Indigenous Legal Methodologies and Water Governance in Canada

by

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TABLE OF CONTENTS

FOREWORD

This major research paper relates to my plan of study by providing me with a deeper understanding of the current conversations and methodologies used for documenting and applying Indigenous laws to water governance in Canada. It also provided an opportunity to engage with federal and provincial policy documents and legislation to determine if and how Indigenous law can and has been (if at all) applied in relation to these processes. I wish to examine Indigenous law and its potential applications for water governance and draw specifically upon Anishinaabe legal orders that have been formally recorded or spoken about in key informant interviews. I also wish to contribute to the emerging conversations regarding the application of Indigenous laws in Canada and in so doing, deliver community relevant scholarship that could be of potential benefit/use to Indigenous communities.

ABSTRACT

Canada has a firmly established bijuridical system, which formally recognizes two distinct legal systems and demands adherence to these laws by individuals, organizations and institutions within its jurisdictions. In recent years, however, there has been emerging scholarship that details the Indigenous legal orders that have existed and continue to exist in Indigenous communities across the country. The legacy of colonial oppression has attempted to erode and delegitimize these legal orders, but many of the deeply embedded laws and legal traditions have been passed down through generations and continue to be relevant and respected in communities. Indigenous legal scholars and community practitioners who write and practice Indigenous law have called for an acknowledgement, revitalization and respect for these laws both within their communities and also by the broader Canadian political and legal landscape. It has only been recently that colonial governments have begun to express interest in bringing these laws into the fold of the Canadian legal system, and most recently the Ontario government has put out a call for proposals to Indigenous communities to begin the process of revitalizing and codifying their laws. This paper will attempt to help communities responding to this call by examining several of the methodologies that currently exist for uncovering and understanding Indigenous laws in Canada and will analyze some applications along with the similarities and differences between them. It will place these methodologies within the context of existing Anishinaabe knowledge on water laws as well as the current frameworks of policy and legislation that exist for water issues in Canada. This paper will then conclude with some recommendations for going forward with the work of revitalizing Indigenous law in Canada.

1. Introduction

1.1 Background

Laws are often understood to be concrete and comprehensive and this understanding explicitly and implicitly instructs how we live our daily lives. Ignorance of the law, after all, is not an accepted defence for breaking the law.[1] This understanding, however, is based on a flawed perception that law is static, when in fact, laws are both evolving and highly contextual. They rely on both the facts of a case, and the individual or persons who have been selected to be decision-makers. The general presumption or understanding in Canada is that there are two uniform bodies of law: the Common Law or Civil Law. The average Canadian likely only recognizes their accountability to one or both of these legal systems and relies on a perceived certainty that they know the bounds of the law within this society and can operate accordingly.

In reality, however, these two "settler" or "colonial" models of law only represent part of the vast network of legal systems that exist in Canada.[2] While Indigenous legal traditions largely predate the "Canadian" legal systems as we know them, these laws have only recently begun to receive more widespread revitalization and recognition. While Canadian courts have recognized that Indigenous law exists, they have yet to afford it equal standing or full legitimacy in their courts. The case of *R v Marshall; R v Bernard* is the most prominent Supreme Court of Canada (SCC) decision to deal with Indigenous legal traditions and stated that:

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[1] *Criminal Code*s, RSC 1985, c C-46, s 19.

[2] Settler law includes the French Civil Law and English Common Law legal systems that were imported into Canada through the processes of colonization in the 17th and 18th centuries. They then became the established dominant legal systems and after the Battle of Quebec in 1759, Canada became established under the jurisdiction of English common law while Quebec followed Civil Law. For more on this see the Department of Justice online: http://www.justice.gc.ca/eng/csj-sjc/just/03.html.

> Aboriginal title has been recognized by the common law and is in part defined by the common law, but it is grounded in Aboriginal customary laws relating to land. The interest is proprietary in nature and is derived from inter-traditional notions of ownership. [3]

This case also cites the *Calder* decision, in which the dissenting judgment recognized that "indigenous legal traditions pre-existed the Crown's assertion of sovereignty."[4] More generally, the SCC has expressed the importance of encouraging "courts to be sensitive to Aboriginal perspectives, and to take them into account alongside the perspective of the common law."[5] Despite these seemingly positive sentiments towards Indigenous law, there is still a great reluctance to accept and engage with Indigenous law in a meaningful way by the courts.

One way in which a government has attempted to increase their "sensitivity" to Indigenous legal perspectives can be found in the recent call in Ontario for proposals "to support revitalization initiatives focused on the reclamation and revitalization of Indigenous legal systems" from the Indigenous Justice Division of the Ministry of the Attorney General in Ontario.[6] In this five page call for proposals, the Attorney General set out the detailed criteria for what is required, including: the use of cultural protocols, proposed evaluation measures, a detailed budget breakdown, a work plan with timelines, planned community participation and the general design of the initiative – "including the

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[3] *R v Marshall; R. v. Bernard*, [2005] 2 SCR 220 at p. 128.
[4] *Ibid* at 132, citing *Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] S.C.R. 313 at 375.
[5] *Spookw v. Gitxsan Treaty Society*, 2017 BCCA 16; citing: *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075 at 1112; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010 at paras. 148-149; *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 (CanLII), [2005] 2 S.C.R. 220 at para. 48; *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507 at para. 42; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII) at paras. 34-35.
[6] Indigenous Justice Division of Ministry of the Attorney General, "Revitalization of Indigenous Legal Systems Grant Guidelines 2017-2018"

need or gap addressed by the proposal."[7] Therefore, the practical implications for this paper are to highlight the central legal methodologies that currently exist and discuss how they have been applied so far and possible limitations of each approach so that Indigenous communities can draw upon what is being done and apply it in their own communities.

When discussing "Indigenous law", an important distinction must be made between this and "Aboriginal law." In Canada, Aboriginal law is the body of colonial law that expresses the rights, responsibilities and obligations of Indigenous people in Canada as conceptualized and dictated by the federal government. These rights are grounded in the understanding that Indigenous people in Canada have inherent rights attributable to their original occupation of this land prior to settler-contact.[8] The sources of this law can be found in section 35 of the *Canadian Constitution* and section 25 of the *Charter of Rights and Freedoms.*[9] These protected rights have been upheld and further contextualized by many common law Supreme Court decisions.

Val Napoleon is an Associate Professor and a Law Foundation Professor of Aboriginal Justice and Governance Research Chair at the University of Victoria and has identified that jurists have found it difficult to agree upon a common definition of "law" in this context. John Borrows is a well-known Professor and Canada Research Chair in Indigenous Law at the University of Victoria and has published numerous books and articles about Indigenous law in Canada.[10] Borrows describes a legal tradition as

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[7] *Ibid* at 3.
[8] Eric Hanson, "Aboriginal Rights" *Indigenous Foundations* (2009) online: http://indigenousfoundations.arts.ubc.ca/home/land-rights/aboriginal-rights.html.
[9] *The Constitution Act,* 1867, 30 & 31 Vict, c 3, s. 35; *Canadian Charter of Rights and Freedoms,* s 25, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[10] For more information on his background, achievements and publications, see: https://www.uvic.ca/law/facultystaff/facultydirectory/borrows.php.

reflecting "a set of deeply rooted attitudes about the nature and role of law in a society."[11] Indigenous law is distinct from Aboriginal law in that it is derived directly from Indigenous communities and is grounded in a rich history of laws, which have been preserved in various ways and are still expressed and upheld in communities to varying extents. As Borrows explains:

> Indigenous peoples' laws hold modern relevance for them and for others. While the laws have ancient roots, they speak to the present and future needs of all Canadians. They contain guidance about how to live peacefully in the world, how to create stronger order, and how to overcome conflict.[12]

These laws are distinctly not recognized by the colonial legal system, but largely predate it.

1.2 Research Purpose and Objectives

This paper will compare and contrast different research methodologies and frameworks that are currently being employed to understand, conceptualize and codify Indigenous law. The methodologies developed by John Borrows,[13] Val Napoleon,[14] Aimee Craft[15] and Aaron Mills[16] will be examined in depth and a comparative analysis will be used to explore how these models might be applied to revitalize laws – specifically relating to

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[11] Val Napoleon & Richard Overstall, "Indigenous Laws: Some Issues, Considerations and Experiences: An Opinion Paper prepared for the Centre for Indigneous Environmental Resources (CIER)" (February 2007) online: http://caid.ca/LawIndIss2007.pdf; John Borrows, "Indigenous Legal Traditions In Canada: Report for the Law Commission of Canada" (January 2006) online: http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf.

[12] John Borrows, "Indigenous Legal Traditions In Canada: Report for the Law Commission of Canada" (January 2006) online: http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf., at 3.

[13] *Ibid.*

[14] Hadley Friedland & Val Napoleon, " Gathering the Threads: Developing a Methodology For Researching and Rebuilding Indigenous Legal Traditions" (2015-2016) 1:1 Lakehead LJ 17 at 17.

[15] Aimée Craft, "Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders" (2014) *Anishinaabe Nibi Inaakonigewin Report.*

[16] Joëlle Pastora Sala & Katrine Dilay, "Written submissions of the Assembly of Manitoba Chiefs submitted to the Expert Panel for the Review of the Environmental Assessment Processes" (23 December 2016) *Public Interest Law Centre*, online: http://eareview-examenee.ca/wp-content/uploads/uploaded_files/16-12-23-amc-written-submissions-ea-review_final.pdf.

water – within Anishinaabe communities in Ontario. A focus will be placed on identifying the similarities and differences between these methodologies to highlight the various considerations that communities will be making when developing a process to codify and uncover their respective laws. This research will address a current outstanding challenge faced by Indigenous communities, which can arise when they want to take uncover and/or apply their laws but face the challenges of navigating the different models that exist for doing this.

The purpose of the MRP will be to document the conceptual and theoretical foundations of Indigenous law in Canada. In this realm water law has been discussed for some time and is an important area to explore, given the current gaps and challenges in water governance. This paper will contribute to the emerging conversations regarding the application of Indigenous laws in Canada and in so doing, deliver community relevant scholarship that could be of potential benefit/use to Indigenous communities.[17]

This paper will examine the following questions:

1) What is the nature and extent of the current scholarship relating to Indigenous legal orders in Canada?
2) Who are the primary scholars in this field and how do they theorize and engage with Indigenous legal orders in their research?
3) How are the selected scholars researching this topic? How Indigenous legal orders being applied, if at all?
4) What are potential applications of Indigenous legal orders in water governance in Canada?

This paper will not spend time exploring debates on whether or not Indigenous laws exist. It will also not examine whether or not Indigenous laws should be studied and respected as a formal legal order in Canada. There is enough scholarship and record in

[17] For more information on the important considerations to be made in the context of Indigenous research, see, for example, Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009).

existence to demonstrate clearly that these laws have always existed in Canada.[18] As John Borrows states, "Indigenous laws should not merely be received as evidence of a particular culture's environmental values; along with other laws they should be accepted as *legal standards* against which North American practices can be measured."[19] Instead this paper will be focused on the current understandings of Indigenous law in Canada and the ways in which communities can codify or document their own laws, with specific attention paid to water laws.

