McGill Law Journal
Revue de droit de McGill

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Volume 65, Number 4, June 2020

URI: https://id.erudit.org/iderudit/1076908ar
DOI: https://doi.org/10.7202/1076908ar

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Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)
1920-6356 (digital)

Explore this journal

Cite this article

Hanna, A. (2020). Going Circular: Indigenous Legal Research Methodology as Legal Practice. *McGill Law Journal / Revue de droit de McGill*, *65*(4), 671–709. https://doi.org/10.7202/1076908ar

Article abstract

Working in Indigenous communities evokes thoughts about appropriate research methodologies. The default to academic methodologies raises questions about what Indigenous research methodologies might look like. Although there is growing discourse on this subject, I often wonder why Indigenous methodologies still tend to follow Western academic approaches. In this paper, I explore possibilities for alternative ways of understanding Indigenous research methodologies that are aligned with Indigenous practices. I argue that when research is conducted according to the ways and worldview of a particular Indigenous group, the researcher will find themselves practising the laws of that society, as many legal principles are exhibited through the manner in which a person walks in the world. Legal research specifically invites and encourages researchers to work in accordance with the very principles being learned. A methodology arising from a particular worldview and the legal order that it entails will promote practices long entrenched in its communities. Walking in such a manner allows a person to break free from traditional Western methodologies and begin to see the world through the cyclical movements of Indigenous knowledge and practice.

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GOING CIRCULAR: INDIGENOUS LEGAL RESEARCH METHODOLOGY AS LEGAL PRACTICE

*Alan Hanna**

Working in Indigenous communities evokes thoughts about appropriate research methodologies. The default to academic methodologies raises questions about what Indigenous research methodologies might look like. Although there is growing discourse on this subject, I often wonder why Indigenous methodologies still tend to follow Western academic approaches. In this paper, I explore possibilities for alternative ways of understanding Indigenous research methodologies that are aligned with Indigenous practices. I argue that when research is conducted according to the ways and worldview of a particular Indigenous group, the researcher will find themselves practising the laws of that society, as many legal principles are exhibited through the manner in which a person walks in the world. Legal research specifically invites and encourages researchers to work in accordance with the very principles being learned. A methodology arising from a particular worldview and the legal order that it entails will promote practices long entrenched in its communities. Walking in such a manner allows a person to break free from traditional Western methodologies and begin to see the world through the cyclical movements of Indigenous knowledge and practice.

Travailler au sein de communautés autochtones suscite des réflexions concernant les méthodes de recherche appropriées. Le recours par défaut aux méthodologies académiques suscite des questions à propos de ce à quoi les méthodologies de recherche autochtones peuvent ressembler. Bien qu'il y ait de plus en plus de discussions à ce sujet, nous nous demandons souvent pourquoi les méthodologies autochtones ont tendance à, encore, se fonder sur les méthodes académiques occidentales. Dans cet article, nous explorons des manières alternatives de comprendre les méthodologies de recherche autochtones afin qu'elles soient en phase avec les pratiques autochtones. Nous soutenons que lorsque la recherche est conduite en fonction du mode de vie et de la vision du monde (« worldview ») d'une communauté autochtone distincte, le chercheur se trouvera à pratiquer le droit de cette société, puisque plusieurs principes juridiques sont mis en lumière à travers la façon dont un individu avance et évolue dans le monde qui l'entoure. La recherche juridique invite et encourage spécifiquement les chercheurs à travailler selon les principes mêmes étant appris. Une méthodologie fondée sur une vision du monde particulière, ainsi que l'ordre juridique qu'elle implique, en viendra à faire la promotion de pratiques longtemps enracinées au sein des communautés dont elle est issue. Avancer d'une telle façon permet à un individu de se libérer des méthodologies occidentales traditionnelles et de voir le monde en fonction des mouvements cycliques du savoir et des pratiques autochtones.

* Assistant Professor, University of Victoria, Faculty of Law. The author thanks, with respect, the people of the Tsilhqot'in Nation; Val Napoleon, Michael Asch, and John Borrows for their insight and guidance; and the Social Sciences and Humanities Research Council of Canada for their generous support.

Citation: (2020) 65:4 McGill LJ 671 — Référence : (2020) 65:4 RD McGill 671

Introduction

In the expanding area of Indigenous research methodologies, the utility and shortcomings of various theories, methods, and practices are often assessed and debated as a means of improving research from Indigenous perspectives.[1] Research generally is rooted in Western philosophical thinking underpinned by the scientific method, making much of academic research foreign to Indigenous ways of knowing.[2] A solid foundation is being established for the expansion of Indigenous research methodologies that extensively investigate the many nuances of the subject area.[3] I can only hope to add to this growing area of knowledge by focusing on the methodological approach to Indigenous legal research applied in my own work into Indigenous laws.

Many questions arise and are debated when it comes to doing research within Indigenous legal orders: How do people do the work of learning, articulating, and implementing Indigenous laws? Who should do this work? What methodological approaches are available to inform the processes involved in answering these questions? I strive to broach some answers to these questions. More specifically, I will provide an analysis of what has become known in academic circles as the adapted case brief method applied to oral traditions for the purpose of identifying legal principles.

In the analysis, I consider the benefits and limitations of applying a common law legal method (the case brief), used in first-year law school training, to Indigenous oral stories. Ultimately, I argue that, although this method is important in facilitating an introductory common law legal education to Indigenous laws, on its own, the method is limited in its depth of analysis. When moving to advanced legal research into Indigenous legal orders, I propose that a nuanced, balanced, holistic methodological approach in research will assist in the development of this particular field of inquiry. Questions regarding the substantive laws are important for artic-

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1 By improving Indigenous research, I am referring to the changes that make research within Indigenous knowledge bases more inclusive and familiar to local communities.

2 See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London, UK: Zed Books, 1999) at 29. Smith argues: "Having been immersed in the Western academy which claims theory as thoroughly Western, which has constructed all the rules by which the indigenous world has been theorized, indigenous voices have been overwhelmingly silenced. The act, let alone the art and science, of theorizing our own existence and realities is not something which many indigenous people assume is possible" (*ibid*). I suggest this is because the "writing, history and theory" that Smith is discussing are foreign conceptual categories that are not easily mapped onto the lived experiential knowledges that Indigenous people hold.

3 See e.g. Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009); LT Smith, *supra* note 2; Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Winnipeg: Fernwood, 2008).

ulating a legal order; however, understanding how Indigenous laws are already functioning will illuminate how these laws may be applied to contemporary matters.[4] Additionally, transitioning from working with stories using a common law method such as the adapted case brief method to a dialogic analysis with multiple sources produces deeper engagement with the contextual social and legal milieu of a legal order. A move toward a holistic analytical approach should begin from within the lens of the particular legal order being studied. I ground this suggestion in a concept of cyclical patterns, or circularity.[5]

A colleague once said as he was heading into my class to give a presentation, "Let's get circular," suggesting it was time to leave the Western academic methods of teaching and learning behind in exchange for an Indigenous practice of learning grounded in creating relationships based on humility, respect, and reciprocity.[6] As relationships are governed by a group's legal order, when students and researchers practise Indigenous research methodologies according to the group with whom they are working, they inevitably engage in a legal practice.

In this paper, I argue that engaging in Indigenous research methodologies of the specific group within which a researcher works amounts to the practice of that society's legal order, as to move within the norms, rules, processes, and obligations of a particular society is a manner of practising Indigenous law. To prove this, I begin by discussing a concept of circularity, or cyclical patterns, as offering one point of entry into thinking about Indigenous ways of knowing. The discussion then turns to how Indigenous research methodologies have their own origins based in community and family teachings, which exist independently of research standards and categories set by Western academic institutions. I follow this discussion with a careful analysis of the application of Western research methods, particularly the common law case brief analysis, to Indigenous knowledges contained in oral traditions. This analysis also considers concerns about translating concepts across worldviews and languages, while arguing that despite the concerns, translation and interpretation are not only necessary, but often expected as part of the individual nature of learning from Indigenous teachings. Once fully articulated, the discussion turns to examples

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4 I refrain from using the word *tradition* in reference to a people's legal ordering of their society to reduce the potential for a reader to interpret this to denote a past legal system. As I argue in this paper, many aspects of a society's past, or historic, legal system continue into contemporary times, however varied their contemporary expressions may be.

5 The concept of circularity here is not intended to suggest that there is a pan-Indigenous concept based on life cycles. Although the concept of cycles exists in many Indigenous worldviews, the specific details of how conceptual patterns are understood vary across them.

6 Personal communication from Darcy Lindberg (15 May 2017).

of how conducting research in Indigenous legal orders according to the laws learned in the research constitutes legal practice.

The Concept of Circularity

The term *going circular* is about understanding differences between disparate worldviews, shifting from the Western logic of linearity to an Indigenous logic of cyclical patterns.[7] For example, Western civilization's concept of progress is based on the steady, linear trajectory from the undeveloped to the developed (e.g., resources, land, societies).[8] In contrast, many Indigenous understandings of being in and movement through the world consist of cyclical patterns (seasonal rounds, renewable harvests, reciprocal relationships). These differences in the two examples (progress vis-à-vis ways of being) underpin institutions developed in the different societies (Western vis-à-vis Indigenous). Capitalism and consumerism drive progress, which takes from the natural environment with a stunning efficiency that maximizes profits while belching out unwanted by-products onto the land and into the waters and skies. This process chews up trees, gulps up millions of tonnes of marine life, and tears minerals from massive holes in the earth producing toxic runoff, encouraging governments to sell the natural environment in a mad commodification of the land's natural inhabitants.[9] This is linear progress—linear, unsustainable development limited only by the demands of an ever-increasing global human population.

Indigenous ways of being also allow people to take from the land, but in a manner that follows cyclical patterns based on reciprocal relationships with non-human partners. The seasonal round allows for hunting certain species at different times of the annual cycle, when they provide the most

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7 As there is significant variation between Indigenous societies, so too is there variety between *Western* nations in their languages, beliefs, histories, and worldviews. I use the term *Western* generally to convey Enlightenment theories about the world, which depict life as flowing in a linear trajectory, to contrast the concept of Indigenous circularity. For more on the concept of Western linearity, see e.g. Immanuel Kant, *On History*, ed by Lewis White Beck, translated by Lewis White Beck, Robert E Anchor & Emil L Fackenheim (New York: Macmillan, 1963); Lewis H Morgan, *Ancient Society, or Researches in the Lines of Human Progress from Savagery Through Barbarism to Civilization* (New York: Henry Holt and Company, 1878); Thomas R Trautmann, "The Revolution in Ethnological Time" (1992) 27:2 Man 379. I acknowledge Michael Asch for his work and many presentations on this particular aspect of Western political theory and anthropological thought.

8 See e.g. Locke's labour theory of property in John Locke, *Two Treatises on Civil Government* (London, UK: George Routledge and Sons, 1884) vol 2, ch 5. See also Morgan, *supra* note 7.

