3.

³⁵⁵ *Tsawwassen Final Agreement*, Tsawwassen First Nation and British Columbia and Canada, 6 December 2007, ss 113-17; and see *Tsawwassen Final Agreement*, at ch 1 s1, ch 15 ss 1, 2, 11, 12, 13, 14, ch 7 ss 36, 37, 38 (“Environmental Emergency” provisions detailing similar Crown supremacy clauses as those found under the regular emergency management treaty provisions).

³⁵⁶ *Lheidli T’enneh Final Agreement*, Lheidli T’enneh and British Columbia and Canada, 29 October 2006 at ss 111-115.; and see *Lheidli T’enneh Final Agreement*, ch 1 s 1, ch 14 ss 4-6 (“Environmental Emergency” provisions).

³⁵⁷ *Yale First Nation Final Agreement*, Yale First Nation and British Columbia and Canada, 5 February 2010, ss 3.26.1; 3.26.5; and see *Yale First Nation Agreement*, ss 12.13.1; 12.13.2; 14.9.1; 18.1.1; 18.1.2; 18.3.1; 18.3.2; 18.3.3 (for provisions dealing with other emergency and environmental emergency management provisions).

³⁵⁸ *Tla’amin Final Agreement*, *supra* note 22 at ss 130-134; and see *Tla’amin Final Agreement*, ss 1, 3, 9-13, 41 (for provisions dealing with other emergency and environmental emergency management provisions).

³⁵⁹ See e.g. *RCAP Report*, *supra* note 315 at 18 (“1.1 Treaties are Nation-to-Nation”); and see *RCAP Report*, *supra* note 315 at 218 (Figure 3.1 Aboriginal, Federal and Provincial Spheres of Jurisdiction – depicting a concept of core and periphery spheres of jurisdiction held concurrently by Federal, Aboriginal and Provincial governments. In explaining the kinds of powers the envision as falling within the ‘core of Aboriginal jurisdiction’ the Commission clarifies “the core includes all matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity; do not have a major impact on adjacent jurisdictions; and are not otherwise the object of transcendent federal or provincial concern”. An extremely interesting analysis might be the application of the Aboriginal, Federal and Provincial Spheres of Jurisdiction concept to current leading emergency management best practices and strategies to ascertain what framework options that would meet both the risk reduction objectives of emergency management and the self-determination and self-governance rights of First Nations as exemplified in

that a local authority under British Columbia's *Local Government Act* has a restricted role given a local authority's powers are restrictively defined by statute. A First Nation operating as a local authority might in turn suffer a more limited voice in management of emergencies (than perhaps justified using a s. 35 Aboriginal rights analysis) irrespective that a given disaster might have a 'downstream' impact on a given treaty area and/or a given First Nation's broader traditional territories where a particular First Nation might still exercise their Aboriginal rights.

There is a conflict inherent in the discussion: "[i]f a Provincial emergency plan has been implemented under section 7, a local emergency plan may be implemented or its implementation may be continued under subsection (1) of this section if and to the extent that the local emergency plan is not in conflict with the Provincial emergency plan".³⁶⁰ The paramourcy of the Crown is also highlighted in the above *Maa-Nulth First Nation Final Agreement* example.³⁶¹ However, could an Aboriginal right protection necessitating out of an emergency management effort trump the provincial law, irrespective that the treaty speaks to the provincial legal supremacy and overtly likens the First Nation to a diminutive local authority? This is a more specific question arising out of the general query of whether some rights can be legally and ethically infringed in the name of emergency response and disaster recovery. In a way the treaty clause presents a severe constriction on the First Nation's potential to rely on their constitutional Aboriginal rights to (say) protect a heritage site at risk in the wake of recovery effort over which they have no say. Would an Aboriginal rights claim trump the language of the treaty?

There might be a temptation on the part of the Crown to address First Nation exclusion from emergency management in their Aboriginal title territories in the same manner as has been exercised in the modern treaties – that is, to reduce by statute a First Nation to the status of a

the general models put forward by RCAP). My gratitude to Violet Erasmus for many helpful conversations on applying the findings detailed in RCAP's Report to scholarly work and for the helpful reminder of 'the circles' depicting RCAP's concept of overlapping jurisdictions).

³⁶⁰ *Emergency Program Act*, *supra* note 76 at s 8 (2).

³⁶¹ *Maa-Nulth Final Agreement*, *supra* note 352 at ss 13.26.3, 13.26.4, 13.26.5 ("13.26.3 Federal Law or Provincial Law prevails to the extent of a Conflict with Maa-nulth First Nation Law under 13.26.1"; "13.26.4 ...each Maa-nulth First Nation Government may ... exercise the powers of a local authority in respect of local emergencies *in accordance with Federal Law and Provincial Law* ...but any declaration and any exercise of power is *subject to the authority of Canada and British Columbia under Federal Law and Provincial Law*" [emphasis added]; "13.26.5 Nothing in this Agreement affects the authority of: a. Canada to declare a national emergency; or b. British Columbia to declare a provincial emergency, in accordance with Federal Law or Provincial Law").

local authority. The same question would arise – would a First Nations’ constitutional aboriginal rights stand to protect a First Nations’ interests in the course of emergency management where that First Nation has been diminished to the status of (or depending on one’s perspective, qualified as) a ‘local authority’? This is perhaps an important consideration for First Nation leaders grappling with these issues now and into the future.

2.3.3 FIRST NATION EMERGENCY MANAGEMENT JURISDICTION IN ABORIGINAL TITLE TERRITORY

As indicated above, the British Columbia government currently assumes control of emergency management in off-reserve aboriginal title territories, though it remains to be seen what will be negotiated from the *Tsilhqot’in* decision.³⁶² Given that the statutory regime governing emergency management is generally silent on non-treaty First Nation inclusion off reserve, there appears to be little statutory or regulatory guidance for public servants to include First Nations in the emergency management of their respective territories. Further, as planning and mitigation are even more jurisdictionally complex, (particularly where industrial activity comes to bear) the statutory silence on First Nation constitutional rights further impedes a reconciling relationship between First Nations and the Crown premised on honour, while increasing First Nation vulnerability to disaster risk.

In this first part of my thesis, I have surveyed the enabling federal and British Columbia legislation governing emergencies, detailing how some exceptional pieces of legislation for emergency contexts are triggered and some of the constitutional limits worked into the scope of emergency management. I conclude that completely absent from the framework is a constructive recognition and respect for s. 35 Aboriginal rights, which are also constitutional rights. In practice, this can mean that Crown servants charged with executing the emergency management framework at both the federal and British Columbia level do so without any statutory or regulatory guidance as to First Nation roles, constitutional status or priority. In fact, delegated emergency management powers to a ‘local authority’ may not even carry a s. 35 consultation obligation given the current status of the case law and the absence of any direction to local

³⁶² *Tsilhqot’in*, *supra* note 217 (given the scope of land base powers acknowledged to be in the purview of the *Tsilhqot’in* Nation, it follows that emergency management of their Aboriginal title territories will eventually come forward for resolution).

governments as to engagement with First Nations, ironically in whose territories the local governments operate.

It would appear that Aboriginal rights are easily suspended in the name of emergency management, whether at the planning and mitigation or response and recovery phases. This suspension of rights is most troubling at the planning, mitigation and response phases of emergency management which can take years and can involve expenditures in the hundreds of millions of dollars, over which First Nations in effect appear to have virtually no say and no audit capacity over Crown commissioned and delivered services. The fiscal dimension of emergency management contributes to the exclusion to the point that there is perhaps a disincentive, on the part of emergency management practitioners and service providers, to include First Nations in emergency response and recovery, given the additional complexity of emergency management resourcing and temptation to monopolize cost recovery funds.

The current scope of Aboriginal rights jurisprudence is not particularly promising to remedy the situation – where it applies, a consultation and accommodation obligation could be read to entrench First Nations in the passive role of the ‘consulted’ instead of positioning First Nations in their rightful place as self-determining and self-governing governing bodies in their own right.³⁶³ Further, any consultation obligations vest solely with the Crown, yet many emergency planning responsibilities are offloaded to industry within the self-regulating industry-specific regulations. Without statutory or regulatory direction and oversight on the issue of First Nations’ constitutional rights, there does not appear to be a prescriptive remedy for First Nation inclusion in the emergency response plans nor even within the impending disaster reporting structures should an emergency take place. So, an industrial accident such as a toxic spill could go unreported to a First Nation in whose territory the spill takes place, irrespective that that First Nation might well be the only population impacted by the spill.

³⁶³ As alluded to in note 342, a general ‘duty to consult and accommodate’ respecting a project requiring a Crown permit could on a broad reading be described as ‘mitigation’ for potential harm to Aboriginal rights. However, further analysis surveying particular project assessment processes (legislative and regulatory frameworks) is necessary to distinguish which of those assessment processes and consultation practices go to a potential infringement of an Aboriginal right and which go to managing risk of harm from the project in the case of a disaster (i.e. risk to Aboriginal rights of (say) a pipeline operating normally and risk to Aboriginal rights of (say) the pipeline exploding and gushing oil into vulnerable area). Only accommodation that spoke to the latter would constitute disaster risk mitigation. More analysis beyond the scope of this thesis would need to be done to determine whether the Crown is under or has met a consultation and accommodation duty for disaster risk management.

Treaty is a potential source of remedy, and emergency management provisions have been incorporated into modern treaties signed to date. However, the current political reality in British Columbia reflects a great deal of dissatisfaction with the British Columbia Treaty Commission and process, with very few agreements being finalized.³⁶⁴ One has to question whether it is reasonable or ethical to force First Nations to continue with the *status quo* while treaty conversations are sorted out, a potentially decades-long proposition. Particularly concerning is that one of the most critical mitigation projects necessary to improve First Nation disaster risk outcomes is to bring First Nation community conditions up to at least Canadian averages, thereby lowering vulnerability to hazards and better averting disasters.

There may be some interim government-to-government agreements currently operating with some success, particularly at the local level in terms of heightening First Nation engagement in all four phases of emergency management.³⁶⁵ However, that approach is also suspect given the current framework does not provide a direct funding avenue to finance First Nation emergency management off reserve. Local governments like municipalities and regional districts and even National parks enjoy that fiscal autonomy, but First Nations essentially do not.

In the next part of this thesis, I argue for a new theoretical framing of Aboriginal rights aimed at challenging the lack of s. 35 recognition implicit in the constructive exclusion of First Nations from the emergency management statutory and regulatory framework operating in British Columbia.

³⁶⁴ See BC Treaty Commission 'Negotiations Update', *supra* note 347 (only 8 First Nations are at the implementation stage of 65 participating First Nations in the BC Treaty Commission process. The 65 participating First Nations represent 104 of 203 Indian Act Bands in British Columbia.); and see AANDC, A New Direction: Advancing Aboriginal and Treaty Rights, by Douglas R Eyford Ministerial Special Representative (Ottawa: AANDC, 2015) online: <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/text-text/eyford_newDirection-report_april2015_1427810490332_eng.pdf> ("...only 26 agreements have been finalized in 42 years given the expenditure of time and resources on negotiations. From the outset, the comprehensive land claims process has been undermined by institutional barriers and process inefficiencies. Today, 75 claims are at various stages of negotiation [throughout Canada]. More than 80 per cent of those tables have been in the treaty process for longer than ten years, some for more than two decades. It is costly to maintain negotiations that drag on year-after-year. Aboriginal participation is funded through a combination of loans and non-repayable contributions. Since 1973, Canada has advanced in excess of \$1 billion to Aboriginal groups through loans and contributions. The debt burden has become an unsustainable barrier to progress. There is a conspicuous lack of urgency in negotiations and in many cases there are sharp differences between the parties about the core elements of a modern treaty. A plan needs to be developed to bring negotiations to a close. All parties must be ready to confront hard realities. Not all claims appear to be heading to successful resolution").

³⁶⁵ In this context I use the term government-to-government as protocols may operate at the First Nation-to-'local authority' level, which is conceptually different from a 'nation-to-nation' protocol or agreement.

SECTION 3 – EMERGENCY MANAGEMENT RIGHTS IN COMMON LAW, THEORY AND PRACTICE

“I have always regarded my academic field’s focus on Aboriginal peoples as being exceedingly narrow. The Supreme Court of Canada has fallen into this trap by obsessing over the “Aboriginal” in section 35(1). Others have ignored the histories, ideas, environments, and economies we share together on this continent. An exclusive focus on Aboriginal peoples can treat us as if we were, are, or should be outside history, politics, or contemporary culture. In my opinion, this slender view is not healthy or helpful in generating holistic relationships”.

- John Borrows³⁶⁶

In the previous section, I reviewed the legislative, regulatory and treaty frameworks that govern First Nation emergency management in British Columbia. I concluded that overwhelmingly, First Nation participation in emergency management is largely restricted to ‘on-reserve’ matters, either *de facto* or by legislative, regulatory or policy exclusion.

The following section explores the implications of constitutional Aboriginal rights on ‘off-reserve’ emergency management, with particular emphasis paid to underlying theoretical tensions informing both the adjudication and implementation of Aboriginal rights generally. Theoretical treatment is necessary to identify some root causes of the Crown’s seeming lack of deference to First Nation interests off reserve. A theoretical framework also helps to clarify how the explicitly recognized ‘duty to consult’ and ‘duty to accommodate’ seem to be understood by the Crown, given each are important Aboriginal constitutional rights (that should be) informing emergency management off reserve. In the context of the larger theoretical dialogue on the constitutional relationship between the Crown and First Nations, the following section also briefly explores the apparent deficit in concomitant funding (fiscal federalism) strategies to achieve constitutional obligations as they pertain to Canada’s First Nations, particularly affecting the areas of off-reserve emergency management. The intent of this section is to offer fodder toward the development of new remedial measures that, if adopted or implemented, might better serve the Crown in upholding its honour and furthering reconciliation with respect to emergency management activities.

³⁶⁶ John Borrows, “Let Obligations Be Done” in *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* eds Hamar Foster, Heather Raven, Jeremy Webber (2007: UBC Press, Vancouver, Canada) 201 at footnote 1 [Borrows, *Obligations*].

3.1. BRIEF OVERVIEW OF ABORIGINAL RIGHTS

Before giving theoretical treatment to Aboriginal rights as developed in the Canadian jurisprudential landscape, I wish to propose that there is perhaps always a distortion present in discussing existing aboriginal rights exclusively through the lens of Western based laws, legal traditions and philosophies.³⁶⁷ First Nations have philosophies, and thus legal traditions, distinct from European based traditions.³⁶⁸ Where a First Nation is restricted to an Aboriginal rights premise in advancing their ways of being, those ways of being might not ever be accurately expressed, and therefore not ever fully respected, given the dialectical constraints of a unilaterally Western-based dialogue.³⁶⁹ Rights within and rights *on par* with the settler state are theoretically distinct and evoke different (though perhaps concurrent) streams of political and legal discourse.³⁷⁰ This thesis largely explores ‘rights within’ the large political body, legal

³⁶⁷ See e.g., Brian Slattery, “The Metamorphosis of Aboriginal Title” (2006) 85 Can. Bar Rev. 255. at 268 [Slattery, “Metamorphosis”] (discussing the weaknesses of conceiving Aboriginal title as a ‘Translated Right’ held under English common law).

³⁶⁸ *UNDRIP*, *supra* note 31 at Article 5 (“Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”); *RCAP Report*, *supra* note 315 at 1 (“...the people who lived here had their own systems of law and governance, their own customs, languages and cultures... They had a different view of the world and their place in it and a different set of norms and values to live by.”); and see Gordon Christie, “Aboriginal Nationhood and the Inherent Right to Self-Government” (Research Paper for the National Centre for First Nations Governance, May 2007) at 2 [Christie, “Aboriginal Nationhood”] (“Canadian governments and courts recognize that pre-contact Aboriginal societies possessed their own legal and political systems, and that to this day these nations have not surrendered the powers they fully exercised before colonial policies undercut their authority.”) [footnotes removed]; and see e.g. Lawrence Rosen, *Law as Culture: An Invitation* (Princeton, New Jersey: Princeton University Press, 2006) at 198-200 (for a treatise on the concept of law as definitive of culture, as well as culture as definitive of law. “However it is displayed, however it is applied, we can no more comprehend the roles of legal institutions without seeing them as part of their culture than we can fully understand each culture without attending to its form of law. In the end, it may be worthwhile, then, to think of law as universal in this one sense—as a marvelous entry to the study of the most central of human features, culture itself, and hence an open invitation, whatever one’s ultimate interests, to thinking about what and who we are.”).

³⁶⁹ See Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012) [Hoehn, *Reconciling Sovereignties*] (for an in-depth discussion on differential conceptions of sovereignty impacting Crown and Aboriginal relations in Canada today); and see Gordon Christie, “Indigeneity and Sovereignty in Canada’s Far North: The Arctic and Inuit Sovereignty” (2011) 110:2 South Atlantic Quarterly 329 at 330 (“My focus is on one word, sovereignty, that serves to ground meaning in the larger story and plays a central role in generating and upholding a web of meaning within which are captured the Indigenous peoples of the Arctic. I want to examine how this word works its magic and to suggest that another word, Indigeneity, not only can help make clear how words and stories function in this setting but can also suggest how Indigenous peoples of the Arctic—in particular, the Inuit in Canada—can usefully meet stories with stories, words with words”). An analysis on philosophical tensions between Indigenous and Western conceptions regarding what the Western legal tradition understands as ‘property’ is outside the scope of this thesis.

³⁷⁰ See Christie, “Aboriginal Nationhood”, *supra* note 368 at 4 (“At its simplest, rights of self-government exist within and under the sovereignty of a larger political body, while rights of self-determination in some ways exist on par with the sovereignty of other political bodies.”).

traditions and philosophical underpinnings that collectively inform Canada and does not attempt to navigate the distinctive philosophies of any First Nation. Rather, I wrote this thesis with the hope of contributing to a larger process that would ultimately give First Nations space and recognition to advance independently their own philosophies and priorities, on their own terms, in conversation informing both the self-governance and self-determination aspects of disaster management.

In 1982, Canada ‘brought home’ its constitution from Great Britain. Prior to the passing of the Canada Act 1982 (U.K.)³⁷¹, amendments to Canada’s constitutional makeup required the legislative consent of England’s Parliament.³⁷² The historical, political, and legal departure from Canada’s colonial status to any European nation remains hugely significant, not least because the patriation process marked an ongoing reinvigoration in public thought on what constitutes the core elements of Canada. Coupled with the enormous political task of agreeing on an amending formula that satisfied federal and provincial representation, additions were made to Canada’s written constitution for the purpose of enshrining certain rights considered essential to the identity of Canada. As such, Canada’s written constitution now better reflects its essential relationship with First Nations in recognizing and affirming “existing aboriginal and treaty rights of the aboriginal peoples of Canada.”³⁷³

Section 35(1) assures that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”³⁷⁴ with no clarity on the scope and content of those rights except that “aboriginal peoples of Canada’ includes the Indian, Inuit and Metis peoples of Canada”.³⁷⁵ As Brian Slattery points out: [T]he sparse wording [of s. 35(1)] leaves open a number of fundamental questions. What precisely are Aboriginal rights and what is their legal basis? What relationship, if any, do they bear to one another? Do all Aboriginal

³⁷¹ *Canada Act 1982*, c.11 (U.K.) (s.1 “The Constitution Act, 1982 set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act”; s. 2 “No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law”).

³⁷² *Statute of Westminster, 1931*, 22 Geo. 5 c. 4 (Required the consent of Canadian parliament before legislation that applied to Canada could be passed in U.K.).

³⁷³ *Constitution Act, 1982*, *supra* note 23 at s.35(1).

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.* at s.35(2).

peoples have the same set of rights or does each group have its own specific set?”³⁷⁶ Like Slattery, governments, including First Nation governments, understood at the time of patriation that “[t]hese are difficult questions, which do not allow for simple or pat answers”.³⁷⁷ The repealed Part IV of the *Constitution Act, 1982* reflected a constitutional commitment, often overlooked in Aboriginal rights discourse, to convene:

a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces... [that] shall include in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, *including the identification and definition of the rights of those peoples to be included in the Constitution of Canada*, and the Prime Minister of Canada shall invite *representatives of those peoples to participate in the discussions on that item*.³⁷⁸

Though the repealed s. 37 and s. 37.1³⁷⁹ of the *Constitution Act, 1982* are not often beleaguered in the literature, most practitioners and academics in the field are familiar with the outcome. The four Constitutional Conferences held under this section³⁸⁰ failed to produce any definitive clarity on the scope and content of s. 35(1), precipitating (or at least exacerbating) the ‘empty or full box’ debate.³⁸¹ As a consequence, the constitutional conversation regarding ‘Aboriginal rights’,

³⁷⁶ Brian Slattery, “A Taxonomy of Aboriginal Rights” in *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* eds Hamar Foster, Heather Raven, Jeremy Webber (Vancouver: UBC Press, 2007) 111 at 111 [Slattery, Taxonomy].

³⁷⁷ *Ibid.*

³⁷⁸ *Constitution Act, 1982*, *supra* note 23 at s 37(1)-(2).

³⁷⁹ *Ibid.* at Part IV.1 (section 37.1), as repealed by s 54.1 (s 37.1 was added by the *Constitution Amendment Proclamation, 1983* (see SI/84-102), and was repealed on April 18, 1987 by section 54.1 of the *Constitution Act, 1982*. Section 37.1(1)-(2) read as follows: “In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date (2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters”).

³⁸⁰ Parliament of Canada, Constitutional Conferences, online: Parlinfo

<<http://www.parl.gc.ca/ParlInfo/Compilations/Constitution/ConstitutionalConferences.aspx>> [Parlinfo] (March 15-16, 1983 Subject: Amendment to the Constitution Act, 1982 respecting aboriginal rights. Note: Present at the conference were federal government representatives along with their counterparts from the provinces and Northwest Territories, and delegates from national native groups; March 8-9, 1984 Subject: Entrenchment of aboriginal rights in the Constitution: native self-government, sexual equality, title and treaty rights, land and resources for communities; April 2-3, 1985 Subject: Entrenchment of the principle of native self-government in the Canadian Constitution; March 26-27, 1987 Subject: Entrenchment of the principle of native self-government in the Canadian Constitution. No agreement was reached at this fourth and final conference mandated by section 37.1 of the Constitution); and see Charlotte Town and Meech Lake Accord conferences as well as later first minister meetings convened to discuss Aboriginal issues as listed on the ParlInfo webpage cited herein).