This paper will also not be weighing the merits or validity of Indigenous law, it will assume that Indigenous law is legitimate.[20] This paper will not provide a normative perspective on how Indigenous communities should express their laws or how all Indigenous peoples should advocate on behalf of their laws. It is fundamentally important to remember that Indigenous law is pluralistic and must not be over-simplified or seen as uniform in any way.[21] There are complexities and diversities that exist within and across the different legal orders in Canada, and for this reason I will focus my application on Anishinaabe laws.

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[18] See, for example, John Borrows, entitled *Freedom & Indigenous Constitutionalism* (Univ. of Toronto Press, 2016); Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009).

[19] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 47

[20] See, for example, Val Napoleon, "Thinking About Indigenous Legal Orders" (2007) *Research Paper for the National Centre for First Nations Governance, National Centre for First Nations Governance*, online: http://fngovernance.org/ncfng_research/val_napoleon.pdf at 10: "Indigenous law in Canada has been challenged by the lack of legitimacy it is accorded within the broader legal system. This process is cyclical: the colonial governments are concerned with the repercussions of adopting Indigenous laws that may undermine the legitimacy of their own laws, so they continue to deny legitimacy to Indigenous laws – which in turn perpetuates the belief that Indigenous law does not have a degree of authority that would allow it to be understood and respected by all Canadians. This means that Indigenous laws can be broken with no consequences, which further erodes Indigenous legal orders."

[21] Val Napoleon & Richard Overstall, "Indigenous Laws: Some Issues, Considerations and Experiences: An Opinion Paper prepared for the Centre for Indigneous Environmental Resources" (February 2007) at 7, online: http://caid.ca/LawIndIss2007.pdf.

This paper will instead be focused on exploring the existing scholarship on Indigenous law in Canada through a literature review and then will explore the ways in which these laws have been incorporated into policy-making and law around water governance in Ontario. This is particularly important in the context of water, as there currently is and has been a persisting water crisis in many Indigenous communities both in Ontario but also more broadly within Canada.[22] These problems have arisen from mismanagement of funding and resources and a governance process that has failed to properly take into account the needs of the specific communities experiencing significantly below average conditions of drinking water and wastewater infrastructures.[23]

1.3 Water Crisis in Indigenous Communities in Canada

Access to safe and clean drinking water and contamination of water bodies have been prevailing issues for Indigenous people for decades. Canada is known for having significant amounts of renewable fresh water bodies, but despite this, there is a notable discrepancy in who has access to these sources and what this access can look like. It is now widely recognized that there is a crisis in many Indigenous communities around water management, specifically in the context of safe drinking water.[24] Unfortunately this issue is not one easily fixed simply by funneling more money into new or existing infrastructure. Instead, it requires substantial changes to the ways that capacity is built, the types of funding available and the additional resources considered and provided.

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[22] M.A. Phare, *Denying the Source: The Crisis of First Nations Water Rights* (Surrey: Rockey Mountain Books, 2009).
[23] Jerry P. White et al. "Water and Indigenous Peoples: Canada's Paradox" (2012) 3:3 *Water and Indigenous Peoples: Canada's Paradox* at 1.
[24] *Ibid.*

This issue is one that has stagnated and persisted despite increases in funding and political grandstanding about the intentions that the government has to fix this problem. In an open letter from over 90 First Nations communities to federal party leaders in October 2015, they wrote, "despite repeated pledges from the federal government to ensure clean drinking water, there are routinely over 100 water advisories in effect in First Nation communities, with some communities living under advisories for over 10 years."[25] This means that almost 20% of First Nation communities experience daily stresses around water issues – such as access to safe and potable water.[26] What is particularly notable about these figures is the gap that exists between safe water for these communities and that which is available for the majority of non-Indigenous Canadians who rarely have to be concerned about where there water is coming from and what the quality may be.

The Canadian and Ontario governments have responded differently to water issues affecting Indigenous peoples. Though the federal government has greater responsibility in this area, the Ontario government has been described as being more responsive and implementing more practically beneficial policies to address the crisis that exists. An example of this was when the Ontario government enacted two pieces of legislation after the Walkerton crisis: the *Safe Drinking Water Act* and the *Clean Water Act*.[27] These pieces of legislation were enacted largely to respond to recommendations from the Walkerton Inquiry, but broadly apply to all communities in Ontario and do not

[25] Council of Canadians, "Federal party leaders urged to end drinking water crisis in First Nation communities once and for all" (15 October 2015) online: http://canadians.org/media/federal-party-leaders-urged-end-drinking-water-crisis-first-nation-communities-once-and-all.
[26] *Ibid.*
[27] *Safe Drinking Water Act* SO 2002, c 32; *Clean Water Act* SO 2006, c22.

exclusively govern management within Indigenous communities.[28] The federal government has enacted legislation that specifically addresses drinking water for Indigenous communities, but this legislation has largely been dismissed as ineffective.[29]

Despite the fact that there has been a persistent water crisis in Indigenous communities in Ontario for decades, very little has been done to address this. It is therefore clear that the status quo for water governance in Indigenous communities in Ontario is not working and that we need new governance mechanisms to address these issues. One deliverable that will come out of this major research paper is to write a shorter policy brief that could be of potential to use for communities who are looking to codify or revitalize their laws and want a concise summary of some of the models that they could use to do this.

1.4 Positioning Myself

My interest in studying Indigenous law and exploring its applications comes from both personal and academic experiences. Though some of my lineage is unknown, what I do know is that most of my ancestors arrived in Canada as settlers, dating back as early as the late 1700s. Much of my childhood was spent proximate to or immersed in nature – particularly the many years I spent living on Toronto Island as a child and many summers spent in the Haliburton county, north of Toronto. It was these immersive experiences with nature that led me to study Environmental Governance at the University of Guelph during my undergraduate degree. From there I became interested in the legal mechanisms that inform the ways that we interact with and govern the natural environment. This led

[28] Richard Lindgren, "Ontario Passes Safe Drinking Water Act", *Canadian Environmental Law Association* (December 2002) online: http://www.cela.ca/article/safe-drinking-water-act/ontario-passes-safe-drinking-water-act.
[29] *Safe Drinking Water for First Nations Act* SC 2013, c 21.

me to enroll in a joint JD / Masters of Environmental Studies Program through Osgoode Hall Law School and York University. Throughout all of these studies and my own personal explorations and investigations, I began to grow increasingly aware of the deep integration between Canadian environmental issues and Indigenous issues. It was from this understanding that I began to become curious about the ways in which Indigenous knowledge – specifically laws and principles – may assist in understanding some of the challenges currently facing environmental governance as well as potentially providing some insight into how to foster more a more sustainable relationship with our natural environment.

1.5 Overview of Paper Structure

This paper will proceed as follows, Chapter Two will provide an overview of the research approach and methodology used and will describe the research frameworks and theories that underscore this approach. Chapter Three will describe and analyze the legislation and policies passed by the Canadian and Ontario governments that address water and may affect Indigenous communities. It will also detail some of the deficiencies and challenges that arise from these governance structures. Chapter Four will provide a brief overview of some of the reported Indigenous Knowledge and laws about water. Chapter Five will then review, compare and contrast the four selected methodologies for codifying and revitalizing Indigenous laws and legal orders. Finally, Chapter Six will set out some recommendations for how to move forward with these processes of revitalizing Indigenous law, both within communities and possibly bringing these laws into the broader fold of governance in Canada.

2. Research Approach and Methodology

2.1 Introduction

This research is guided by Indigenous perspectives on how research frameworks and techniques. For this type of research, grounding the work from an Indigenous perspective is important because it is dealing with Indigenous knowledge and traditions and it would therefore be inappropriate and ineffective to import a colonial model of research and analysis on this work. As a non-Indigenous person, I have taken guidance from PhD research done by Nicole Latulippe. In her paper *Bridging Parallel Rows: Epistemic Difference and Relational Accountability in Cross-Cultural Research*, she examines how to engage with Indigenous knowledge and research in the context of western paradigms.[30] Latulippe emphasizes that is important for researchers to "stay implicated" in how they engage with Indigenous methodologies and to do the deep work to disrupt the deeply rooted colonial ways of engaging with Indigenous knowledge.

There is a risk that non-Indigenous researchers feel entitled to knowledge: "a more preferable approach they say, is one in which non-Indigenous researchers fully embrace the uncomfortable epistemological tension that comes with the realization that they can never fully know the Other; nor should the aspire to do so."[31] One way to minimize this is through the reflexive self-awareness method explained by Margaret Kovach in her book *Indigenous Methodologies, Characteristics, Conversations, and Contexts.*[32] This model asks the researcher to become aware of his or her own positioning and the power dynamics and disparities that exist within their research with a look

[30] Latulippe, Nicole, "Bridging Parallel Rows: Epistemic Difference and Relational Accountability in Cross-Cultural Research" (2015) 6:2.
[31] Paulette Regan, Unsettling the Settler Within (Vancouver: UBC Press, 2010) at 26.
[32] *Supra* note 17.

towards offering recommendations that are flexible and adaptable.[33] The advantages of these perspectives is that they can result in the important work of negotiating objectives, building relationships and developing mutually beneficial outcomes with the communities or individuals that are implicated in the research or will seek to use it.[34]

2.2 Applying Critical Indigenous Legal Theory

To guide my research in Indigenous legal systems / natural law in Canada, I have employed a theoretical framework that is grounded in Indigenous knowledge and understandings of law. Tracey Lindberg writes about Critical Indigenous Legal Theory, which starts with the presumption that Canadian law and Western perspectives on Indigenous law are typically both overtly and covertly adverse to Indigenous legal methodologies. This theory explores the ways in which Indigenous understandings, laws and principles govern the relationships with lands and each other.[35] This theory examines how an Indigenous perspective can and has been used in the construction of laws and how a critical analysis and critical tools may be used to assess Canadian legal understandings from an Indigenous perspective.[36] Lindberg warns that without this type of critical thinking about Indigenous legal systems, there may be an "increase in the construction and application of legislation that is predicated on the eradication of the rights of Indigenous citizens."[37] Therefore it is not just about the Canadian legal system absorbing Indigenous law, but about it maintaining its legitimacy in its own right.

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[33] *Ibid* at 10.
[34] *Ibid* at 11.
[35] Tracey Lindberg, "Critical Indigenous Legal Theory Part 1: The Dialouge Within" (2015) 27 Can J. Women & L. 27.
[36] *Ibid.*
[37] *Ibid* at 234.

Lindberg suggests that "without developing an arsenal of Indigenous critical theorists we will see an increase in the construction and application of legislation that is predicated on the eradication of the rights of Indigenous citizens."[38] Lavallee also explores the practical application of Indigenous research frameworks and how they can be bridged with Western methodologies for research.[39] She warns about ways that this bridging process can present challenges and the ways in which an Indigenous research framework can be employed to mitigate these challenges.

The first challenge in this research was to determine how the different methodologies for understanding and codifying Indigenous law interact and intersect. The research examined the colonial assumptions about Indigenous law to determine the real or perceived barriers that exist in implementing or respecting Indigenous law based on existing colonial paradigms about law and policy. Within the Critical Indigenous Legal Theory framework, the historical significance of colonial and Indigenous relations is placed within the context understanding how communities can go about navigating the process of revitalizing and codifying their laws within a broader legal system that has typically oppressed and challenged these legal systems.