9 Aside from being a generally accepted maxim, see e.g. Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada* (North York, ON: Captus University Publication, 1994) generally and at 1–2; Kenichi Matsui, *Native Peoples and Water Rights: Irrigation, Dams, and the Law in Western Canada* (Montreal & Kingston: McGill-Queen's University Press, 2009) at 9–10.

food and are least impacted by selective depletion of the population. Reciprocal relationality ensures that in exchange for animals giving themselves to people, people ensure the animals' continued viability.[10] Animals are our relations—natural relations as opposed to natural resources. Healthy environments ensure the best likelihood for healthy, viable animal populations, be they terrestrial or marine. Attention to the circular life-patterns produces a different logic for living on the land from a linear pattern of progress. With capitalist progress, people profit on the brink of species loss—managed extinction—where abundance above a scientifically calculated minimum viable population is harvested (e.g., the herring and salmon fisheries on the west coast of Canada).[11] With Indigenous ways of being, people live on the abundance of healthy populations. In other words, a person can either live off the capital itself (by gambling on questionable counting and estimating practices) until it is gone, or a person can live off the interest of the capital (i.e., healthy, sustainable populations) continually. The distinction between linearity and circularity has also informed the relationship between Indigenous and non-Indigenous populations in Canada. This distinction is made clear in Canadian courts.

European concepts of linearity of human societies shaped the legal relations between the Canadian state and Indigenous societies by serving as a justification for the legitimacy of the Crown's assertion of sovereignty. This is apparent in two cases in particular: *Van der Peet* and *Sparrow*. In *Van der Peet*, the Supreme Court of Canada considered an old, rejected theory from anthropology known as social evolution.[12] Chief Justice Lamer, writing for the majority, held that Sto:lo were too low on the scale of social development to have acquired what could be recognized in Canadian law as a right to sell fish commercially, as they were only at a "band level of social organization rather than at a tribal level."[13] This finding was based on the concept that people begin at a state of nature without complex societies (savagery) and evolve socially and linearly through stages of social development until they reach the ultimate social organization (civilization)

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10 See e.g. my discussion in Alan Hanna, "Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective" (2013–2014) 45:3 Ottawa L Rev 365 at 378–79 [Hanna, "Making the Round"].

11 For example, data may be manipulated to permit the federal government's opening of a fishery, when taken in context with all of the data, there is little support for an ongoing fishery. See MHH Price, CT Darimont, NF Temple & SM MacDuffee, "Ghost Runs: Management and Status Assessment of Pacific Salmon (*Oncorhynchus* spp.) Returning to British Columbia's Central and North Coasts" (2008) 65 Can J Fisheries & Aquatic Sciences 2712.

12 See *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet* cited to SCR].

13 *Ibid* at paras 90–91.

with all its accoutrements.[14] Holding that Sto:lo were only at a band level of social organization, Lamer was saying that Sto:lo were, at the time of contact with Europeans, only so far along the linear trajectory that leads to civilization, which was not far enough to prove that selling fish could have been "central to the Sto:lo way of life."[15]

Therefore, Sto:lo failed to meet Lamer's Aboriginal rights test requiring that a practice be integral to their distinctive culture for it to be legally recognized as an Aboriginal right at Canadian law. This narrow view of Indigenous society misses alternate explanations, such as that Sto:lo were at the apogee of a sustainable system that relied upon their active participation in maintaining ecological balance. This alternate view suggests that Sto:lo people managed their fishery and only sold or traded surplus salmon, allowing the maintenance of a healthy population for them and the other many peoples along the river who relied on the same resource.

The *Sparrow* case similarly emphasized the supremacy of linear development against alternate social ordering by holding that European supremacy is acknowledged de facto upon arrival. In *Sparrow*, Chief Justice Dickson's ruling is not as explicit as Lamer's about higher and lower scales of social evolution, but it carries the same value-laden judgment about Indigenous societies' (in this case Musqueam's) social development vis-à-vis the Crown:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.[16]

This assertion can be made when one society understands itself as more advanced (superior) to another (socially, politically, legally) such that there was "never any doubt" that the local Indigenous population lost their legal interest in their lands the moment Europeans arrived.[17] The distinction

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14 Also known as the *stadial theory* or four stages theory. See e.g. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London, UK: George Bell and Sons, 1887); Morgan, *supra* note 7. Although the discipline of anthropology refuted this theory in the early twentieth century, Canadian courts have continued to base decisions on its concepts.

15 *Van der Peet*, *supra* note 12 at para 90.

16 *R v Sparrow*, [1990] 1 SCR 1075 at 1103, 70 DLR (4th) 385.

17 Aaron Mills presents a compelling and decisive argument on the relationship the Crown established with First Nations based on settler superiority: "Colonialism is a relationship defined by the principle of settler supremacy, which mandates that the interests of settler persons and peoples are to be given priority over the interests of indigenous persons and peoples, insofar as those interests derive from their indigeneity. It presumes that

between the differing worldviews that run through these two cases offers insight into the disconnect in understanding one society from the perspective of another.[18] *Van der Peet* and *Sparrow* do not reflect an understanding that a different way of being in the world is not only possible, but may prove to be more interconnected to the environment by interacting in its cycles rather than seeking linear progress through its conquest. Instead, these cases assume the inferiority of Indigenous societies to European societies, making it easy for people to dismiss the need to accept as valid other ways people know their world, and the potential authority that would accompany such an acknowledgement.

The distinction between linearity and circularity forms the backdrop for this discussion on Indigenous legal research methodologies, as to understand the differences allows researchers to find a different location as a base to begin grappling with legal concepts governing Indigenous societies. The focus on the circular provides a framework for this work, which begins with the simple notion of resisting taking the current status of Indigenous legal research as a starting point and moving forward toward some undefined end. Grounding this paper in the work I do researching Indigenous legal orders, I will circle around to consider what our research predecessors have said about studying Indigenous systems of law. I will also circle around to consider modes of Indigenous research carried out in a pre-colonial past to provide information that should help inform decisions about what may constitute Indigenous research methodology in the present.

Indigenous Research Methodologies

I am interested in the origins of the idea of Indigenous research methodologies.[19] The carving out of a space for Indigenous perspectives in research is undoubtedly a response to a historically European and Euro-settler entrenched field of academic study in the nineteenth and twentieth

settler and indigenous interests are necessarily in conflict and thus that the one must be pursued as against the other" (Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished] at 3).

18 Discussed in more detail subsequently in this paper. See also *ibid* at 28.

19 Arguably, LT Smith's work (*supra* note 2) is one source of its origins academically, but there may be earlier accounts.

centuries. During this period of Indigenous research, researchers were predominantly white men,[20] with Indigenous people as their research subjects.[21] This acknowledgement of the history of anthropological research emphasizes the connection between research and Western scholarly institutions, which would also suggest that before the arrival of Europeans, Indigenous people simply did not do research. Yet, we know this to be false, as historical Indigenous knowledges exist (often referred to as traditional knowledge or traditional ecological knowledge), amounting to a *longue durée* of accumulated knowledge through experiential existence in the world.[22] Questions arising at the intersection of Indigenous knowledge processes and Western research methods, such as Shawn Wilson's hypothetical question "Can a ceremony include a literature review?," create space to consider the relationship between Indigenous and Western systems of knowledge production.[23] Pre-colonial era Indigenous knowledge, therefore, arose independently of Western scientific research methodological frameworks.

At a fundamental level, Indigenous people studied their surroundings to learn how to live successfully within the limits of the environment for the benefit of their group's generational longevity. In other words, Indigenous people were not passive subjects in their environment. Rather, they actively engaged in acquiring and constructing knowledges to help people exist in a meaningful way in their world. Studying the environment, and a people's place in it, produces ontological and epistemological knowledges underpinning the particular worldview of a people.[24] Therefore, Indigenous research in pre-colonial times was as much a necessity as was having laws that govern behaviour in human societies. Considering that living life

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20 For a feminist perspective on gendered anthropology of the nineteenth and twentieth centuries, see generally Trinh T Minh-ha, *Woman, Native, Other: Writing Postcoloniality and Feminism* (Bloomington: Indiana University Press, 1989).

21 See the litany of anthropological studies that clog libraries with research on Indigenous subjects. See e.g. the works of Herbert Spencer, Lewis Henry Morgan, and Bronislaw Malinowski. Certainly, women were also emerging in this notably male field with anthropological pioneers such as Margaret Mead and Ruth Benedict.

22 For a general introduction to Mi'kmaq knowledge as an example, see Marie Battiste, *Decolonizing Education: Nourishing the Learning Spirit* (Vancouver: Purich, 2013) at 38. See generally Marie Battiste & James [Sa'ke'j] Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Vancouver: Purich, 2000). For an Anishinaabe perspective, see Leanne Betasamosake Simpson, "Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation" (2014) 3:3 Decolonization: Indigeneity, Education & Society 1.

23 Wilson, *supra* note 3 at 43ff.

24 Robert YELḰÁTTE Clifford explains the relationship between law and culture as being one that "shapes and frames our thinking within a legal tradition." This process of shaping thought began with the origins of the people contained in their sacred teachings. See Robert YELḰÁTTE Clifford, "WSÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River)" (2016) 61:4 McGill LJ 755 at 761, 771–72.

means living according to a group's social interactions and the laws it produces, doing research means that the manner in which research is conducted is necessarily carried out in accordance with the group's laws as a particular iteration of an Indigenous methodology (i.e., the legal order produces a methodological framework that shapes how research is conducted). Logically then, when Indigenous research methodologies are applied, a researcher is effectively practising the tenets of the particular society's legal system.

The notion of Indigenous research methodologies as legal practice is rooted in the axiom that research is relational.[25] The research itself is relational, as relationships are formed between the researcher and their research partners. Our subject matter also inevitably involves relationships, as the world is inherently interconnected.[26] When a researcher invites, accepts, and otherwise develops a relationship with Elders and other knowledge holders (which may include the land, animals, birds, plants, sky) to learn, we are inevitably entering an Indigenous legal order. We are automatically drawn into obligations that govern these relationships according to the specific laws within which the work is being conducted, and we commit to fulfil these obligations as part of our acceptance of the research relationship.

Take, for example, my work with Tsilhqot'in people in their territory. I have learned through my family (Secwepemc, with close Tsilhqot'in relations) that we provide food to our Elders, regardless of our purpose for visiting. As such, I always prepare lunches with fruits and other healthy snacks whenever visiting to learn. I could not imagine showing up at an Elder's house, or to a meeting with a group of Elders, empty-handed. Providing food is rooted in at least two key Tsilhqot'in legal principles deep within Tsilhqot'in law: sharing and reciprocity.[27] Sharing is prevalent, as it helps foster good relationships and ensures a balanced distribution of nourishment to others. Reciprocity facilitates sharing and establishes enduring relationships that require regular maintenance for continued health and balance. To get a glimpse of Tsilhqot'in legal reasoning as a starting point for understanding the research relationship, I look to their oral tradition.