³⁸¹ Louise Mandell & Leslie Hall Pinder “Tracking Justice: The Constitution Express to Section 35 and Beyond” in *Patriation and its Consequences: Constitution Making in Canada* eds Lois Harder & Steve Patten (Vancouver: UBC

far from the ‘reconciliation’ concept more recently advocated by the judiciary and touted as a policy objective of governments, has hitherto proven a vicious and expensive adversarial contest, mediated by the Courts, that arguably has no end in sight.

Slattery explains: “[s]ince 1982, the Supreme Court of Canada has delivered a series of decisions that furnish many important pieces of the puzzle. However, the pieces still lie scattered about in a somewhat disconnected fashion.”³⁸² Since the definitive discourse of Aboriginal rights has largely fallen on the judiciary, Slattery goes on to “fit them together and fill in the gaps, so as to provide” what he calls a “coherent taxonomy of Aboriginal rights in Canada”.³⁸³ It would seem that as opposed to an empty or full box, s. 35.1 is more akin to a looking glass – one that has been shattered into infinite pieces where we consider scattered and irregular fragments to guess at our reflection as a reconciled whole.

Slattery identifies two overarching ‘classes’ of rights, ‘specific’ and ‘generic’ aboriginal rights.³⁸⁴ Drawing from leading case law, he explains that specific rights are those rights “whose existence, nature, and scope are determined by factors that are particular to each Aboriginal group”³⁸⁵ and “[a]s such, they vary in character from group to group.”³⁸⁶ He clarifies that “different Aboriginal groups may have similar rights, but this is just happenstance. It does not flow from the nature of the right”.³⁸⁷ Slattery’s conception of ‘specific rights’ can be read as an analysis that strives to respect the unique and independent identities of each First Nation in Canada. In contrast, ‘generic rights’ to Slattery are rights “of a standardized character that [are] basically identical in all Aboriginal groups where [they] occur[]. The fundamental dimensions of

Press, 2015) 180 at 197 (“The courts have interpreted section 35 in unfolding layers of dynamic jurisprudence, which no one imagined. The premiers thought the word “existing” meant “extinguished”, and argued that the provision was an empty box in *R. v. Sparrow* (1990). But the Supreme Court of Canada held the opposite: “existing” means “unextinguished”. In *Haida Nation v. British Columbia* (2004) the court held that section 35 holds the promise of reconciliation of “pre-existing Aboriginal sovereignty with assumed Crown sovereignty” (*Haida Nation v. British Columbia* [Minister of Forests] at para. 20).”).

³⁸² Slattery, Taxonomy, *supra* note 376 at 111.

³⁸³ *Ibid.*; and see Brian Slattery, The Generative Structure of Aboriginal Rights” (2007) 38 Sup Ct L Rev (2d) 595 [Slattery, “Generative Rights”] (for further details of Slattery’s conception of ‘generic’ and ‘specific’ Aboriginal rights).

³⁸⁴ Slattery, Taxonomy, *ibid.* at 111.

³⁸⁵ *Ibid.* at 112.

³⁸⁶ *Ibid.* at 114.

³⁸⁷ *Ibid.*

the right[s] are determined by the common law doctrine of Aboriginal rights rather than by the unique circumstances of each group”.³⁸⁸

So, in accordance to Slattery’s taxonomy of Aboriginal rights, the Heiltsuk right to commercially sell herring row on kelp is a *specific right to the Heiltsuk Nation*, owing to the application of the *Van der Peet* test to the activities advanced as a right to the Courts in *Gladstone*.³⁸⁹ By contrast, Aboriginal title is a *generic right*. Aboriginal title is:

the right to decide how the land will be used; the right of enjoyment and occupancy of the land: the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land...[with] an important restriction – it is collective title held not only for the present generation but for all succeeding generations...it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land.³⁹⁰

Aboriginal title is a *generic right* because it would basically have the same character for any First Nation that could successfully establish its claim.

By way of application of his analysis to various principles out of the leading case law, Slattery goes on to extrapolate a number of other ‘generic aboriginal rights’³⁹¹, including:

- the right to conclude treaties³⁹²
- the right to customary law³⁹³
- the right to honourable treatment by the Crown³⁹⁴
- the right to an ancestral territory (Aboriginal title)³⁹⁵
- the right to cultural integrity³⁹⁶
- the right to self-government³⁹⁷

³⁸⁸ *Ibid.* (“Generic rights are of a uniform character whose basic contours are established by the common law of Aboriginal rights. All Aboriginal groups holding a certain generic right have basically the same kind of right. The essential nature of the right does not vary according to factors peculiar to the group.”).

³⁸⁹ *Ibid.* at 112; *Van der Peet*, *supra* note 113 at paras. 46 and 60; *Gladstone*, *supra* note 113.

³⁹⁰ *Tsilhqot’in*, *supra* note 217 at paras 73-4.

³⁹¹ Slattery, Taxonomy, *supra* note 376 at 114-5 (Slattery’s analysis leads to ‘abstract rights’ which he describes as ‘uniform’, and therefore ‘generic’ (applicable to all First Nations).

³⁹² *Ibid.* at 115-6.

³⁹³ *Ibid.* at 116.

³⁹⁴ *Ibid.* at 116-8.

³⁹⁵ *Ibid.* at 118.

³⁹⁶ *Ibid.* at 118-120.

³⁹⁷ *Ibid.* at 120-1; *contra Delgamuukw*, *supra* note 342; *contra R v Pamajewon*, [1996] 2 SCR 821.

Only two of these rights—the right to honourable treatment by the Crown (consultation and accommodation, the honour of the Crown) and the right to an ancestral territory (Aboriginal title)—have been implicitly decreed by the Supreme Court of Canada. Most Aboriginal rights tested in Canada’s highest court are better categorized as ‘specific rights’ under Slattery’s analysis. Each of the other generic Aboriginal rights Slattery lists are sometimes conceded, though not necessarily respected, by the Government of Canada.³⁹⁸

Slattery emphasizes that generic rights are “abstract rights” with a “uniform character, which does not change from group to group”.³⁹⁹ He explains “[g]eneric rights are not only *uniform* in character; they are also *universal* in distribution. They make up a set of fundamental rights presumptively held by all Aboriginal groups in Canada... It is presumed that every Aboriginal group in Canada has these fundamental rights, in the absence of valid legislation or treaty stipulations to the contrary”.⁴⁰⁰ To Slattery, generic and specific rights are osmotic, given “[s]pecific rights... arise under the auspices of generic rights and assume different forms in different Aboriginal groups, depending on the particular circumstances of each group”.⁴⁰¹ He explains their relationship as follows:

Just as all generic rights give birth to specific rights, so also are all specific rights the offspring of generic rights. In other words, there are no “orphan” specific rights. The reason is that generic rights provide the basic rules governing the existence and scope of specific rights. So an Aboriginal group cannot possess a specific right

³⁹⁸ Slattery, *Taxonomy*, *ibid.* at 115, 114-121; *Haida*, *supra* note 208 at paras 16-25 (the honour of the Crown); and see *Tsilhqot’in*, *supra* note 217 (Aboriginal title); and see AANDC, *The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government Part I Policy Framework: The Inherent Right of Self-Government is a Section 35 Right*, online: AANDC <<https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>> (“The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown’s relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources. The Government acknowledges that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right. However, litigation over the inherent right would be lengthy, costly and would tend to foster conflict. In any case, the courts are likely to provide general guidance to the parties involved, leaving it to them to work out detailed arrangements. For these reasons, the Government is convinced that litigation should be a last resort. Negotiations among governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government.”).

³⁹⁹ Slattery, *Taxonomy*, *ibid.* at 128.

⁴⁰⁰ *Ibid.* at 123 [emphasis in original].

⁴⁰¹ *Ibid.* at 128.

unless it is rooted in a generic right. By the same token, the scope of a specific right cannot exceed the basic dimensions of the generic right that engenders it.⁴⁰²

Slattery illuminates a third, intermediary category of rights that vest somewhere between generic and specific rights: “[r]anged between basic generic rights and specific rights are rights of intermediate generality, which relate to specific subject matters”.⁴⁰³ To Slattery the generic “right of cultural integrity fosters a range of intermediate generic rights, which relate to such matters as livelihood, language, and religion. These intermediate rights give birth to specific rights, whose character is shaped by the practices, customs, and traditions of particular Aboriginal groups”.⁴⁰⁴

When applied to a Canadian legal analysis of the strength of a potential Aboriginal rights claim, Slattery’s idea of generic rights is useful toward identifying the kinds of infringements that might occur in the course of Crown emergency management within First Nation territories – infringements that might be justiciable according to Canadian legal norms. As we have seen in the first part of this thesis, practitioners and legislators alike categorize emergency management into four distinctive categories: planning, mitigation, response, and recovery. We have also seen that First Nations are by and large *prima facie* excluded within the regulatory frameworks governing Canada’s and British Columbia’s emergency management framework.⁴⁰⁵ What follows is a very general survey of some ‘generic’ rights that may be implicated in a dispute

⁴⁰² *Ibid.* at 123.

⁴⁰³ *Ibid.* at 128; (Using the example of the generic right to honourable treatment by the Crown, Slattery explains that the generic right (honourable treatment by the Crown) “operates at a high level of abstraction and harbours a range of intermediate generic rights relating to different subject matters, such as the creation of Indian reserves or the protection of existing reserves. These intermediate rights, in turn, engender myriad specific fiduciary rights vesting in particular Aboriginal groups, whose precise scope is determined by the concrete circumstances in which they arise” at 121-22).

⁴⁰⁴ *Ibid.* at 122.

⁴⁰⁵ However, again I note here that there may well be existing protocols functioning between particular First Nations and specific local authorities and/or the Crown in right of British Columbia and/or the Crown in right of Canada that speak to emergency management on a case by case basis. It is unclear whether there is any Crown inventory of those protocols (particularly those that may operate at the ‘local authority’-First Nation level), evaluation strategies (i.e. audit criteria to determine strength of utility), or whether the Crown attempts to streamline said protocols to meet any ‘gold standards’ in emergency response and/or best practices in emergency management generally. I have opted to restrict my research to the emergency specific statutory and regulatory frameworks operating in British Columbia, including those respecting modern treaties, and not to attempt to assemble an inventory of emergency management protocols, as perhaps interesting and useful as such a project might be. I likewise avoid case examples given the those examples could not justify the apparent lack of any material effort to universally accept and respect First Nations as an integral governance body in relation to the management of emergencies within their respective territories at the statutory and regulatory levels. As Gordon Christie remarked: “[a]ll too often while successful actions are restricted to the ‘victorious’ Aboriginal nation, all nations are exposed to the setbacks. Defeats become precedents, while victories are nearly always restricted to the particular situation” (Christie, “Aboriginal Nationhood”, *supra* note 368 at 3).

regarding the Crown's handling of any or all of the four phases of managing an emergency impacting a given First Nation population and/or its territories. An infinite number of specific rights potentially are, or may be, infringed during Crown emergency management (particularly where that management is unilateral) and within Slattery's framework, specific rights flow from generic rights.⁴⁰⁶ As such, the following cursory and general exploration is limited to a 'generic rights' analysis.

As all four phases of emergency management require governance for execution it follows that self-governance is impaired where First Nations do not have a steering voice in managing emergencies within their respective territories. The first part of this thesis details the jurisdictional framework currently governing emergency management within British Columbia. As seen, except in the very few cases where a First Nation has concluded a modern treaty with the Crown specifying emergency management, First Nations in BC are largely restricted to emergency management activities on reserve. First Nation exclusion takes place irrespective of the fact that in many cases the Crown-made reserves are a 'postage stamp' in comparison to a given First Nation's traditional territories and that in many cases First Nations have asserted Aboriginal title to those traditional territories. Therefore, generally speaking, where First Nations in BC do have a governance voice over emergency management that voice is restricted to a fraction of their territory. Or, in the case of modern treaty First Nations, those Nations are qualified as a lower level of government relative to the Crown, treated in some respects like local governments.⁴⁰⁷ Further, even where the Crown permits First Nations to exercise some emergency management activities on reserve, the conceptual approach is to have the province deliver the services and recoup their costs from the Department of Indian Affairs:

All provincial and territorial emergency response and recovery costs incurred on First Nations reserve lands will be assumed by Aboriginal Affairs and Northern Development Canada for all natural disasters that occur on or after April 1, 2014.⁴⁰⁸

⁴⁰⁶ Slattery, Taxonomy, *supra* note 376 at 123 ("Just as all generic rights give birth to specific rights, so also are all specific rights the offspring of generic rights. In other words, there are no "orphan" specific rights. The reason is that generic rights provide the basic rules governing the existence and scope of specific rights. So an Aboriginal group cannot possess a specific right unless it is rooted in a generic right. By the same token, the scope of a specific right cannot exceed the basic dimensions of the generic right that engenders it").

⁴⁰⁷ See e.g. *Maa-Nulth Final Agreement*, *supra* note 352 at ss 13.26.0-13.26.5 (as outlined above under section 2.3.2 'First Nation Emergency Management in Treaty Territory').

⁴⁰⁸ *DFAA Guidelines*, *supra* note 239 at "Interpretive Bulletin 4: First Nation Reserves", online: Public Safety Canada <<http://www.publicsafety.gc.ca/cnt/mrgnc-mngmnt/revr-dsstrs/gdlns-dsstr-ssstnc/index-eng.aspx#s9>>.

As the old adage says, he who holds the gold, makes the rules. In the case of the Crown in right of British Columbia, emergency management is steered through their Provincial Emergency Program (PEP), which typically parachutes in specially trained Crown servants into disaster areas.⁴⁰⁹ The specialized Crown servants exercise prescribed special powers under emergency management legislation to take immediate and tangible action and irrespective of the outcome or result of those actions they are generally speaking protected by a host of indemnifications.⁴¹⁰ Regulatory priorities found in the fiscal arrangements aimed at financing emergency recovery costs can result in the infringement of all of Aboriginal title, cultural integrity and customary law generic rights described by Slattery (as well as the plethora of ‘specific’ rights that might flow from these ‘generic’ rights).⁴¹¹

The Disaster Financial Assistance Program (BC) tiers into federal funding once cost and population thresholds have been met. So, for the first \$3 per population of eligible disaster recovery costs occurring off reserve, the government of Canada pays nothing and the impacted provincial government pays the entire costs. For the next \$6 per population of eligible disaster recovery costs, the federal government contributes 50%. For the next \$6 per population of eligible disaster recovery costs, the federal government contributes 75%. For the remainder of the costs, the federal government pays 90%.⁴¹²

The Disaster Fund Assistance Program is a cost sharing strategy to finance emergency response and recovery. As discussed, the federal guidelines further prescribe that provincial

⁴⁰⁹ See e.g. British Columbia, Emergency Management BC, *B.C. Earthquake Immediate Response Plan* (Victoria: Emergency Management BC, 2015) at 22 (figure 2) online: PEP <<http://www2.gov.bc.ca/assets/gov/public-safety-and-emergency-services/emergency-preparedness-response-recovery/provincial-emergency-planning/irp.pdf>> (for a detailed framework of how Emergency Management BC plans to respond to the case of a catastrophic emergency. The protocols demonstrate how resources [are] will be organized in the event of an earthquake disaster and how support for local authorities is delivered. The Plan indicates that it was designed to be applied to other types of catastrophes or to earthquakes occurring in other regions than the GVRD and Victoria and area).

⁴¹⁰ These are discussed further in Part I of this thesis. See e.g. *Emergency Program Act*, *supra* note 76 at s 18; and see e.g. *Emergencies Act*, *supra* note 21 at s 47.

⁴¹¹ Slattery, *Taxonomy*, *supra* note 376 at 116, 118-120, 123.

⁴¹² Public Safety Canada, *Disaster Financial Assistance Arrangements (DFAA)*, at Appendix A and B online: <<http://www.publicsafety.gc.ca/cnt/mrgnc-mngmnt/rcvr-dsstr-fnncl-ssstnc-rrngmnts/index-eng.aspx>> (it is perhaps noteworthy that the federal/provincial cost sharing formula was cut significantly in the 2015 budget. The new guidelines operate at \$3, \$6, \$6 eligible provincial expense thresholds (per capita of population) whereas the cost-sharing formula prior to Feb 1 2015 operated at \$1, \$2, \$2 eligible provincial expense thresholds (per capita of population). The effect of this budgetary cost in a \$20 million dollar event (eligible response and recovery costs) amounts to a \$4 million shift from federal financial assistance onto provinces who will have to find some other mechanism to offset disaster response and recovery costs that federal government used to cover under the old cost-sharing formula).

governments (and their selected contractors and consultants) will be compensated 100% by the Department of Indian Affairs for any costs incurred in responding to emergencies on reserve.⁴¹³ Given the provincial Crown preemptively holds all the cards (any money they spend in accordance to the disaster fund guidelines will be compensated); a First Nation's ability to prescribe emergency management appears to be restricted to the pleasure of the provincial Crown. A First Nation could not feasibly execute an emergency response and recovery strategy in the absence of resourcing to pay for the substantial cost associated with disaster recovery.

In the vacuum of prescriptive language calling for the direct inclusion of First Nations in emergency management over their traditional (particularly Aboriginal title) territories, the provincial Crown appears to assume a unilateral governance and implementation role in off reserve emergency management generally.⁴¹⁴ As previously noted, one of the only ministries without a current role listed in the British Columbia emergency program regulations is the Department of Aboriginal Relations and Reconciliation.⁴¹⁵ As such, it does not appear that the British Columbia Crown makes any serious effort to include First Nations in emergency management within their territories. And given the priority given to Crown emergency response and recovery servants and contractors (through the Disaster Assistance Fund priorities), there appears to be a disincentive to finance local First Nation emergency response and recovery crews.

Tsilhqot'in clarified that Aboriginal title includes “the right to decide how the land will be used ... and the right to proactively use and manage the land”.⁴¹⁶ First Nations, having governed their respective territories for thousands of years, potentially offer long-term knowledge of the land base. That knowledge is extremely helpful in streamlining recovery efforts that involve any engineering of the environment as part of the emergency recovery process. For example, it is not uncommon that in flood recovery efforts a streambed may be graded and/or a whole river system

⁴¹³ *DFAA Guidelines*, *supra* note 239 (“All provincial and territorial emergency response and recovery costs incurred on First Nations reserve lands will be assumed by Aboriginal Affairs and Northern Development Canada for all natural disasters that occur on or after April 1, 2014”).

⁴¹⁴ As noted elsewhere in this thesis, there may be examples of some First Nations playing a cooperative emergency management role (i.e. shared jurisdictions) through protocols. Researching such protocols was outside the scope of this thesis.

⁴¹⁵ *Emergency Program Regulations*, *supra* note 273 at Schedule 1.

⁴¹⁶ *Tsilhqot'in*, *supra* note 217 at paras 73-4.

intermittently ripped. Ensuring use for future generations⁴¹⁷ involves consideration of how the land functioned for past and current generations (i.e. landslides, droughts, river routes, weather patterns, fish runs etc.). Where First Nations are restricted from steering response and recovery efforts, not only may there be an infringement of Aboriginal title, site-specific rights may be compromised. For example, there may be spiritual and historical sites in need of special care during reconstruction efforts. Similarly, priority may be warranted to particular areas for food, social, ceremonial purposes. Or, in the case of a claim to Aboriginal title, there may be rights in relation to a whole plethora of land/marine use objectives, including economic development.

Recovery costs can reach into the tens of millions. There is a lost opportunity to build First Nation employment capacity and further local economic development agendas when First Nations peoples and their respective corporations and governance bodies are excluded from the recovery and response phases of emergency management. Reasoning that disaster recovery could also reasonably involve recovering a local economy, it is bizarre that emergency management in the recovery phase is not overtly capitalized upon to buttress local service providers within First Nation communities who may be struggling to secure financing to further their economic development plans. For example, if there were a line item in the Disaster Financial Assistance Arrangements that stated (say) ‘where a local First Nation contractor or service provider can be called upon to provide a recovery service, that contractor will be given the right of first refusal for delivery of the service’ Canada and British Columbia could further concomitant federal priorities around equalizing on and off reserve quality of life indexes, while still meeting even a strict reading of the disaster recovery agenda.

The *Indian Act* does not specify emergency management. From the Crown’s vantage point, empowerment to govern or participate in emergency management on reserve appears to be at the pleasure of AANDC. It holds the obligation and presumed authority by virtue of the government’s implementation of s. 91.24 of the *Constitution Act, 1982* and the authority of the Public Safety and Emergency Preparedness Ministry who devolves its responsibilities among Canada’s federal ministries.⁴¹⁸ AANDC, like all federal ministries, is responsible for ensuring that it meets the prescribed emergency preparedness protocols set out by Public Safety

⁴¹⁷ See *ibid.* (the SCC restricted Aboriginal title: “Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land”).

⁴¹⁸ *Emergency Department Act, supra* note 41.

Canada.⁴¹⁹ AANDC then passes on the mandate to develop emergency plans onto First Nations, and likewise set the guidelines for access to AANDC-controlled funding to meet the mandate. There is little First Nation autonomy in on-reserve emergency management and practically no First Nation directed off-reserve emergency management (except in those cases where a specific emergency management protocol has been made with a First Nation that has been tested, implemented and functions) – a situation hardly congruent with a right to self-government.

Where the Crown has not adequately consulted with and accommodated a First Nation, particularly in the planning, mitigation and recovery phases of emergency management, that Nation's right to honourable treatment by the Crown is infringed. There is potentially an argument that in some cases emergency response is so urgent that lives might be lost or other severe, preventable consequences might arise if standard consultation and accommodation approaches were undertaken during an emergency *response* effort. Even emergency response however could be conducted without infringing a First Nation's right to honourable treatment.

One strategy involves response protocols that reflect the current jurisdictional authorities in the emergency management frameworks and approaches First Nation engagement during planning phases of emergency management to meet consultation and accommodation obligations. Another approach would be in the realignment of emergency management jurisdictional authorities where First Nations were respected as the governing bodies of their respective traditional territories and managed emergencies for the region concerned accordingly. This would require honourable implementation of a requisite fiscal strategy to redirect resources that would have been spent on (say) regional district emergency management. Other approaches could be developed where honourable treatment of First Nations is prioritized.

While planning, mitigation and recovery are pillars of all emergency management frameworks legislated federally and in British Columbia, unlike emergency response (the fourth pillar) they are executed with the luxury of time. As such, arguments that consultation with First Nations might fetter emergency management efforts are misguided. While it may be that the Crown, on a case-by-case basis, might make an effort at consultation and accommodation, the *prima facie* framework is silent on First Nation engagement. As such, there is little in the public

⁴¹⁹ *Ibid.*

domain to evaluate and compare in order to develop streamlined approaches (minimizing harm and avoiding waste) and to cultivate best practices with respect to ensuring impacted First Nations are adequately engaged in all phases of emergency management to meet the Crown's consultation and accommodation obligations.