2.3 Summary of Federal and Provincial Legislative Processes

Policies and legislation at the federal and provincial (Ontario) level were examined and synthesized to give an overview of the current legal and political landscape around water governance. This serves to give an overview of the ways in which the division of powers has created complexities within water governance.

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[38] *Ibid.*

[39] Lynn F. Lavallee, "Practical Application of an Indigenous Research Framework and Two Qualitative Indigenous Research Methods: Sharing Circles and Anishinaabe Symbol-Based Reflection" (2009) 8:1 International Journal of Qualitative Methods.

2.4 Review of Indigenous Knowledge and Reports on Water laws

This paper also examines key policy documents (including declarations) from Indigenous organizations and work done by individuals that relate to the environment, with a specific focus on water. It also identifie where and how these organizations and individuals conceptualize water laws and governance and some of the work that is being done on an ongoing basis.

I also draw upon information provided in interviews conducted with Elders, Traditional Knowledge holders, leaders in Indigenous communities/organizations and government employees from existing research conducted through Deborah McGregor's water governance project. Research participants were asked how traditional knowledge can play a role in water governance. Approximately 30 interviews were conducted in 2010-2012. These interviews were analyzed for mentions of legal orders, traditions and stories to include what some non-scholars are saying about Indigenous law in Canada today. Content analysis was used here to examine the interviews for their qualitative elements.[40] The focus here is to look closely at both the content and context of the interviews to attempt to understand underlying meanings and relationships.[41]

The text analyzed is explored through the focus on keywords and emerging themes within the context of the broader content. The following steps were taken in the analysis of the key informant interviews:

1. Data collection: interviews received from Deb McGregor as part of research for a paper on Traditional Knowledge around water in Ontario.[42]

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[40] Hsiu-Fang Hsieh & Sarah E. Shannon, "Three Approaches to Qualitative Content Analysis" (2005) 15:9 Qualitative Health Research 1277, online: http://journals.sagepub.com/doi/pdf/10.1177/1049732305276687.

[41] *Ibid.*

[42] Deborah McGregor, Principle Investigator for a SSHRC funded project "Traditional Knowledge and Water Governance in Ontario".

2. Organize and prepare data: organized based on backgrounds of interviewees. Browsed through interviews and made notes on first impressions.
3. Code and describe data: carefully read each transcript and label relevant pieces (words, phrases and sentences – is it repeated/emphasized?)
4. Conceptualize, classify, categorize and identify themes
5. Connecting and interrelating data
6. Interpretation, creating explanatory accounts, providing meaning – describing the connections between the categories

The key inquiries that guided the analysis of the interviews are:

1. How does the participant discuss water law/indigenous law/ water governance/ natural law explicitly?
3. Does the participant discuss related concepts in a way not yet identified by this research?
4. Is there a central concern or thesis from this participant?
5. Are there any additional parts of the participant interview that are relevant?

These interviews were used largely to provide some context around how Indigenous peoples, policy-makers and government bureaucrats were talking about water governance. Though much of the discussion of water issues used the terminology "traditional knowledge" with few mentions of "law", these interviews were very useful for providing context. The content of these interviews revealed some of the trends and common conceptualizations of the problems and possible solutions within water governance. Therefore while these interviews are not the focal point of this research, they were very helpful to provide background information that extends beyond what is available from academic sources, government documents and grey literature.

2.5 Review and Analysis of Indigenous Legal Methodologies

A literature review was conducted to determine what scholars and Indigenous peoples have said about Indigenous law in Canada. This literature review examined writings that both discuss Indigenous or natural laws and also examined works on methodology around

codifying / translating Indigenous laws. The systematic literature review identifies various research methodologies employed to document and codify Indigenous law. I used specific keywords and search databases to provide search results that are publically available. I specifically focused on the work done by Val Napoleon, Aimee Craft, John Borrows and Aaron Mills which all detail different ways of codifying/triangulating/synthesizing/revitalizing Indigenous law in Canada.

Apart from doing extensive notable work in this area, these scholars were chosen as they all bring a unique approach to this work and provide different modes of analysis. They also all bring different perspectives not only from an academic perspective, but also from different community perspectives, which inform much of the work they do. While Craft, Borrows and Mills are all Anishinaabe, there is still a diversity of perspectives that exist between them. While Napoleon is not Anishinaabe, the methodology she has developed is very comprehensive and has already been applied several times at the individual community level. The method developed by Napoleon with the help of Hadley Friedland has also been accepted broadly across the country and has been adopted by the Indigenous Bar Association as part of their project called 'Revitalizing Indigenous Law.'[43]

2.6 Literature Gaps or Limitations

As the Indigenous legal order scholarship is currently emerging, there has been little research conducted to evaluate the "conceptualization" of Indigenous legal orders and methods employed to codify Indigenous laws. I acknowledge that at this time it is a challenge to fully capture each and every Indigenous legal order in Canada as many have

[43] Indigenous Bar Association, "Revitalizing Indigenous Law" (2014), online: http://www.indigenousbar.ca/indigenouslaw/.

yet to be codified – and in some cases, some Indigenous peoples may not wish their laws to be codified.

Much of the literature discusses the limits that exist in trying to create a broad and wholly inclusive account of Indigenous laws in Canada.[44] Legal scholars including Craft state that further interviews with elders and more communities would provide for a more full picture and understanding of Indigenous law in Canada.[45] This does present a practical concern as we attempt to move forwards in our understanding and inclusiveness of Indigenous legal orders. It would likely take decades of dedicated time and resources to even come close to learning about and compiling all of the legal traditions and orders that exist amongst Indigenous peoples in Canada.

2.7 Summary and Conclusion

The overarching approach that guides this paper draws upon Indigenous research methods and perspectives in an attempt to challenge existing colonial models of research and inquiry. This perspective challenges the assumptions that prevail around our legal systems and the colonial governance models that have dominated for the last several centuries. This paper will subsequently look at some of the legislative and policy-based products of these governance systems and the ways in which they affect water access and quality for Indigenous communities in Canada.

[44] Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2002) 11:1 Indig LJ 1 at 7.
[45] Aimée Craft, "Anishinaabe Nibi Inaakoniqewin Report" (2014) at 45, online: http://law.robsonhall.com/chrr/wp-content/uploads/sites/5/2016/11/ANI_Gathering_Report_-_June24.pdf.

3. Navigating Government Policy and Legislation on Water Governance

3.1 Introduction

There are many jurisdictional issues that arise within the governance of water. While water governance is clearly articulated in the case of non-Indigenous populations, the situation is very different for Indigenous communities. Federal responsibility for "Indians and lands reserved for Indians" originated in 1763 where it was explicitly stated in the *Royal Proclamation.*[46] While the federal government has remained ultimately responsible for water management on reserves, it has collaborated with provincial governments – particularly in times of crisis (and especially when the provincial government is implicated in some way). The federal government also shares some of the responsibility with the communities and typically the Chief and Council manages the day-to-day operation of water systems.[47]

3.2 Federal Responsibilities on Reserve

The Federal government is responsible for legislating and creating policies for water matters on reserve and that have direct implications for Indigenous people. There are three federal departments that play a role in the governance of water on reserves: Department of Indigenous and Northern Affairs (responsible for water infrastructure), Department of Health (monitors water quality) and the Department of Environment and Climate Change (guidelines for wastewater and source water protection). Though these

[46] *Royal Proclamation,* 1763, R.S.C., 1985, App. II, No. 1.
[47] *Supra* note 23.

three departments act separately on some issues, they jointly developed and work on the First Nations Water Management Strategy. [48]

Ministry	**Drinking water responsibility**
Health Canada	Water quality monitoring (advisory): Health Canada specifically works with southern communities to manage drinking water quality processes and procedures. It primarily provides information on quality as well as guidance on how to best achieve safe practices.
Environment Canada	Source Water: provides advice and resources on protection and sustainable use.
INAC	Capital construction, operations and maintenance: provides funding and advice for communities.

Despite having policies and legislation in place that appear to address issues of water management on reserves, it is commonly known that there is a water crisis in Canada for Indigenous peoples.[49] This problem is complex and extends beyond the simplicity of funding needs or shortfalls.[50] Rather, this problem is one that has a myriad of factors and deeper historical colonial roots. Prime Minister Justin Trudeau has expressed on many occasions that he intends to address the eroded and troubled relationship between the federal government and Indigenous peoples. In a 2015 ministerial mandate letter to Carolyn Bennett, Minister of Indigenous Affairs and Northern Development, Prime Minister Trudeau wrote:

[48] Environment and Climate Change Canada, "Water Governance & Legislation: Federal Policy and Legislation" (15 December 2016) online: https://www.ec.gc.ca/eau-water/default.asp?lang=En&n=E05A7F81-1
[49] *Supra* note 23.
[50] *Supra* note 64 at 1.

> No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.[51]

This sentiment echoes the *Royal Commission on Aboriginal People*,[52] which recommended in its final report that the federal government develop better policies and legislation to better address the needs of Indigenous communities while also facilitating their engagement. The stated aim of the current federal government is to have the standards and quality for water on reserve ameliorated to the point where these communities experience the same water standards as communities that are not on reserve.[53] However, the inclusion of traditional knowledge or Indigenous laws invites sometimes difficult and or inappropriate comparisons and may have the effect of sterilizing the water laws and relationships that Indigenous communities have to water. The top-down approach that that is typical of the federal government, tries to impose a singular solution on diverse communities is problematic, and has failed to see the success it intended to. [54] The following table details the water policies and legislation that have passed over the last several decades. It highlights the many attempts that have been made to address the obvious water crisis for Indigenous communities, all of which have been ultimately unable to produce meaningful long-term solutions.

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[51] Canada, Office of the Prime Minister, "Minister of Indigenous and Northern Affairs Mandate Letter", (Ottawa: November 2015) online: http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter.

[52] Established by the federal government in 1991 to conduct hearings in 96 communities in Canada and produce reports and studies to examine the living experiences and conditions for Indigenous people across the country. For more information see: http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637.

[53] *Supra* note 48.

[54] For more on this see: Cathy Gulli,, "Why can't we get clean water to First Nations reserves?" (7 October 2015) Maclean's Magazing, online: http://www.macleans.ca/news/canada/why-cant-we-get-clean-water-to-first-nation-reserves/.