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25 See Wilson, *supra* note 3 at 43, 77; Kovach, *supra* note 3 at 137.

26 Kovach states that "Indigenous research is bound in ceremony, spirit, land, place, nature, relationships, language, dreams, humour, purpose, and stories in an inexplicable, holistic, non-fragmented way" (*supra* note 3 at 140).

27 There are additional principles that are involved here, such as protecting the community, protecting the vulnerable, and respect for others, to name a few. For the purposes of this paper, I choose sharing and reciprocity to give an example of how engaging in a relationship compels acting in accordance with legal principles.

Oral Tradition: A Source of Knowledge

The law-ways and other deep cultural knowledge of a people are embedded in their oral tradition.[28] This statement is true for Tsilhqot'in people.[29] Within the oral tradition exist the nuances of acceptable behaviour and conduct covering a range of legal topics, from harms and conflicts to family law and jurisdiction, to name a few.[30] Analyses of oral stories as a source of Indigenous knowledge, particularly legal knowledge, go back to the first half of the twentieth century, when jurist Karl Llewellyn and anthropologist E. Adamson Hoebel applied the "modern treatment of cases at law" to Cheyenne stories about conflict to unpack what they could identify as law or the "law-ways" of Cheyenne society.[31] Although there was controversy over the utility of this method of research, Llewellyn and Hoebel had set the groundwork for studying Cheyenne law-ways by looking into "trouble cases" (i.e., stories about conflict between people).[32] The work of case-briefing oral stories to identify laws has been resurrected in more recent scholarship.[33] Although research using oral stories is a logical source of knowledge, the application of a Western case law or case brief method to

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28 See James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 157–58.

29 I can attest to the veracity of this statement through my own ten years of research with the Tsilhqot'in Nation. Justice David Vickers also accepted as fact the reality of stories containing "the rules of conduct [and] a value system passed down from generation to generation" in *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 434 [*Tsilhqot'in*].

30 For more on this, see generally Hanna, "Making the Round," *supra* note 10. Addressing these areas of law as separate, distinguishable categories is erroneous, as law applies to life holistically, overlapping and flowing together, making the identification of clear categories sought by Western legal practitioners difficult and potentially misleading.

31 KN Llewellyn & E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941) at ix, 15.

32 For one critique, see John M Conley & William M O'Barr, "A Classic in Spite of Itself: *The Cheyenne Way* and the Case Method in Legal Anthropology" (2004) 29:1 Law & Soc Inquiry 179 at 189, cited in Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, 2009) [unpublished] at 26 [Napoleon, *Ayook*]. Conley and O'Barr argued that the veracity of the stories was unreliable as they were from a much earlier time than when they were being shared with Llewellyn and Hoebel. Additionally, Christine Zuni Cruz properly credits Llewellyn and Hoebel for providing a "clear and reliable picture of law ways emerg[ing] from the cases of trouble," while acknowledging the problematic nature of approaching Cheyenne law "from an 'objective', categorical Eurocentric manner premised on 'law' or 'case law' as it exists in Western culture": see Christine Zuni Cruz, "Law of the Land—Recognition and Resurgence in Indigenous Law and Justice Systems" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 315 at 317.

33 See Napoleon, *Ayook*, *supra* note 32; Hadley Louise Friedland, *Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada* (PhD Dissertation, University of Alberta, 2016) [unpublished].

draw out law is contentious, albeit conceptually helpful, as I will explain after providing a brief introduction to the case brief method of analysis.

The Adapted Case Brief Method

The current adapted case brief method was developed by legal scholars Hadley Friedland and Val Napoleon.[34] Roughly stated, the adapted case brief method involves applying a first-year law template for analyzing court decisions to Indigenous oral stories in order to "identify a problem and a decision or resolution to that problem."[35] The template sets out steps to identify the resolution of some problem, consisting of the following:

- Identify an issue (human problem) that the analysis will serve to resolve;
- Determine the facts from the story relevant to the stated issue;
- Identify the decision made in the story that resolves the issue; and
- Identify the reasons (given and implied) behind the decision.[36]

Ideas, statements, actions, or concepts that are beyond the researcher's epistemological grasp are "bracketed" and set aside from the analysis.[37] The results of several of these case brief analyses of stories are then gathered into categories under a framework, which may include "legal processes," "legal responses and resolutions," "legal obligations," and "legal rights."[38] This analysis is then brought into conversation with participants through a carefully planned out community engagement process to help clarify concepts and reduce the potential for misinterpretation.[39] My research method stems from this preliminary technique, although I approach stories holistically, offering a range of possible responses without applying the adapted

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34 See Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015–2016) 1:1 Lakehead LJ 16 at 23. See also Friedland, *supra* note 33 at 62, 75.

35 See Friedland, *supra* note 33 at 62, 75.

36 See Friedland & Napoleon, *supra* note 34 at 23.

37 See *ibid*.

38 See Friedland, *supra* note 33 at 76.

39 Legitimacy and accuracy of analysis are gained through a synthesis of multiple sources of information, as Friedland explains: "[T]he legitimacy of my research results is rooted in the *process of reasoning through* both community interviews and non-ideal resources using the adapted method of legal analysis and synthesis" (*ibid* at 66).

case brief template.[40] My concern with this method is that applying the template potentially filters out Indigenous knowledge and shapes the contours of responses into forms that resemble state common law categories.[41] In response to this concern, I articulate the most common critiques of this method and offer an alternate path for considering law in stories.

Common Law Methodology for Identifying Indigenous Laws

A key criticism of the use of a case law method is that it is a technique of the common law applied to Indigenous knowledges. Circling back, Llewellyn and Hoebel were not blind to the potential for Euro-American law to influence outcomes. For instance, they identified the possibility that a framework for investigation "may dictate what one sees and makes use of, and may dictate also a general frame into which the data may be squeezed," to make it fit into recognizable categories.[42] Their insightful response acknowledges that common law legal tools are designed to address legal problems "*given to* it [the legal system] for solution" rather than posing or framing problems according to their own institutional design.[43] Yet, this response does not address how to avoid shaping results. Llewellyn and Hoebel did not let their concern impede their work, likely because they could not see another way through the daunting problem of understanding entirely different epistemological perspectives about the world. They relied on the universality of the technical operation of law, such as correctness and incorrectness, as a means of peeking into Cheyenne legal consciousness:

> The obstacle [in the study of Indigenous law] is the acceptance of the realm of Law as being of a different order; for if of a different order, then it sets its own premises and becomes impenetrable on any premises except its own. But the only thing about technical Law which is

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40 My introduction to Indigenous laws research was through the adapted case brief analysis, without which I may still have difficulty contemplating legal concepts across Indigenous and common law orders. I support and teach this method to incoming law students at the University of Victoria. Great as a method for teaching new law students to recognize and identify legal concepts, I find it does not go far enough in providing nuance reflecting the fluidity of legal concepts rooted in Indigenous worldviews. As a scholar, my goal is to begin with the tools I learned, and move the methodology in a direction that makes sense to me with the hopes that I contribute in some helpful manner to a dynamic ongoing conversation.

41 Recent scholarship has taken two diverging paths on this. Some scholars use common law categories to frame Indigenous legal principles, whereas others strive to avoid that practice. See e.g. Friedland & Napoleon, *supra* note 34, in contrast with Mills, *supra* note 17 at 33.

42 See Llewellyn & Hoebel, *supra* note 31 at 39. McLachlin CJ cautioned the court on the same concern when considering concepts from Indigenous knowledges: "[T]he court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts" (*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 32).

43 See Llewellyn & Hoebel, *supra* note 31 at 42.

> different in the sense of incomparable is that it has a technical field of discourse, one of legal correctness and incorrectness—discussion of which can of course be based only on premises of doctrinal Law itself.[44]

Llewellyn and Hoebel go on to say that law's technical elements can be accepted as a "batch of tools to get jobs done in a culture," which forms part of a theory that serves to validate the method from one legal order being applied across disparate legal systems.[45] This argument suggests that different legal orders will have, at the core, mechanisms that, although different in appearance or conceptuality, can function to serve the same ends.[46] Some current scholarship raises this point as being the central problem with conducting common law legal analyses on Indigenous legal orders.

Anishinaabe legal scholar Aaron Mills argues that different worldviews with unrelated historical, ontological, and epistemological origins create entirely different concepts of legality. The logic systems underpinning these differences ostensibly determine whether rational coherence across legal orders is possible, making the translation of legal concepts across them problematic, particularly when English is the only translational link. As Mills explains,

> if constitutionalism is the logic and structure of how members of a people belong to one another, then translation is a coherent expectation if and only if legality pluralism obtains between the distinct constitutional orders. If, rather, the circumstance is one of legality difference, than the respective constitutional orders are not only different, but are different in kind and the prospect of constitutional translation is incoherent. One may be able to translate distinct content across common logics, but translating across distinct logics just makes no sense: a logic is by definition the thing through which sense is made.[47]

The distinction Mills identifies is between Western neo-liberal legality, with liberalism as its defining structure, and Indigenous rooted legality arising from the roots of a people's origins through creation stories to anchor their legal order.[48] These distinctions, according to Mills, are so great that reasoning across them becomes a futile exercise, as the differing logic systems that inhere in each one prevent comprehension across them. This aligns with Llewellyn and Hoebel, specifically their view of "the realm of Law as being of a different order; for if of a different order, then it sets its

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44 *Ibid* at 41–42.

45 *Ibid* at 42.

46 See Jeremy Webber's argument for a parallel justice system, along which this line of reasoning follows, in "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in Canada, Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report on the National Round Table on Aboriginal Issues* (Ottawa: Communication Group, 1993) 133.

47 Mills, *supra* note 17 at 28.

48 See *ibid* at 41.

own premises and becomes impenetrable on any premises except its own." Mills insists that to understand Indigenous legal orders, people from liberal consciousness will need to learn Indigenous worldviews; otherwise, assimilation and continued colonial violence remain inevitable. Although I do agree with Mills's reasoning, I am more inclined to believe there is room for comprehension across disparate logic analytics and the worldviews from which they abound. Anthropology has made this claim for some time.

I point to Claude Lévi-Strauss's seminal work on kinship to support this claim. Kinship is the institution through which people create rules about marriage across humanity's disparate societies to avoid incest, a universal social taboo.[49] Lévi-Strauss's work on kinship structures directly relates to legal orders, as kinship is a legal institution. His work shows that although the systems will differ (some being extensively elaborate), as the social organizations and normative orders certainly differ, human beings share common concepts despite those differences.[50] If we cannot find frames of common reference to identify across different worldviews, then there can be no hope of commensurability or even conversation. This is precisely Mills's point, arguing that finding frames of reference requires learning other worldviews. My point is that Mills's argument is not, or, at least, does not have to be, determinative.