Of course, the examples of generic rights that might be infringed during Crown emergency management discussed above are not exhaustive. Given the distinctive nature of each First Nation and their territories, differences in potential conflict of uses and management priorities are potentially broad. The purpose of this section was to provide an exemplar of the kinds of conflicts that may well come to litigation in the near future, particularly in light of the recent headlining Mount Polley dam breach that has arguably resulted in greater public scrutiny on the role First Nations play in industrial related emergency management activities.

Whether considering infringement of specific or generic rights arising from Crown directed emergency management, there is the potential for a ripple effect to take place negatively impacting Slattery's 'intermediate-generic rights', like livelihood, language and religion. The point is that emergency management—though constrained to an event (as opposed to regular day-to-day governance)—is not benign and can have a long-term negative impact if conducted without diligence to the rights of respective impacted populations. A high level of attention is placed on this matter in emergency management legislation as far as the constitutional rights under scrutiny are 'democratic freedoms'. The same vigor and attention however has not been paid to the potential constitutional infringement of Aboriginal rights in the course of Crown exercise of special 'emergency powers'.

3.2. RIGHTS OR OBLIGATIONS?

John Borrows demonstrates that one can reframe Slattery's portrayal of generic and specific rights as conclusive obligations held by the Crown. He explains, "Crown obligations mirror the generic and specific nature of Aboriginal rights".⁴²⁰ For example, Borrows characterizes "the generic right to honourable treatment by the Crown"⁴²¹ as "a general *obligation* for the Crown to treat Aboriginal peoples fairly and honourably and to ensure that Aboriginal peoples are not

⁴²⁰ Borrows, *Obligations*, *supra* note 366 at 206.

⁴²¹ Slattery, *Taxonomy*, *supra* note 376 at 121-2.

exploited”.⁴²² Borrows explains that as such, Crown obligations “toward Aboriginal peoples are now firmly part of Canada’s constitutional fabric.”⁴²³

Borrows offers an expansive categorization of Crown obligations specific to Canada’s constitutional law. Crown constitutional obligations owed to First Nations thus include:

recognition; affirmation; reconciliation; non-extinguishment without consent; prevention of the perpetuation of ‘historic injustice suffered by Aboriginal Peoples at the hands of colonizers’; not imposing unjustifiably unreasonable limitations; not imposing unjustifiably undue hardships; not unjustifiably denying preferred means of Aboriginal people exercising rights; minimal impairment; allocating resources to Aboriginal peoples; conserving resources for Aboriginal peoples; protecting the safety of Aboriginal rights users; ensuring economic and regional fairness; measuring historic reliance on resource use for Aboriginal and non-Aboriginal people; structuring discretion; giving priority (which varies with nature of right); providing for Aboriginal participation in resources development; government reducing economic barriers for Aboriginal peoples; managing change honourably; compensation; consultation; accommodation; administrative law procedural safeguards; legislative dispute resolution legislation; mitigation strategies; promoting federalism, democracy, rule of law, and protection of minorities; not violating Aboriginal individual’s Charter rights.⁴²⁴

One has only to survey the list to reflect that by Borrows’ apt characterization of s. 35(1) jurisprudence, Crown obligations to First Nations are considerable. Given that the source of these obligations is Canada’s constitution should give them particular weight and priority. Yet, as Borrows reveals “it sometimes appears as though governments do not consider themselves as possessing significant obligations towards Aboriginal peoples. Aboriginal peoples persistently protest the Crown’s approach to Aboriginal and treaty rights and yet the Crown often responds as if it does not have legal obligations to Aboriginal peoples”.⁴²⁵

For example, the June 2014 Supreme Court of Canada *Tsilhqot’in* decision, held, for the first time in the history of Aboriginal rights jurisprudence, that a First Nation possessed the right of Aboriginal title.⁴²⁶ In the wake of commentary, news articles, industry reaction and publicised First Nation leadership meetings following the landmark decision, the CBC reported on August

⁴²² Borrows, *Obligations*, *supra* note 366 at 206.

⁴²³ *Ibid.*

⁴²⁴ *Ibid.* at 206-7 (Borrows explains that “[t]he nature and scope of Crown obligations have only recently come to light”).

⁴²⁵ *Ibid.* at 206-7; and see Gordon Christie, “‘Obligations’, Decolonization and Indigenous Rights to Governance” (2014) 27:1 Canadian JL & Jur 259.

⁴²⁶ *Tsilhqot’in*, *supra* note 217.

16, 2014 (a full six weeks after the release of the decision): “[a]ccording to a Freedom of Information request filed with the provincial government by The Canadian Press, [BC] Aboriginal Relations and Reconciliation Minister John Rustad has *not received a single briefing note, memorandum, email or other internal communication regarding the court case over the past year*”.⁴²⁷ As for the federal government response to the new ruling, Cheryl Casimer (First Nations Summit) reportedly remarked “the First Nations Leadership Council, which includes the summit, the B.C. Assembly of First Nations and the Union of B.C. Indian Chiefs, *hasn't heard a word from Ottawa* aside from a press release sent to media the day of the decision”.⁴²⁸

As the early apparent government response to *Tsilhqot'in* reflects, ‘the obligation gap’ constitutes a divide within the Crown itself that frustrates a cohesive, discernable (to the average member of the public), and enforceable constitutional relationship between First Nations and the rest of Canada.⁴²⁹ Whether that relationship is framed in accordance to ‘reconciliation’, ‘treaty federalism’, ‘indigenous diplomacy’ or ‘Crown/First Nation relations’; the legislative, executive, and judicial arms of government each seem to be preoccupied with their own independent analysis as to what ‘the Crown’ should *do* with respect to Aboriginal rights.

The following section will attempt to understand ‘the obligation gap’ from a theoretical standpoint in the hopes of elucidating some solutions aimed at improving current government-to-government practices generally as those practices pertain to the implementation of rights and obligations, emphasising emergency management rights and obligations issues specifically.

⁴²⁷ “B.C. Aboriginal Leaders Talk Strategy Over Ruling: Hundreds of Chiefs, Lawyers, and Native Representatives Gather in Richmond B.C.”, *Canadian Press* (16 August 2014) online: CBC News <<http://www.cbc.ca/news/canada/british-columbia/b-c-aboriginal-leaders-talk-strategy-over-historic-land-claims-ruling-1.2738346>>.

⁴²⁸ *Ibid.*

⁴²⁹ Compare Christie, *Indigeneity and Sovereignty*, *supra* note 369 (Christie characterizes escalating interest in the Arctic as a ‘threat’ of ‘second generation colonialism’ and frames his academic analysis as offering a strategy for ‘resistance’. I find it difficult to accept Crown language suggesting goals of ‘reconciliation’ when leading indigenous theorists appear compelled to treat contemporary Aboriginal rights dialogues as ‘resistance’ strategies to avert yet another example of colonialism. A clear disconnect exists between the Crown self-portrayal as honourably reconciling with indigenous peoples in Canada and at least some indigenous legal experts’ view on the veracity of that ‘honourable reconciliation’).

3.3. THEORIZING OBLIGATIONS

Ask not what the government can do for you, ask why it doesn't.

- Attributed to Gerhard Kocher, author

Borrows' observation that "governments do not consider themselves as possessing significant obligations towards Aboriginal peoples is poignant and should not be ignored. Understanding government reluctance to admit constitutional obligations in the context of rights may reflect a theoretical bias toward liberalism and the individual in how the Crown in right of the judiciary, executive, and legislatures regard 'Aboriginal rights'.

In Isaiah Berlin's Inaugural Lecture delivered before the University of Oxford in 1958, he outlines his seminal work on delineating 'positive' from 'negative' freedoms.⁴³⁰ Berlin clarifies that liberty or freedom (used interchangeably) can be understood in accordance to two fundamentally different questions. He states: "[t]he answer to the question 'Who governs me? Is logically distinct from the question 'How far does government interfere with me?'"⁴³¹ It is in this difference, says Berlin, "that the great contrast between the two concepts of negative and positive liberty" consists.⁴³²

Summarizing giants in philosophy, Berlin extrapolates the specific features of negative and positive liberty that render the two concepts of freedom incongruent. Focusing, in part, on the vastly influential thinking of John Stuart Mill in modern political discourse, Berlin highlights some concerning features of the 'negative' sense of liberty. In elucidating "[w]hat made the protection of individual liberty so sacred to Mill?"⁴³³ Berlin writes:

The defence of liberty consists in the '*negative*' goal of warding off interference. To threaten a man with persecution unless he submits to a life in which he exercises no choices of his goals; to block before him every door but one, no matter how noble the prospect upon which it opens, or how benevolent the motives of those

⁴³⁰ Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (London: Oxford University Press, 1969) 118 [Berlin, *Liberty*] (I am extremely grateful to Professor Michael Plaxton for instructive conversations in the area of the philosophy of law and for introducing me to Berlin's piece which became foundational to my theoretical treatment of Aboriginal rights in this thesis).

⁴³¹ *Ibid.* at 130.

⁴³² *Ibid.* at 130.

⁴³³ *Ibid.* at 127.

who arrange this, is to sin against the truth that he is a man, a being with a life of his own to live.⁴³⁴

Berlin explains that the ‘negative’ sense of liberty has three important and overriding characteristics: the first pertains to an *inconsistency* in Mill’s portrayal of liberty (basically that “Mill’s argument for liberty as a necessary condition for the growth of human genius falls to the ground)⁴³⁵; the second is that the doctrine is comparatively *modern* in so far as “[t]here seems to be scarcely any discussion of individual liberty as a conscious political ideal (as opposed to its actual existence) in the ancient world”,⁴³⁶ and the third is that “*liberty in this sense is not incompatible with some kinds of autocracy, or at any rate with the absence of self-government*”. Berlin placed important weight on the third characteristic, explaining:

Just as a democracy may, in fact, deprive the individual citizen of a great many liberties which he might have in some other form of society, so it is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom. The despot who leaves his subjects a wide area of liberty may be unjust, or encourage the wildest inequalities, care little for order, or virtue, or knowledge, but provided he does not curb their liberty, or at least curbs it less than many other regimes, he meets with Mill’s specifications. Freedom in this sense is not, at any rate logically, connected with democracy or self-government. Self-government may, on the whole, provide a better guarantee of the preservation of civil liberties than other regimes, and has been defended as such by libertarians. But there is no necessary connexion between *individual* liberty and democratic rule.⁴³⁷

Applying Berlin, a theoretical account of the s. 35(1) jurisprudence to date might simply be that the courts have been overwhelmingly concerned with constructing a negative rights regime particular to aboriginal peoples. Borrows notes the Supreme Court of Canada’s obsession with “the Aboriginal” in Aboriginal rights,⁴³⁸ which becomes much more explicable when one extrapolates from Berlin’s summary of the ‘goals’ of *negative freedom* to frame the judicial goals that seem to inform Aboriginal rights jurisprudence:

We must preserve a minimum area of [Aboriginal] freedom if we are not to “degrade or deny [their] nature’. [Aboriginal peoples] cannot remain absolutely

⁴³⁴ *Ibid.* [emphasis added].

⁴³⁵ *Ibid.* at 128; referencing James Stephen *Liberty, Equality, Fraternity* (attack on Mill).

⁴³⁶ *Ibid.* at 129 (“The desire not to be impinged upon, to be left to oneself, has been a mark of high civilization both on the part of individuals and communities. The sense of privacy itself, of the area of personal relationships as something sacred in its own right, derives from a conception of freedom which, for all its religious roots, is scarcely older, in its developed state, than the Renaissance or the Reformation.”).

⁴³⁷ *Ibid.* at 129-30 [emphasis added].

⁴³⁸ Borrows, *Obligations*, *supra* note 366 at 201 footnote 1.

free, and must give up some of [their] liberty to preserve the rest. But total self-surrender is self-defeating [the result is assimilation and there would be no need for s. 35(1)]. What then must the minimum be? That which [an Aboriginal person] cannot give up without offending against the essence of his [Aboriginal] nature. What is this essence? What are the standards which it entails? This has been, and perhaps always be, a matter of infinite debate. But *whatever the principle in terms of which the area of non-interference is to be drawn*, whether it is that of natural law or natural rights, or of utility or the pronouncements of a categorical imperative, or the sanctity of the social contract, or any other concept with which [Aboriginal peoples] have sought to clarify and justify their convictions, *liberty in this sense means liberty from; absence of interference* beyond the shifting, but always recognizable, frontier.⁴³⁹

In this light, the Court's obsession with 'the Aboriginal' in s. 35(1), as well as their particular long-standing focus on governmental 'justification of infringement' of 'integral aspects of distinctive cultures' can be understood as predictable legal precedent toward elucidating the "shifting, but always recognizable, frontier" of Aboriginal "negative" freedoms as protected by s. 35(1) of the *Constitution Act, 1982*. Also in this light, we can understand Slattery's taxonomy of Aboriginal rights as an exemplar of negative aboriginal rights thesis in action. Again referencing Berlin, 'specific' and 'generic' rights are philosophically determined in accordance with either *particular* or *general* 'threats' to the 'degradation' or 'denial' of 'Aboriginal nature' at the hands of the state, while balancing [and thus affirming] 'necessary' state interference implicit to overarching governance. From Berlin's theoretical lens, Crown obligations implicit to a *negative* rights construct are limited to prescriptive actions which further non-interference (to a point) where Crown goals and policies impair 'aboriginality', *without any obligation of advancing Aboriginal peoples own goals and policies per se*.

In considering the political and legal ambiguities informing the Crown's relationship with Aboriginal sovereignty, Felix Hoehn's observations on the jurisprudential history dealing with Aboriginal rights in Canada reflects a 'negative rights' experience of First Nations' constitutional standing:

It is not surprising that courts felt bound to accept assertions of Crown sovereignty, but by doing so the courts perpetuated a paradigm that *did not treat Aboriginal peoples as equals* and left them at the mercy of such "rights" as could be recognized by courts in spite of Crown sovereignty, not by virtue of their own sovereignty. This approach necessarily led to a *limited theory of Aboriginal rights that demoted the status of Aboriginal nations from sovereigns to mere occupants*, reflecting the

⁴³⁹ Berlin, *Liberty*, *supra* note 430 at 126-7.

centuries-old ethnocentric premise that North America was legally vacant land when the settlers came.⁴⁴⁰

Hoehn's observation suggests that the jurisprudential history informing s. 35 Aboriginal rights as 'negative liberties' is the result of the Crown's denial of First Nation sovereignties. The lack of recognition implicit in the denial of First Nation sovereignty "did not treat Aboriginal peoples as equals", "demoted the status of Aboriginal nations" and perpetuated "the centuries-old ethnocentric premise that North America was legally vacant land when the settlers came".⁴⁴¹

The contest between sovereignties has profound implications in terms of appreciating real-world tensions between Berlin's negative and positive liberty. Gordon Christie captures three integral aspects of contemporary treatment of sovereignty in reference to settler-state relationships with the Arctic and its peoples:

First, *sovereignty* is understood as denoting territorially based power, the ability to act in relation to defined lands (and not, for example, directly in relation to persons, objects, or events). A nation-state holding sovereign power does so in relation to its defined territory and enjoys under this power the highest degree of deference in relation to decisions it makes. Second, all other decision-making bodies either within or outside this territory must accede to the decisions made by this sovereign power within the scope of its territory. Finally, accession to decisions made by the sovereign applies to all within the territory, generating obligations on all to follow its commands—authority is conceived of as designating a right held by the sovereign to be obeyed by all parties.⁴⁴²

As Christie relates, the sovereign holds power in relation to its defined territory and enjoys under this power the highest degree of deference in relation to decisions it makes; accession by all other decision making bodies within and without the defined territory is assured; and the sovereign enjoys an internal assurance of authority, that is the right to be obeyed by all parties within the territory.⁴⁴³ Putting aside for the moment that, as Christie relates, there are differential conceptions of a territorially based relationship to lands, water, life within and each other inherent to indigenous philosophies and legal traditions, jurisdictional authority over a precisely defined territorial boundary is supreme where the euro conception of a sovereign power is evoked. Deference to a sovereign's jurisdictional supremacy means no scope of justifiable

⁴⁴⁰ Hoehn, *Reconciling Sovereignties*, *supra* note 369 at 151 [emphasis added].

⁴⁴¹ *Ibid.*

⁴⁴² Christie, "Indigeneity and Sovereignty", *supra* note 369 at 333.

⁴⁴³ *Ibid.*

infringement [interference] with the sovereign's power need be considered as sovereignty is the conveyance of absolute authority in British imperial based legal traditions.

Eurocentric assertions of 'sovereignty' find power and political content in the philosophical conception of positive liberty. Berlin suggests that 'positive liberty' is another, perhaps weightier conception of freedom or liberty, just as significant to philosophical and thus political reason as the 'negative' conception of liberty. While the negative conception of liberty asks 'How far should government interfere with Aboriginal peoples and their territories?' the *positive* liberty conception of Aboriginal rights is concerned with 'Who governs Aboriginal peoples and their territories?'.⁴⁴⁴ If we apply Berlin, the inherent tension between negative and positive liberty is at the philosophical root of tensions frustrating reconciliation, where we understand reconciliation as per Hoehn's view as reconciling Crown and Aboriginal sovereignties.

Berlin emphasises the enormous division in the two conceptions of liberty, of particular relevance to contemporary Aboriginal rights discourse stating, "[T]he desire to be governed by myself, or at any rate to participate in the process by which my life is to be controlled, may be as deep a wish as that of a free area for action, and perhaps historically older. But it is not a desire for the same thing".⁴⁴⁵ Berlin explains positive liberty:

[t]he 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were from outside. I wish to be somebody, not nobody; a doer – deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them... I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.⁴⁴⁶

Basically, the distinguishing feature of positive liberty is that it prioritizes self-determination.

⁴⁴⁴ Berlin, *Liberty*, *supra* note 430 at 130.

⁴⁴⁵ *Ibid.* at 131.

⁴⁴⁶ *Ibid.*

Berlin acknowledges “[t]he freedom which consists in being one’s own master, and the freedom which consists in not being prevented from choosing as I do by other men, may, on the face of it, seem concepts at no great logical distance from each other—no more than negative and positive ways of saying much the same thing.”⁴⁴⁷ However, as Berlin illuminates, the history of ‘negative’ and ‘positive’ notions of freedom diverged dramatically until coming into direct conflict with one another.⁴⁴⁸ Berlin believed that positive liberty taken to its logical conclusion ultimately results in coercion and domination, as demonstrated in various experiments with its more well-known disciples, nationalism, communism, authoritarianism and totalitarianism.⁴⁴⁹ As Berlin explains, many of the unfavourable outcomes of ‘positive’ liberty historically stem from the fundamental challenge of distinguishing between self-governance by appeal to a ‘higher self’ or ‘ideal’ versus a ‘lower’, ‘empirical’ self, governed by passion, desire, or immediate pleasures.⁴⁵⁰ The result is an impersonation that equates “what X would choose if he were something he is not, or at least not yet, with what X actually seeks and chooses”.⁴⁵¹ Those who adopt this view are in a position “to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their ‘real’ selves, in the secure knowledge that whatever is the true goal of man (happiness, performance of duty, wisdom, a just society, self-fulfilment) must be identical with his freedom—the free choice of his ‘true’ albeit often submerged and inarticulate, self”.

Just as Berlin’s negative rights summary sheds light on the theoretical underpinnings informing much of s. 35 Aboriginal rights jurisprudence, so too does his positive liberty thesis inform the unfortunate paternalistic relationship that frames the Crown’s relationship to First Nations that led to the need for constitutional protection of First Nation freedoms in the first place.

The Royal Commission on Aboriginal Peoples was established in 1991 “to study the evolution of the relationship between Aboriginal peoples (First Nations, Inuit and Métis), the

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.* at 132.

⁴⁴⁹ *Ibid.* at 144.

⁴⁵⁰ *Ibid.* at 132.

⁴⁵¹ *Ibid.* at 133.

government of Canada and Canadian society as a whole”.⁴⁵² Their work took years: “Over a period of five years, the Commission held 178 days of public hearings, visited 96 communities, heard briefs from over 2000 people, commissioned more than 350 research studies, and reviewed numerous past inquiries and reports”.⁴⁵³ It is by far the most comprehensive process considering Canada’s relationship with Aboriginal peoples to date, and arguably the most inclusive in terms of diversity of perspectives informing the Commission’s final report. As a consequence of its mandate, much of the Commission’s work involved elucidating the extent and consequences of Canada’s preparedness to ‘ignore the actual wishes’ of Aboriginal peoples.⁴⁵⁴ It also considered Canada’s readiness to bully,⁴⁵⁵ oppress⁴⁵⁶ and even torture,⁴⁵⁷ particularly in the savagery of

⁴⁵² “Revisiting RCAP - Toward Reconciliation: The Future of Indigenous Governance” (Symposium Discussion Paper, Ottawa: Institute on Governance, October 2014) at 4 [footnotes removed] online <<http://iog.ca/wp-content/uploads/2015/01/IOG-Revisiting-RCAP.pdf>>.

⁴⁵³ *Ibid.*

⁴⁵⁴ See e.g. *RCAP Report* vol 1, *supra* note 315 at 176 (“One of the fundamental flaws in the treaty-making process was that only the Crown’s version of treaty negotiations and agreements was recorded in accounts of negotiations and in the written texts. *Little or no attention was paid to how First Nations understood the treaties or consideration given to the fact that they might have had a completely different understanding of what had transpired.*” [emphasis added]); and see Gordon Christie “Developing Case Law: The Future of Consultation and Accommodation” (2006) 39:1 UBC L Rev 139 at 172 “The Crown seems to consistently approach disputes over Aboriginal concerns as if these are moral or political affairs, situations in which it may have obligations, but not *legal* obligations... [The Crown] seems to be strongly wedded to the notion that when told it must have the intent of substantially addressing Aboriginal concerns, this language only requires that it put on a show about addressing Aboriginal concerns. This is clearly, however, not what the Supreme Court has made of the Crown’s obligations. It has placed on the Crown the obligation to move beyond putting on appearances—it speaks of the Crown having to actually move in relation to Aboriginal concerns, if this is the reasonable response to these concerns” [emphasis in original]).