Chronology of Federal Water Policy and Legislation that Affects Indigenous Communities

Date	Event
1970	Canada Water Act
1978	Guidelines for Canadian Drinking Water Quality
1987	Federal Water Policy: this came about after the Joint Committee on Drinking Water Standards (1986), which looked into water resource management issues and committed to safe drinking water in all federal jurisdictions.
1995	National Assessment of Drinking Water and Sewage Treatment in First Nations Communities (headed by Health Canada and DINAD). The central finding in this report is that health and safety risks are present in 35% of water systems.
1999	The *First Nations Land Management Act* is enacted to provide signatory First Nations with the authority to make laws that relate to their reserve lands, resources and the environment.
2001	National Assessment of Water and Wastewater Systems in First Nations Communities (report issued in 2003). Similar findings to the preceding report: 29% of water systems registered as high risk. Policy: Guidance for Safe Drinking Water in Canada: From Intake to Tap. Health Canada Report: Safe Drinking Water on First Nations Reserves, Roles and Responsibilities
2002 - 2004	Federal/Provincial report issued in 2002 "From Source to Tap: The multi-barrier approach to safe drinking water." This report was later updated in 2004 to bring a collaborative approach to drinking water management in all sizes/types of communities. Though the guidelines are highly detailed, they only put forward voluntary guidelines – and are therefore unenforceable.
2003	First Nations Water Management Strategy launched to specifically improve wastewater management on reserves. The strategy commits $600 million over 5 years towards resources, training and development of plans to protect water and manage wastewater on reserves.
March 2006	Federal government announces the "Plan of Action for Drinking Water in First Nations Communities." This plan increased funding and introduced the issue to discussions within the Senate and the House of Commons.

June 2006	DIAND created an Expert Panel on Safe Drinking Water for First Nations, which held public hearings across the country to hear from "interested parties." This panel found that there lacked an effective regulatory framework to outline funding targets, roles and responsibilities. This panel made three recommendations for a new framework moving forwards to address these issues: create new federal legislation, better utilize existing provincial statutes and/or develop a framework based upon existing "customary laws."[55]
2007	*Final Report from the Standing Committee on Aboriginal Peoples* is issued and commented on the safe drinking water issues. Much of this is framed within the context of how the lack of adequate water services serve as a barrier for new economic development and investment in or near these communities.
April 1, 2008	First Nations Water and Wastewater Action Plan (FNWWAP) commences with the aim of bringing the water conditions and services on reserves into comparable quality with those in other Canadian communities.
2010	Protocol for Centralized Drinking Water Systems in First Nations Communities
2011	National Assessment of First Nations Water and Wastewater Systems began to "define the current deficiencies and the operational needs of water and wastewater systems" and then to make recommendations about long term solutions (commissioned from FNWWAP recommendation).[56]
2011	Water and Wastewater Policy and Level of Service Standards (LOSS) – reinforces the FNWWAP to deliver potable water and wastewater services on reserve.
2012	The Omnibus Budget Bill repealed and replace the *Canadian Environmental Assessment Act* which had the effect of lowering / loosening the requirements for detailing the effects that a proposed development would have on waterways/bodies.[57]

[55] Harry Swain et al. "Report of the Expert Panel on Safe Drinking Water for First Nations" (November 2006) *Published under the authority of the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians,* online: https://www.safewater.org/PDFS/reportlibrary/P3._EP_-_2006_-_V1.pdf.

[56] Department of Indigenous and Northern Affairs, "National Assessment of First Nations Water and Wastewater Systems – 2009-2011" (27 October 2016) online: https://www.aadnc-aandc.gc.ca/eng/1313426883501/1313426958782.

[57] Ecojustice, "Legal Backgrounder: Canadian Environmental Assessment Act (2012)" online: https://www.ecojustice.ca/wp-content/uploads/2015/03/August-2012_FINAL_Ecojustice-CEAA-Regulations-Backgrounder.pdf.

2013	Safe Drinking Water for First Nations Act comes into force November 1 – introduced by then Minister of Aboriginal and Northern Development Canada. Currently no regulations have passed under this legislation. (Responsibility: INAC and FN) Guidance for Providing Safe Drinking Water in Areas of Federal Jurisdiction v. 2.
2014	Indigenous and Northern Affairs Canada creates the First Nations On-Reserve Source Water Protection Plan, which "provides First Nations communities with the necessary tools to assist them in developing their own community-based source water protection plan."[58]
2015	The Standing Senate Committee on Aboriginal Peoples released an interim report on housing and infrastructure on reserves, which notably identified the poor infrastructure on reserves and recommended a lift to the 2% funding cap for First Nations programs.[59]
2016	Federal budget announces $8.4 billion in funding for Indigenous programs, with $4.6 billion going to infrastructure (including water infrastructure) which is more than double what was allocated in the 2014 budget.[60]
2017	2017 Budget: explicit statements to improve water infrastructure for Indigenous communities: " Clean drinking water for every Canadian, no matter where they live."

All of the policies and legislation listed above were implemented in a unilateral fashion, sometimes with consultation but with varying degrees of meaningful engagement and application of the input given by Indigenous peoples. One particularly controversial development in water legislation in Canada was Bill S-8, which put forward the *Safe Drinking Water for First Nations Act*,[61] and was passed into Parliament in 2013. This legislation imposed significant new costs and responsibilities on First Nations to

[58] Department of Indigenous and Northern Affairs Canada, "First Nations On-Reserve Source Water Protection Plan" (2014) online: https://www.aadnc-aandc.gc.ca/eng/1398369474357/1398369572276.
[59] Aeembly of First Nations, "Water and Infrastructure AFN Annual Report" (2016) online: http://www.afn.ca/en/policy-areas/Water-and-Infrastructure.
[60] *Ibid.*
[61] *Supra* note 29.

manage their water resources without an adequate accompanying transfer of supportive resources.[62] This therefore had the effect of downloading responsibility without adequate transition provisions and no legislative guarantees that an adequate amount of funding would be provided.

This Act has also received significant criticism for failing to adequately consult with First Nations communities to phase in regulations and has, in fact, failed to implement any sort of regulatory process to carry out the legislation. Regulations are important because they specify processes required for infrastructure development, training and resources provision. Without regulations there is likely to be a 'capacity' or 'regulatory' gap between the stated goal of the legislation, and its outcomes.[63]

The Canadian Environmental Law Association wrote a report about Bill S-8 and outlined recommendations for elements to be included in the legislation, including: 1) Protection of Aboriginal and treaty rights as laid out in the Constitution 2) Development of a long-term plan for water resource management and 3) Acknowledgment of Indigenous governance structures.[64] Unfortunately, the final enacted draft of the legislation did not incorporate these recommendations. This is largely reflective of a method of legislating around Indigenous issues, where the consultative stage may seem open and inclusive, but then largely fails to adequately incorporate the recommendations and requests that arise in the consultation process into the final policy or legislation.

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[62] Assembly of First Nations, "33rd Annual General Assembly Report 2011-2012" (2012) at 43, online: http://www.afn.ca/uploads/files/2012afnannualreport.pdf.
[63] Atleo, S., "AFN National Chief Calls for Real Action on Safe Drinking Water for First Nations", Assembly of First Nations Bulletin (Ottawa: 27 May 2010) online: http://www.afn.ca/uploads/files/water/10-05-27.pdf.
[64] Canadian Environmental Law Association. "Briefing note to the standing committee on Aboriginal Peoples Re: Bill S-8" (2012) online: http://s.cela.ca/files/846CELA_BriefingNoteBillS-8.pdf.

3.3 Provincial Responsibility in Water Governance

Provinces in Canada are responsible for creating policies and legislation that address issues around drinking water and waste water systems generally in municipalities and rural areas. Provinces are specifically responsible for source water protection, while municipalities take on responsibility for managing drinking water and waste water systems.[65] Though water governance technically falls within federal jurisdiction, water crises on reserve and elsewhere have blurred the jurisdictional lines with provinces and the federal government enacting legislation and policies in response to clear deficiencies in the water governance systems.

In response to the crisis in Walkerton, Ontario in 2000,[66] a commission was developed to investigate how and why it occurred and what must be done to prevent something like it from happening again. Of the many recommendations that came out of this report, there are several that pertain to First Nations communities – some of which exceeded provincial jurisdiction. Of the seven recommendations that explicitly mentioned First Nations, the general theme within these recommendations is that better training, resources and collaboration were needed between government and communities.[67] The *Ontario Water Resources Act*, passed a regulation called the Drinking Water Protection Regulation which served as a response to the water crisis in Ontario.[68] Unfortunately this regulation entirely excluded reserves as they were considered to be within federal

[65] *Supra* note 23.
[66] Walkerton Inquiry (Ont.), O'Connor, D. R., & Ontario, *Report of the Walkerton Inquiry* (2002) Toronto: Ontario Ministry of the Attorney General.
[67] *Ibid.*
[68] O. Reg. 170/00.

jurisdiction.[69]

The Chiefs of Ontario submitted a report the Walkerton Commission, which detailed the issues facing First Nations in Ontario relating to water quality, access and maintenance.[70] In comparing the Walkerton crisis to the Kashechewan crisis, it is notable that there was far less response and no high level national inquiry that resulted from the Kashechewan incident. In fact, within the community after the residents were allowed to return home, much of the conditions that resulted in an E. coli outbreak persisted.[71] Evacuations have continued to occur in 2006, 2012, 2015 and 2016 costing several millions of dollars each time.[72]

Chronology of Water Related Crises and Policy Responses in Ontario

Date	Event
1990	Enactment of the *Ontario Water Resources Act*
October 1996	Royal Commission on Aboriginal People releases Final Report
May 2000	Deaths from E. *coli*. Contaminated water in Walkerton, ON
2001	Walkerton Commission established
January 2002	Part One of the Walkerton Commission Report released
May 2002	Part Two of the Walkerton Commission Report released
December	Government of Ontario passes *Safe Drinking Water Act*. Created in

[69] David R. Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill LJ 81.
[70] Kamanga, D., Kahn, J., McGregor, D., Sherry, M., and Thornton, A. (Contributors). Drinking Water in Ontario First Nation Communities: Present Challenges and Future Directions for On-Reserve Water Treatment in the Province of Ontario. Submission to Part II of the Walkerton inquiry Commission. (2001) Chiefs of Ontario, Brantford, ON, online: http://www.chiefs-of-ontario.org/sites/default/files/files/COO_Walkerton_Report.pdf
[71] CBC News in Review, "Toxic Water: The Kashechewan Story" (2005) online: https://media.curio.ca/filer_public/f8/4e/f84e2dd8-76c5-4fbf-b9b7-b9d053b4ac2f/kashechewan.pdf.
[72] CBC News, "Kashechewan: Water crisis in Northern Ontario" (9 November 2006) online: http://www.cbc.ca/news2/background/aboriginals/kashechewan.html.

2002	response to the Walkerton Report by consolidating all legislation related to drinking water and introducing new mechanisms to ensure safe drinking water.
2003	Ontario Drinking Water Quality Standards Regulation (169/03) under the Safe Drinking Water Act and the Drinking Water Systems Regulation (170/03)
2004	Certification of Drinking Water Systems Operations and Water Quality Analysts Regulation (128/04) under *Safe Drinking Water Act*
October 2005	Evacuation of Kashechewan First Nation due to *E coli.* Contamination[73]
August 2006	Chiefs of Ontario contribute written submission to Expert Panel on Safe Drinking Water for First Nations.
October 2006	Government of Ontario passes *Clean Water Act.* This legislation requires that communities create source water protection plans to safeguard drinking water and identify / act on potential threats.
2015-2016	Chief Drinking Water Inspectors Report – Annual Report on drinking water
October 17, 2016	Ontario government proposes a 2 year moratorium on new or further water takings from groundwater sources by water bottling companies (this affects – most notoriously – Nestle).[74] This is considered to be the "biggest change in water policy since Walkerton" but must still be fully enacted/enabled.