I suggest that until such a time as Canadians entrenched in neo-liberal ideology can begin to understand Indigenous rooted legalities, we can and should look to common understandings about ourselves and the world around us to recognize consistencies across human societies. Finding consistencies offers space to have discussions about mutual commensurability, which in turn may open avenues for learning about Indigenous legalities

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[49] See Claude Lévi-Strauss, *The Elementary Structures of Kinship*, revised ed by Rodney Needham, translated by James Harle Bell & John Richard von Sturmer (Boston: Beacon Press, 1969).

[50] Lévi-Strauss is engaging in a theoretical discussion between nature and culture as being determinative of responses to a universal taboo:

> The *fact of being a rule*, completely independent of its modalities, is indeed the very essence of the incest prohibition. If nature leaves marriage to chance and the arbitrary, it is impossible for culture not to introduce some sort of order where there is none. The prime rôle of culture is to ensure the group's existence as a group, and consequently, in this domain as in all others, to replace chance by organization. The prohibition of incest is a certain form, and even highly varied forms, of intervention. But it is intervention over and above anything else; even more exactly, it is *the* intervention (*ibid* at 32 [emphasis in original]).

Culture, a social feature of all human societies, takes the arbitrary out of leaving matters to nature, and provides an intervention that may take many shapes and forms throughout different groups, which is shown in the balance of his book.

while resisting anti-Indigenous sentiment.[51] Alternatively, W̱SÁNEĆ legal scholar Robert YELḴÁTTE Clifford suggests a preliminary approach to thinking about Indigenous laws that does not require comprehensive knowledge of Indigenous worldviews.[52] Clifford's approach invites engagement on the basis of relationship, which implies that comprehension of the legal order will be relative to developing an understanding of the worldview, as the relationship will require.[53] In short, multiple points of entry into Indigenous legal orders invite the engagement that Mills identifies as relevant for avoiding a dead end for Indigenous peoples by enlightening liberal Canadians on Indigenous legalities. Differences are important, and one legality is not to be assimilated into another without continuing the violence inflicted on Indigenous peoples. Respecting differences while recognizing humanity's commonalities will be key to teaching and learning another's worldview, which as Clifford wisely instructs, will be through relationships.

The problem with recognizing that differing systems of law are not necessarily inconsistent in their overall function of managing peoples' behaviour and creating rules for acceptable conduct is the risk of universalizing knowledges about distinct groups of people. An example of a universal statement generalizing law would be that most people will want to punish someone who harms another within their group. It may be true, or not. What we cannot know is what defines harm, how harmful conduct is perceived, what defines punishment or consequence, and what possibilities exist for providing a resolution. Analysis by a person trained in Canadian criminal law is shaped by that person's knowledge and understanding of those categories and the labels created within that area of law. Yet, the

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51 One need only turn to comments on current affairs involving Indigenous nations and the struggle to assert decision-making authority over land. Anti-Indigenous sentiments have come up time and again, for example, against Secwepemc in their resistance to the Ajax Mine, Tsilhqot'in resistance to Taseko's Prosperity Mine, and most recently with Wet'suwet'en hereditary chiefs standing against the Coastal GasLink pipeline, where one commenter likened the tension between the elected Chief and Council system and the Hereditary system to "watching a couple of hyenas fighting over a carcass" (Ray Klymchuk (31 January 2020), comment on John Ivison, "Pipeline Dispute Raises Important Question—Who Speaks for First Nations?" *National Post* (30 January 2020), online: <nationalpost.com> [perma.cc/LD72-9D7W]).

52 See *supra* note 24 at 768:

> A comprehensive knowledge of W̱SÁNEĆ cosmology is not necessary in order to begin constructing an understanding of the legal tradition, but we need an open mind to the effect cosmology may have on conceptions of proper relationships—whether it is with each other, the Earth, ancestors, or otherwise. This understanding is integral because law is, fundamentally, about relationships.

53 For another discussion on relationships between political groups as providing an invitation to learn, see Alan Hanna, "Reconciliation Through Relationality in Indigenous Legal Orders" (2019) 56:3 Alta L Rev 817 at 828–31 [Hanna, "Reconciliation Through Relationality"].

analysis will likely be highly skewed if the person does not have some grounding in the tradition of analysis; as Llewellyn and Hoebel identified, a legal order "sets its own premises and becomes impenetrable on any premises except its own."[54] Therefore, a departure point into a legal order may be to recognize that there may be concepts with analogies in other legal orders, with the caveat that some things that may seem alike are often anything but alike. The following example about interpreting Tsilhqot'in law should provide some context for interpretation from within one's own legal consciousness.

Legal historian Hamar Foster's expert report to Tsilhqot'in legal counsel in the Tsilhqot'in title trial provided evidence of how people who passed into Tsilhqot'in territory "had to obtain guides and give presents" to secure "safe passage."[55] Foster asserts that these payments were a toll or rent: "Tsilhqot'in obviously knew their territory, and others appear to have known at least one of its boundaries. To be safe, one had to be accompanied by Tsilhqot'in, paying what in effect was a 'toll' to enter and 'rent' if you wanted to stay and settle down."[56]

Foster's interpretation of giving something in exchange for safe entry into the territory as being a payment of a toll or rent is reasonable on two grounds. First, this interpretation is given for the specific purpose of providing evidence in a court of Canadian law. This evidence had to align with Canadian common law conceptions of property and exclusivity for the Court to understand the activity as evidence of Tsilhqot'in laws. Second, Foster's interpretation may simply be true. However, an interpretation from the Tsilhqot'in legal perspective offers at least one alternate response to these activities: that the expectation of reciprocity is rooted in relationality.

Based on knowledge I have gained working with Tsilhqot'in Elders and stories, I suggest that Foster's account may be better understood as a practice of gift exchange to secure a balanced relationship with the newcomers (translated as *rent* in a Lockean property category). The gifts non-Tsilhqot'in offer to Tsilhqot'in people (e.g., food, beads) are not necessarily considered commodities used to purchase a grant of access or license (i.e., rent or toll). The act of gifting, and the physical gift itself, represent an interest in establishing a relationship. Gifting is a mechanism of forming

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54 Llewellyn & Hoebel, *supra* note 31 at 41.

55 Foster is citing from "Robert Homfray's expedition in 1861, when he gave 'all the beads and trinkets we had left' to 'the same Indians who [later] killed' Waddington's men." Foster writes, "it appears that every party that passed that way had to obtain guides and give presents in order to ensure safe passage into Tsilhqot'in territory." See Hamar Foster, *Tsilhqot'in Law: A Report Prepared for Woodward and Company* (2005) [unpublished, on file with the author] at 21–22.

56 *Ibid* at 23.

and maintaining relationships in many Indigenous legal orders.[57] In accepting the gift, Tsilhqot'in were willing to exchange access to their land for a limited time.[58] This exchange of one gift for another is based in the principle of reciprocity in the Tsilhqot'in worldview, examples of which are traced to their origin story, *Lendix'tcux*.[59] Of course Tsilhqot'in would expect these gifts if a person wanted entry to the territory. Without the initial gift and its concomitant obligations to maintain the relationship, which produce reciprocal benefits for both parties, there would otherwise be no basis for exchanging access to their land.

A relationship based on one party taking something that is neither offered nor given is set to fail. The consequence of accessing Tsilhqot'in's land without gaining entry through their legal system was severe.[60] Framed in a common law perspective coloured by a free market system economy and the Lockean definition of property, the Indigenous practice of exchanging gifts (an act of relationship, exchanging nominal "beads and trinkets" for limited access to land) is interpreted as a *payment* of *rent*.[61] Both are legal practices arising from disparate legal orders, but they are conceived of quite differently, thus creating a potential for misinterpretation.

A risk of misinterpretation exists when a researcher from a Canadian common law legal order attempts to relate concepts rooted within an Indigenous legal order without a competent understanding of the relevant worldview and how it frames legal interactions.[62] This is true, of course, unless the stated purpose of the research is to articulate Indigenous laws and translate them into analogous common law legal concepts. I am not suggesting Foster's interpretation was incorrect, or that it was somehow contrived to mislead Canadian courts. On the contrary, Foster's interpretation is an accurate translation into common law legal categories of property and immigration (i.e., Tsilhqot'in managing access to their territory). However, the internal understanding of the law may lead to a different in-

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57 See Hanna, "Reconciliation Through Relationality" *supra* note 53 at 837.

58 Elder Marion William of Xeni Gwet'in explained: "Gain access to the territory? Back in the day there was a lot of trading, they made a lot of relationships in the trading areas. ... Trading resources and whatnot was always huge within our people back then. So a lot of trading could have been taken in place in sharing. Like sharing mutual agreement relationships with each other. Good understanding of sharing the land" (Interview in Xeni Gwet'in (5 July 2017)).

59 See Hanna, "Making the Round," *supra* note 10 at 378. In general, reciprocity is applied to maintain relationships between people and animals such that animals feed people in exchange for people ensuring the animals' existence. This is an exchange of life for life.

60 Often death. See Foster, *supra* note 55 at 22.

61 See *ibid* at 21–23.

62 See Mills, *supra* note 17 at 33, regarding disparate logic analytics providing little basis for comprehension.

terpretation than the translated version, despite translation being a necessary strategic practice, particularly in contemporary times. Translation achieves intelligibility of Indigenous concepts for non-Indigenous Canadian legal scholars and practitioners.[63] Common law methods of interpretation such as the case brief method offer a slippery slope to researchers and eager new law students who apply them without sufficient training in a relevant Indigenous worldview.

Interpretation of Concepts

The example above offers a cautionary tale to researchers, as it demonstrates that translation has the propensity to narrow a field of inquiry to a specific set of facts. The narrowing effect is the intended purpose of the adapted case brief method, as it serves to provide a "small slice" of an Indigenous legal order, making it more accessible for people wanting to learn.[64] However, researchers should be aware of the downside to over-narrowing analysis to a particular question or set of facts in relation to Indigenous stories, as legal scholar Sákéj identifies:

> These stories have multi-levels of understanding depending on ceremonial contexts and do not conform to the imagined Eurocentric classification of them or to the categories of myth, legend, or fiction. Like Aboriginal rights, the stories are *sui generis*. Implicate in nature, they cannot be easily fragmented into discrete units of Eurocentric knowledge without seriously impairing their meaning.[65]

The application of a case brief template, which asks a single question of an Indigenous story, limits information in the story to the relevant facts pertaining to the issue, operating as a lens that filters out other elements of the story. As Sákéj describes, this impairs a story's meaning. Granted, this method works well in providing an example of a response to a problem embedded within an Indigenous story as a "starting point" for research into a legal order.[66] However, it may also cut off a wealth of other possibilities that reveal deeper reflections of the Indigenous group's legal order. To

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63 See John Borrows, *Canada's Indigenous Constitution* (Toronto: Toronto University Press, 2010) at 139 on the reframing of some Indigenous laws to make them intelligible.