⁴⁵⁵ See e.g. *RCAP Report, ibid.* at 471-2 (“This debate is instructive because it demonstrates the conflict between the principles enshrined in treaties and the demands of an increasing non-Aboriginal population. The Songhees may have had treaty entitlement to their land, but the fact that they were merely occupying it, as opposed to ‘improving’ it and thus increasing its value — or worse, occupying property whose value was increasing despite their presence — gave the government the arguments it needed to bring in rules that enhanced its ‘flexibility’ in dealing with Aboriginal people... Thus the superintendent general was given the power to remove Aboriginal people from their land and their homes in the interests of non-Aboriginal society. Most of the members of Parliament who debated the bill agreed with its objective, although some had concerns about details in the amendments. Such powers were used repeatedly to facilitate development relocation”).

⁴⁵⁶ See e.g. *ibid.* at 281-2 (“From the passage of the first version of the *Indian Act* in 1876, amendments were brought forward almost every year in response to unanticipated problems being experienced by federal officials in implementing the civilization and assimilation policies to which they were committed. Many of these amendments eroded the protected status of reserve lands. Others enabled band governments to be brought under almost complete supervision and control. Yet others allowed almost every area of the daily life of Indians on reserves to be regulated or controlled in one way or another... [followed by] a review of some of the most oppressive amendments and practices in the *Indian Act* and its administration in the period up to and beyond the 1951 revision.”).

⁴⁵⁷ See e.g. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Public Domain: Truth and Reconciliation Commission of Canada, 2015) at 41 online: TRC <http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [TRC Report Summary] (“Taken from their homes, stripped of their belongings, and separated from their siblings, residential school children lived in a world dominated by fear, loneliness, and lack of affection”. The Truth and Reconciliation Commission of Canada details many traumas children suffered during Canada’s residential school era - for many, impacts suffered for a lifetime and in turn impacting whole communities).

treatment toward children in the residential school system. These were all in the name of an assimilationist agenda to ‘civilise the Indian’ and foster his ‘higher self’ into a likeness of the settler state, as heart-wrenchingly detailed in Volume 1: Looking Forward, Looking Back.⁴⁵⁸

Irrespective of efforts to constitutionalize Aboriginal rights and the still poorly developed legal and political principles of ‘reconciliation’⁴⁵⁹ and ‘the Honour of the Crown’⁴⁶⁰, largely unacknowledged is the glaring “obligation gap”⁴⁶¹ that can not only frustrate First Nation exercise of secured ‘negative’ liberties. The Crown seems eager to prioritize ‘non-interference’ (where obligations might be contested) and ‘justified interference’ where a Crown objective is sought, as opposed to ‘recognition’ of First Nations as self-determining (sovereign) peoples requiring a more sophisticated treatment of constitutional relations. Where Crown obligations are considered in this light, Berlin’s caution on paternalism couldn’t be more relevant:

Paternalism is despotic, not because it is more oppressive than naked, brutal, unenlightened tyranny, nor merely because it ignores the transcendental reason embodied in me, but because it is an insult to my conception of myself as a human being, determined to make my own life in accordance with my own (not necessarily rational or benevolent) purposes, and, above all, entitled to be recognized as such by others... I may feel unfree in the sense of not being recognized as a self-governing individual human being; but I may feel it also as a member of an unrecognized or insufficiently respected group: then I wish for the emancipation my entire class, or community, or nation, or race or profession. So much can I desire this, that I may, in my bitter longing for status prefer to be bullied and misgoverned by some member of my own race or social class, by whom I am, nevertheless, recognized as a man and a rival—that is as an equal—to being well and tolerantly treated by someone from some higher and remoter group, who does not recognize me for what I wish to feel myself to be.⁴⁶²

Berlin instructs that reaction to despotic rule (whether overtly tyrannical or paternalistic in character) fuels longing for another, *third* ‘hybrid form sort of freedom’⁴⁶³:

⁴⁵⁸ RCAP Report vol 1, *supra* note 315.

⁴⁵⁹ Newman, *Consultation*, *supra* note 219 at 114.

⁴⁶⁰ *Ibid.* at 26-7.

⁴⁶¹ Borrows, *Obligations*, *supra* note 366 (Borrows specifically identifies the need for theoretical treatment of obligations).

⁴⁶² Berlin, *Liberty*, *supra* note 430 at 157 (“For if I am not so recognized, then I may fail to recognize, I may doubt my own claim to be a fully independent human being. For what I am is, in large part, determined by what I feel and think, and what I feel and think is determined by the feeling and thought prevailing in the society to which I belong, of which, in Burke’s sense, I form not an isolable atom, but an ingredient (to use a perilous but indispensable metaphor) in a social pattern.”).

⁴⁶³ *Ibid.* at 160-2 (“Provided the answer to ‘Who shall govern me?’ is somebody or something which I can represent as ‘my own’, as something which belongs to me, or to whom I belong, I can, by using words which convey fraternity and solidarity, as well as some part of the connotation of the ‘positive’ sense of the word freedom (which

What oppressed classes or nationalities, as a rule, demand is neither simply unhampered liberty of action for their members [negative rights], nor, above everything, equality of social or economic opportunity [though still a necessary and important objective], still less assignment of a place in a frictionless, organic state devised by the rational lawgiver [which might by necessity be acceded to as an interim measure]. What they want, as often as not, *is simply recognition ... as an independent source of human activity, as an entity with a will of its own, intending to act in accordance with it (whether it is good or legitimate, or not), and not to be ruled, educated, guided, with however light a hand, as being not quite fully human, and therefore not quite fully free.*⁴⁶⁴

Berlin struggled to define the space between ‘negative’ and ‘positive’ freedoms, indicating that some used to the term ‘social freedom’, which he says is close but not quite correct.⁴⁶⁵ I have elected to call that third type of freedoms ‘recognition rights’ to draw out the argument I am advancing here. Insofar as the Crown continues to frustrate what we can frame from Berlin as the

it is difficult to specify more precisely), *describe it as a hybrid form of freedom*; at any rate as an ideal which is perhaps more prominent than any other in the world today, yet one which no existing term seems precisely to fit. Those who purchase it at the price of their ‘negative’, Millian freedom certainly claim to be ‘liberated’ by this means, in this confused, but ardently felt, sense... No doubt every interpretation of the word liberty, however unusual, *must include a minimum of what I have called ‘negative’ liberty*. There must be *an area within which I am not frustrated*...It is not a demand for *Lebensraum* for each individual that has stimulated the rebellions and wars of liberation for which men were ready to die in the past, or, indeed, in the present. *Men who have fought for freedom have commonly fought for the right to be governed by themselves or their representatives—sternly governed if need be...but in a manner which allowed them to participate*, or at any rate to believe that they were participating, *in the legislation and administration of their collective lives...It is the non-recognition of this psychological and political fact (which lurks behind the apparent ambiguity of the term ‘liberty’) that has, perhaps, blinded some contemporary liberals to the world in which they live*. Their plea is clear, their cause is just. But they do not allow for the variety of basic human needs. Nor yet for the ingenuity with which men can prove to their own satisfaction that the road to one ideal also leads to its contrary.” [emphasis added]).

⁴⁶⁴ *Ibid.* at 156 (“...when I demand to be liberated from, let us say, the status of political or social dependence, what I demand is an alteration of the attitude towards me of those whose opinions and behaviour help to determine my own image of myself. And what is true of the individual is true of groups, social, political, economic, religious, that is, of men conscious of needs and purposes which they have as members of such groups.”).

⁴⁶⁵ *Ibid.* at 160 (“Provided the answer to ‘Who shall govern me? is somebody or something which I can represent as ‘my own’, as something which belongs to me, or to who I belong, I can, by using words which convey fraternity and solidarity, as well as some part of the connotation of the ‘positive’ sense of the word freedom (which it is difficult to specify more precisely), describe it as a hybrid form of freedom, at any rate as an ideal which is perhaps more prominent than any other in the world today, yet one which no existing term seems precisely to fit.”).

‘recognition rights’ of Aboriginal peoples in Canada—to deny as it were Aboriginal ‘sovereignties’⁴⁶⁶—legal and political conflict will surely continue to be the norm.⁴⁶⁷

Aboriginal rights understood in reference to Berlin’s hybrid ‘recognition rights’ can be better understood by referencing the *United Nations Declaration on the Rights of Indigenous Peoples* as an interpretive tool.⁴⁶⁸ For example, the first article states “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms...” and could be likened to Berlin’s reference to a need for ‘fraternity’—in essence the article constitutes a declaration that Indigenous peoples are part of humanity.⁴⁶⁹ Article 2 declares “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity” which could be equated to Berlin’s reference to a need for ‘association on equal terms’.⁴⁷⁰ Article 3 states “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” which could be likened to Berlin’s account of a need for ‘solidarity’.⁴⁷¹ Article 5 declares “Indigenous

⁴⁶⁶ Compare Hoehn, *Reconciling Sovereignties*, *supra* note 369 at 151 (“It is not surprising that courts felt bound to accept assertions of Crown sovereignty, but by doing so the courts perpetuated a paradigm that did not treat Aboriginal peoples as equals and left them at the mercy of such “rights” as could be recognized by courts in spite of Crown sovereignty, not by virtue of their own sovereignty. This approach necessarily led to a limited theory of Aboriginal rights that demoted the status of Aboriginal nations from sovereigns to mere occupants, reflecting the centuries-old ethnocentric premise that North America was legally vacant land when the settlers came. The Supreme Court of Canada...has now recognized prior Aboriginal sovereignty over territories on this continent. At the same time, the Court has acknowledged that Crown assertions of sovereignty cannot be recognized as legitimate unless founded on a treaty. This lays a solid foundation for a new paradigm of Aboriginal law based on the equality of peoples, and it will finally satisfy long-standing calls to abandon a foundation for Canadian sovereignty that relies on false beliefs about the superiority of European nations.” [footnotes and emphasis omitted]).

⁴⁶⁷ Compare *ibid.* at 155 (“However, [recognition of Aboriginal sovereignties] is only *legal* recognition. The true urgency in reconciling sovereignties comes from the need to allow Aboriginal peoples to find ways to heal from the harm they have suffered from the long failure of settlers to treat them as equals. This failure harmed Aboriginal peoples, their communities, and their institutions; it also damaged the relationship between Aboriginal and non-Aboriginal Canadians. Reconciliation will allow Aboriginal Canadians to take an equal part in the political and economic development of Canada. This will benefit all Canadians.”).

⁴⁶⁸ *UNDRIP*, *supra* note 31 (The Declaration informs part of an important body of international law that is outside the scope of this paper. However, the fact of the existence of the Declaration is in itself significant to this thesis in that Western based Courts do not have to broaden their theoretical approach to understanding the nature of Aboriginal rights (apart from ‘negative rights’) as ‘recognition rights’ in a vacuum. There are legal instruments, such as *UNDRIP* that offer recognition content to a philosophical rights analysis which may be helpful in distinguishing Aboriginal rights as something more than collectively held ‘negative rights’, which, as I argue throughout this section, is the theoretical premise currently monopolizing s. 35 rights jurisprudence).

⁴⁶⁹ *Ibid.* at Article 1; Berlin, *Liberty*, *supra* note 430 at 158.

⁴⁷⁰ *UNDRIP*, *ibid.* at article 2; Berlin, *ibid.* at 158.

⁴⁷¹ *UNDRIP*, *ibid.* at article 3; Berlin, *ibid.*

peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State” which is in line with Berlin’s reference to ‘mutual understanding’. The relevant quote from Berlin is as follows:

Yet it is not with individual liberty, in either the ‘negative’ or in the ‘positive’ senses of the word, that this desire for status and recognition can easily be identified. It is something no less profoundly needed and passionately fought for by human beings—it is something akin to, but not itself, freedom; although it entails negative freedom for the entire group [consistent with a concomitant need for negative rights reading of s. 35 Aboriginal rights], it is more closely related to *solidarity, fraternity, mutual understanding, need for association on equal terms*, all of which are sometimes—but misleadingly—called social freedom...⁴⁷²

Much of the *United Nations Declaration on the Rights of Indigenous Peoples*’ content is in line with the vague place between positive and negative freedom that Berlin identifies as including solidarity, fraternity, mutual understanding, and need for association on equal terms. The *United Nations Declaration on the Rights of Indigenous Peoples* is also consistent with other content Berlin identifies as part of recognition – union, closer understanding, integration of interests, a life of common dependence and common sacrifice, particularly concentrating on the Declaration’s preamble.

I wish to emphasize here that in adopting Berlin’s theoretical framework, I am contemplating Crown/Aboriginal relations *within* the construct of the *Constitution Act, 1982* and the predominantly Western liberal philosophical precepts that have largely informed its evolution. There are more considered theoretical avenues that effectively challenge the restrictive paradigm of sequestering an indigenous/settler state relationship to the narratives of the settler-state. Those avenues are beyond the present scope, given that I am attempting to identify a particular vacuum in Crown obligations specific to First Nation exclusion in emergency management off reserve that even the most conservative reading of Aboriginal constitutional rights could serve to ameliorate.

As Berlin warns, no amount of ‘negative’ freedom can compensate for a lack of ‘social freedom’, or recognition, and in fact the paternalism implicit in benignly repressing a people ‘for their own good’ is despotic. Crown actions that operate to censure First Nation self-

⁴⁷² Berlin, *ibid.*

determination goals mark Canada's ongoing advancement of its own 'positive liberty' relative to Canada's relationship with First Nations and their territories. As such, couched in Borrows' observation that "Aboriginal peoples persistently protest the Crown's approach to Aboriginal and treaty rights and yet the Crown often responds as if it does not have legal obligations to Aboriginal peoples"⁴⁷³ lies the more disturbing reality that contrary to 'reconciling' with First Nations, the Crown insidiously continues a legacy of oppression.

I do not wish to be read as professing that the negative liberties inherent in Aboriginal rights discourse in Canada, and the concurrent Crown obligations they demand, are not important, or even essential. Nor am I suggesting that equality of social and economic opportunity are dispensable components of constitutional Aboriginal rights. In fact, much more could and should be done in Canada with respect to affirmative action strategies aimed at both the individual and community level to address disparity in social and economic opportunity. What I am suggesting, echoing Berlin, is that *limiting* constitutional Aboriginal rights discourse, particularly where 'obligations' are concerned, to a 'negative rights' goal ultimately results in further repression of Aboriginal peoples' 'recognition rights'. That repression is not only 'dishonourable', but it deters reconciliation and at its worst perpetuates despotic paternalism and other forms of oppression.

Hoehn is hopeful that *Haida* marked a change in the jurisprudential and thus legal landscape that informs Aboriginal constitutional rights. He states:

The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* has now recognized prior Aboriginal sovereignty over territories on this continent. At the same time, the Court has acknowledged that Crown assertions of sovereignty cannot be recognized as legitimate unless founded on a treaty. This lays a solid foundation for a new paradigm of Aboriginal law based on the equality of peoples, and it will finally satisfy long-standing calls to abandon a foundation for Canadian sovereignty that relies on false beliefs about the superiority of European nations.⁴⁷⁴

However, in the recent *Tsilhqot'in* decision, the Supreme Court of Canada diminished the import of their prior acknowledgement of Aboriginal sovereignty by emphasising the 'radical title' vested in the Crown underlying Aboriginal title territory—the common legal concept used to

⁴⁷³ Borrows, *Obligations*, *supra* note 366 at 206-7.

⁴⁷⁴ Hoehn, *Reconciling Sovereignties*, *supra* note 369 at 151.

delineate First Nation interest in their unsurrendered, unceded ancestral territories. The ‘negative liberties’ approach prevailed and the title right is measured in accordance to an application of court-adduced ‘Aboriginality’ to the land and water in question with a well-defined justification measure to, in Berlin’s words, ‘identify the frontiers of non-interference’.

A potentially overlooked consequence of framing First Nation rights according to ‘negative liberties’ to the exclusion of First Nation ‘recognition rights’ is that First Nation interests become increasingly characterized in accordance to Western legal and philosophical concepts. The individual negative liberties philosophy underlying Aboriginal rights jurisprudence the Courts have used to date forces First Nations to reframe and thus distort their claims in order to advance the ‘right’ in question within the prescribed precedential format - as negative liberties. In this way, the goal of recognition implicit in the idea of First Nation ‘recognition rights’ is fettered and the consequence for the First Nation perspective that informed the assertion of the right can be ‘death by a thousand cuts’.

For example, the progression of the doctrine of Aboriginal title in the Courts has proven increasingly reflective of rights akin to fee simple⁴⁷⁵, which (ironically) was born of ‘the great legal fiction’ that William the Conqueror owned all of England, and owned it personally, after the Norman conquest of Anglo Saxon England in 1062. Fee simple is the largest bundle of rights available to a fee holder as against the Crown, who has retained underlying title to real property under British common law these thousand years. Those who are unfamiliar with the particular legal nuances characterising the decades-long struggles for recognition of Aboriginal title in the courts might understandably be surprised to hear that *Aboriginal* title in the celebrated *Tsilhqot’in* context means “it cannot be alienated except to the Crown”⁴⁷⁶ given that “[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province”. Eyebrows might arch further to hear that the oft-touted ‘*sui generis*’ nature of ‘Aboriginal title’ stemming from the ‘Crown’s special relationship with Aboriginal

⁴⁷⁵ *Tsilhqot’in*, *supra* note 217 at para 73 (“*Aboriginal title confers ownership rights similar to those associated with fee simple*, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land” [emphasis added]) contra *Delgamuukw*, *supra* note 342 at para 190 (stating Aboriginal title “is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts”, as cited in *Tsilhqot’in*, *supra* note 217 at para 72).

⁴⁷⁶ *Tsilhqot’in*, *ibid.* at 74.

peoples' is in fact delineated from understanding "[t]he Aboriginal interest in land" as a "*burden* [on] the Crown's underlying title".⁴⁷⁷ Finally, eyes might blink in surprise to know that really nothing of Aboriginal peoples informs the *concept* of *Aboriginal* title at all – 'it is what it is', a new type of tenure necessary because of 'the special relationship of the Crown with Aboriginal peoples' but wholly, and exclusively, informed by the legal traditions and philosophies of the settler state.

While inarguably an enormous stride for Aboriginal rights (particularly when framed as negative liberties), *Tsilhqot'in* potentially takes us further away from recognition of Indigenous legal systems and philosophies that inform First Nation property constructs and further away from the sovereign aspirations that often inform Aboriginal title conflicts in the first place.⁴⁷⁸ By constructing Aboriginal title as a 'negative liberty', the Court has assured the Crown's continued "right to encroach on Aboriginal title if the government can justify this in the broader public interest".⁴⁷⁹ As such, Crown certainty is assured in Aboriginal title areas throughout Canada given that, as Slattery put it, "[g]eneric rights are not only *uniform* in character, they are also *universal* in distribution. They make up a set of fundamental rights presumptively held by all Aboriginal groups in Canada..."⁴⁸⁰ It follows that the Supreme Court of Canada has, while constructing and advancing an Aboriginal negative right, also entrenched a legal mechanism securing the Crown's positive liberty to continue to encroach on the Aboriginal 'recognition rights' (to define and govern their territories in accordance to respective Indigenous legal traditions and philosophies), wherever and whenever title might be proven or claimed. In contrast to Hoehn's hope that *Haida* sparked "a new paradigm of aboriginal law based on the equality of peoples",⁴⁸¹ Aboriginal title arguably is *not* recognition of Aboriginal sovereignty. Rather, it is another, albeit more obsequious, paternalistic legal concept that is rooted in Canada's asserted positive liberty over the lives and territories of First Nation peoples.

⁴⁷⁷ *Ibid.* at para 69.

⁴⁷⁸ See also Christie, "Indigeneity and Sovereignty", *supra* note 369 (Sovereign aspirations may be a misnomer appreciating Gordon Christie's challenge to Eurocentric monopolization of relations to territory and governance as 'sovereignty'. Christie argues that there are indigenous understandings of territorial based relations that are as legitimate as the sovereignty model, though underrepresented).

⁴⁷⁹ *Tsilhqot'in*, *supra* note 217 at para 71.

⁴⁸⁰ Slattery, *Taxonomy*, *supra* note 376 at 123 [emphasis in original].

⁴⁸¹ Hoehn, *Reconciling Sovereignties*, *supra* note 369 at 151.

Further, as Gordon Christie instructs, the idea of sovereignty itself is an imported Eurocentric concept that tends to monopolize all conversations and resistance to Crown dominance.⁴⁸² However, as Christie notes, the fact of indigeneity makes alternative narratives and ways of understanding a relationship to territory and each other possible. Christie rhetorically queries “[a]re there really no other sensible ways that the sovereign claims of a nation state might be challenged?” and then answers:

...there are indeed sensible challenges but that their sensibility emanates from a very different vantage point. From this point, analysis is positioned so we can clearly see that the sovereignty model is but one way of making sense of how people can think of themselves in relation to one another and to land. That this vantage point can be reached only by way of the terrain of *Indigeneity* validates these sorts of challenges. It is the very fact of the Indigeneity of the Inuit—of their status as separate meaning-generating communities, living within other larger narrative structures *they* create—that makes this sort of resistance both possible and appropriate.⁴⁸³

Appreciating Christie’s portrayal of the complexities inherent to competing sovereignties, particularly given ‘sovereignty’ is “but one way of making sense of how people can think of themselves in relation to one another and to land”⁴⁸⁴ accentuates the enormous shortcomings of currently favoured constitutional processes. These processes are overwhelmingly entrenched in a negative liberties interpretation of Aboriginal rights.

Understanding the theoretical framework that informs contemporary engagement with Aboriginal constitutional rights assists in identifying the root of the ‘obligation gap’ pervasive in the Crown’s relationship to First Nations. Whether speaking of a lack of implementation of hard-won ‘negative liberties’, the implicit denial of Aboriginal sovereignties, the quagmire of abandoned, stalled or failed treaty negotiations, the ongoing paternalistic and oppressive legacy of the *Indian Act* governance regime, or the lack of implementation of existing treaties, impact-benefit agreements and interim measures, the ‘obligation gap’ grievances (to name a few) are profound. It is well beyond the scope of this project to attempt to consider in depth the vast body of tensions frustrating reconciliation (and much has already been done by the Royal Commission on Aboriginal Peoples). Yet, what many instances of the ‘obligation gap’ *prima facie* have in common is that they are rooted in the same precept that regards Aboriginal constitutional status

⁴⁸² Christie, “Indigeneity and Sovereignty”, *supra* note 369 at 339.

⁴⁸³ *Ibid.* at 339-40.

⁴⁸⁴ *Ibid.*

as yet another mere expression of negative freedom from the state, where the Crown qualifies its relationship with Aboriginal peoples in terms of a ‘shifting frontier’ of non-interference. Recognition, reciprocity, and reconciliation are challenging ideals to merge within a framework that defines relationships as obstructions.