The *Clean Water Act* is a piece of Ontario legislation, which is tasked with ensuring that everyone in Ontario has access to safe drinking water.[75] While it has been effective in some ways, it has also been criticized, particularly in the ways that it legislates the inclusion of Indigenous knowledge. The Act rigidly and specifically sets out how "Traditional Knowledge" (TK) can be considered and places a stronger emphasis on the value of empirical evidence and scientific testing, which can be a restrictive barrier to the

[73] Niether the Ontario or Federal governmet acted for 10 days while knowing about the water contamination until an evacuation was finally ordered , *Ibid.*
[74] Guelph Today Staff, "Some good news for those concerned about Ontario's water" (16 November 2016) online: https://www.guelphtoday.com/local-news/some-good-news-for-those-concerned-about-ontarios-water-465368
[75] *Supra* note 27.

inclusion of this information.[76] The *Clean Water Act* also limits the ability of incorporating TK into source water protection. There are therefore limited examples of successful and fulsome inclusion of Indigenous water knowledge under this legislation.[77] When there has been inclusion, it has sometimes been delayed or has had negative consequences, which has tarnished the reputation of the program under the Clean Water Act for other potentially interested communities.[78]

One of the major issues is one of timing. The rigid time frames that are set out in the legislation make it difficult for the government to engage with First Nations communities in meaningful and effective ways towards building relationships.[79] This challenge is linked with the ability to find the knowledge holders in the first place, and then work towards building effect relationships that would foster co-management or substantive inclusion in the decision-making processes.

Despite these challenges, as of 2014, Ontario was the jurisdiction considered to be the furthest ahead in implementing a comprehensive and effective source water protection program.[80] This is particularly notable in contrast to the evaluation Ecojustice gave to the Federal government. Where Ontario received an A letter grade in this assessment, the federal government received an F for failing to make any legislative progress towards improving water quality in First Nations communities and for providing insufficient funds to improve these standards. While the budgetary issue has since improved with the new federal government, the legislative gaps remain.[81]

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[76] Interview Participants 9 & 19.
[77] Interview Participant 18.
[78] Interview Participant 17.
[79] Interview Participant 18.
[80] Ecojustice, "Waterproof 3: Canada's Drinking Water Report Card" (2014) online: https://www.ecojustice.ca/wp-content/uploads/2014/11/Waterproof_Essentials_web_corrected_Dec_8.pdf
[81] *Ibid.*

3.4 The Challenges of a Federalist System

The federalist structure of this country creates a disenfranchisement by creating a 'legal geography of space' which excludes Indigenous peoples from decision making about the environment: "these federalist structures organize, separate, and allocate water and rocks in a manner that promotes unequal distributions of political influence."[82] This becomes manifested by the ways in which the government divides and parcels up land and bodies of water and sets out rigid governance structures on this basis.[83]

The division of powers issues also arise when distinguishing between a reserve and a municipality. Within the treaty relationships it was assumed (by most Indigenous communities) that clean water would be provided, and yet the federal government has limited service provision experience in this area, due to federalism and the division of powers (which traditionally gives that power to provinces and subsequently municipalities). It has also been stated that it can be difficult sometimes for elders to understand how and why their waters may be polluted (particularly when they are not the polluters) – so the reliance on natural water sources without treatment becomes an issue. Simply applying a municipal model will not work, whatever water governance structure is set up must account for the spiritual connection with the land and water that each individual community has.[84]

Devolving responsibilities to reserves as it is done with municipalities does raise some challenges and concerns. While possibly and seemingly good intentioned, this strategy is in danger of perpetuating colonial unilateral decision-making. It is important that rather than simply unloading and thereby shirking responsibility, this is done in an

[82] *Ibid* at 30.
[83] *Supra* note 19.
[84] Interview Participant 11.

appropriate, collaborative and thoughtful way. As stated by one of the interview participants,

> When I take a look at where the federal government wants to go (in regards to water), there is a feeling that this is further devolving of federal responsibility to provincial responsibilities for water or limiting the whole jurisdiction of water to the boundary of the reserves. I think if we take a look at the impact of governance to water, it goes beyond the boundary of the reserve and so we have to take a look at the tools that we need to ensure that when we are looking at this issue correctly.[85]

Another challenge with the devolution of responsibility – from the federal government to the Ontario government – is that many communities have limited connections with provincial governments. Despite this, some authority has already been delegated – such as in the management of source water protection and wastewater.[86] One way that this might be positive, is that Ontario has appeared to be more engaged with and primed to listen to and respond to Indigenous concerns about drinking water – largely as a result of the Walkerton crisis.[87]

If it is done in an appropriate way, however, downloading of responsibilities can be an effective way of transferring the management of water resources more into the hands of Indigenous communities. The local governance perspective is important in the sense that it has "boots on the ground at the local level. Rather than going through various hoops to address that management gap, you empower the First Nations to manage its own resources."[88] This would ultimately look more like co-management and can exist without explicit recognition from the judicial system. These processes should be seen as extending beyond the courts and was described by one interviewee as follows:

[85] Interview Participant 15.
[86] Interview Participant 4.
[87] Interview Participant 15.
[88] Interview Participant 16.

> There is always the question of what is it that we actually want at the end of the day through our litigation, and we want a declaration that we actually hold Aboriginal title over the lakebeds and the riverbeds of the central Great Lakes. But, what does that actually mean? There's a responsibility to manage the resources and lands, and to be stewards of them. Until we receive that declaration, we have an obligation to get as close to that as we can.[89]

3.5 Summary and Conclusion

There is division of powers and responsibilities over water management between the federal and provincial governments that has created a complex and problematic water governance structure. While the federal government maintains the primary responsibility for Indigenous communities and reserve lands, the Ontario government is arguably far better equipped to manage and provide the necessary services and infrastructure. The ultimate ideal model, however, is one where the necessary resources and support are given to communities directly so that they are able to exercise governance over their water in a way that aligns with their laws and values. The following chapter will explore some existing traditional water knowledge and reporting on water laws and some of the ways that Indigenous communities and individuals are talking about water governance and use.

[89] *Ibid.*

4. Review of Indigenous Knowledge and Reporting on Water Laws and Governance

4.1 Chiefs of Ontario

The Chiefs of Ontario drafted a Water Declaration of the Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario in October 2008, which summarizes their perspectives on water quality, water quantity, safe drinking water and recommendations for future steps. This declaration was passed as a Resolution by consensus and is divided into the following sections: relationship to waters, conditions of our waters, major themes, rights of waters and self-determination, and rights to waters and treaties.[90]

4.2 Assembly of First Nations

The AFN has a National Water Declaration that is two pages in length and sets out several integral elements of the relationship and responsibility to water. This declaration discusses ceremonies, inherent and treaty rights, the current condition and protection of waters, consultation and accommodation, water governance, and Indigenous knowledge systems.[91] The context of this declaration is to express the respect for and inherent gift that water is and must be treated appropriately to promote harmony between all living creatures. Prior to the 2016 budget being released, AFN asked for a commitment to make "equitable funding" a reality – this included funding towards improving drinking water infrastructure.[92]

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[90] Chiefs of Ontario, "Water Declaration of the Anishinaabek, Mushkegowuk and Onkwehonwe" (October 2008) online: http://www.chiefs-of-ontario.org/sites/default/files/files/COO%20water%20declaration%20revised%20march%202010.pdf.
[91] Assembly of First Nations, "National Water Declaration" (2013) online: (http://www.afn.ca/uploads/files/water/national_water_declaration.pdf.
[92] Aseembly of First Nations, "Closing the Gap: 2015 Federal Election Priorities for First Nations and Canada" (2015) online: http://www.afn.ca/en/closing-the-gap-2015.

4.3 Josephine Mandamin

Josephine Mandamin, Anishinaabe Grandmother and water walker [93] has been instrumental in bringing awareness of Indigenous traditions around water, including receiving awards such as the Lieutenant Governor's Ontario Heritage Award for Excellence in Conservation. Through her advocacy work, Mandamin has gotten over 100 First Nations communities to sign onto the First Nations Great Lakes Water Accord and has walked over 20,000 km in the name of water.[94] Her work is driven by the desire to make people aware of their dependence to and connection to water and she has stated,

> I will go to any lengths to and direction to carry the water to the people. As women, we are carriers of the water. We carry life for the people. So when we carry that water, we are telling people that we will go any lengths for the water. We'll probably even give our lives for the water if we have to. We may at some point have to die for the water, and we don't want that.[95]

4.4 Anishinaabe Water Laws Reported in Interviews

While there are many commonalities across the country in the ways that water is understood and treated, there are also significant diversities in these relationships with water. One interview participant – an Indigenous woman and teacher, described the relationship with nature as differing across the country and stated that while this relationship mostly emphasized responsibility, the governance structures will look different when dealing with different bodies of water – ie lakes, rivers, oceans,

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[93] Water walkers are women who have organized to carry water great distances, relay-style, in an effort to raise awareness to the water issues and crises that exist in Canada. For more information see: http://www.motherearthwaterwalk.com/?page_id=11.

[94] ICMN Staff, "Ojibwe Grandmother and Water Walker Josephine Mandamin Honored for Conservation" Indian Country Media Network (4 March 2016) online: https://indiancountrymedianetwork.com/news/environment/ojibwe-grandmother-and-water-walker-josephine-mandamin-honored-for-conservation/.

[95] *Ibid.*

groundwater.[96] One key water principle that appears to flow throughout many Indigenous communities in Canada, is that women are the water keepers. This principle came through in both the literature and the interviews.

Many of the interview participants talked about the importance of bringing in the women through ceremony when talking about water – and in the absence of women then Elders must be included in these conversations. The inclusion of these voices is crucial when dealing either with government or even when going through the process of uncovering or revitalizing the water laws in a community. When dealing with outsiders, there can be a process of translation that has to occur to bridge the gaps in understanding and knowledge about relationships with water. Several interview participants identified the highly technical and rigid framework that is applied by government officials in the process of water management, which must be reconciled with the "integrated system of caring and responsibility for water that our people have."[97]

One interview participant described the process by which some communities are attempting to supersede the level of protection that the government is offering for water resources to thereby accept responsibility for their own water and thereby take control:

> We will write our own water law and governance system and we will follow that, and this law will be as good as, or better than the provincial law, and probably, as good as, or better than the federal law. Thereby, under your federal law, this law will supersede. And so that's what's happening now in Akwesasne which we've been doing for quite a long time, is we're bringing together the different components of our communities law that reflect water in order to write an Akwesasne water law, and that water law will be as good as or better than the federal or provincial and therefore supersede them both.[98]

[96] Interview Participant 2.
[97] Interview Participant 3.
[98] Interview Participant 4.

4.4 Summary and Conclusion

Much of what Indigenous individuals and organizations are seeking and emphasizing in talking about water, is the ability to self-govern and/or to allow their understandings of water to fundamentally guide the way that water is managed in their communities. Though there are clear and underlying principles that illustrate many community perspectives on water knowledge and laws, such as that we have a responsibility to protect the water and that women are the water keepers, it must also be recognized that water laws will differ between communities and so a uniform nation-wide approach is not appropriate. The following chapter will detail the four methodologies selected for revitalizing and codifying Indigenous laws in Canada and will draw out the similarities and differences between the approaches.