64 Napoleon, *Ayook*, *supra* note 32 at 95. Napoleon's reason for taking a "small slice" approach to Indigenous legal orders is that tackling the entirety of a legal order is simply too extensive, and therefore impossible, to manage in one project. In other words, legal research in small slices limits scope to manageable research goals and helps reduce the likelihood of accessing knowledges that a researcher may have no prior training necessary to allow proper comprehension. To be clear, my concern considers Napoleon's advice at an extreme that she was not articulating, by arguing that too narrow a slice potentially limits analysis.

65 Henderson, *supra* note 28 at 158.

66 Friedland, *supra* note 33 at 63, 65.

demonstrate, the following example deals with an adapted case brief analysis of a matter relating to harm.

The Tsilhqot'in story of *The Blind Man who was cured by the Loon* gives an account of a blind man who goes hunting with his wife.[67] The blind man's wife helps him by aiming his arrow when he shoots. One day they shoot a caribou, but his wife tells him he missed. After a brief exchange over whether he actually missed, she runs off and leaves him in the forest. Eventually, the man hears a loon's call and makes his way to the lake where the loon is swimming. He asks the loon if she would help him regain his sight in exchange for a necklace of shells, to which the loon agrees. The loon instructs the man to go into the water to dunk his head. After submerging his head twice, the man's sight returns "as good as ever."[68] The man places his shell necklace around the loon's neck, which she wears to this day. When he steps out of the water, he retraces his tracks back to where he had shot the caribou, which was left there, and eventually back to his camp. When he arrives at their camp, "he kill[s] his wife, and burn[s] her and the caribou up together."[69]

At first blush, considering a main research question relating to how people address harms between and among one another, a researcher's adapted case brief analysis may focus on the act of leaving a blind spouse alone in the woods.[70] The issue could go something as follows: *What is the proper response when a person in a position of trust abandons and betrays the person who relies on them?*[71] The facts, which would be limited to addressing this issue, could include:

> The person in a position of trust was a spouse;
>
> The woman lied about the kill and left her blind husband alone in the forest;
>
> The man heard a loon and found his way to the loon;
>
> The man had his sight restored;

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67 See Livingston Farrand, "Traditions of the Chilcotin Indians" (1900) 4 Memoirs of the American Museum of Natural History 1 at 35–36.

68 *Ibid* at 35.

69 *Ibid* at 36.

70 Analysis begins with an overarching "specific research question" to begin to narrow the research focus. See Friedland & Napoleon, *supra* note 34 at 20.

71 This was the issue I identified in my first attempt at providing a case brief of this story as a second-year law student just beginning to learn how to apply the adapted case brief method. In the context of Tsilhqot'in law, this issue as identified is ill informed and inadequate. I provide it here as a straw horse to show my learning path as a new researcher, and as a caution to other beginners who are setting out to grapple with Indigenous legal analyses.

The man traced his steps back to his camp; and

The man killed his wife.

The decision-maker identified in the analysis is the blind man, as he decided to kill his wife, arguably as a response to being abandoned by her. The reasons for this decision are identified as follows: he took responsibility for his circumstance of being left alone and vulnerable in the forest, found a way to heal his vision, and followed his trail back to camp where he killed his wife and burned her body.

The principle that would flow from this analysis is that, in the past, the most extreme but valid consequence for a woman who betrayed and abandoned her (ostensibly vulnerable) husband was death at his hands and his discretion. The problem with this analysis is that it filters out a range of other possibilities and attempts to set an extremely dangerous precedent for women that, in practice, does not align with the Tsilhqot'in legal order. Therefore, the analysis as a literal translation through an undisciplined Canadian lens is inaccurate and dangerous. One of the missing pieces of this analysis is that of the other legal relationships in the story, with the caribou, the loon, the forest, and the lake, which get stripped out in a Western-derived Canadian worldview as inanimate props in the background scenery. Digging deeper into additional elements left out of the small slice analysis requires a shift in the issue. The overarching research question can remain the same (i.e., how do people respond to interrelational harms?), but a slight shift in the issue changes the analysis.

Issue: *What is the proper response to being stranded alone in the forest?*

Facts: Blind man is left alone in the forest;

Man hears loon in the distance;

Makes his way to the lake where the loon is located;

Asks for help from loon;

Agrees to give his necklace in exchange for an attempt to regain his sight;

Follows the loon's instructions;

Recovers his sight;

Fulfils his obligation to the loon with the necklace.

Decision: Blind man decides to address his circumstance by seeking help from another.

Reasons: He followed Loon's instructions to heal himself (stated in the story) so he could survive his predicament and take care of himself after being abandoned (unstated, inferred).

This analysis addresses the man's responsibilities to himself, and his obligations to his natural surroundings, which are potentially harmful if he could not safely navigate his way. He had to use his other senses to seek a path to a resolution for his own circumstance. He did this by listening to the forest and heard the loon's call. This led him to the lake, where he was able to ask for help. The loon offered the man to enter a reciprocal relationship through an exchange of gifts. This relationship leads to enduring obligations they have to each other—to keep the loon in good health, to help the man (people) when they need it. Otherwise, if people cannot ensure the health of the loon, the loon would no longer be able to help them in times of need. One Elder explained that where loons are, the water is always clean (the clean water contributing to healing, as logically, dirty water would cause more harm than good).[72] In this discussion, the man has an obligation to listen to his surroundings (the natural environment) and maintain healthy relationships with the land (and everything connected to it, including non-human beings such as the loon) to be able to make his way and continue to live. This is law related to the land, carried down from the ancestors as being Tsilhqot'in.[73]

Killing someone for committing an offence is an interpretation often coloured by historical western European concepts of criminal law.[74] The second analysis provides a response that gets into maintaining helpful relationships, which is more aligned with what Elders stated in interviews on the subject of interrelational harms. In discussions about this story, Elders did not acknowledge that the man's killing his wife was an acceptable response to being abandoned.[75] Instead, they focused on the relationship

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72 "Wherever you see loon you'll see that water is real clean": Interview with William Billyboy at Tl'etinqox (10 July 2012).

73 "That's what our people used to a long time ago, if they want to be good warrior, a good hunter, they can't just sleep all day and be hunter. They are told things, the law is for people how they're gonna provide for their family. This is what our people carried because in them days you can't go to the store. A store is out there. ... That's what our ancestors carried. That was the law of the land. It's the way we did things": Interview with Thomas Billyboy at ?Esdilagh (31 July 2012).

74 In some older Indigenous histories, stories of retaliatory killings existed as part of a legal order, as they were for many centuries in western European countries such as France and England. Yet these practices ceased upon entry into Indigenous treaties of peace, such as the Great Law of Peace of the Haudenosaunee Confederacy and the Treaty of Wetaskiwin between Cree and Blackfoot.

75 Interview with Marie Dick and William Billyboy at Tl'etinqox (10 July 2012). Marie explained that she understood the story with the gender roles reversed—that the man abandoned his wife in the woods, but she did not kill him in the end. The term "killing" does not necessarily translate into the ending of a life. It has many other possible definitions, including ending life as the person knows it, which supports the version that the man and wife separated for a while, suggesting he or she "killed" the marriage. For more on this, see Robert Brockstedt Lane, *Cultural Relations of the Chilcotin Indians of West Central British Columbia* (PhD Dissertation, University of Washington, 1953) [unpublished] at 56, discussed subsequently in this paper.

with the loon, and when pressed, explained that the husband and wife split up, and eventually reunited after suffering from being apart from one another. Their interpretation of the story covered separation and reconciliation, thus reinforcing the concept of maintaining relationships described in the second analysis. In hindsight, a responsive interpretation to take away from the first analysis is that responsibility for a vulnerable individual is significant, as indicated by the severity of the story's outcome (some manner of death).

As applied to this story, the adapted case brief method within a common law framework would miss these principles governing relationality in a Tsilhqot'in worldview (obligations connected to establishing and maintaining relationships). Instead, it would favour an interpretation that finds analogy in the jurisprudence of historical European-based law (severe punishment for a perceived wrong). I am not discrediting the method here, as the second analysis applies the same method, but from a different starting point, a different perspective. Therefore, the responsibility is upon the researcher to ensure they approach stories from a position of competence, or risk misinterpretation. I merely suggest, as a result of this brief comparative exercise, that once a researcher has developed some depth of knowledge in a particular worldview, they should focus less on the adapted case brief method and implement a more holistic socio-legal analysis of stories that does not obscure larger interconnected realities contained in stories. With that in mind, the common law analysis is also limited through the interpretation of the language itself.

Turning to Indigenous stories as a source of law is fraught with potential pitfalls. Some of these pitfalls are a result of a lack of resources available to a researcher, particularly one who comes from outside of a legal order with limited or no knowledge of the local language. As Friedland identifies, the most available resources—those that are publicly available and written in English—are the "least ideal" for Indigenous legal research.[76] However, as Friedland mentions, these least ideal resources may be the only ones available to researchers who have no cultural or community connection. Use of these resources is made up for by reliance on analyzing multiple stories, producing results for comment by community members who are immersed in the community's cultural knowledge, and citing researcher transparency in the analysis.[77] This is a creative, effective way of making

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[76] Friedland, *supra* note 33 at 50.

[77] *Ibid* at 60, 80–81. Friedland cited Napoleon's earlier work of using multiple cases in combination with interviews (*ibid* at 47–48).

use of problematic resources, although I am compelled to grapple with language as a serious impediment to analysis.[78]

Language Translation

The potential for misinterpretation is great when working within stories recorded in English. A story is translated from the home language to English, which is then written down and exists as a moment in time. In addition, different storytellers tell the same stories in different ways. For example, Elder Marie Dick shared the story of the *Blind Man who was cured by the Loon* as the woman who was blind, abandoned in the woods by her husband, and had to find the loon.[79] This version changes the gendered dynamic to reveal additional concepts missing in the old written version. For example, in Marie's story, the woman does not kill the man, but leaves him, offering another interpretation of *killing* a person. Capturing one story for publication freezes one version, while typically several other versions exist, capable of "dynamic transformation" to remain relevant for people in changing times.[80] The translation of that one recording also freezes meaning, sending ripples of misinterpretation off into the future. Often misinterpretation may occur simply because there are no words in English to capture concepts in an Indigenous worldview, as Chief John Snow explains:

> When I speak to whitemen of Iktûmnî [a great medicine man] I find I run into one of the great problems of dealing with another social group: language. Different cultures produce different values systems, which in turn produce diverse vocabularies. Sometimes I find it almost impossible to translate certain Stoney words into English and keep the true meaning or give the correct connotation.[81]

An example of Chief Snow's comment can be found in the same story of the *Blind Man and the Loon* with the concept of *killing* in the sentence "he killed his wife..." Quite simply, one English word can apply loosely to connote a range of meanings. Robert Lane's work with Tsilhqot'in in the 1950s described how using the word *murder* may encompass multiple concepts:

> Murder also may have been more talked about than committed. Often it was done magically, and death from what we would consider natural cause might be counted as murder. In hunting, there were many hazards such as snowslides, falls, and attacks by animals. The

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78 Friedland cites lack of accessibility and multiple possible interpretations as reasons justifying avoiding reliance on a local language as a resource for law (see *ibid* at 38–39). Transparency may offer some comfort in interpretation using the least ideal resources, including those recorded only in English (see *ibid* at 67).