Echoing Berlin, the body of work my profession excels in extolling “spring from, and thrive on, discord”.⁴⁸⁵ He writes “[w]here *ends are agreed, the only questions left are those of means*, and these are not political but technical, that is to say, capable of being settled by experts or machines like arguments between engineers or doctors”.⁴⁸⁶ So it is, if the content of s. 35 rested on accord, emphasis could shift to the important area of implementation which would reflect, rather than define, the illusive prospect of ‘reconciliation’.

Accord, however, does not necessarily mean ascription to the same goals or objectives. In a bid for pluralism, Berlin reassures us that:

*...human goals are many, not all of them commensurable, and in perpetual rivalry with one another. To assume that all values can be graded on one scale, or that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide-rule could, in principle, perform... In the end, men choose between ultimate values; they choose as they do, because their life and thought are determined by fundamental moral categories and concepts that are, at any rate over large stretches of time and space, a part of their being and thought and sense of their own identity; part of what makes them human.*⁴⁸⁷

Perhaps those of us that hail from the settler state contribute to reconciliation by careful reconsideration of what it is that constitutes our *own* identity, by vigilance in assessing and reassessing our own moral categories and concepts, particularly those that purport to justify continued unilateral assertion of Crown sovereignty. Surely the honour of the Crown is nothing less than those virtues that define our own thought and sense of what makes us human. As Sákéj Henderson advises, we must build a post-colonial world where caring and love supersedes everything.⁴⁸⁸

⁴⁸⁵ Berlin, *Liberty*, *supra* note 430 at 118.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.* at 171-2.

⁴⁸⁸ James (Sa'ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition*, (Saskatoon: Purich Publishing, 2008) at 102 (“To unfold Canada’s future – indeed, the global future – we have to care enough to reimagine and remake it into an extraordinary postcolonial nation. To create a just

Irrespective of any individuals', or groups', favoured philosophical treatment of Aboriginal rights and reconciliation, whether as a manifestation of liberal pluralism or within the philosophical and legal realms of indigeneity, Berlin advises careful consideration of the philosophy that informs political relations. He writes "...when ideas are neglected by those who ought to attend to them—that is to say, those who have been trained to think critically about ideas—they sometimes acquire an unchecked momentum and an irresistible power over multitudes of men that may grow too violent to be affected by rational criticism". Berlin believed that:

...political theory is a branch of moral philosophy, which starts from the discovery, or application, of moral notions in the sphere of political relations...to understand such movements or conflicts is, above all, to understand the ideas or attitudes to life involved in them, which alone make such movements a part of human history, and not mere natural events. Political words and notions and acts are not intelligible save in the context of the issues that divide the men who use them. Consequently our own attitudes and activities are likely to remain obscure to us, unless we understand the dominant issues of our own world.⁴⁸⁹

Adopting Berlin's premise we find that there is a pragmatic reason to better engage First Nations in the management of emergencies within their traditional territories. We must invariably conclude that the 'obligation gap' is morally repugnant, despotic in fact, whether in the governance and delivery of health, education, or emergency management services (to name a few), and will continue to frustrate reconciliation.

Experience to date demonstrates that understanding Aboriginal rights restrictively as 'negative liberties' held by Aboriginal peoples as against the Crown bypasses, to the immense convenience of the settler state, the fundamental problem of realizing First Nation self-determination⁴⁹⁰ within a constitutional framework that: (1) denies legislative capacity to any

society, truth has to prevail over dogma, creativity over impossibility, constitutionalism over domination, hope over experience, prophecy over habit, kindness over the impersonal, place over time, solidarity over individualism, serenity over vulnerability, and caring and love over everything.").

⁴⁸⁹ Berlin, *Liberty*, *supra* note 430 at 120-1.

⁴⁹⁰ See *UNDRIP*, *supra* note 31 at Article 3 (Canada endorsed the Declaration in 2010); but see AANDC, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" online: AANDC <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>> (In Canada's statement of support, particular reference is made to Canada's arguably 'narrow' view as to the implications of UNDRIP domestically: "Although the Declaration is a *non-legally binding document that does not reflect customary international law nor change Canadian laws*, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada." [Emphasis added]. In essence, Canada equates its endorsement of UNDRIP as a vague commitment to 'continue working in partnership with Aboriginal peoples...').

institution but the Crown legislatures;⁴⁹¹ (2) exhaustively divides jurisdictional capacity and fiscal authority exclusively within the Crown; and (3) limits judicial authority over the issue of the constitutionality of the Crown's behaviour to the Crown itself.

Arguably, achieving 'reconciliation' involves both Hoehn's conception of 'sharing sovereignties'⁴⁹² and an understanding of that other hybrid type corollary of liberty framed here as 'recognition rights'. In the context of settler-state/Indigenous relationships, these could be understood through engagement with the *United Nations Declaration on the Rights of Indigenous Peoples*. 'Sharing sovereignties' with its corollary requirement of 'recognition' would shift constitutional dialogues from adversarial disputes over non-interference to conversations of collaboration particularly lacking (and particularly impacting) in the areas of First Nation legislative authority, First Nation fiscal equalization and First Nation adjudication.

I have argued that reconciliation (understood as reconciling Crown and Aboriginal sovereignty) is continually frustrated by the philosophical precepts underscoring s. 35 Aboriginal rights jurisprudence. Using the work of Isaiah Berlin, I have posited that the predominance of a liberal philosophical bias held by the courts in framing s. 35 Aboriginal rights, has the effect of largely limiting Canada's constitutional relationship to First Nations to a fluid frontier of non-interference by a superintending Crown. I have further argued that the 'obligation gap' materialises from the same theoretical root that frustrates reconciliation between Canada and First Nations. Jurisprudential philosophical bias that limits s. 35 interpretation to repeatedly defining the scope and frontier of that fluid area of non-interference arguably diverts theoretically, politically and pragmatically from appeals for recognition, interaction, collaboration, reciprocity and contribution.

⁴⁹¹ Guy R gimbald and Dwight Newman, *The Law of the Canadian Constitution* (Markham: LexisNexis Canada, 2013) at 11, para 1.27 [R gimbald and Newman, *Constitution*] ("Parliament enjoys the power to legislate, and no legislation may be made except by Parliament or a provincial legislature" at para 1.27); and see *Reference re: Initiative and Referendum Act (Man)*, [1919] AC 935 (PC) [as cited in R gimbald and Newman].

⁴⁹² Hoehn, *Reconciling Sovereignties*, *supra* note 369 at 155 ("Negotiation also allows the parties the greatest flexibility for finding the means for sharing sovereignty, land, and resources. This may include allowing the "original" title to an Aboriginal nation's territory to remain with the nation or crafting terms on which this title may be shared with the Crown.").

3.4. THE THEORETICAL IMPACT OF ABORIGINAL RIGHTS AND CROWN OBLIGATIONS ON EMERGENCY MANAGEMENT

The next section explores the field of Aboriginal rights of particular interest in emergency management. It applies first the theoretical lens of negative liberties to flesh out some of the barriers to effective First Nation participation in off-reserve emergency management that could be correctable by a mere commitment to implement existing Aboriginal rights within the current emergency management framework. It then considers a deeper realm of corrective measures that require a theoretical shift in jurisprudence toward the ‘gray nether’ of a ‘recognition’ interpretation of s. 35 Aboriginal rights.

3.4.1 ‘NEGATIVE’ ABORIGINAL RIGHTS AND EMERGENCY MANAGEMENT

Applying both Slattery’s taxonomy of generic and specific rights and Borrows’ reciprocal conception of Crown obligations, emergency management activities can be organized in accordance to the Aboriginal ‘generic’ and ‘specific’ rights held by First Nations who may be impacted by a given emergency, and to the concomitant obligations held by the Crown in relation to those rights.⁴⁹³ As outlined above, emergency management is typically organized into four distinct policy areas: mitigation, planning/preparation, response and recovery. Aboriginal rights and title are impacted in all four phases.

3.4.1.1 THE IMPACT OF ABORIGINAL TITLE ON CROWN JURISDICTIONS⁴⁹⁴

A full 41 years after the Supreme Court of Canada alerted Canadians that “Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty

⁴⁹³ Slattery, Taxonomy, *supra* note 376; Borrows, *Obligations*, *supra* note 366.

⁴⁹⁴ I again wish to acknowledge that the presentation of the arguments in this thesis constitute a largely ‘one-sided’ and Western based perspective of concepts relied on throughout. However, I am indeed continuously troubled by the apparent departure that can occur between First Nation and Crown specific understandings of the legal concepts flouted in s. 35 (1) dialogues. For example, there may be a remarkable expanse between Crown servants and First Nation leaders on the meaning of a term like ‘Aboriginal title’. Those operating from within the confines of Crown driven jurisprudence recognize that Aboriginal title has a specific legal meaning as a particular sort of legal right that is constrained by Canada’s constitution, Canadian and general common law jurisprudence and western notions of the philosophy of law. First Nations operating from within their own legal systems and philosophies may well ascribe a meaning to the term much more akin to ‘sovereignty’ than to the jurisprudential guidance on the nature of ‘Aboriginal title’. While I have approached this thesis largely within the constraints of Canadian legal doctrine, I acknowledge such does not necessarily reflect a balanced (reconciled) perspective of what Aboriginal title is or how (or which) First Nation interests should be served by Aboriginal title claims in their territories.

or otherwise”,⁴⁹⁵ and 17 years after the same Court articulated the test for Aboriginal title,⁴⁹⁶ the Tsilhqot’in Nation proved its own claim for Aboriginal title to the satisfaction of Canada’s highest court and in the process facilitated greater clarity in the law as to what Aboriginal title is and the rights it conveys.⁴⁹⁷ The Chief Justice summarized:

- Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.
[...]
- Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown’s fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.⁴⁹⁸

The Supreme Court of Canada’s clarification on the law of Aboriginal title, examination of the impact of claims to Aboriginal title on the Crown’s duty to consult and accommodate, as well as the Court’s finding that in *Tsilhqot’in* “the Province’s land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot’in people”⁴⁹⁹ warrants caution in considering the implications of Aboriginal title, and claims to Aboriginal title, on emergency management law.

Notably, in *Tsilhqot’in* the Chief Justice dismissed the British Columbia Court of Appeal’s approach of applying a narrow ‘site-specific occupation’ test for Aboriginal title.⁵⁰⁰ She stated in justifying the Court’s rejection of the site-specific occupation test that: “the Court of Appeal’s approach results in *small islands of title surrounded by larger territories* where the group possesses only Aboriginal rights to engage in activities like hunting and trapping”.⁵⁰¹ Ironically, that description effectively summarizes the current jurisdictional constraints many First Nations are forced to cope with under the current emergency management regime where their only *de*

⁴⁹⁵ *Tsilhqot’in*, *supra* note 217 citing *Calder v Attorney General of British Columbia*, [1973] SCR 313.

⁴⁹⁶ *Delgamuukw*, *supra* note 342.

⁴⁹⁷ *Tsilhqot’in*, *supra* note 217.

⁴⁹⁸ *Ibid.* at para 2.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.* at para 28.

⁵⁰¹ *Ibid.* at para 29.

facto ‘islands of authority’ vests in limited emergency management decision-making over on-reserve matters, as outlined in the first part of this thesis.

In summarizing the test for Aboriginal title in *Tsilhqot’in*, Chief Justice McLachlin states:

The claimant group bears the onus of establishing Aboriginal title. *The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms.* In asking whether Aboriginal title is established, the general requirements are: (1) “sufficient occupation” of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.⁵⁰²

When one considers the overarching task of “identifying how pre-sovereignty rights and interests can properly find expression in modern common law terms” in the course of establishing Aboriginal title, it follows that an important task in evaluating the degree of legislated infringement on claimed Aboriginal title lands is to identify how (and whether) that legislation properly, and effectively, reflects modern Aboriginal rights and interests.

The Chief Justice of Canada clarifies the legal nature of Aboriginal title in *Tsilhqot’in*.⁵⁰³ She begins with a summary of Justice Dickson’s concurring judgement in *Guerin v The Queen*,⁵⁰⁴ stating:

At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1. The Aboriginal interest in land that burdens the Crown’s underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.⁵⁰⁵

⁵⁰² *Ibid.* at para 50.

⁵⁰³ *Ibid.* at paras 69-72.

⁵⁰⁴ *Guerin v The Queen*, [1984] 2 SCR 334 at 379-82 [*Guerin*].

⁵⁰⁵ *Tsilhqot’in*, *supra* note 217 at para 69.

The Chief Justice continues with a summary of the Court’s findings on the legal nature of Aboriginal title in *Delgamuukw*, explaining:

...Aboriginal title gives “the right to exclusive use and occupation of the land... for a variety of purposes”, not confined to traditional or “distinctive” uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land – to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.⁵⁰⁶

The Chief Justice then explains that all that remains of the Crown’s radical or underlying title to lands held under Aboriginal title is (1) “a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands”; and (2) “*the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the Constitution Act, 1982*”.⁵⁰⁷

The Chief Justice concludes on behalf of the Court (in a rather ambiguous statement somewhat typical of Aboriginal rights jurisprudence) that “Aboriginal title *is what it is* – the unique product of the historic relationship between the Crown and the Aboriginal group in question”.⁵⁰⁸ This statement, of course, building upon the idea first espoused in *Van der Peet* and later emphasised in *Delgamuukw* that the Crown’s underlying interest in Aboriginal title lands is a “*process of reconciling Aboriginal interests with the broader public interests under s. 35 of the Constitution Act, 1982*”.⁵⁰⁹

⁵⁰⁶ *Ibid.* at para 70 citing *Delgamuukw*, *supra* note 342 at para 117, and citing *Guerin*, *supra* note 504 at 382.

⁵⁰⁷ *Tsilhqot’in*, *ibid.* at para 71 [emphasis added]; and see *Constitution Act, 1867*, *supra* note 20 at s 109 (“All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, *subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same*” [emphasis added]).

⁵⁰⁸ *Tsilhqot’in*, *ibid.* at para 72.

⁵⁰⁹ *Ibid.* at para 71, [emphasis added]; and see *Delgamuukw*, *supra* note 342 at 81-2 (“The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Van der Peet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by “their bridging of aboriginal and non-aboriginal cultures” (at para. 42). Accordingly, “a court must take into account the perspective of the aboriginal people claiming the right. . . . while at the same time taking into account the perspective of the common law” such that “[t]rue reconciliation will, equally, place weight on each” (at paras. 49 and 50). In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain “the Canadian legal and constitutional structure” (at para. 49)); and see *Van der Peet*, *supra* note 113 at paras 42, 49, 50.

A successful Aboriginal title claim may certainly impact the management of emergencies in First Nation territories. However, it bears noting that Crown emergency management or aspects of it may meet the threshold to justify infringement of Aboriginal title according to *Tsilhqot'in*.⁵¹⁰ In fact, arguably few other potential areas would so neatly fit within the judicially derived justification criteria: certainly saving lives and homes in an emergency could be constructed as a “compelling and substantial purpose” and could account for the priority of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown.⁵¹¹ Again however emergency management involves a spectrum. For example, planning, mitigation, response and recovery and what might be regarded as ‘justifiable infringement’ during the response phase might not amount to precedent for justifiable infringement during the planning phase. As such, any evolving jurisprudence testing the boundaries of the ‘islands of non-interference’ in emergency management would at this stage be fluid at best. More analysis will be required in the time to come as the particular ‘specific rights’ aspects of the ‘generic Aboriginal title right’ plays out in the jurisprudence and beyond.

As previously noted, generally speaking, in the Province of British Columbia, most (if not all) First Nations’ reserves encompass only a very fractional percentage of said Nations’ traditional territories.⁵¹² Certainly where the decision-making in question pertains to priorities in emergency planning, mitigation, response and recovery, Nations have a much broader and intensive interest in emergency management within their traditional territories than the current Crown driven regime allows for. Just as said ‘islands of title’ are incongruent to Aboriginal title, the current regime that results in ‘islands of authority’ over emergency management are incongruent to honourable recognition of Aboriginal rights and title generally.

Non-interference (or a ‘negative rights’ theoretical premise) logically results in precluding the exercise of Aboriginal rights except where a First Nation has ‘won’ a ‘positive rights’ struggle. In the example of Aboriginal title, a conflict could arise where a given First Nation has exercised a ‘positive right’ in developing comprehensive land and/or marine management plans

⁵¹⁰ *Tsilhqot'in, ibid.* at paras 77-88.

⁵¹¹ *Ibid.* at para 77 (“To justify overriding the Aboriginal title-holding group’s wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown’s fiduciary obligation to the group”).

⁵¹² See e.g. *BCStats Map, supra* note 227 (pdf link to “45 Central Coast”) (Figure 2 on page 55 of this thesis).

that exclusively prioritizes the values and interests of that particular First Nation. Where Canada and British Columbia likewise continue to assert their own ‘positive rights’ to manage the same land and/or marine areas, whether in the more restrictive sense of managing for disasters or the more broad sense of general land and/or marine use priorities that meet the standard of “a compelling and substantial public purpose and are not inconsistent with the Crown’s fiduciary duty to the Aboriginal group”,⁵¹³ implementation of a given First Nation’s ‘preferred method of enjoying the right [of Aboriginal title]’ by way of implementation of their own land and/or marine use plans could be frustrated, particularly where the Crown disagrees as to where the correct ‘boundary of non-interference’ lies. Arguably, the ‘justifiable infringement test’ specific to Aboriginal title solidified in *Tsilhqot’in*,⁵¹⁴ will challenge First Nations seeking to uphold their land and marine management regimes in ever encroaching ‘constitutionally justified paramouncy over Aboriginal rights’.⁵¹⁵ In a sense, by applying the reflections of Berlin to flesh out the undercurrents of the existing tensions we can currently understand the evolving Aboriginal title conversation as a conflict of Berlin’s ‘positive rights’, where Canada continues to exercise the Crown’s version of its own positive rights over First Nation’s territories and seeks to resolve conflict by ascribing ‘islands of non-interference’ (‘negative’ land rights through Aboriginal title) to restrictively enable First Nations a limited exercise of their own positive rights.

From such a philosophical vantage point, we can further see that the modern treaties treatment of emergency management presents as a good example of how this winds up looking on the ground in an issue specific contest over management of a particular aspect of the broader ‘generic right’ of a treaty land-based right. Where there is no impediment of the Crown’s exercise of its positive rights, and some autonomy is agreed to for emergency management

⁵¹³ *Tsilhqot’in*, *supra* note 217 at para 2.

⁵¹⁴ *Ibid.* at paras 77-88.

⁵¹⁵ Where the infringement test is characterised as resolving paramouncy conflicts, as takes place in division of powers disputes. An interesting analysis might be to consider whether the *Tsilhqot’in* expression of the ‘infringement test’ is more in-line with a ‘watertight’ compartments view of federalism (see e.g. *Canada (AG) v Ontario (AG)* [1937] UKPC 6, [1937] AC 326 and see *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para 146 “According to the “classical” approach favoured by the Judicial Committee of the Privy Council until 1949, the heads of power constituted “watertight compartments”, and overlaps between them were to be avoided to the full extent possible”) or with more modern views of federalism that take a more flexible approach (see e.g. *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para 147 “This conception “recognizes that in practice there is significant overlap between the federal and provincial areas of jurisdiction, and provides that both governments should be permitted to legislate for their own valid purposes in these areas of overlap” [references omitted]).

purposes, islands of non-interference result with the frontiers negotiated and renegotiated in accordance to when Crown and First Nation powers come into conflict at the boundaries. For example, emergency response planning that is allocated by agreement restrictively to a particular First Nation and specific to that First Nation's treaty area and financed through a fiscal scheme also mutually ascribed to, we have in effect drawn and implemented an effective 'island of non-interference'. Where there is the potential for both a First Nation and Crown exercise of 'positive rights' to come into conflict, (say) in the exercise of declaring and acting on a 'local state of emergency', the modern treaty First Nations are statutorily constructed as 'local authorities' across the board, with decision-making authorities constructively subservient to those of the Crown (as outlined above).⁵¹⁶ Again, through the philosophical lens Berlin offers, the Crown's positive rights prevail, irrespective of the affront on the exercise of First Nations' own positive rights. Depending on the circumstances, the positive rights contest may or may not be problematic. This thesis is concerned with the outcomes of such contests that result in avoidable harm to First Nations. In this example, the Crown exercise of positive rights operates to the diminishment of First Nations' own positive rights. Where that exercise of the Crown's unilateral positive rights results in avoidable harm to a given First Nation, weaknesses in the islands of non-interference approach to First Nations' governance scope become apparent.

Statutory guidance acknowledging First Nation section 35 Aboriginal rights that embraced a 'recognition rights' approach to First Nations governance roles in emergency management would help to ameliorate the harms that can result in the gap between an 'islands of non-interference' approach and an overt 'positive rights' contest approach. In this sense, 'recognition rights' fit nicely within the guidance Slattery offers, who also characterises Aboriginal rights in partial accordance to 'recognition'. Slattery however frames his argument primarily through a broad historical and jurisprudential review of the "Metamorphosis of Aboriginal Title" wherein he argues in particular for a *sui generis*, generative interpretation of Aboriginal title incorporating

⁵¹⁶ See e.g. *Maa-Nulth Final Agreement*, *supra* note 352 at ss 13.26.3, 13.26.4, 13.26.5 ("13.26.3 Federal Law or Provincial Law prevails to the extent of a Conflict with Maa-nulth First Nation Law under 13.26.1"; "13.26.4 ...each Maa-nulth First Nation Government may ... exercise the powers of a local authority in respect of local emergencies *in accordance with Federal Law and Provincial Law* ...but any declaration and any exercise of power is *subject to the authority of Canada and British Columbia under Federal Law and Provincial Law*" [emphasis added]; "13.26.5 Nothing in this Agreement affects the authority of: a. Canada to declare a national emergency; or b. British Columbia to declare a provincial emergency, in accordance with Federal Law or Provincial Law").

the ‘Principles of Recognition’ and the ‘Principles of Reconciliation’.⁵¹⁷ Slattery’s analysis is useful to my argument in other respects. In particular, he concludes that “...section [35] recognizes a body of generative rights, which bind the crown to take *positive steps* to identify aboriginal rights in contemporary form, with the participation and consent of the Indigenous peoples concerned”.⁵¹⁸ Slattery’s interpretation of Aboriginal rights as generative rights binding the Crown to take ‘positive steps’ echoes the positive aspects of Aboriginal rights as ‘recognition rights’ distinct from ‘negative rights’ or non-interference rights approach.