5. Review and Analysis of Indigenous Legal Methodologies

5.1 Introduction

While Indigenous law has been around since time immemorial, the formalized study of it by academic scholars has only substantially emerged within the last several decades. Indigenous law has emerged as a topic of research long before the release of the TRC reports. Many scholars, elders and community members have written about the governing mechanisms that inform the ways that their societies operate. The following scholars have contributed to emerging scholarship on Indigenous laws and the methodologies they use to uncover and analyze Indigenous legal principles.

One important thing to note is the distinguishing vocabulary that can come up in this work. When discussing the individual scholars I will use the vocabulary that they use which will include: legal orders, legal systems, laws, and legal principles. The following four scholars were selected on the basis that they have all contributed uniquely to the development of Indigenous legal methodologies. These scholars all bring unique perspectives both from their own communities and experiences, and also in light of the types of contributions that they make. While some are more focused on an academic form and presentation, others engage at a more local and community specific level. Despite these differences, they all bring fundamentally and equally important contributions to the processes involved in revitalizing Indigenous law.

5.2 John Borrows

John Borrows talks about the "resurgence" of Indigenous law and the importance of recognizing this law as a third and equal legal system in Canada.[99] In his most recent

[99] *Supra* note 19.

book published in 2016, *Freedom and Indigenous Constitutionalism*, Borrows builds on his previous work in establishing the rich, powerful and principled Indigenous laws that currently exist in Canada. Borrows places the histories of these laws within the context of the Canadian Constitution and the legal restrictions that the Constitution has explicitly and implicitly placed on Indigenous laws.

Borrows emphasizes that Indigenous legal traditions are separate from the common and civil law systems but they interact with it nonetheless, and these interactions can often highlight tensions and disparities. In his many writings, Borrows effectively demonstrates how Indigenous law has been formed in many of the same ways and derived from similar sources as colonial legal models.[100] In this way he compares and contrasts these legal systems in a way that is comprehensive and broadly accessible to all audiences. His ultimate argument is that these legal traditions are in fact a third equal order of law that should be respected and incorporated into the Canadian legal landscape. He explains this using the Two Row Wampum from the Treaty of Niagara, seen below:

(Onondaga Nation, 2017)

This wampum represents the two boats alongside each other, one being a Dutch ship and the other being a Haudenosaunee canoe. Both boats contain different individuals with their own laws, religion and customs, but this wampum expresses an intention to

[100] *Supra* note 19.

allow each boat to continue on its course and to respectfully not interfere with each other.[101] We have come a long way from this mutual respect for each others autonomy and in the realm of law, the colonial legal systems have largely tried to entirely overtake any Indigenous law that existed and continues to exist. It is therefore important to remember these original intentions that existed at treaty-making time and to look towards ways to respect this original agreement.

Common law derived from Indigenous law

In his book *Resurgence of Indigenous Law*, Borrows puts forward the central argument that Canadian law does actually derive some of its foundations from Indigenous laws, but this has been obscured by overpowering Western legal narratives.[102] Borrows has argued on many occasions that, "Canada cannot presently, historically, legally or morally claim to be built upon European-derived law alone."[103] Understanding this is important in the process of bridging the existing gap between Indigenous and colonial legal systems as it highlights the ways in which laws do evolve and can be influenced by other legal models. It demonstrates that legal traditions do not derive their strength and legitimacy from their ability to rigidly adhere to its original form and content, but rather its ability to grow and evolve to meet the changing needs of a society.[104] In recognizing this evolution and the interrelatedness of these laws, Borrows is not arguing that all discriminatory laws or those which give no credence to Indigenous laws be abandoned in entirety, but that their

[101] *Ibid.*
[102] *Supra* note 19.
[103] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, Scholarly Publishing Division, 2010) at 15.
[104] *Ibid* at 8.

interpretation be such that relinquishes discriminatory effects. He states that this could be most explicitly and impactfully done with the interpretation of treaties.[105]

Importance of Legal Pluralism

Though several of the scholars discussed here have also identified this issue, Borrows was the first to substantially discuss the co-existence of Indigenous and non-Indigenous laws in terms or legal pluralism. The central barrier to the acceptance of and possible further integration of Indigenous legal principles stems from the fact that many colonial governments and legal institutions see Indigenous law as acting in opposition to the common and civil law systems. Borrows explains: "[m]uch of the history of Canadian law concerning Aboriginal peoples is often seen as conflictual, a contest between ideas rooted in First nations, English, American, and international legal regimes in which one source of law must become ascendant."[106] It is therefore important to determine ways in which to reconcile the differences that do exist and work towards developing a system that acknowledges and respects the different legal systems in Canada.

This new system would be one that follows a model of legal plurality. Finding inconsistencies between Indigenous and non-Indigenous laws does not in itself help us to resolve which model should and will prevail.[107] The Supreme Court has not expressly invoked the doctrine of incompatibility in describing the nature of Aboriginal rights protected by the Canadian constitution, however such a doctrine may ultimately find its way into this type of analysis.[108]

[105] *Ibid* at 20.
[106] *Supra* note 11 at 4.
[107] *Supra* note 19.
[108] *Supra* note 19 at 8.

A model of legal pluralism would allow for the simultaneous presence of different legal principles within one legal landscape.[109] This model already exists in Canada through the co-existence of both the common law and civil law, making Canada uniquely positioned to further extend this to Indigenous law. This would promote the rejection of discriminatory interpretations of law, but would not require an abandonment of already existing laws.[110] Another term for this which Borrows discusses, is "intersocietal law", which he describes as working more on the ground to follow legal norms and values that are reflected in every-day life – not simply as seen by the formalized legal institutions.[111]

Understanding Indigenous Law: Issues, Individuals, Institutions and Ideas

Borrows most notable book on Indigenous law from an Indigenous perspective is *Drawing Out Law: A Spirit's Guide*.[112] This book contrasts the Canadian legal system with the Anishinabek perception of law, which is more broadly defined to examine and draw from community life, nature and individuals. Borrows discusses how the strength of Anishinabek story telling is the ability and encouragement of listeners and participants to draw their own conclusions. This is often important because stories may have different meanings or possibilities for interpretation and this shapes laws.[113]

Unlike Borrows' book *Canada's Indigenous Constitution,* the arguments in this book are more implicit and with a grounding in Anishinabek philosophical ways. He is careful to contrast these two books as approaching similar subject areas but from very different voices and styles. This difference is useful in highlighting the ways in which

[109] *Supra* note 101 at 8 citing endnote 13.
[110] *Ibid* at 20.
[111] *Ibid* at 16.
[112] John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, Scholarly Publishing Division, 2010).
[113] *Ibid* at 71.

legal pluralism and perspectives can co-exist and provide different but equally valid contributions. Borrows talks about how Anishinaabe peoples place a high degree of importance and attention on dreams. The sharing of these dreams is expected and some dreams that have particularly poignant lessons or values held within them may be disseminated throughout the community.[114]

> These [Anishinabek] laws are sourced in the thunder and lightning, in animal creation narratives, individuals' efforts, educational creativity, community resistance, Canadian legal doctrines, comparative law's insights, family members' relationships, community deliberations, Windigo stories, and our experiences with and reflections on the Great Mystery.[115]

Borrows tells a story of his grandmother bringing him to a cave where their family has been going for 150 years – filled with petroglyphs and scrolls – considered to be a sacred place. Here his grandmother said to him: "Our traditions are always being renewed. What you see sitting along the platforms is the result of generations of work. We keep them sealed in here so that they are always ready for a future day. It's our way for drawing out law."[116] In this story, Borrows' grandmother says that the scrolls and teachings that she is sharing with him are in a real sense, Anishinaabek law.[117]

The book is broken down into four parts that are meant to capture the places that law can be derived from. The first is "Issues", which includes Aboriginal rights, the infringements of rights and the issue of child welfare. The second part is "Individuals" where several stories are told about individuals who had complications in their lives, which far exceeded the imagination or understanding that those around them could perceive. It highlights the ways in which people can be perceived by society in a certain

[114] *Ibid* at 5.
[115] *Ibid* at xiii – xiv.
[116] *Ibid* at 39-40.
[117] *Ibid.*

way (ie being successful/ confident) but may come from a history if struggle or may be dealing with things in their personal life which is seriously inhibiting their ability to find happiness and peace and may affect them in unpredictable or difficult to understand ways. This is why context or understanding the full person is important before judging. And there are Anishinaabe stories which can help explain this.

The third part is called Institutions and this section talks about the necessity of the multiple legal systems in Canada to work together and that the focus of strengthening Indigenous law is not to tear down the existing legal institutions. Here, Borrows quotes an elder who is addressing a group of students at Osgoode who are about to embark on the Aboriginal intensive program and says,

> You can't effectively practice in our communities if you don't know who we are and what we believe… You need to understand us at a deeper level to provide legal advice that will resonate with our ideals. You need to help us get to the root of justice as we see it… Please don't steal our decision-making ability with your fancy law school ideas. Help us restore our laws. Help us regenerate our internal regulations.[118]

Another chapter on this issue discusses Borrows' method for teaching and he says, "my real goal for them [my students] is not their friendship, though I accept and welcome that if it develops. What I want for them is independent, creative thought. Sometimes that requires submerging my own beliefs. Ambiguity is a big part of teaching law in an Anishinabek context, and I find it can be a useful learning tool, too."[119]

The final section is "Ideas", which discusses how social change is rooted in ideas about what is right and just. Borrows uses the example of how educational institutions have responded to the clearly disproportionate representation of Aboriginal students and

[118] *Ibid* at 133.
[119] *Ibid* at 157.

faculty based on the idea that this representation was vital to the proper functioning of the institution.[120] To apply Indigenous law, we must challenge the preconceived ideas that we have that Canadian law as it stands is the best method.[121] It is also important to understand that racism is a socially constructed phenomenon that perpetuates hurtful and destructive ideas.[122] This can be especially damaging for Indigenous peoples when they don't "look" like the stereotype of an Indigenous person and their bloodline – and therefore their rights – get called into question.[123]

Methodology: Case briefing

Borrows was the first legal scholar to apply the case comment method from the common law to Anishinaabe stories. By doing this, he is able to help in "drawing out" the legal principles from these stories and most notably first practiced this method in a 1996 article where he wrote a case comment on *Nanabush v Deer, Wolf et al.*[124] The method advocates for an approach that has some similarities to the case briefing method[125] in the common law, but also allows for greater flexibility in the interpretation of the roles of actors within the story and the possible interpretations of the outcomes:

> … Indigenous traditions and stories are both similar to and different from case law precedent. They are analogous to precedent because they attempt to provide reasons for, and reinforce consensus about, broad principles and to justify or criticize certain deviations from generally accepted standards.[126]

[120] *Ibid* at 196.
[121] *Ibid* at 197.
[122] *Ibid* at 202.
[123] *Ibid.*
[124] John Borrows, "With or without you: First Nations law in Canada" (1996) 41 McGill LJ 41, at 649.
[125] Case briefing is the method through which a judicial decision is read, analyzed and then distilled into the following categories: Facts, Issues, Ratio (the rule that the court used to make its decision), Application (how this rule was applied to the facts in this case) and Conclusion.
[126] *Supra* note 19 at 14.