79 Interview with Marie Dick at Tl'etinqox (10 July 2012).

80 Henderson, *supra* note 28 at 159.

81 Chief John Snow, *These Mountains Are Our Sacred Places: The Story of the Stoney Indians* (Toronto: Samuel Stevens, 1977) at 9.

> tendency was to count any disappearance, where it could not be proved otherwise, as murder.[82]

Murder carries a specific meaning in Canadian law under the *Criminal Code*.[83] The use of the term *kill* would likely be interchangeable with *murder* to an informant, as both would convey the general meaning of the loss or disappearance of a person. The killing of a person in a story does not necessarily mean the person physically died, as they may have left the community, or their spirit may have been killed, or they may have lost their ability to be a successful hunter, effectively *killing* their status.[84] The challenge of explaining concepts that have broad meaning from one language to another, one worldview to another, particularly when the informant or their interpreter is not fluent in the other language, creates room for error. Despite this problem, working on understanding and articulating laws in English from English translations of oral traditions in an Indigenous language is unavoidable.[85]

Although learning Indigenous law in the language in which it originates is preferred,[86] most Indigenous law scholars are not fluent in an Indigenous language.[87] Indigenous languages contain "standards and practices" of the

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82 Lane, *supra* note 75 at 56.

83 See *Criminal Code*, RSC 1985, c C-46, s 229: "Culpable homicide is murder (a) where the person who causes the death of a human being (i) means to cause his death, or (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not".

84 An analysis quickly becomes complicated, as the killing of the blind man's wife was followed with a statement that he "burnt her and the caribou up together." Research would then be followed to discover what possibilities are meant by "burnt." It may be as simple as the literal translation conveyed in the story: he killed her and burnt her body. This literal translation does not seem to accord with the Tsilhqot'in legal order, as I was told Tsilhqot'in people do not kill other Tsilhqot'in people (see Interview with Patricia Guichon in Williams Lake (23 July 2012), translated by Angelina Stump: "they [Tsilhqot'in people] were not supposed to kill their own tribe. This rules that the chief has set for us was there even way before the religion came in, it was already there because we weren't allowed to kill"). Further, the principle of using everything that a person takes would prevent the burning of the caribou, suggesting that the statement "burnt her and the caribou up together" does not align with a literal meaning. There is likely a problem with the translation. This is an example of the depth of analysis that has to be invested in working out one statement in a story.

85 Language loss is one reason for this inevitability, as expecting only people fluent in the language to do this work would be untenable, since many community members themselves no longer speak their languages.

86 See Val Napoleon, "Thinking About Indigenous Legal Orders" (18 June 2007) Research Paper for the National Centre for First Nations Governance, online (pdf) at 2: <fngovernance.org> [perma.cc/VN3B-ZZRC].

87 See John Borrows "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795 at 809–10 [Borrows, "Tricksters"].

relevant legal orders,[88] which means there is a risk of losing knowledge of a people's laws if the language disappears.[89] A sad reality is that colonialism's pervasiveness has entrenched English as a dominant language widely spoken throughout Canada, making it a default platform for the education and deliberation of different legal orders by a broad range of people, from community members to students and lawyers.[90]

Although English creates an efficient platform for studying Indigenous legal orders, efforts to learn a related Indigenous language should accompany learning the laws.[91] In many situations, using translators underscores the language barrier and hinders a reliable translation of concepts. English professor Lorraine Weir describes the process of using translators for witness testimonies given at the Tsilhqot'in trial as hurried and problematic, as real-time translations made accuracy questionable when "word choices in English are influenced by the terms used by counsel, particularly when equivalents do not exist" in the Tsilhqot'in language.[92] Sitting down with Elders for research interviews offers more time to explore meaning and allows translators time to wrestle with word choice; however, this does little to alleviate the problem of equivalency of words or concepts, particularly when some concepts only have meaning in one worldview and not the other. The barriers to translating concepts across worldviews are compounded by the problem of translating words across disparate languages, as language forms the matrix through which legal concepts are woven.[93]

Accepting the inextricable connection of language and law, a community's or nation's invigoration of their legal order should include strengthening language learning internally. As with other epistemological and ontological understandings within a worldview, loss of knowledge of various aspects of a legal order will follow language loss. Combined with the other concerns over applying a common law method to identify Indigenous legal principles, working in English takes a researcher another step further from understanding a legal system in its own context. Yet failing to study and engage because of the flaws associated with working from another language would likely result in maintaining the status quo: continued silence and denial of Indigenous peoples' laws. The use of English as the research

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88 See e.g. Sarah Morales, speaking specifically about Hul'qumi'num, in *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD Dissertation, University of Victoria, 2014) [unpublished] at 17. I argue that the notion of law inhering in language also applies in the Tsilhqot'in legal order.

89 See Borrows, "Tricksters", *supra* note 87 at 810.

90 See *ibid* at 809.

91 See *ibid* at 810.

92 Lorraine Weir, "'Oral Tradition' as Legal Fiction: The Challenge of Dechen Ts'edilhtan in *Tsilhqot'in Nation v. British Columbia*" (2016) 29 Intl J Sem L 159 at 181.

93 See generally Lindsay Keegitah Borrows, *Otter's Journey Through Indigenous Language and Law* (Vancouver: UBC Press, 2018).

standard for studying an Indigenous legal order adds another element to the researcher's responsibility to make time and space for translators while making best efforts to learn the language and being clear when concepts and words do not align. The relevance of language leads back to a focus on stories, and the interpretation of meaning contained within them.

Stories as Research Resource

The challenge of using Western research methodologies to investigate Indigenous societies is well documented, largely for the reason stated in this paper, which is the tendency to force Indigenous concepts into Western conceptual categories, distorting concepts to appear Western.[94] The categories used in analytical frameworks are constructions identifiable to common law lawyers. This in itself is not fatal to a project, as showing how an Indigenous group's actions, decisions, and patterns of conduct are law that is intelligible to Canadian law turns the discussion in courtrooms and negotiating tables from culture, beliefs, and values to one of laws and legality. Discussions of *law* rather than *culture* change the tone, giving matters the force of law, which helps shift some power in favour of Indigenous groups. If the project is to identify law for the purpose of recognition in Canadian common law legal circles, then common law methodologies are well suited to the work. However, if the project is to learn Indigenous laws in their own contexts, then the critiques are sustained. As records internal to an Indigenous society, stories, although dynamic in their content, are reflections of the social setting of the time from which they emerge. The possibility of anachronism is always present in the interpretation process, requiring comprehension to be considered in historical context.

Researchers should bear in mind that the stories comprising an oral tradition are from a particular time, which may (and often does) have little direct recognizable relevance in today's colonized societies. Circling back to research and understand the historic challenges and strengths of a society at a given time is relevant for understanding a story in context.[95] Sákéj

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94 See generally LT Smith, *supra* note 2; Kovach, *supra* note 3; Wilson, *supra* note 3.

95 The method of interpretation and analysis employed by the Indigenous Law Research Unit at the University of Victoria using the adapted case brief method emphasizes the importance of a research primer, as Friedland and Napoleon explain:

> The analytical work with the stories of a particular Indigenous society must be contextualized by basic information about that society if we are going to be committed to communicating this work within and across communities today. All stories are cut from and reflect the political structure (e.g., decentralized), the legal order (e.g., non-hierarchical or kinship based), and the history of a people and this entire context informs the legal analysis (Friedland & Napoleon, *supra* note 34 at 27).

argues that "these stories reveal what is taken as custom or law is a prejudice of the generation and the place, often in conflict with older teachings."[96] In other words, the stories capture a sense of how things were in a particular social epoch, embodying the "relationship between jurisprudence and culture" in a given temporal setting.[97] The analyses researchers bring to bear on publicly available stories recorded in the past, then, are a snapshot of a specific circumstance from a society that existed sometime in the past, which merely offers a "feeling"[98] or "flavour" of a group's law-ways of that time.[99] As such, the results of any such analyses of old oral traditions should be used cautiously to inform modern processes. Caution necessarily invites translations from past to present that understand, as best as possible, the socio-legal and political ways of both time periods.

As recording results of research in writing reflects permanence, care should be taken to present an Indigenous legal principle from an oral tradition as one that reflects a particular circumstance in a particular time, which may change due to the fluidity of these variables. An analysis is a snapshot of one instance. A story offers many possible responses that change with even minor variances in the circumstances. An Elder will selectively choose a story (or stories) to share that provides a frame of reasoning for problem-solving that may take several days, weeks, or even months to process.[100] The oral tradition is dynamic, and "stories provide a sense of clarity yet arbitrariness" that serves to engage the recipient's reasoning process within their worldview.[101] Compared with the certainty of published stories printed in ink, the flexibility of the oral tradition to address a range of problems challenges notions of consistency, certainty, and predictability. Therefore, utilizing analytical results of publicly available stories for guiding the generation of contemporary Indigenous laws rather than implementing them on the face of the results is prudent.

Articulating legal principles from stories as definitive expressions of Indigenous laws for contemporary purposes risks entrenching the past, which would be anachronistic and largely unhelpful in meeting the needs of contemporary Indigenous societies. When Ubuntu scholar Devi Dee Mucina

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96 Henderson, *supra* note 28 at 159.

97 *Ibid*.

98 Henderson argues that stories are performances, which allows the fluid transmission of ideas in any time period: "Like the structure of First Nations languages, the oral tradition responds to the dynamic transformation of the Earth Lodge. This energetic method transmits Indigenous humanities and its knowledge of the flux to the new generations. This [oral] tradition is not about a fixed or recorded body of stories retained from the First Nations 'past'" (*ibid*).

99 Llewellyn & Hoebel, *supra* note 31 at 19.

100 See Henderson, *supra* note 28 at 158.

101 *Ibid* at 161.

writes about using stories as a resource for research, he discusses the purpose of stories and the practice of storytelling as a methodological approach requiring "dynamic engagement" rather than a specific method of interpretation.[102] As I read Mucina's work, I was searching for his method of application, but soon realized that his approach emphasizes storytelling as a *practice* that allows flexibility of meaning for each listener, rather than the *substance* it may provide.[103] He was not imposing a method of interpretation from which I could hope to gain insight. Instead, his teaching is more profound and liberating. The invigoration of Indigenous legal orders is dependent on the continuation and strengthening of its practices, such as storytelling and the creation of new stories, to continue embedding "knowing and learning" of the present societies.[104] For Mucina, the practice of storytelling is what reinvigorates Indigenous laws as much as (or more than) interpreting the meaning in old stories. Accepting the practice of storytelling in itself as a method of understanding law embedded in an oral tradition engages my argument for broadening the scope of research from a single-issue approach to a more holistic analysis.