Slattery’s piece helps to round out an interpretation of Aboriginal rights as ‘recognition rights’ as he reasons that there exists a direct (and necessary) role for Indigenous peoples themselves in framing the content of Aboriginal rights understood as generative rights,⁵¹⁹ echoing the Supreme Court that “Reconciliation is not a final legal remedy in the usual sense. Rather, it is a *process* flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982”.⁵²⁰ Once again, Aboriginal rights philosophically framed as ‘recognition rights’, or Aboriginal (title) rights as generative rights informed by the Principles of Recognition and the Principles of Reconciliation,⁵²¹ mirror the content of the *United Nations Declaration on the Rights of Indigenous Peoples*.⁵²² Aboriginal rights understood as recognition rights thus include all of: traditional negative freedoms, positive freedoms on the part of a given Aboriginal People (in the context of this thesis, a given First Nation), positive obligations on the part of the Crown

⁵¹⁷ Slattery, “Metamorphosis”, *supra* note 367.

⁵¹⁸ *Ibid.* at 286.

⁵¹⁹ *Ibid.* at 281-2 (“As seen earlier, Principles of Recognition govern the nature and scope of aboriginal title at the time of Crown sovereignty — what we have called historical title. This title provides the point of departure for any modern inquiry and a benchmark for assessing the actions of colonial governments and the scope of Indigenous dispossession. By contrast, Principles of Reconciliation govern the legal effects of aboriginal title in modern times. They take as their starting point the historical title of the Indigenous group, as determined by Principles of Recognition, but they also take into account a range of other factors, such as the subsequent history of the lands in question, the Indigenous group’s contemporary interests, and the interests of third parties and the larger society. So doing, they posit that historical aboriginal title has been transformed into a generative right, which can be partially implemented by the courts but whose full implementation requires the negotiation of modern treaties.”).

⁵²⁰ *Ibid.* at 286 [emphasis in original] citing *Haida*, *supra* note 208 at para 32.

⁵²¹ But see Slattery, “Metamorphosis”, *ibid.* at 282 (where he argues that Aboriginal title requires both an incorporation of the Principles of Recognition and the Principles of Reconciliation: “Unless we distinguish between these two sets of principles, we may fall into the trap of assuming that historical aboriginal title gives rise automatically to modern title, without regard to its broader social impact. Such an assumption fosters two judicial tendencies. The courts may be led to construe historical aboriginal title in an artificially restrictive way, in the effort to minimize conflicts with modern societal and third party interests. Alternately, an expansive view may be taken of the processes whereby historical title is extinguished, whether by Crown action or the passage of time. These tendencies, if left to operate unchecked, will diminish the possibility of reconciliation ever occurring.”).

⁵²² *UNDRIP*, *supra* note 31.

and an indispensable Indigenous voice setting out the appropriate degree of Indigenous agency necessary to effect reconciliation (shared or mutual governance).⁵²³

Brian Slattery evokes both his taxonomy concept of specific and generic rights as well as his generative approach to Aboriginal rights as informed by the ‘Principles of Recognition’ and the ‘Principles of Reconciliation’ in his article “The Generative Structure of Aboriginal Rights”.⁵²⁴ Again, Slattery’s work is useful toward further drawing out the content of what I call ‘recognition rights’ in line with the description offered by Berlin of a third sort of freedom that lies apart from both ‘negative’ and ‘positive’ rights. While Slattery limits his use of the term ‘recognition’ to qualify a judicial goal of “the identification of the central attributes of Aboriginal societies in the period before European contact”,⁵²⁵ I attempt to use the term more holistically and include not only all of the attributes of Aboriginal societies in the period before European contact, but those of today which collectively would inform the content of the right of self-determination. I argue that the term recognition serves equally well in each usage.

In fact, my proposition speaks directly to the shortcomings that Slattery identifies in Justice Lamer’s reasoning in the *Van der Peet* test where he explains that Justice Lamer:

does not take into account the historical modes of reconciliation that occurred when the Crown established relations with indigenous peoples, nor does he consider the need for new modes of reconciliation today. The result is that Aboriginal rights are identified in an almost mechanical manner, without regard to the contemporary needs of Aboriginal peoples, the rights and interests of other affected groups, or the welfare of the body politic as a whole.⁵²⁶

Berlin’s third category of rights (what I have called ‘recognition rights’) between ‘negative’ and ‘positive’ freedoms addresses the shortcomings of the *Van der Peet* articulation of Aboriginal rights that Slattery identifies. As Slattery puts it, the idea of ‘recognition rights’ acknowledges that “[t]he desire for recognition is a desire for something different: for union, closer understanding, integration of interests, a life of common dependence and common sacrifice”.⁵²⁷ In short, it seems Berlin, some 50 years before the fact, essentially identified what would become the content of both of what Slattery frames as ‘recognition’ and ‘reconciliation’ principles

⁵²³ And see *Chartrand, Constitutional Legitimacy*, *supra* note 115.

⁵²⁴ Slattery, “Generative Rights”, *supra* note 383.

⁵²⁵ *Ibid.* at 597.

⁵²⁶ *Ibid.*

⁵²⁷ Berlin, *Liberty*, *supra* note 430 at 158.

(summarizing his interpretation of leading aboriginal rights jurisprudence) within Berlin's own articulation of that third broad area of freedoms that contrasts both negative and positive rights.

Likewise, Slattery's treatment of the wording of s. 35 fits neatly into Berlin's broader philosophical analysis on rights generally. Slattery states: "[i]n saying that Aboriginal rights are 'recognized', the section seems to focus on rights in their original, historically-based forms. The word 'affirmed' by contrast seems more concerned with the way these rights are to be treated in contemporary times—as living rights that serve the modern interests of Aboriginal peoples and at the same time promote reconciliation with the larger society".⁵²⁸ The content of both 'recognition' and 'affirmation' from the wording of s. 35 that Slattery identifies fit within Berlin's framing of what I have called 'recognition rights' as "something akin to, but not itself, freedom; although it entails negative freedom for the entire group [Slattery's 'recognized'], it is more closely related to solidarity, fraternity, mutual understanding, need for association on equal standing".⁵²⁹ The latter fits with what Slattery suggests are 'affirmed'—"living rights that serve the modern interests of Aboriginal peoples and at the same time promote reconciliation with the larger society".⁵³⁰

In line with Slattery's preference to interpret Aboriginal title as 'sui generis' (or of their own kind),⁵³¹ Berlin's struggle to name that nebula between 'positive' and 'negative' rights accentuates and philosophically validates the *sui generis* nature of 'recognition rights'. In my reading of Slattery, both his and my version of Aboriginal rights are neither best understood as positive rights nor best understood as negative rights, but something else—something *sui*

⁵²⁸ Slattery, "Generative Rights", *supra* note 383 at 623.

⁵²⁹ Berlin, *Liberty*, *supra* note 430 at 158.

⁵³⁰ Slattery, "Generative Rights", *supra* note 383 at 623.

⁵³¹ Slattery, "Metamorphosis", *supra* note 367 at 257 ("only the *sui generis* approach does justice to the complexities of the subject [conceptions of Aboriginal title]"); *Tsilhqot'in*, *supra* note 217 at paras 12, 14, 72 ("The principles developed in *Calder*, *Guerin* and *Sparrow* were consolidated and applied in the context of a claim for Aboriginal title in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title." (para 14) "The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question." (para 72)).

generis—outside the more dominant tracts of philosophical thought, as Berlin describes the nebula (again restated here):

What oppressed classes or nationalities, as a rule, demand is neither simply unhampered liberty of action for their members [negative rights], nor, above everything, equality of social or economic opportunity [positive obligations (or affirmative action) of the Crown], still less assignment of a place in a frictionless, organic state devised by the rational lawgiver [rejection of sequestering to the passive status as ‘the consulted’ thereby entrenching the exclusive positive rights of the Crown]. What they want, as often as not, *is simply recognition ... as an independent source of human activity, as an entity with a will of its own, intending to act in accordance with it (whether it is good or legitimate, or not), and not to be ruled, educated, guided, with however light a hand, as being not quite fully human, and therefore not quite fully free.*⁵³²

Whether approaching the rights interpretation question from an intensive (and perhaps even conservative) historical jurisprudential review as Slattery has, or through the application of specific philosophical treatment as I attempt to do in this thesis, we come to the same conclusion. An exclusively negative rights approach toward interpreting the scope and content of Aboriginal rights fails to reflect their purpose and nature and in turn frustrates reconciliation and all it implies.

Ultimately, I am arguing for a shift in the underlying philosophical approach that seems to be informing much judicial thought in Aboriginal rights jurisprudence—that is, I am arguing for a fundamental departure from the apparent increasing ascription to a ‘negative rights’ premise in framing s. 35 Aboriginal rights. Rather, I am suggesting that approaching Aboriginal rights through a ‘recognition rights’ analysis would ultimately better serve the Crown in meeting a reconciliation agenda. While the conversation could and likely would continue to involve and as such evolve ‘islands of non-interference’ there would also be space and precedent for respectful collaboration and even friendship in the administration of jurisdictional areas of mutual concern. In the area of emergency management, this could involve both application of current models where First Nations exercise areas of absolute autonomy as well as application of a new model that seeks to prioritize First Nation agency in *all* areas of emergency management. Just as other

⁵³² Berlin, *Liberty*, *supra* note 430 at 156 (“...when I demand to be liberated from, let us say, the status of political or social dependence, what I demand is an alteration of the attitude towards me of those whose opinions and behaviour help to determine my own image of myself. And what is true of the individual is true of groups, social, political, economic, religious, that is of men conscious of needs and purposes which they have as members of such groups”).

constitutional priorities are afforded statutory recognition in emergency management frameworks, the ‘recognition approach’ to respecting constitutional Aboriginal rights in the same way would likely necessitate similar statutory acknowledgment. There would thus be tangible guidance respecting First Nation inclusion to those exercising what has been traditionally supported as exclusively Crown (‘positive rights’) driven functions of state.

3.4.1.2 THE DUTY TO CONSULT AND ACCOMMODATE DURING EMERGENCY MANAGEMENT

A significant challenge in fleshing out the Crown’s duty to consult in emergency management lies in identifying definitively who holds the obligation to consult and accommodate—a question I contemplate in another context later in this thesis as I attempt to sort out who is the Crown when contemplating the ‘obligations of the Crown’.

Chief Justice McLachlin, in her determinations on behalf of a unanimous Supreme Court in *Tsilhqot’in Nation v. British Columbia*, declared unequivocally: “[w]here title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982* requires *the Crown* to consult with the group asserting title and, if appropriate, accommodate its interests”.⁵³³ However, as explored briefly in the first part of this thesis, the British Columbia Court of Appeal held in *Neskonlith* that municipalities (and by extension ‘local authorities’) do not have a duty to consult.⁵³⁴ As outlined above, the *Neskonlith* precedent produces a troubling gap of First Nation exclusion given practically any given First Nation’s traditional territories, as well as potential Aboriginal title territories, currently lie in the jurisdictional ambit of provincially contrived ‘local authorities’ for the purposes of emergency management as a result of British Columbia delegating a substantial portion of its emergency management powers to local authorities.⁵³⁵ If it is so that local authorities are not under a duty to consult with First Nations, an arguably egregious and harmful jurisdictional conflict lies simmering throughout the expanse of British Columbia.

⁵³³ *Tsilhqot’in*, *supra* note 217 at para 2.

⁵³⁴ *Neskonlith*, *supra* note 220.

⁵³⁵ *Emergency Program Act*, *supra* note 76; *Local Government Act*, *supra* note 140; *Environmental Management Act*, *supra* note 133; *Wildfire Act*, *supra* note 129 (note this legislative list is exemplary, not exhaustive as discussed in the first part of this thesis).

While a detailed analysis exploring the duty to consult jurisprudence in the context of the larger emergency management statutory regime outlined above was outside the scope of this thesis, a few additional points have bearing on the analysis at hand. First, a targeted appraisal of the federal government's duty to consult and accommodate in the area of *defining* the harms that in turn informs risk management priorities could be a useful contribution to discussions as to whether there is adequate inclusion of First Nation particular interests in especially the recovery funding frameworks. As mentioned above, there could be real departures in perceived areas of priority respecting particularly recovery and mitigation efforts where there is a lack of agreement on what constitutes harm.⁵³⁶ So, where for example, a particular local food fishery might be conceived as very low on the list of priority potential harms from a federal Crown perspective, as demonstrated in the Disaster Financial Assistance Arrangements (which does not currently fund resource recovery but will (say) fund rebuilding a public picnic area)⁵³⁷, the continued integrity of that food fishery might be of paramount importance to a given local First Nation who is both culturally and pragmatically dependent on that fishery for survival. Analysis as to what constitutes sufficient consultation and accommodation on this point could be very useful toward clarifying current ambiguities in the framework. For example, analysis of the consultation gap and a prescriptive survey at potential solutions might result in some sort of process where (say) high level First Nation organizations could consult and inform high level federal funding strategies that better prioritise First Nations at an individual emergency management level – strategies that could then be considered for opt-in by individual First Nations. Similar approaches could potentially be imagined as operating at the Provincial level, or both. Whatever the outcomes or preferred approaches by both First Nations and the Crown, the point is—a conversation is desperately needed. More analysis however is required to ascertain the current consultation and accommodation requirements and prescriptive approaches in light of the current gaps in engagement I have attempted to expose in this thesis.

⁵³⁶ See e.g. James [Sákéj] Youngblood Henderson, “Empowering Treaty Federalism”, SaskLR 1994 vol 58 at 327-8 (“Existing federal and provincial laws cannot be perceived as impersonal or neutral public rules, for these are the exclusive voice of the colonialists. Treaty First Nations have never formally participated as equals in the implementation of these federal laws nor have they consented to them. If they had any role in the legislation, it was as lobbyists or influence peddlers. These laws, like most provincial laws, are seen as embodying only the goals and values of the colonialists.”).

⁵³⁷ *DFAA Guidelines*, *supra* note 239.

Second, what is immediately apparent is that British Columbia Crown servants are basically operating without a publicly discernible statutory mandate and direction to consult with First Nations during any stage of emergency management – the ultimate sound of silence. In the sections that follow, I question whether in addition to the duty to consult, a recognition rights approach would help close the gap where First Nations are constructively left out of the current statutory emergency management frameworks.

3.4.2 ‘RECOGNITION’ ABORIGINAL RIGHTS AND EMERGENCY MANAGEMENT

In the following section, I argue that adopting a ‘recognition rights’ approach inspired by Berlin’s categorization of rights and utilizing the *United Nations Declaration on the Rights of Indigenous Peoples* for content, s. 35 Aboriginal rights can be understood as ‘recognition rights’. I further suggest that South Africa’s socioeconomic rights could likewise be understood as recognition rights. By likening Canada’s Aboriginal recognition rights to South Africa’s socioeconomic recognition rights, a range of precedent on the justifiability of South African recognition rights becomes relevant for analysis in the Canadian Aboriginal rights context. Further, understanding these rights as recognition rights as opposed to positive rights might contribute to dispelling potential fears that a judicial enforcement role over elected governments would undermine democracy. Rather, I argue that ‘recognition rights’ would ultimately operate to serve democratic processes when put in their context of addressing the facts of Canada’s colonial history.⁵³⁸

3.4.2.1. FROM RIGHTS TO RECONCILIATION - WHO IS THE CROWN?

The *Constitution Act, 1867* provides some guidance on who constitutes ‘the Crown’ under the constitutional make-up of Canada, as well as the power the Crown holds. “Section 9... provides that ‘[t]he Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen’.”⁵³⁹ Of course, conflicting theoretical perspectives could debate just *whom* the Crown is when used in the context of Aboriginal rights. Pragmatic

⁵³⁸ See Slattery, “Metamorphosis”, *supra* note 367 (for an account of Canada’s colonial history with First Nations leading to another similar interpretation of Aboriginal rights as recognition rights); and see Hoehn, *Reconciling Sovereignties*, *supra* note 369 at 73-75.

⁵³⁹ Régimbald and Newman, *Constitution*, *supra* note 491 at 9 para 1.19; *Constitution Act, 1867*, *supra* note 20 at s. 9.

guidance may be found in Canada's oldest high court case deliberating the issue of First Nation land ownership. The Privy Council instructed in *St Catherine's Milling* (1888) that:

[i]n construing these enactments [BNA Acts 1840 & 1867], it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its Legislature, the land itself being vested in the Crown.⁵⁴⁰

The Crown, as such, could be understood as a figurative symbol without any independent power to govern over the land base to which its "radical title" is vested.⁵⁴¹ That governance is spread between the legislative, executive and judicial arms of the Crown in right of Canada respectively. Like colours of the same rainbow, these "arms" are not mutually exclusive; they are the entire Crown at the same time.

In *Mitchell v Peguis Indian Band*, "Dickson C.J. said that the relationship between Aboriginal peoples and the Sovereign had never depended on who the particular representatives of the Crown were. Dickson said that 'federal-provincial divisions that the Crown has imposed on itself are internal to itself' and therefore these divisions could not alter the relationship between the sovereign and Aboriginal peoples".⁵⁴² As such, when the Court speaks of the Honour of the Crown, the Crown is *all* of the Crown, including the Crown in right of Parliament, the Crown in right of the legislatures, and the Crown in right of the executive (federal and provincial).

The Crown takes on a somewhat more distinctive persona in the recent *Grassy Narrows* decision of the Supreme Court of Canada. On behalf of the Court, the Chief Justice concludes, "although Treaty 3 was negotiated by the federal government, it is an agreement between the

⁵⁴⁰ *St Catherine's Milling and Lumber Company v The Queen*, [1888] UKPC 70 at 7.

⁵⁴¹ *Ibid.*; *Tsilhqot'in*, *supra* note 217 at para 69 (The Supreme Court of Canada re-affirmed the concept of underlying 'radical title' vested in Crown in the recent *Tsilhqot'in* decision: "The starting point in characterizing the legal nature of Aboriginal title is Dickson J.'s concurring judgment in *Guerin*, ... At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province.").

⁵⁴² Hoehn, *Reconciling Sovereignties*, *supra* note 369 at 54 citing *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85.

Ojibway and the Crown”.⁵⁴³ Further, “[t]he promises made in Treaty 3 were promises of the Crown, not those of Canada”.⁵⁴⁴

Régimbald and Newman explain:

it is important to note that despite the principle of the Crown’s indivisibility, a distinction must be made between the Queen in right of Canada and the Queen in right of a province. In these distinct capacities, *the Crown acts as separate persons in the sense that the act of one cannot engage the responsibility of the other*. In other words, the decisions of the federal executive and the provincial executives are distinct and unrelated.⁵⁴⁵

It is interesting to consider the Crown’s divisibility in reference to the recent *Grassy Narrows* decision that identifies the Crown as the distinctive ‘treaty making’ persona and goes on to apply the divisibility of the Crown as a manifestation of government in terms of treaty responsibilities. The Court explains the overarching attendant duty of the Crown to “exercise its powers in conformity with the honour of the Crown”⁵⁴⁶ and states the Crown is “subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests”.⁵⁴⁷ The Court emphasizes “[t]hese duties bind the *Crown*” [as distinct from government *per se*].⁵⁴⁸ Though the Court distinguishes the Crown emphatically in terms of the treaty relationship with the Ojibway, the Court explains that governments exercise the Crown’s power and in so doing “the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question”.⁵⁴⁹

The Court makes a point of correcting “a misconception of the legal role of the Crown in the treaty context”.⁵⁵⁰ The Court explains:

It is true that Treaty 3 was negotiated with the Crown in right of Canada. But that does not mean that the Crown in right of Ontario is not bound by and empowered to act with respect to the treaty⁵⁵¹... Both levels of government are responsible for

⁵⁴³ *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447 at para 30 [*Grassy Narrows*].

⁵⁴⁴ *Ibid.* at para 35.

⁵⁴⁵ Régimbald and Newman, *Constitution*, *supra* note 491 at 9 para 1.20 [emphasis added]; *Theodore v Duncan*, [1919] A.C. 696 (Australia PC); *J.R. Théberge Ltée v. R.*, [1970] Ex. C.R. 649 (Can. Ex. Ct.).

⁵⁴⁶ *Grassy Narrows*, *supra* note 543 at para 50.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.* [emphasis in original].

⁵⁴⁹ *Ibid.*

⁵⁵⁰ *Ibid.* at para 32.

⁵⁵¹ *Ibid.* at para 32.

fulfilling [the promises of the Crown made in Treaty 3] when acting within the division of powers under the *Constitution Act, 1867*.⁵⁵²

Specific to the role of the federal government's exclusive jurisdiction over "Indians and Lands Reserved for Indians" under s. 91(24) of the *Constitution Act, 1867*, the Court's ruling means that a province does not need to obtain federal approval before it can take up land under a treaty. Rather "the applicability of provincial legislation that affects treaty rights through the taking up of land is determined by *Mikisew Cree*... and s. 35 of the *Constitution Act, 1982*."⁵⁵³

Standing in contrast to the common understanding that s. 91(24) is a central source of Crown fiduciary obligations owed to First Nations, *Grassy Narrows* stands for the principle that though Crown authority is divisible, its 'generic'⁵⁵⁴ obligations are *universal* as between the Crown in right of Canada and the Crown in right of a province. So it would seem that where a Royal Prerogative that impacts First Nations is, or has been, displaced by legislation, the body that statutorily assumed the prerogative likewise assumed all the attendant Crown obligations to First Nations—the Honour of the Crown, the fiduciary duties owed by the Crown—arising from the 'special relationship between the Crown and Aboriginal peoples'.

The Court's favoured approach of understanding Crown authorities relative to First Nations as *divisible*, with only Crown honour and fiduciary duties to First Nations as universal (or indivisible), risks placing First Nations in an impossible situation of attempting to realize Crown obligations (stemming from the honour of the Crown and Crown fiduciary duties to First Nations) and circling at the mercy of division of power disputes between the arms of government as to with whom a given authority (and its concomitant obligations) primarily vest. In fact, *Grassy Narrows* appears to further entrench an already inherent problem of federal and provincial governments offloading financial responsibility to First Nations under the auspices of division of power disputes.

Jordan's Principle⁵⁵⁵ arose from the tragic case of a Cree child who could not leave hospital to live with his family and community because of a funding dispute between the federal and a

⁵⁵² *Ibid.* at para 35.

⁵⁵³ *Ibid.* at para 37; *Mikisew Cree*, *supra* note 342 (as cited in *Grassy Narrows*); *Constitution Act, 1982*, *supra* note 23 at s. 35.