They are also similar because they rely on past fact patterns to draw out solutions for related cases. These precedents are also similarly interpreted by knowledge holders, who interpret and present the precedents based on current circumstances. The fundamental differences, however, lie in the way that they are both recorded and applied (oral tradition and therefore the story teller becomes very active in how the law is applied).
This methodology lays out the facts, the issue and the resolution of the issue.

Example

In one example, *Nanabush v Deer, Wolf et al.,* the issue is whether Nanabush's actions disturb the necessary balance that must be maintained between humans and animals as required by law, such that one is not taking too much from the other or unnecessarily/excessively infringing on the other. To understand the resolution of the issue, Borrows applies precedent (other stories and cases) and notes the necessary differences in interpreting these stories compared with the interpretation of common law cases, "it is true that the stories as told here have been translated and stylized to make them more readily accessible to common law readers. However, all law requires a translation process."[127] These changes made "are also quite consistent with a genre of First Nations storytelling, which allows the narrator to become the Trickster, transforming the content of the stories into a new, previously unaccepted form."[128] Therefore, there is great flexibility in the application and the re-telling of these laws – which allows for nuanced and varied meanings to be explored and found within them.

[127] *Supra* note 12 at 20.
[128] *Supra* note 12 at 21.

Limitations

With regards to Borrows' case briefing method, there are some limitations that would exist in the execution of this methodology. Given the formalized nature of this process, it gives guidance on form but gives little information on the process of finding and hearing the stories and laws in the first place. It is therefore only useful to the extent that there is clear and accepted sources of laws to begin with. Following this, Borrows' case briefing method takes a very academic approach of distilling the laws into a form that is digestible for academic and legal institutions as it mirrors that which is being done in the common and civil legal systems. While this is very useful for some purposes, it might not work for some communities who are looking to use the laws internally or who are hoping to maintain a framework that more closely aligns with how they understand and use their laws.

5.3 Val Napoleon

Val Napoleon has written extensively about Indigenous legal orders in Canada and makes the distinction between a legal system – "state-centered legal systems in which law is managed by legal professionals in legal institutions that are separate from other social and political institutions" – and a legal order, which is "law that is embedded in social, political, economic, and spiritual institutions."[129] This distinction is important because it questions our assumptions about how legal processes and institutions should look and creates room for models that may be unfamiliar from a Western or colonial perspective. Apart from various papers Napoleon has written about Indigenous law, she has also

[129] Napoleon, Val, "Thinking About Indigenous Legal Orders"(2007) *Research Paper for the National Centre for First Nations Governance* at 2. See also: Val Napoleon and Hadley Friedland, "The Inside Job: Engaging With Indigenous Legal Traditions Through Stories" in Tony Lucero & Dale Turner (Eds.), *Oxford Handbook on Indigenous Peoples' Politics* (Oxford University Press, forthcoming 2014).

helped develop a research method to "engage with Indigenous laws seriously as laws" through the Accessing Justice and Reconciliation Project in collaboration with the Indigenous Bar Association.[130] This work is being carried out with Hadley Friedland, who is currently a Visiting Assistant Professor at the University of Alberta where her research focuses on Indigenous laws and legal methodologies. The Accessing Justice and Reconciliation project that Napoleon and Friedland work on together (with a team of researchers) includes seven phases and a rigorous analytical framework, which assess Legal Processes, Legal Responses and Resolutions, Legal Obligations, Legal Rights and General Underlying Principles. More broadly, this approach is focused on recognizing and respecting the specifics of each legal tradition so as not to "flatten the complexity,"[131] while also recognizing that these traditions do not stand in isolation and may be understood comprehensively as a larger whole.

Reject over-simplification

Napoleon and Friedland are concerned with dismantling the oversimplification of Indigenous laws and legal orders and challenging the notion that tradition is the basis of law and should be rigidly followed and upheld, without responding to the changing nature of society.[132] One example of this, exists in the tendency to treat elders like "priests" or as being all knowing. This places an oversimplified sort of pressure on elders to always "know" and be able to provide answers and can result in an absolutist notion about their knowledge that can make it difficult to challenge, disagree with or critique.[133]

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[130] "Revitalizing Indigenous Laws", Indigenous Bar Association, online: http://www.indigenousbar.ca/indigenouslaw/project-documents/.
[131] *Ibid.*
[132] *Supra* note 20.
[133] *Ibid.*

Legal system versus legal order

A key distinction made by Napoleon is that the term "legal system" is used to mean a state-centered legal institution that is managed by the legal professionals in a society. A "legal order", however, is used to describe laws that are embedded in society, politics, economies and spirituality – and is therefore not a separate entity as it is in a legal system. It is also important to recognize that there are different legal orders for different Indigenous peoples, and that there are different laws and ways of describing these laws that are reflected within the language (see example of KI law and the Gitksan word for law: *ayook*). Napoleon places emphasis on the centrality of culture within the ordering and developing of laws and legal systems and argues that law is in fact culturally bound.[134]

This understanding is crucial when trying to understand why the mainstream Canadian legal system has such a difficult time incorporating Indigenous law into Canadian law, but it is also helpful to keep in mind when considering "Indigenous law" as one concept, when in reality it captures many different cultures and their respective laws. It is therefore crucial that the understanding of law goes beyond just looking at law that exists within a culture, and instead we must go inwards to understand our own cultural biases and assumptions. We must be working to understand the society and their culture in a holistic way, not simply trying to understand their laws in isolation, "[r]ules are only a part of law. In other words, law is the intellectual process of deliberating and reasoning to apply rules according to the context."[135]

[134] *Supra* note 20.
[135] *Supra* note 20 at 4.

Napoleon describes the Canadian legal system as being highly "centralized."[136] This means that the decision makers and those that regulate the profession are distinctly situated within society and that a hierarchy exists to show clear positions of power and authority within the system. There are some Indigenous societies that have adopted a more centralized system or have elements of their legal processes that are centralized, but many are more decentralized.

A decentralized system of law will derive the laws from different sources, including the Creator and the natural environment – sometimes referred to as Natural Law.[137] The challenge of a decentralized system, is that it is usually less linear – especially to those that are used to a centralized system – and so questions will arise around how to determine what is a law, what the consequences of breaking a law are and how these laws can and do change over time.[138]

Methodology: Case analysis

> Rather, when we talk about Indigenous legal traditions at this point in history we are necessarily talking about an undertaking that requires not just articulation and recognition, but also mindful, intentional acts of recovery and revitalization.[139]

The Accessing Justice and Reconciliation Project (AJR) emphasizes the need to move away from simplified and romanticized ideas of Indigenous law and instead towards a community-needs based approach to uncovering and articulating Indigenous laws as the contemporarily exist.[140] This project follows the following methodology:

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[136] *Supra* note 20 at 5.
[137] There are many different understandings and framings of the term "natural law" , but for the purposes of this paper, natural law will refer to laws that Indigenous communities have found within the natural environment – including from plants, animals, water and land).[137]
[138] Val Napoleon, "Thinking About Indigenous Legal Orders" (2007) *Research Paper for the National Centre for First Nations Goverance,* at 6, online: http://fngovernance.org/ncfng_research/val_napoleon.pdf.
[139] Hadley Friedland & Val Napoleon, " Gathering the Threads: Developing a Methodology For Researching and Rebuilding Indigenous Legal Traditions" (2015-2016) 1:1 Lakehead LJ 17 at 17.
[140] *Ibid.*

1. Develop a specific research question. The research questions are developed with an aim to solve a specific legal problem or highlight a specific principle. For example, it is not enough to just strive for broad concepts of "equality", this process needs to specifically address the complex legal and social issues that exist.[141] Without this specificity, the process would be too philosophical and lacking necessary practical applicability. This is achieved by starting with a topic – for example residential schools – and then exploring internal and external forces and dynamics to develop question(s).

2. Case Analysis: bring the research question to the stories. Laws can be found in "different kinds of stories, in songs, dances, and art, in kinship relationships, in place names, and in the structures and aims of the institutions of each society."[142] The case analysis here builds off of the methods first developed by Borrows, but Friedland and Napoleon state that their approach further adapts the common law analysis and asks more specific research questions.[143] Similarly to Borrows, this method identifies issue, facts, decision/resolution, reason/ratio, and a bracket section to write additional things to think about like possible red herrings or issues around cosmology and supernatural elements.[144] It also involves going through these stories and analyzing them by considering alternatives, such as imagining the characters as having different genders, or applying power and gender perspectives.[145] The decision and ratio part of the analysis may take more adapting as it is not always clear who the decision maker is in the story.[146] There are still formalities that must be followed to maintain the integrity of the process:

[141] *Ibid* at 20.
[142] *Ibid* at 21-22.
[143] *Ibid* at 22.
[144] *Ibid* at 23.
[145] *Ibid* at 24.
[146] *Ibid.*

[h]owever we choose to engage with Indigenous legal traditions, we need to be rigorous, transparent and consistent. This means we cite our sources, whether this is a certain elder, a ceremony, a story, a historical account from anthropological literature, or all of the above.[147]

3. Creating a framework. There are three pain parts to creating this framework. The first part is developing a "primer", which involves placing the story in context of the specific community from which it is derived. The second element is "synthesis" which is the act of deconstructing the story and applying the methodology / analytical framework to it. Figure 1 shows the Analytical Framework used by Friedland and Napoleon:[148]

Analytical Framework

1. **Legal Processes:** *Characteristics of legitimate decision-making/problem-solving processes, including:*
   a. *Who are authoritative decision-makers?*
   b. *What procedural steps are involved in determining a legitimate response or resolution?*
2. **Legal Responses and Resolutions:** *What principles govern appropriate responses and resolutions to harms and conflicts between people?*
3. **Legal Obligations:** *What principles govern individual and collective responsibilities? Where are the "shoulds"?*
4. **Legal Rights:** *What should people be able to expect from others?*
   a. *Procedural rights*
   b. *Substantive rights*
5. **General Underlying Principles:** *What underlying or recurrent themes emerge in the stories and interviews that might not be captured above? What are the principles that guide the expression and application of the law?*

The central purpose of this framework is to provide transparency to others using this methodology who may come to similar or different conclusions, but still be able to see how the initial conclusions and case analysis was executed.[149] An Indigenous legal framework is important so that it can be applied across different sources and types of law

[147] *Ibid* at 26.
[148] *Ibid* at 28-29.
[149] *Ibid* at 29.

and will take into account the differences that exist in Indigenous legal traditions when Western legal theory fails to do so.[150]

4. Implementation, Application and Critical Evaluation. True to its name, this stage of the research methodology comes about when there are contemporary human and social issues to which the laws may be applied. This step is crucially important to take indigenous law outside of an academic vacuum and to apply it to real world scenarios, as it was originally intended.[151]

This project is ongoing but it has so far yielded two central conclusions. The first is that Indigenous legal traditions are very diverse between different communities and there is therefore no universal model of traditions. For example in the context of criminal law, some legal traditions may focus on healing, others may emphasize the importance of safety as the ultimate goal.[152] The second conclusion highlights three central requirements for a legal tradition: consistency, continuity and adaptability. While these legal traditions have remained continuously over long periods of time, they also have an implicit ability to adapt and respond to changing contexts.