The method of analysis I employ in my work, with its translation and interpretation of languages and concepts, offers limited insight into a particular legal order for the several reasons discussed in this paper. The benefit of its application is the functional example it offers (i.e., identifying principles and processes in stories), which reinforces an argument for the continuation of traditional legal practices as a means of keeping the past active and dynamic to inform the present. For this to occur, researchers must not get stalled in preliminary engagement with a particular method of analysis based on the articulation and resolution of identifiable issues, such as the adapted common law case brief method. The challenge for researchers is to continuously strive to understand oral traditions (and other sources of law) from within the teachings of the worldview in which they are grounded, producing a more nuanced, holistic approach to comprehension.

Moving Beyond the Adapted Case Brief Method

Rather than identifying an issue, a decision-maker, and a resolution in a case brief method of analysis, I approach stories as more nuanced and flexible to gain insight into the principles applied in relation to peoples' needs and relationships pertaining to the subject matter (e.g., land, water, animals). I refer to this as the holistic analysis method. Any categories I identify in a project are not neatly distinct and separable. On the contrary, they overlap, interconnect, and interrelate. Categories are imposed as a

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[102] See Devi Dee Mucina, "Story as Research Methodology" (2011) 7:1 AlterNative: Intl J Indigenous Peoples 1 at 8.

[103] See *ibid*.

[104] *Ibid* at 6.

means of organizing concepts for comprehension and discussion. The category of *needs* allows me to understand how a particular relationship works, based on people's expectations. Two needs in law I identify include understanding what people expect from others to ensure a sense of well-being through predictability, and what responsibilities people adopt toward others. I also consider the effects on people and their relationships when those expectations are not met. These are a few basic examples of organizing concepts into frames of thinking to render a holistic method for identifying legal principles in stories.

A holistic method invites researchers to circle back around from Western scientific methodologies toward Indigenous ways of knowing oneself in the world before the imposition of European scholarship. Through the holistic method, engagement with several referents within a story broadens the possibilities of understanding compared with the single point of approach in the adapted case brief method. This approach aligns with engaging stories through an Indigenous methodology (storytelling, as mentioned above), as a recipient can gain the knowledge they require on their terms as it pertains to the circumstances of their life at the time, which may offer multiple teachings as time and circumstance change. Comprehension is tied to meaning, which is dynamic because it is tied to circumstance and experience. The extent to which a holistic analysis can be applied is only limited by the worldview and legal orders of Indigenous nations themselves, and the knowledge, learning, and abilities of the listener-researcher.[105] The accuracy of legal analysis remains at issue. Holistic analysis of stories combined with in-community conversations allows for a reasonable attempt at articulating what the researcher perceives to be legal principles and processes. In an effort to verify accuracy, the researcher may turn to historical records and media publications to overlay a group's responses to conflict, tension, or threats onto legal analysis. The following paragraphs offer an example of the application of the holistic method of analysis.

A friend of mine, Elder Gilbert Solomon, shared a story about his cousin, who was told about a place along the river where a rock sits up above the river. He was told that if the rock is rolled into the river, the next day it will be back in its original place. So Gilbert's cousin went and rolled the rock into the river. The next day, it was back where it started. He tried it again to the same effect. Gilbert explained to me that "he didn't live very

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[105] Holistic research is readily supported and promoted by many Indigenous scholars, such as Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence, and a New Emergence* (Winnipeg: Arbeiter Ring, 2011) at 20–25; Mills, *supra* note 17; Clifford, *supra* note 24. Clifford states, "law and culture (or worldview) cannot be separated," suggesting a holistic approach to researching law will be more effective than law-research alone (*ibid* at 761).

long after that, he drowned in the water."[106] At its narrowest, a person may assume that there is an issue with individuals rolling rocks down hills into rivers, or about whether an individual should question what they are told.[107] These interpretations may be relatively correct in part, showing only a small part of a larger legal concept, as without a better understanding of Tsilhqot'in perspectives about relationality and connection to the land, the listener can only make assumptions about the problem in the story. Analyses of this manner are largely speculative, and verification becomes a challenge. The holistic method requires a deeper engagement with the Tsilhqot'in worldview, and the necessary time to process, as I will now explain.

I sat with this story for some time, trying to make sense of its meaning. I did not force a deduction or its reasoning, accepting that it was a story to file away in my memory under the label "for another day." I had also remembered Gilbert telling another story about how rolling rocks down a mountain invites unhappy spirits, who can visit misfortune on people. At some point, I was sitting at Chilco Lake (known by Elders as a healing lake) in the Xeni valley, reflecting on the story of *Raven and the Salmon*.[108] In the story, Raven has racks of salmon drying in his pit-house. As he dances around, one of the salmon keeps getting tangled in his hair. Raven gets angry and throws the salmon to the ground outside. Suddenly, all the salmon come to life, come down from the racks, and return to the river. Raven is unable to stop them and is left with nothing. As I sat there watching the flicker of light off the cresting waves and thinking about Raven's loss, I remembered being told not to throw rocks into the lake. Suddenly, the stories and the stones aligned.

I realized Gilbert's story about his cousin could not be narrowly understood to convey a particular point relating to his cousin, or even about testing truth about rolling rocks. When lined up with *Raven and the Salmon*, the cousin story and Gilbert's cautions against throwing or rolling rocks came into focus as a legal teaching embodying a prohibition against causing unnecessary disturbances. Yes, Raven insulted and harmed Salmon, but stories often have more than one meaning. Raven also caused an unnecessary disturbance that led to the loss of his catch. He upset the peaceful condition of his surroundings. Gilbert's cousin caused an unnecessary disturbance that led to loss of his life. Rolling rocks down a hill just to see

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106 Interview with Gilbert Solomon at Xeni Gwet'in (4 July 2017).

107 I acknowledge Chimamanda Ngozi Adichie's caution in her presentation "The Danger of a Single Story" for its potential to create stereotypes and misrepresent concepts: "The Danger of a Single Story" (2009), online: *TED* <www.ted.com> [perma.cc/5TAW-8965]. The holistic method requires immersion in story, place, relationships, and language as much as possible.

108 See Farrand, *supra* note 67 at 18–19.

if a story is true is considered unnecessary when weighed against the potential for harm and destruction the act causes, not only to humans but to non-humans and the land itself, which will upset the spirits, all of whom are in relationships with Tsilhqot'in people.[109] The prohibition applies to land generally and is capable of specific applications, such as the obvious application to water, depending on the circumstances and subject matter.

One logical extension of this legal rule applies to the rivers, and particularly to salmon spawning beds. Chief Joe Alphonse once shared with me that in the past, a person who was caught disturbing a salmon spawning bed would be dealt with severely.[110] Under a holistic approach, meaning flows through knowledge, context, circumstance, and experience. It does not come through a single-issue analysis on paper, but through the lived experience that comes with being on the land, in relationship with people, their surroundings, and their worldview. To verify my understanding of the prohibition against disturbance, I can turn to accounts from different external sources. I found the verification for this analysis in the *Tsilhqot'in* trial decision, where Justice Vickers acknowledged through the testimony of Chief Ervin Charleyboy that

> there are laws ... against creating a disturbance in a community. Offenders were punished by being tied to a post from sun up to sun down in order to shame them before the community. Repeat offenders ran the risk of being banned from their community for a period of time.[111]

The severity of the punishment (to use the word in the transcript) indicates the level of importance of this particular point of law. This is only a brief example, which invites more conversation beyond the scope of this paper. In short, the holistic method allows a deep and nuanced understanding of the legal order from within the scope of the worldview. Undoubtedly, understanding it from within the home language would provide an additional layer of comprehension not fully available to me at this time. Learning law on the land, in community, in relation to others, inevitably brings the researcher into the practice of the legal order being studied. Learning the law on one hand, while acting differently in practice, would suggest learning could take place in a vacuum—it cannot.

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109 To note, Gilbert's cousin did not come to harm after his first act of rolling the rock. This suggests people may question what they are told. Harm only befell Gilbert's cousin after subsequent attempts, which appear unnecessary after he received his answer the first time about whether what he was told was true.

110 Personal communication (15 August 2016).

111 *Tsilhqot'in*, *supra* note 29 at para 431.

Stories in Research

Living with stories from an Indigenous perspective suggests a different methodology than the expected academic standard imposed by Western institutions of learning. Some of the legal principles I have learned to abide by based on the legal orders of Secwepemc and Tsilhqot'in peoples include the following:

Respect

Have and understand the reason(s) why you are working with a particular group, community, or nation. Wanting to work with a group *just to help* is largely insufficient. People are not helpless, and often are tired of being *helped* by outsiders.[112] Some valid reasons may include partnerships with a group; offering to contribute skills and services to a project already underway or that a group has already identified as a priority; response to a request for collaboration; an obligation to one's own community or a family member's community; and prior relationships (as these are ongoing). Often, Indigenous researchers will be working with communities who are not their own for any number of reasons (e.g., political, familial, historical). Understanding why a researcher is working with a particular community is an act of respectful relationship-building, as they are usually working with someone else's people. The end result of Indigenous research must be to benefit the community or nation in some manner, which would be discussed and agreed upon at the outset of the research.

Preparation

Do background research before ever speaking with people in a community. Expecting people to hold a researcher's hand by imparting knowledge to bring a researcher up to speed is disrespectful, as it wastes people's valuable time and could have been avoided with some preparation.

Know the practices and protocols involved in ceremony, as research with others is a ceremony.[113] These include knowing which direction a sharing circle flows, whether gifts are appropriate or required and, if so, what kind of gift is appropriate (gifts are typically offered in recognition of invitation to a relationship that has enduring qualities).

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[112] See e.g. Vine Deloria, Jr, *Custer Died for Your Sins: An Indian Manifesto* (New York: Avon, 1969) at 83–104.

[113] See generally Wilson, *supra* note 3; Kovach, *supra* note 3 at 140.

Learning

When a person enters a particular community to engage with local knowledges, they are accepting an obligation to learn. This may be tested to allow knowledge-keepers to determine the extent of a researcher's receptivity. A seemingly fantastic story may be shared immediately to see how the researcher responds through subtle facial signals, such as a smirk or a roll of the eyes. Any subtle inflection of disbelief often accurately reflects a person's integrity regarding their openness to discover the different worldview about which they are invited to learn.