⁵⁵⁴ I borrow here Slattery's taxonomy concept for Aboriginal rights.

⁵⁵⁵ See First Nations Child and Family Caring Society of Canada, *Jordan's Principle*, online: <<http://www.fncaringsociety.com/jordans-principle>> [Jordan's Principle] (Jordan's Principle calls on the

provincial government as to who was responsible for his medically necessary home care. After two additional years of languishing in a Winnipeg hospital, 800 kilometers from his family home, Jordan died at five years old in hospital without ever having lived in a family home. The enormous strain and expense his family bore as a result of the funding dispute as well as the inhumane disregard of Jordan's best interests, is exactly the type of damaging real world scenario that arises from ambiguity as to who holds the authority to realize obligations to First Nations.⁵⁵⁶

While Jordan's principle was upheld in *Pictou Landing Band Council v Canada*⁵⁵⁷, emphasis was placed on the principle as 'child-centered', with little remonstrance of the Crown for the appalling abuse of an 'internal Crown division' for the express *purpose* of avoiding a financial obligation to a First Nation member.⁵⁵⁸ While the Canadian federal government recently dropped their appeal of the *Pictou Landing* decision (a decision favouring application of Jordan's Principle to another child with complex medical needs), the federal Crown continues to advance an interpretation of Jordan's Principle as children-oriented and medical-specific.⁵⁵⁹ The honour of the Crown does little to advance 'the special relationship of the Crown to First Nations' when an arm of government can (correctly at law) claim a particular duty is *ultra vires* given the limits of its particular scope of authority. Governments make these claims irrespective of the fact that the duty arises from a service or an institution enjoyed by other Canadians unfettered by the fiscal controversies inherent to financing First Nation services and institutions.

Land management, including emergency management in Aboriginal title territory (and now in treaty territory since Grassy Narrows) *off-reserve* is subject to similar jurisdictional funding concerns inherent to Jordan's Principle. INAC budgets are limited and often involve extremely onerous reporting requirements. As the Special Rapporteur on the rights of Indigenous peoples identifies: "...many of Canada's laws, in particular the Indian Act, still do not permit the

government of first contact to pay for the services and seek reimbursement later so the child does not get tragically caught in the middle of government red tape).

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342.

⁵⁵⁸ *Ibid.*; Jordan's Principle, *supra* note 555.

⁵⁵⁹ *Ibid.*

effective exercise of indigenous self-government.”⁵⁶⁰ “..As well, “[f]unding priorities and amounts are unilaterally, and some say arbitrarily, determined by the federal Government.”⁵⁶¹ The Special Rapporteur also explained that the federal government’s “funding mechanism also leads to reporting requirements that were repeatedly described to the Special Rapporteur as onerous”.⁵⁶² The Special Rapporteur related that “[t]here is clearly a perception among indigenous leaders that third-party management can be imposed for punitive or political reasons”.⁵⁶³ He further identified a new ‘own-source revenue’ policy, which he claims will likely be phased in to all funding agreements between the federal Government and First Nations. The Special Rapporteur explains: “[u]nder this policy, First Nations will be expected, as they are able and over time, to contribute to the costs of their government activities, with the expectation that indigenous reliance on federal funding will decline. Specifically aboriginal representatives have expressed the feeling that they are being “punished” when they demonstrate success, in the sense that their funding will be reduced”.⁵⁶⁴ The Rapporteur’s report echoes the view that First Nations are a *burden* on Crown sovereignty and that federal policy is obsessed with offloading the First Nation burden, another element of the widening ‘obligation gap’.

⁵⁶⁰ *Anaya, UNHRC Report, supra* note 38 at para 39 (“The Indian Act renders almost all decisions made by a First Nations government subject to the approval of the Minister of Aboriginal Affairs and Northern Development, including changes in band by-laws, funding for reserve programmes and infrastructure, and the leasing of land...”).

⁵⁶¹ *Ibid.* at para 42 (“Federal funding for First Nations governments under the Indian Act is structured through “contribution agreements” for which they must apply. Funding priorities and amounts are unilaterally, and some say arbitrarily, determined by the federal Government. Spending is monitored and reviewed to ensure that conditions the Government imposes are met, and funds are withheld if audits are not delivered on time—which forces indigenous governments to reallocate available funds to ensure programming continuity, making reporting even more difficult.”).

⁵⁶² *Ibid.* at para 43 (“This funding mechanism also leads to reporting requirements that were repeatedly described to the Special Rapporteur as onerous”. First Nation communities that receive federal funding under the Indian Act regime, 70 per cent of which have fewer than 500 residents, typically have to produce 100 or more reports a year for various federal agencies. The Government acknowledges that “reliance on annual funding agreements and multiple accountabilities...can impede the provision of timely services and can limit the ability of First Nations to implement longer-term development plans”).

⁵⁶³ *Ibid.* at para 44 (“Furthermore, if a First Nation government functioning under the Indian Act has financial difficulties as a result of funding delays, reporting delays or other situations, it faces the potential imposition of a co-manager or federally appointed third-party manager who takes over control of all the nation’s federally funded programmes and services. There do not appear to be significant financial management resources available from the federal Government for First Nations, at their own request, before they are in a default or deficit position. There is clearly a perception among indigenous leaders that third-party management can be imposed for punitive or political reasons.”).

⁵⁶⁴ *Ibid.* at para 45.

AANDC budgets, by statute, are limited specifically to on-reserve activities and are arguably (by the Department of Indian Affairs and the Crown in right of Canada's own rigorous policies superintending First Nation band budgets) too limited and too specific to be used for off reserve land and marine management. Yet, the Crown evades the golden key to effective consultation, which is a consistent and accessible fiscal regime to make consultation an affordable endeavor for First Nations whose band governments typically struggle in grossly under-resourced offices without the expertise and infrastructure to engage with material as the Crown presents it.

Just like the circumstances leading up to Jordan's Principle, both the federal and provincial governments can evoke credible arguments denying authority (or obligation) under the division of powers to finance off reserve land and marine management activities. This in turn leaves open the potential to accuse First Nations of a lack of good faith in frustrating consultation. That emboldens the respective governments to act unilaterally, to the detriment of First Nation interests, in the wake of failed consultation when the source of the problem may primarily lie with the absence of resourcing for First Nation off-reserve land and marine management activities.

It goes without saying that Crown servants do not work for free.⁵⁶⁵ Members of Canada's judiciary do not work for free.⁵⁶⁶ Legislators do not work for free.⁵⁶⁷ In fact, collectively, the workforce that constitutes the Crown is among the highest paid, and most secure, employment sectors in Canada. Why does the Crown appear to assume that the servants of Aboriginal

⁵⁶⁵ See Canada, Treasury Board, Rates of Pay for Public Service Employees, online: Treasury Board <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/coll_agre/rates-taux-eng.asp> ("The Government of Canada negotiates rates of pay for employees in the core public administration as part of the terms and conditions of employment. The Treasury Board, as the employer, negotiates 27 collective agreements with 15 different bargaining agents." The Treasury Board website comprehensively links to the rates of pay of the several sectors of public service employees).

⁵⁶⁶ See e.g. *Judicial Compensation Act*, SBC 2003 c 59; and see British Columbia, Report to the Attorney General of British Columbia and the Chief Judge of the Provincial Court of British Columbia Pursuant to Section 5(3) of the Judicial Compensation Act, *Final Report of the 2010 British Columbia Judges Compensation Commission* (20 September 2010) at 29 online: <<http://www.ag.gov.bc.ca/judicial-compensation/info/2010-JCC-FinalReport.pdf>> ('Comparison with Provincial Court Salaries' for a table comparing salary levels for Provincial and Territorial Court Judges across Canada from 2009-2011. The 2009 salary low was in Manitoba at \$197,736.00. The 2009 salary high was \$248,057.00 in Ontario); and see *Judges Act*, RSC 1985 c J-1 at s 9 ("The yearly salaries of the judges of the Supreme Court of Canada are as follows: (a) the Chief Justice of Canada, \$370,300; and (b) the eight puisne judges, \$342,800 each").

⁵⁶⁷ See *Salaries Act*, RSC 1985 c S-3; and see *Members' Remuneration and Pensions Act*, RSBC 1996 c 257 at s 2(1) ("...effective April 1, 2007, the basic compensation for each member is \$98000 per year." The section goes on to explain how the annual compensation is adjusted from year to year in accordance to increases in the consumer price index").

governments should work for free? While a plethora of policy objectives, regulatory regimes and even statutory guidance has imploded throughout Canada since the duty to consult was laid out in *Haida*, very little adjustment in terms of fiscal policy has evolved to *finance* aboriginal participation in consultation and accommodation activities. This aspect of the ‘obligation gap’ is particularly problematic given those Aboriginal servants are called upon to carry out the Crown’s own honour. Denying the resourcing to effectively engage in consultation denies First Nations any recognition of their self-determining interest in their territories.

As outlined above, the exclusion of First Nations in both the federal and provincial emergency management frameworks off reserve is linked inextricably to the fiscal apparatus that finances emergency management as between the federal and provincial governments generally. The First Nation role in emergency management is largely a vacuum. There are few to no requirements throughout even risk-specific legislation such as the *Transportation of Dangerous Goods Act*⁵⁶⁸ to engage with or to finance First Nations in emergency management within their traditional territories at any of the planning, mitigation, response or recovery phases.⁵⁶⁹

The fiscal obligation gap is due, in part, to the lack of concerted treatment of Aboriginal rights by the three arms of the Crown. Focusing for a moment on the Crown in right of Canada, for over 30 years now the federal government has avoided replacing the retracted s. 37 constitutional conferences on Aboriginal rights.⁵⁷⁰ It has ignored the recommendations of the Royal Commission on Aboriginal Peoples. It has antagonistically participated as an intervener in practically every Aboriginal rights case to move through the courts, thus persistently positioning itself as an adversary rather than a reconciling friend of First Nations. It has dodged developing a fiscal federalism framework that recognizes (with dollars and cents) First Nation governance off reserve and equalization on reserve, which is another constitutional standard the rest of Canada enjoys. Clearly, the Crown in Right of Canada is *not* prepared to realize either the negative liberties interpretation of First Nations Aboriginal rights upheld in the written constitution, let alone a ‘recognition rights’ reading of Aboriginal rights that reflects the United Nations

⁵⁶⁸ *TDG Act*, *supra* note 96.

⁵⁶⁹ Except where there is a modern treaty with specific emergency management provisions as outlined earlier in this thesis.

⁵⁷⁰ See Parlinfo, *supra* note 380.

Declaration on the Rights of Indigenous Peoples. At what point will the judiciary stop *anticipating* government-negotiated settlement of obligations to First Nations⁵⁷¹ and better moderate First Nation disputes with the Crown?

Remembering that from the Supreme Court of Canada's own rulings, Crown divisions are internal to itself insofar as its relationship to First Nations is concerned⁵⁷² and further, that sharp dealing will not be tolerated.⁵⁷³ As such, it would seem that the Court has an underdeveloped role in ensuring that the Crown in right of Canada and the Crown in right of a province does not use Canada's federalism to widen any further 'the obligation gap' to which this chapter is devoted (which the Jordan's principle demonstrates they have a propensity to do—even when the 'obligation-controversy' at hand involves the needs and care of a vulnerable child). The following sections will explore a potential avenue to broaden judicial oversight over the Crown's relations with First Nations.

3.4.2.2. ARE 'RECOGNITION RIGHTS' JUSTICIABLE RIGHTS?

If you don't have a self-start, sometimes you need a crank.

- Roy Edward Elander⁵⁷⁴

Arguably, the judiciary's role in advancing the Crown's constitutional relationship with First Nations has thus far proven a conservative exercise of the judiciary's powers, quite apart from the 'judicial activism' the Court is at times accused of. Returning for a moment to Berlin's thesis setting out negative liberties from positive liberties and a liberty like 'social freedom' ['recognition rights'], the judiciary has favoured a 'negative liberties' interpretation of s. 35 Aboriginal rights that does not satisfy the 'recognition rights' aspect that might more accurately inform First Nation appeals for rights recognition in relationships with the Crown. Furthermore,

⁵⁷¹ *Haida*, *supra* note 199 at para 14; and see *Tsilhqot'in*, *supra* note 208 (clarifying the purpose of s 35: "Section 35 of the Constitution Act, 1982 represents "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights" It protects Aboriginal rights *against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.*" [references omitted, emphasis mine]).

⁵⁷² *Grassy Narrows*, *supra* note 543 at para 35.

⁵⁷³ *Haida*, *supra* note 208 at para 42.

⁵⁷⁴ I credit my grandfather with this quote as I often heard it in defense of my grandmother's colourful insistence that the dishes get done. For those of this millennium, 'a crank' as used in this quote refers to the crank of an old fashioned automobile, usually located at the front of the car near the bumper, whose rotation was necessary to start the car engine.

the *United Nations Declaration on the Rights of Indigenous Peoples* could be judicially invoked as a useful interpretative tool informing the ‘recognition rights’ content of s. 35 Aboriginal rights. Widening judicial treatment of the theoretical development and implementation of s. 35 Aboriginal rights is necessary because of the Crown’s own antipathy toward implementing s. 35 cases, honouring (the now repealed) s. 37 commitments and reluctance to follow the Court’s admonitions to resolve outstanding issues and achieve reconciliation through negotiation.

The South African experience is perhaps a useful example of the areas in which judicial treatment of s. 35 Aboriginal rights could be enhanced to better meet the ‘recognition rights’ aspect of Aboriginal rights content. South Africa is currently recognized as a common-wealth country, coping with decolonization through (in part) constitutional reform that recognizes historical inequities between colonial (settler-state) governments and indigenous peoples.

Though a comprehensive analysis of the South African constitutional experience is well outside the scope of this thesis, the South African example demonstrates that a judiciary within the Commonwealth may depart from the adage that the only justiciable rights are negative rights. Of particular interest are the remedies under development for breaches of socioeconomic rights in South Africa, which in the particular context of South Africa and its histories might also be better understood as ‘recognition rights’ as opposed to stark ‘positive liberties’. For the purposes of this section, I am simply adopting (rather than making more than a superficial case for) the view that there are parallels between South Africa’s constitutional socioeconomic rights and Canada’s Aboriginal rights significant enough to likewise frame South African constitutional socioeconomic rights as ‘recognition rights’, irrespective that the subject is of course open to dispute. I also survey some South African remedies that might serve as inspiration for Canadian courts to explore an expanded role of judicial oversight in the (narrow area) area of Crown/First Nation relations.

Adopting a theoretical framework inspired by Berlin, where we understand South Africa’s positive socioeconomic rights’ as ‘recognition rights’, and recognition as inextricably linked to reconciliation, the idea of an expanded judicial role to ensure that Aboriginal rights (at least) serve to ameliorate inequities suffered by First Nations at the hands of the Crown may not seem so radical.

The South African constitutional experience is part of a dramatic transformation that took place in the later part of the last century. "In 1994, South Africa transitioned from apartheid into a constitutional democracy premised on the realization of human rights and transformation of the inequities of the apartheid years".⁵⁷⁵ Parallels might be drawn between the Canadian and South African colonial experience wherein an overt objective of the settler state was the subjugation of the indigenous population in order to further land acquisition and resource extraction benefiting the colonizers. Likewise, in the age of reconciliation (both South Africa and Canada now have government processes aimed at reconciliation with indigenous populations), parallels might be drawn in policy objectives between the South African constitutional right to health care (a recognition right) and the Canadian s. 35 constitutional right to accommodation (where Crown obligation is understood as the content of the right, accommodation is likewise a recognition right).

Arguably, both the South African health care system and the Canadian consultation and accommodation system might be described as chaotic, fraught with inequities in outcome and uncertainty, under-resourced, and mismanaged with poor and fragmented policy development.⁵⁷⁶ Also, both rights (recognition right to health care in South Africa and recognition right to accommodation in Canada) are part of a larger package of reforms aimed at meeting basic needs and furthering a departure from each Nations' history of apartheid (South Africa) and subjugation and assimilation (Canada). Another common objective in the larger packet of reforms is arguably efforts to redress poverty inequity within target populations to equalise access to financial health and security: "[t]he poorest 10 percent of South Africa's population receive approximately 0.1 percent of total income, while the top 10 percent receive approximately 51 percent".⁵⁷⁷ The Government of Canada reports that "Aboriginal people face significant earnings and income disparities compared to non-Aboriginal people in Canada".⁵⁷⁸

⁵⁷⁵ Lisa Forman & Jerome Amir Singh "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa" in *The Right to Health at the Public/Private Divide: A Global Comparative Study* eds Colleen M. Flood & Aeyal Gross (New York: Cambridge University Press, 2014) 288 at 289 [*Rights South Africa*].

⁵⁷⁶ *Ibid.* at 299.

⁵⁷⁷ *Ibid.* at 291, fn 19.

⁵⁷⁸ AANDC, *Aboriginal Income Disparity in Canada* by Dr. Ravi Pendakur & Dr. Krishna Pendakur (Ottawa: the Strategic Research Directorate of Aboriginal Affairs and Northern Development Canada, 2013) online: AANDC <<https://www.aadnc-aandc.gc.ca/eng/1378411773537/1378411859280>>.

Some argue that poverty and unemployment in South Africa have worsened since the development of a government mandate to reform inequities: “[m]any households experienced limited access to education, health care, electricity, and clean water [also all too common problems among Canadian First Nation reserves]. Levels of poverty and unemployment [in South Africa] have worsened since this time”.⁵⁷⁹ Income disparity appears to be a pressing issue in both Canada and South Africa, irrespective that there may well be differences in degree as to the income spread.

In each of South Africa and Canada, multiple barriers arising out of the colonial experience may frustrate narrow government policy objectives. For example, other social conditions outside the narrow concern of Medicare access problems affect overall health goals in South Africa,⁵⁸⁰ and in Canada other community problems may affect First Nation participation in consultation (i.e. lack of adequate resourcing⁵⁸¹ to effectively participate in meetings) can frustrate Crown accommodation obligations. It appears issues also arise as to differences in views on the ideal approaches to implement the health care right in South Africa and consultation and accommodation obligations in Canada. South Africa has a *White Paper for the Transformation of the Health System in South Africa* that advocates a decentralized and localized approach to reforming health care system,⁵⁸² while in Canada challenges arise in affecting implementation of Crown s. 35 obligations throughout federal, provincial and local governments.

While Canada’s constitutional (s. 35) Aboriginal rights, including the rights to consultation and accommodation, arise from the body of the Constitution itself (as opposed to being nestled in Canada’s *Charter of Rights and Freedoms*), South African socioeconomic rights are primarily

⁵⁷⁹ *Rights South Africa*, *supra* note 575 at 291.

⁵⁸⁰ *Ibid.* at 292.

⁵⁸¹ Understanding ‘resourcing’ as not only funding to cover travel and accommodation for possible regional or multiparty meetings, but also the financial costs of disseminating information throughout the community for consideration. Aboriginal rights are collective rights therefore, consultation requires the collective consideration of the right holders. In addition to fair compensation for time spent organizing, attending, recording and analyzing community response at community meetings, fiscal resourcing should also acknowledge any poverty burdens to community members contemplating meeting access, such as childcare and family food security needs for participants and also should consider the costs of any external professional support that might be required for the community to interpret complex data.

⁵⁸² *Rights South Africa*, *supra* note 575 at 290-91.

protected in the 1996 Constitution's Bill of Rights.⁵⁸³ "The universal health right is contained in section 27, which also entrenches rights to water, food, and social security".⁵⁸⁴ The section reads:

s. 27 (1)(a) Everyone has the right to have access to health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

s. 27(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

s. 27 (3) No one may be refused emergency medical treatment.⁵⁸⁵

Like Canada's s. 35 constitutional Aboriginal rights, the *content* of the health rights in the South African constitution is vague. Similar to the Canadian 'empty versus full box debate',⁵⁸⁶ in South Africa "the Constitution does not define the precise content of these duties, and the task of interpretation falls to the government as well as the judiciary".⁵⁸⁷

Unlike Canada, South Africa has a constitutional court whose purpose is basically to adjudicate constitutional matters. The South African constitution is quite specific regarding the constitutional courts mandate:

s. 167 (3) The Constitutional Court

(a) is the highest court in all constitutional matters;

(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and

(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

...

s. 167 (7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.⁵⁸⁸

As the Court itself describes, "[t]he Constitutional Court is South Africa's highest court on constitutional matters. So its jurisdiction - the scope of its authority to hear cases - is restricted to

⁵⁸³ *Ibid.* at 301-302.

⁵⁸⁴ *Ibid.* at 301-302.

⁵⁸⁵ *Constitution, South Africa, supra* note 20 at s 27.

⁵⁸⁶ See generally *supra*, note 381.

⁵⁸⁷ *Rights South Africa, supra* note 575 at 303.

⁵⁸⁸ *Constitution, South Africa, supra* note 20 at s 167.

constitutional matters and issues connected with decisions on constitutional matters”.⁵⁸⁹ Future work might beneficially explore the purposive approach within South Africa of clearly delineating a range of recognition rights within its new Constitution (health rights are but just one area of recognition rights within the South African Bill of Rights) and the decided oversight role ascribed to the judiciary.

Arguably, an important specific intention of empowering the South African judiciary with such a significant oversight role is to determine whether “...*Parliament ... has failed to fulfill a constitutional obligation*”.⁵⁹⁰ Contrary to subverting democracy (acknowledging that the driving purpose in the advent of democratic processes in Great Britain was to wrestle away powers from the Sovereign and his/her patrons, including the judiciary) South Africa perhaps sought to guarantee democracy by creating a ‘constitutional referee’ through the judiciary after the dramatic (global) *recognition* of the vast inequities between the colonizer and the colonized.

Certainly the idea of importing constitutional reforms that involve an expanded judicial oversight role over Parliament to assist Canada in better meeting its Constitutional obligations to First Nations is a controversial proposition. However, South Africa may well prove in the long run that such reforms are actually necessary to *safeguard* democracy where there is an enormous difference in social power arising from histories of subjugation and violence ultimately requiring recognition of the needs and interests of the oppressed group in order to move toward peaceable and equitable governance relations. As noted above, in over 30 years of Aboriginal rights constitutional disputes in Canada, arguably very few rights have been ubiquitously recognized and implemented, in spite of copious (and expensive) jurisprudence on the matter. Without some kind of enforcement mechanism binding Canadian governments to meet the obligations of the Crown, it is difficult to see where a ‘negotiated’ shift will bear effective change – change that serves to redress the enormous inequities that continue to exist between First Nation and non-First Nation populations in spite of 30 years of an Aboriginal rights framework.

⁵⁸⁹ South Africa, Constitutional Court of South Africa’s Website, About the Court, Role of the Constitutional Court, online: Constitutional Court of South Africa <<http://www.constitutionalcourt.org.za/site/thecourt/role.htm>>.

⁵⁹⁰ *Constitution, South Africa*, *supra* note 20 at s 167 (4)(e).

In Canadian *Charter* cases where a negative right has been infringed, the Courts might either strike down, or read in, legislation as the nature of the infringement requires for remedy.⁵⁹¹ These remedies however strictly arise from ‘negative’ rights disputes – as per Berlin, those disputes where ‘the state is stopping me from doing something that I am free to do’.⁵⁹² In the South African recognition rights example, the Court may adjudicate on the *reasonableness* of state action in compliance efforts to its socioeconomic rights obligations.⁵⁹³ In *Grootboom*, the Court laid out a standard of reasonableness, to be determined on a case-by-case, indicating that the state’s primary obligation was to act reasonably to provide the basic necessities of life to those who lack them.⁵⁹⁴

The Court indicated that reasonableness required comprehensive programs, and that excluding a significant segment of society would be unreasonable, as would excluding the needs of the poor, given their reliance on the state for the basic necessities of life. In seeking to ensure that the basic necessities of life were provided to all, the state had to focus, in particular, on the needs of the most vulnerable, especially the poor, and those experiencing urgent and desperate needs. The Court interpreted "progressive realization" in line with international law to require the state to take steps to realize the rights as expeditiously as and effectively as possible, and that any deliberately retrogressive measures would need full justification in light of all the rights in the Constitution and available resources...⁵⁹⁵

For the Court, reasonableness required the state to focus in particular on the needs of the most vulnerable in the course of administering comprehensive programs that should likewise strive to avoid excluding a significant segment of society. Later, the South African Constitutional Court declared a state policy unconstitutional for breach of the standard of reasonableness: “[t]he Court found that government policy failed to meet constitutional standards because it excluded those

⁵⁹¹ Matthew A Hennigar, “Players and the Process: Charter litigation and the Federal Government” (2002) 21 Windsor YB Access Just 91 at 109, fn 44 (“Specifically, the government’s greater dissatisfaction with judicial amendment than with invalidation is probably motivated by how much freedom the remedy gives the government to respond legislatively. Invalidation offers the most freedom in this respect, while either form of amendment (“reading down” or “reading in”) offers the least and, as such, appealing a judicial amendment may offer an easier way to “undo the damage” to government policies.” (109) “To clarify, ‘judicial activism’ occurs when courts exercise their power of judicial review so as to block (‘negative activism’) or require (‘positive activism’) the action of the legislative and executive branches.”).

⁵⁹² Berlin, *Liberty*, *supra* note 430 at 122 (“I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree...”).

⁵⁹³ *Rights South Africa*, *supra* note 575 at 307- 8; and see *Government of the Republic of South Africa and Others v Grootboom and Others*, [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) [*Grootboom*].

⁵⁹⁴ *Ibid.*

⁵⁹⁵ *Ibid.*

who could reasonably be included where such treatment was medically required”.⁵⁹⁶ As a remedy, the Court ordered the government “to remove, without delay, restrictions on the drug and make it available in the public sector, provide for training of counselors, and take reasonable measures to extend testing and counseling facilities throughout the public health sector”.⁵⁹⁷

In a show of support for government efforts at instituting South African health care rights, “the Court held unanimously that the *Medicines Act* permitted regulations to provide for price controls, including setting a single exit price for drugs into the health system...”⁵⁹⁸ The decision came after “several pharmacy chains challenged the government's legislative efforts to create a national pricing system for medicines, which included a pricing committee, a single exit price for all medicines, and a fixed dispensing fee for pharmacists and dispensers of medicines”.⁵⁹⁹ Through *obiter dicta*, the South African court offered further clarity on the reasonableness framework:

In particular, Justice Sachs held that “preventing excessive profit taking from the manufacturing, distribution and sale of medicines is more than an option for government. It is a constitutional obligation flowing from its duties under section 27(2). Justice Moseneke reiterated this sentiment saying that “[p]rohibitive pricing of medicine... would in effect equate to a denial of the right of access to health care”.⁶⁰⁰

The South African justices emphasise that the government had reasonably regulated pharmaceutical price controls in order to meet their constitutional obligations as prohibitive pricing would equate to a denial of the right of access to health care. As it stands, Canadian governments have not yet legislated or regulated industry to consult with or accommodate First Nations, nor have Canadian governments sought to implement Aboriginal rights generally in contest with interests of other Canadians. As a Commonwealth court has upheld a government’s industrial regulation for the purposes of meeting that government’s constitutional obligations, if (say) British Columbia were to statutorily require industry to consult and accommodate First Nations where there may be a potential aboriginal rights infringement, that decision might withstand an industrial appeal in spite of the fact that the Court decreed in *Haida* that obligation to consult vested with the Crown. Further, the Canadian judiciary might even consider reading in

⁵⁹⁶ *Rights South Africa*, *supra* note 575 at 310.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.* at 310-11; and see *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others*, 2005 (2) SA 311 para 661 (CC) (S.Afr.) [New Clicks].

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*

an industrial consultation obligation as a s. 35 infringement remedy on the basis of the South African finding that such prescriptive regulatory action furthers government held obligations to meet citizens' positive rights.⁶⁰¹ Likewise, the Canadian judiciary could 'read in' a statutory priority respecting Aboriginal (recognition) rights as a remedy for a given impugned piece of emergency management legislation, thus addressing systemic Aboriginal rights infringements (disrespecting First Nation agency) perpetuated by omission (or a failure by the Crown to reasonably act on Aboriginal rights).

As hinted by the Court's 'progressive realization' analysis in *Grootboom*,⁶⁰² like in Canadian Aboriginal rights cases, South Africa's Constitutional Court appears to have developed a 'justification' standard offering some protection to the autonomy of the executive and legislative arms of government. Earlier, the South African court stated in *Soobramoney* that "a court would be slow to interfere with rational decisions taken in good faith by the political organs ... whose responsibility it is to deal with such matters."⁶⁰³ In *Maibuko*, the Court clarified that while it "affirmed the democratic value of litigation on social and economic rights in achieving accountability, it concluded that it was inappropriate for it (and not the government) to quantify the content of ... [the] right. The Court therefore concluded that the policy was reasonable".⁶⁰⁴

Some commentators on the South African jurisprudence critique the Court's approach to the Constitution's socioeconomic rights as creating nothing more than an administrative entitlement to accountability, which, to the detractors, fails to guide state efforts to assure 'progressive realization' and does not serve the key populations intended to be the beneficiaries of such rights.⁶⁰⁵ Likewise, critics point out that the equality potential of South Africa's socioeconomic

⁶⁰¹ Contra *Haida*, *supra* note 208 at para 53 ("It is suggested... that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate... flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests.").

⁶⁰² *Rights South Africa*, *supra* note 575 at 307- 8; and see *Grootboom*, *supra* note 593.

⁶⁰³ *Thiagraj Soobramoney v Minister of Health (Kwa-Zulu Natal)*, 1998 (1) SA 765 (CC) (S. Afr.) [*Soobramoney*] at para 29; and see *Rights South Africa*, *supra* note 575 at 306.

⁶⁰⁴ *Rights South Africa*, *ibid.* at 315-16; and see *Mazibuko and Others v City of Johannesburg and Others*, 2009 (4) SAI (CC) (S.Afr.) [*Mazibuko*].

⁶⁰⁵ *Rights South Africa*, *ibid.* at 316 ("The contrast between the Mazibuko and TAC outcomes may suggest that the Constitution's socioeconomic rights may only yield equitable outcomes in cases of extreme legislative noncompliance").

rights is undercut by implementation problems, a familiar situation in Canada with respect to s. 35 Aboriginal rights.⁶⁰⁶ The South African socioeconomic ‘recognition’ rights jurisprudence may provide interesting precedent for remedies where a federal or provincial ministry does not *implement* a judicial decision.⁶⁰⁷

In the end however, it might be that even mere administrative accountability (a seeming compromise to proponents of South African socioeconomic rights) would go a long way toward Canadian Aboriginal rights implementation. Drawing upon the South African experience and case law dealing with their particular branch of ‘recognitions rights’ could serve as useful precedent toward developing creative remedies in Canada’s future. Obviously, the obligation gaps found in emergency management are but one area of Canada’s Aboriginal rights dialogue that could be improved with a shift and broadening of analysis.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ See discussion of the decision in *ibid.*; and see Christie, “Aboriginal Nationhood”, *supra* note 368 at 3 (“All too often while successful actions are restricted to the ‘victorious’ Aboriginal nation, all nations are exposed to the setbacks. Defeats become precedents, while victories are nearly always restricted to the particular situation.” [footnotes removed]); add see *Canada v Long Plain First Nation*, 2015 FCA 177 at paras 140-156 (For a brief overview of remedies available to First Nations in duty to consult cases. “I add that if Canada were to misconduct itself, many other remedies could be available. For example, . . . the respondents might be able to obtain remedies on short notice, where justified and appropriate, to prevent further disposition of the land or to require Canada to cause the land to be conveyed back to it. There may also be real estate remedies under existing Manitoba law, but I need to explore these here.” (para 155)).

SECTION 4 - CONCLUSION

Through the writing of this thesis, I have attempted to draw out some fundamental mechanics of current emergency management practices in Canada and particularly within British Columbia. I began with acknowledging the standing global wisdom that reducing vulnerability is a critical objective toward improving outcomes when communities encounter hazards. Hazards that intersect with unprepared and/or vulnerable communities can quickly manifest into disasters – the greater the vulnerability, and the less preparation, the greater the costs – including all of human collateral and wellbeing, social and economic security, and health and safety of environment and infrastructure. From this starting point, a patently obvious emergency mitigation priority presents itself – all governments operating in Canada should be working toward improving the standard of living to at least average Canadian levels in those communities whose infrastructure, service delivery and wellness indexes are already well below sub-par – on a priority basis. Such a priority would have particular application in many First Nation communities. As the Panel on Enhancing Aboriginal Planning and Preparedness at the recent Disaster Risk Reduction Roundtable signalled, many First Nations are already living in the equivalent of disaster zones⁶⁰⁸ which can only amount to further disproportionate costs in the event of a natural disaster.

The focus of this thesis has been the particular role First Nations currently play within the statutory and regulatory apparatus of natural disaster management in British Columbia. The current legislative and regulatory frameworks governing emergency management federally and in British Columbia are basically silent on the role of First Nations in managing emergencies within their tradition and Aboriginal title territories off reserve. The prevailing Crown assumption appears to be that First Nations will only play a passive role as ‘the consulted’ by others who are employed by British Columbia to manage emergencies, if they are consulted at all. As such, the British Columbia emergency management regime overwhelmingly positions non-First Nation organizations to manage emergencies on behalf of First Nations and further acts as a barrier to First Nations who seek to manage emergencies within their own territories and even at times on-reserve.

⁶⁰⁸ Canada RoundTable, *supra* note 12 at 15-16.

While there are some exceptions touched upon in this thesis, the overwhelming and glaring omission of any discernable protocols operating to protect and prioritize First Nations s. 35 constitutional Aboriginal rights in all phases of Canada's and British Columbia's emergency management framework raises extremely troubling ethical and legal issues.

If it is so that First Nations are constructively left out of emergency management, the question then becomes what is to be done about it. The answer is multifaceted, and priority themes of resolution are properly at the behest of impacted First Nations. To effectively contribute toward a dialogue on solutions, the second part of this thesis has been devoted to deconstructing why s. 35 Aboriginal rights litigation, as the jurisprudence currently stands, would likely produce unfavourable, or only moderately corrective, outcomes. I ask why there appears to be an overwhelming failure on the part of the Crown to implement Aboriginal rights in regular governance practices generally, with specific implications of a First Nations omission in British Columbia's emergency management regime specifically. To put the issue into pragmatic context I ultimately sought to unearth whether Crown servants across the board in British Columbia's emergency management framework are constructively aware of the existence of Aboriginal rights, particularly First Nations' constitutional standing and priority, and further what it is they think they should *do* with those rights as servants of the Crown. Given there is apparently no legislative or regulatory direction prioritising s. 35 Aboriginal rights within the existing framework, it is difficult to surmise how it is Crown servants go about respecting those rights. Rather, it appears there is a suspension of First Nation constitutional rights in all four phases of emergency management in British Columbia, and most glaringly during a declared state of emergency. This suspension of rights is most troubling at the planning, mitigation and recovery phases of emergency management which can take years and can involve expenditures in the hundreds of millions of dollars over which First Nations in effect have virtually no say and no audit capacity. Such a suspension of rights takes place irrespective of whether a given First Nation is disproportionately exposed to risk and consequentially most impacted by a given disaster.

Given that the 'obligation gaps' in emergency management appear to be part of a larger, and deeply problematic obligation gap respecting Crown implementation of s. 35 Aboriginal rights generally, I have in the course of this thesis given theoretical treatment to what I view as the

Crown's failure to act and act reasonably. I have attempted to demonstrate that a restrictive theoretical application of what Isaiah Berlin calls 'negative rights' as the philosophical underpinning of the content of s. 35 Aboriginal rights leads to projecting those rights as 'islands of non-interference', which ultimately views relationships as obstructions thwarting ideals of reconciliation and at a more insidious level, perpetuating the oppression and hierarchies of the settler state. With a restrictively negative rights approach to Aboriginal rights, what Isaiah Berlin identifies as the 'positive rights' of the dominant state are assured and furthered with tyrannical outcomes.

I argue that Isaiah Berlin's articulation of a third sort of right, which I called 'recognition rights', offers a far more helpful philosophical basis to interpret Aboriginal rights within the Canadian jurisprudential context – where the goals of safeguarding s. 35 Aboriginal rights include reconciliation and upholding the Crown's honour. I applied Isaiah Berlin's doctrine to the context of s. 35 Aboriginal rights in Canada framing the place in between a 'negative' and 'positive' rights interpretation of s. 35 as the area of 'recognition rights'. I suggest that s. 35 Aboriginal rights constructed as 'recognition rights' would logically and quite simply absorb the content of the *United Nations Declaration on the Rights of Indigenous Peoples*. I then went a step further and likened Canadian s. 35 Aboriginal 'recognition rights' to South Africa's socioeconomic rights. South Africa's socioeconomic rights are predominantly understood as 'positive rights', an anomalous occurrence in the commonwealth that in effect creates justiciable government obligations. Basically I suggest that South Africa's socioeconomic rights are not quite 'positive rights' and Canada's section 35 Aboriginal rights are not quite 'negative rights' and both, given the shared histories of colonialism and commonwealth legal traditions, are perhaps better framed as 'recognition rights'. Comparing the justiciable socioeconomic rights in South Africa's constitution and Canada's constitutional Aboriginal rights highlights the precedential value of the South African experience, thereby widening the judicial scope for oversight of reconciliation itself.

I raise concern about the courts' ongoing deference to governments that fail to effectively negotiate and in particular fail to implement outcomes and obligations, as opposed to condemning government inaction. I claimed that there is an avenue for the courts to play a more critical role in compelling government affirmative action without demolishing democratic

process (a common concern raised when debating the appropriate sphere of the judiciary). I further argued that where Aboriginal rights are understood as ‘recognition rights’, a failure to act by the government (or a failure to act reasonably) with respect to the implicit obligations s. 35 conveys would be justiciable. I concluded that even if the result is only to provide First Nations with some (albeit process ridden and expensive) mechanism toward Crown accountability in its obligations to First Nations there potentially could be a dramatic improvement with respect to the Crown’s implementation of s. 35 obligations generally. Crown suspension of s. 35 Aboriginal rights when exercising emergency management powers would likewise be justiciable where Aboriginal rights are understood as ‘recognition rights’, Particularly, a ‘recognition rights’ approach might provide First Nations leverage to further self-determination and self-governance objectives wherever the Crown fails to give First Nations due priority and agency in the design and execution of emergency management frameworks.

As I have identified in the body of this thesis, it is certainly not the case that there is never any First Nation involvement within the existing Canada and British Columbia emergency management framework. However it can be fairly stated that under the current shroud of silence as to statutory and regulatory *direction* on the constitutional implications of s. 35 Aboriginal rights within all four phases of emergency management, execution of the s. 35 consultation and accommodation obligations within emergency management – currently the most proactive form of Aboriginal rights Crown obligation – takes place in an unregulated ‘nebula’. There are no standards and so no audits; there are neither compliance checks, nor any measure of public scrutiny as to best practices or priority outcomes. This basically leaves First Nations at the mercy of the Crown’s own courts or forced into direct action in order to achieve any corrective outcomes.

I offer here a few additional thoughts around potential solutions, outside a litigation sphere, intended only to be of some use toward further critical analysis and commentary. Given the precedent of successive modern treaties in British Columbia, I suspect in the years to come we will see a growing impulse (particularly on the Crown’s part) to move emergency management powers from regional districts and instead divest emergency management powers directly to First Nations under British Columbia’s *Emergency Program Act*. In that way the resourcing (fiscal and capacity building) currently flowing to regional districts would instead flow to First Nation

governments who would then have the acknowledged authority to trigger and execute emergency response and management plans generally and would have the collaboration status that regional districts enjoy within the Provincial Emergency Program. This appears to have been the favoured approach to tackling First Nation emergency management within the sprinkling of modern treaties that have been concluded in British Columbia, even though the approach conceptually places First Nations on par with lesser local governments.⁶⁰⁹ This approach also seems to be reflected in the ‘mutual aid agreement’ approach between local authorities and on-reserve First Nation fire authorities for fire suppression activities where fires or threats of fires exceed the capacity of the given fire suppression authority. In a recent Emergency Management British Columbia reimbursement policy, First Nations again were likened to ‘local authorities’ for the purposes of executing the policy constructed to disperse resources.⁶¹⁰ It might be that First Nations and settler state governments will prefer to model emergency management for natural disasters generally in accordance to existing mutual-aid fire suppression models. More analysis should be done, with a particular focus on the current fire suppression emergency response framework specifically (which was outside the scope of this thesis) and how it might be broadened to improve First Nation / Crown emergency management frameworks generally.

Another corrective approach could involve realigning the emergency management framework beginning at the federal level. Rather than the federal government and provinces monopolizing the power to declare emergencies within their geographical boundaries as per the federal *Emergencies Act* outlined above (again, emergency management is not within the enumerated heads of power and so constructively falls within the federal POGG power),⁶¹¹ First Nations recognized as ‘governments’ as opposed to ‘stakeholders’ under such a framework could potentially then execute equivalent powers to declare and manage emergencies within their

⁶⁰⁹ *Maa-Nulth Final Agreement*, *supra* note 352 at ss 13.26.3, 13.26.4, 13.26.5 (“13.26.3 Federal Law or Provincial Law prevails to the extent of a Conflict with Maa-nulth First Nation Law under 13.26.1”; “13.26.4 ...each Maa-nulth First Nation Government may ... exercise the powers of a local authority in respect of local emergencies *in accordance with Federal Law and Provincial Law* ...but any declaration and any exercise of power is *subject to the authority of Canada and British Columbia under Federal Law and Provincial Law*” [emphasis added]; “13.26.5 Nothing in this Agreement affects the authority of: a. Canada to declare a national emergency; or b. British Columbia to declare a provincial emergency, in accordance with Federal Law or Provincial Law”).

⁶¹⁰ BC Fires Bulletin, *supra* note 22 (“Local governments, for the purposes of this bulletin, include local authorities as defined in the Emergency Program Act and First Nations band councils.”).

⁶¹¹ *Constitution Act, 1867*, *supra* note 20 at s 91 “It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada...”).

respective territories, without being constructively reduced to ‘local authorities’. Under such a model, the flow of resources currently expended on provincial emergency management strategies could then be redirected to build capacity within First Nation organizations to deliver the same scope and quality of disaster management services off reserve (in all four phases: planning, preparation, response and recovery) currently disproportionality monopolized and executed by provincial bodies and their contractors throughout a given First Nation’s traditional territories. Further analysis is required to determine whether this line of approach is in line with the guidance offered in the Royal Commission on Aboriginal Peoples Report.

I argued earlier in this thesis that because of First Nations’ particular constitutional status evoking necessary relationships with all manner of Crown administrative bodies, First Nations are perhaps the optimum governments for centralizing and streamlining emergency response within their traditional territories, protecting not only their own but settler populations inhabiting their traditional territories as well. Local authorities do not have nearly the administrative and fiscal management scope with commensurate inter-governance relations that most First Nations effect. It seems bizarre from a simply pragmatic viewpoint that regional districts, with their relatively more meagre budgets and reduced service delivery capacities, would be preferred over First Nations as the governing body executing emergency management delivery, particularly for emergencies of a scale that disaster response is required.

Irrespective of where the dialogue will next turn, of critical importance is that an effective dialogue take place – one that acknowledges the lack of constructive inclusion of First Nations in all phases of British Columbia natural disaster management, and that the lack of inclusion is deeply problematic in all of an ethical, legal, and pragmatic sense. Without statutory and regulatory protections in place, First Nations s. 35 Aboriginal rights can easily be suspended in the name of emergency management. Perhaps the same vigilance protecting other constitutional values during times where extraordinary measures are required needs to be directed toward protecting s. 35 Aboriginal rights. The unfortunate truism within Canada’s current socio-economic landscape is that First Nations generally constitute Canada’s most vulnerable communities, and therefore First Nations collectively are most at risk from hazards becoming disasters. On this point alone, there is not only a legal but also a moral imperative to reconsider First Nation roles in emergency management throughout their traditional territories.

A further reality that warrants careful attention are the facts of colonialism that led to Canada's current relationship with First Nations, with particular attention to the Truth and Reconciliation Commission's account of First Nation cultural genocide at the hands of the settler state.⁶¹² While a thoughtful and detailed exploration of cultural genocide was outside the scope of the thesis, my research and thinking upon this topic, particularly with respect to the broad implications of the constructive exclusion of First Nations from the disaster management framework, led me to a deeply disturbing question. Where a 'disaster risks assessment' of a proposed largescale industrial project demonstrates potential critical harm to all of a given First Nation's essential (and culturally specific) food sources, spiritual and ceremonial sites, health of environment, and stability of infrastructure – does the Crown commit *First Nation specific* genocide if the project is approved anyway and the worst case scenario takes place? The ethical and legal considerations in this question are of profound importance within the current political landscape of British Columbia and I hope the content of this thesis exploring disaster management has offered some contribution toward such a debate.

⁶¹² TRC Report Summary, *supra* note 457.

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