Humility and the Learning Process

Know the appropriate process for how teaching and learning take place within the community. For example:

Introductions and informed consent. Proper introductions of the researcher, where they are from, who their relations are, and an acknowledgement of the research partnership and their relationship with their territory is a practice of respect. People want to know who they are speaking with so they can decide whether they choose to enter a research relationship with that person and provide teachings and share information.

Likewise, introducing the project clearly and succinctly provides the information people need to make informed decisions about whether to participate. A researcher must be clear about academic ethical and legal matters relating to the work, such as use of shared knowledge, ownership of the knowledges shared and created, anonymity, duration and security of stored information, and potential risks involved in the dissemination of knowledge. This means traversing one of the more troubling aspects of research, which is accessing informed consent. Do not expect that gaining consent is a given. People expect honesty, transparency, and trust in all aspects of the relationship into which they may invite a researcher. The informed consent document has the appearance of colonial appropriation and creates an immediate air of distrust with many Elders when they are asked to sign. I place it on the table and explain the purpose of the form—that it is designed to protect all people involved, particularly participants, as it defines their rights regarding the project. These include their ability to withdraw from the project at any time or to refuse to allow their knowledge to be shared, a right to review any material before publication (if that is one of the research outcomes), and the right to remain anonymous (accepting the risks of being identified in a small community).

The form speaks to the academic institution about ownership of knowledge and limits to its uses. From an Indigenous legal perspective, many of these matters would be commonly understood based on knowledge of the appropriate legal order. Principles of respect, trust, and protection, in addition to explicit instructions, would be understood to define the use

of shared knowledges between peoples; but non-Indigenous partners have yet to display the ability to understand, let alone abide by, an Indigenous legal order, and have an enduring history of breaching Western laws and agreements of their own accord. With the informed consent form on the table, I take the time to go over it orally in plain language, having reviewed and committed the document to memory in advance. This allows people to consider the implications of their decision to participate in a conversational manner, allowing for reflection and questions about any meaning or concerns. This is a difficult part of the work, which takes time, care, respect, and humility to complete.

Sharing circles. Learn whether the community prefers to use talking circles, as these are important for practising an appropriate method of sharing for a specific community.[114] Also be prepared to respect when a group chooses not to use a sharing circle in favour of some other method for sharing ideas through collaborative conversation.

Silence. Understand the role that silence plays in the exchange of knowledge. Silence may be required to allow a person to gather their thoughts. Often silence imparts specific meaning that may include signalling some knowledge or information to others in the circle, or to the researcher.

Conversation. Accept that these interviews will occur as conversations rather than a question-and-answer period. Some researchers (and lawyers) will come to a learning session with a detailed list of questions in arm, and will be determined to get an answer to each question in an orderly fashion. In my experience, the process does not unfold in this manner. Generally, one or two questions, or even an introduction of the purpose for the visit, will launch a dialogue, and the researcher's role is to listen and facilitate the discussion in a natural and flowing manner. Conducting interviews based on the principles of respect and sharing allows for conversations rather than the mining of information.

Dynamics. Understand the role of several potential dynamics that occur in community groups. These include family dynamics (often younger siblings will defer to the eldest sibling in the room); age (younger Elders and community members will defer to more senior Elders); gender (men may defer to women on some subjects, or women defer to men); and politics (some people will not speak if certain people are in the same room).[115] Any

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[114] See Kovach, *supra* note 3 at 136.

[115] The gender roles here are oversimplified as a binary. Gender roles can be more accurately described from within a particular Indigenous language and worldview. See e.g. Ma-Nee Chacaby & Mary Louisa Plummer, *A Two-Spirit Journey: The Autobiography*

of these situations may cause some participants to remain silent. A researcher should understand how to attempt to respectfully include those who are unresponsive and know when to leave well enough alone.

Stories

After experiencing a story (orally or in writing), do not jump to conclusions. Live with the story for a while. Review it again later, and again later still. Dream about the story. Let it speak for itself in a personal manner to the researcher as an individual.[116] Subjects and meanings will change depending on several factors in the researcher's life, such as circumstance, age, gender, the research question, context, and any knowledge the storyteller may be intending to emphasize or share explicitly. Consider a story in the context of other stories and knowledges that have been shared with the researcher.

Relationality

Land-Based Learning

Much knowledge is only fully engaged when understood in context with the many relationships connected to the land. Whenever possible, learning should take place on the land, on the territory of the people. Often, research conversations occur indoors in a community. Once a story is learned and knowledge shared, the researcher has an obligation to go out on the land, walk, ride, paddle, sit, to consider the teaching in context. Indigenous knowledges are interrelational, involving many entities that are effectively inseparable. Being outdoors to live with a story or teaching helps ground abstract ideas in experiential context.

Reciprocity

Understand how reciprocity works within the partner research community. Relationships that develop in research maintain balance through a principle of reciprocity. People are gifting the researcher their time,

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of a Lesbian Ojibwa-Cree Elder (Winnipeg: University of Manitoba Press, 2016). Furthermore, Emily Snyder, Val Napoleon, and John Borrows write, "matrilineal societies, and societies that strived to embrace gender fluidity, were condemned and forced to take up structures based on the male/female binary wherein the male side received privileges and were recognized as having the most valued attributes. Colonialism was, and still is, reliant on patriarchal, heterosexist violence," in "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593 at 610.

116 See Henderson, *supra* note 28 at 159–60, who states that "[t]he listener ... is expected to think about and interpret messages in the story. Oral tradition does not spell out everything a listener needs to know, but rather makes the listener think about ordinary experiences in new, implied ways."

thoughts, accounts of experiences, and knowledge. Balance requires some form of reciprocal exchange, which may be expressed symbolically through providing healthy food, small gifts, or honoraria to acknowledge that people are taking time out of their lives to share with the researcher. More significantly, reciprocity is expressed through completing research projects and ensuring that partner communities are owners of the knowledge produced, that opportunities for review and comment are provided, and that the work provides some benefit to the community.

Honoraria

Providing honoraria is a common practice in research. Gifting may be an equivalent gesture in pre-contact practice, particularly if the gift had some economic value, as seen in coastal potlatches. However, the gifting of money in contemporary times makes the practice more susceptible to critique as a Western economic conveyance that is often erroneously construed (particularly in litigation) as purchasing knowledge. The explanation I provide for gifting honoraria is that they are offered in acknowledgement of the time a person is taking from their life to participate. That a person is retired and spends their days at home is not a valid counter argument, as people frequently value their time using different currencies, of which money is only one. Elders are often required to travel some distance to attend interviews, unless the researcher visits their home.

Sharing

Be prepared to share the researcher's position, purpose, connections to the community, and experiences when helpful, and know when to reserve some knowledges if they have the potential to derail conversations.[117] Make

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[117] For example, the community coordinator who was working with me would not share my kin connection to the nation. She explained that information would likely interfere with the conversations, as the participants would have started teasing me as a relation. I always begin by acknowledging the nation's relationship and authority over their territory, as this is my personal position. There are difficult subjects that should not be approached for a lack of professional training to properly manage the potential impacts of that knowledge. One key example is residential school experiences. Occasionally people unexpectedly offer their experiences without warning. Some colleagues have explained that an Elder can never be interrupted, as we should respect their ability to decide if their information will be harmful to them. While true, the researcher must also be aware of the potential unintended harmful impact such a discussion may have on another person in the room. As researchers, we have an obligation to do no harm, and when a conversation heads into harmful territory, to mitigate the harm. As a researcher with the Tsilhqot'in Nation, I have a legal obligation to protect the communities within which I work and their members. In this example, I would be inclined to acknowledge (and have done so) a person's courage and strength to share, while explaining the risks to others in

space during and after conversations to ensure participants may ask the researcher any questions. The principles of reciprocity and sharing mean the exchange of knowledge flows between people and is not unidirectional. Vulnerability and humility are also important principles in establishing and maintaining relationships of trust and respect.

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Although some or many of these principles and steps may apply to multiple disparate Indigenous nations, by no means are they complete or fixed. They are offered as examples to provide a sketch of what is possible. The actual Indigenous research methodology implemented by any researcher would be shaped and informed by the particular socio-legal parameters of the nation within which the research is being conducted.

Conducting research according to principles provided by the group or nation with whom a researcher is working means that the researcher is working as a part of legal practice from within the legal order. In other words, adherence to the law in designing and enacting research methodology is legal practice, as the actions reinforce the norms, rules, and principles that exist in a group's legal system. The actions show people that the researcher understands and is committed to carrying out their obligations under the law, as this reflects internal knowledge of a person's obligations and responsibilities according to the law. Research according to a particular Indigenous research methodology is an example of the continued vitality of a nation's legal order. It exhibits a researcher's commitment to ongoing learning, knowledge, sharing, respect for, and reciprocity within the relationships with people who have invited the researcher into their society and trusted them to be responsible with the knowledge that was shared.

Conclusion

Despite the many pitfalls identified in this paper related to researching Indigenous legal orders from a Canadian common law perspective, comprehension of Indigenous legal principles and processes is possible. As Friedland wisely points out, transparency in statements on outcomes is important to allow for alternative interpretations to engage with a researcher's own.[118] Translation and interpretation of concepts and languages create much room for misinterpretation and misunderstanding; however, given the historic and ongoing changes colonialism imposes on

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the room, and respectfully disengage that particular conversation despite the risk of being ostracized, as I would prefer to suffer ostracization than sitting by while a community member became dangerously traumatized because of my decision to refuse to break protocol. This is a rare example of when I would break with protocol, but I believe the legal order provides for such exemptions when other legal priorities, such as protection of people, take precedent.

[118] See Friedland, *supra* note 33 at 80–81.

Indigenous communities, research and conversation about these laws can and should be done in a nuanced, holistic manner.

Disparate thinkers from disparate systems can have conversations about Indigenous laws when they immerse themselves in the particular worldview of the people with whom they are working. Reasoning takes time. Stories need to live, embodied in the flesh and thoughts of the learner. This also takes time. Learning through a holistic method invokes the need to live the laws being studied. Once a researcher can conduct themselves according to the legal teachings of a group, they better understand how the so-called traditional laws of the past are still in practice today, providing insight that would be precluded by a purely academic methodology.

This work invites researchers to veer off the linear path of standard academic research paradigms determined solely by universities, and circle around to the different Indigenous ways of knowing rooted in our own histories, experiences, and worldviews. Circling around reminds Indigenous researchers that we have long-standing practices of learning about and understanding the world around us according to our own ways. For a person to enter another's territory (geographic, ontological, metaphysical, cosmological), they should have some understanding of their responsibilities and obligations as a guest according to the local legal order, if the laws, and by extension, the lands and people, are to be respected. They should be able to demonstrate what they have learned by living the laws as opposed to merely writing about them. The need for knowing one's place according to the law necessitates the study of Indigenous laws by means which are effective, necessary, and appropriately rooted in the logic of the people.