Application

The Accessing Justice and Reconciliation Project partnered with seven partner communities representing six legal traditions including: Coast Salish (Snuneymuxw First Nation and Tsleil-Waututh First Nation); Tsilhqot'in (Tsilhqot'in National Government); Northern Secwepemc (T'exelc Williams Lake Indian Band); Cree (Aseniwuche Winewak Nation); Anishinabek (Chippewas of Nawash Unceded First

[150] *Ibid* at 31.
[151] *Ibid* at 32-33.
[152] *Ibid* 25-36.

Nation #27); and Mi'kmaq (Mi'kmaq Legal Services Network - Eskasoni). By working with these communities, Napoleon and Friedland were able to apply the methodology they had created in a deeply immersive and adaptable way. Much of this work is still in the early stages and is ongoing.

Limitations

Napoleon and Friedland's methods have been applied in several communities thus far – most of which have been in Western Canada. It therefore will need to be considered by communities in other parts of Canada whether this model would make sense for the ways in which they understand and engage with their legal systems. While some elements may be universal, some may have been adopted with coastal and/or Cree communities in mind – and so it is important to consider this when looking at broader applications. This methodology, like that of John Borrows, is also more visible to the common law but may be done at the cost of losing some of the ceremonial or original formatting of the laws. While this is useful for the purpose of translating the laws into a form that can be understood by Western legal traditions, it may not be preferable for communities looking to use the laws exclusively internally.

5.4 Aimée Craft

Aimée Craft is currently an Adjunct Professor at the University of Manitoba's Faculty of Law and the Director of Research for the National Inquiry into Missing and Murdered Indigenous Women and Girls. Craft is a notable Anishinaabe scholar who writes on the methods of understanding and triangulating of Indigenous legal orders and Anishinaabe *Inaakongewin* (law). Craft challenges the status quo of exclusively using common and

civil law principles in the understanding of *Inaakongewin* and the interpretation of treaties between Indigenous and non-Indigenous people.[153] Craft does not suggest that colonial understandings or interpretations of treaties be done away with altogether, but rather that they be taken "alongside indigenous interpretation principles, which include assessing the indigenous legal foundations on which treaties were made."[154] Craft's understanding of Anishinaabe law comes from ceremony, secondary sources: written, cultural, ethnographic and ethnohistorical evidence – including Basil Johnston's collection of writings. Craft, like Borrows, argues that Indigenous laws were considered along with British Common law in treaty making, and she presents evidence of the ways in which clear Indigenous traditions and laws were present in these processes.

One of her notable writings is on the interpretation of treaties using Indigenous legal orders. After analyzing errors of the past in respecting and understanding language and culture in the treaty-making process, Craft develops a framework to retell treaty negotiations in a way that incorporates Anishinaabe laws.[155] Craft creates this framework by weaving together written accounts of the negotiations, oral history and Anishinaabe norms, customs and knowledge. Craft calls this methodology "triangulation" and it emphasizes the importance of drawing on all available sources and mediums of information while also being aware of and responding to limitations, such as the dominance of writings from a colonialist's perspective.

[153] Aimée Craft, "Living Treaties, Breathing Research" (2014) 26:1 Canadian Journal of Women and the Law 1.
[154] *Ibid* at 8.
[155] *Ibid 152.*

Worldview

"Anishinaabe are taught to be dedicating themselves to be aware and caring to everything within and around you, at every moment and in daily life."[156]

The Anishinaabe worldview is distinct from others in that it emphasizes a "holistic nature" of understanding the world and the interconnectedness between all living and non-living beings and entities in the world.[157] This understanding of the world comes with it many obligations and responsibilities – borne both by individuals and the collective.[158] Humans are not considered as being at the top of any hierarchy and there is less emphasis on linear and literal conceptions.[159] And this worldview in its entirety is uniquely shared and disseminated through oral transmission and language.

Language

"Indigenous languages have spirits that can be known through the people who understand them, and renewing and rebuilding from within the peoples is itself the process of coming to know."[160]

Language is also an essential part of this research. Language is not limited to spoken form, it can be non-verbal and can simply include ways of knowing and socializing.[161] The ways that we interpret or translate language can have very different effects and consequences. For example, using the words "negotiate" or "make" in the context of a treaty have different implications than saying a treaty was "signed".[162] One specific interesting observation made, was that the Anishinaabe parties to the treaty referred to the

[156] *Ibid* at 8, quoting Niizhoosake Copenace
[157] *Ibid* at 8.
[158] *Ibid.*
[159] *Ibid* at 10.
[160] *Ibid* at 15, citing Marie Battiste,.
[161] *Ibid* at 15.
[162] *Ibid.*

Queen as "mother" and that with this title, came significant meaning and understandings of obligation.

To explore this further, Craft researched the oral histories that unpacked the understood rights, obligations and responsibilities that exist between the mother-child relationship. Despite the fact that both Indigenous and non-Indigenous parties referred to the Queen as "mother", there were fundamentally different understandings of what that meant. This difference can be summarized as follows: the British perspective of children was that they were subservient to their parents and could not express autonomy, whereas the Anishinaabe perspective holds that children are to be respected and valued.[163] References to the Queen "mother" invoked notions of kinship and so Anishinaabe people would therefore expect obligations of love, kindness and caring to come through.[164] This would be similar to the relationship between Nimaamaa Aki (Mother Earth) and Anishinaabe people: the mother would love and care for her children unconditionally (this really played into assumptions in treaty negotiations).[165]

This methodology places a lot of emphasis on the past and the events that historically take place. This is because "reclaiming history is a critical and essential aspect of decolonization."[166] Though with this come some challenges. One is that there needs to be significant translating across languages and the gaps in records that resulted from biases and perceptions of importance of certain ideas/issues over others. Also, most of the written records are written from a colonial perspective. This shaping of the written

[163] *Ibid* at 17.
[164] *Ibid* at 87-88.
[165] *Ibid* at 88-89.
[166] *Ibid* at 18 – quoting Linda Tuhiwai Smith.

narrative comes through the colonial lens, which inherently minimizes and reduces the authority of the Indigenous perspective and knowledge.

Stone Fort Treaty Interpretation

In Craft's book *Breathing Life into the Stone Fort Treaty* she uses *Inaakonigewin* and Anishinaabe normative expectations to help understand why there are different interpretations of Treaty 1.[167] Examining this treaty now is symbolic: The Anishinaabe are taught to look ahead seven generations and Treaty One was signed approximately 141 years ago (seven generations). It is therefore a good time to examine how and if the treaty promises and intentions are being upheld.

It has been largely accepted that Treaty One is now (and has for awhile been) contentious and has within it many conflicting interpretations. Many see it as being unfair and have attempted to explain how and why the "deal" struck seems to be so unjust for the Anishinaabe people.[168] There are many theories that exist as to how all parties came to agree on this, including that: the Anishinaabe did not understand the terms of land surrender and sale, or that there was a gap in comprehending written text. Rather, portraying the Anishinaabe people as being weak or powerless would not be accurate.[169]

The differences in understanding of the process of treaty making and treaty signing go right to the root of the issue; the two signatories had fundamentally different views of how a treaty was to function. While the Crown thought of this process as a one-and-done document, the Anishinaabe view the treaty process as one that is ongoing and commences a mutually beneficial and obligatory continuing relationship[170]. It is therefore

[167] Aimée Craft, *Breathing Life into the Stone Fort Treaty* (Saskatoon: Purich Publishing, 2013).
[168] *Supra* note 152 at 20.
[169] *Supra* note 152 at 21.
[170] *Supra* note 152.

not sufficient to exclusively look at the written text of a treaty for meaning – we must instead explore the context of the socio-political environment at the time and take into account Indigenous norms around this type of process.

Within Anishinaabe *Inaakonigewin* (law), both formal and informal systems operate and are largely grounded in relationships.[171] But Craft doesn't focus her work on drawing sharp distinctions between the formal and informal systems. Craft draws upon Borrows' stated sources of Indigenous law: sacred, natural, deliberative, positivistic, and customary.[172] Craft writes that laws are "infused" within the Anishinabemowin language and passed down to younger generations through teachings about leading a good life, referred to as "mino-bimaadiziwin".[173]

Kinship and relationships between humans, animals, fish, plants, rocks and *adissokan* (spirits) underlie much of Anishinaabe laws.[174] Kinship goes even beyond these beings and arises from the relationships that exist between all of the different beings in the world – the grandmother moon and grandfather sun and all of the other creatures who depend on one another – the most dependent of which is the humans (in this case Anishinaabe). Humans must navigate all of these relationships and strive to find balance and a good life within these interactions.[175]

It can then be understood that the Anishinaabe perspectives that would have informed their treaty making intentions and processes would have been centered on ideas of kinship, relationship with the natural environment – and the fact that the Crown

[171] *Supra* note 166 at 66.
[172] *Supra* note 166 at 67.
[173] *Supra* note 166 at 69.
[174] *Supra* note 166 at 70.
[175] *Supra* note 166 at 71.

adhered to Anishinaabe protocols would have allowed for the assumption that Anishinaabe normative values were being respected.

Methodology: Triangulation

The triangulation framework involves drawing upon the following sources: written record, oral histories, and indigenous knowledge/norms/customs. Specifically, recorded Anishinaabe historical records can be found in the following: birch bark scrolls, wampum belts, pictographs, and petroforms.[176] This methodology was employed most notable at a four-day gathering in Manitoba. These water laws are described as being more than theory or religion, and instead representing a way of life that is expressed through daily actions and choices.[177] This four-day gathering followed Anishinaabe rules, procedures and ceremonies in accordance with tradition. The sessions that would take place throughout these days would have at least 4 female and 4 male elders in attendance and each person in the session would have the chance to speak in the circle.[178] Detailed notes (and sometimes audio recordings) were taken and a draft of these notes and transcripts were provided to the elders before publishing.[179]

Anishinaabe Legal Principles

A series of questions was put to the participants on the second and third day, including: "what is law to you?", "Is 'law' the right word?", "What role does Anishinaabe water law have in water protection?"[180] One of the core findings from this inquiry is that, law is centered on relationships and the law must be lived daily and actively shared and made

[176] *Ibid* .
[177] *Supra* note 45 at 4.
[178] *Supra* note 45 at 7.
[179] *Ibid.*
[180] *Supra* note 45 at 11.

into a collective effort.[181] These water laws are described as being more than theory or religion, and instead represent a way of life that is expressed through daily actions and choices.[182] Using this as a starting point, Craft created five categories through which to explore, uncover and analyze legal principles.

i) Structure: there are four categories of law: sacred, natural, customary and deliberative and the procedure on how to carry out those laws are very specific and honouring the procedure is deemed to be very important.[183] There is also more emphasis on understanding and following the spirit of the law – and less concern with following rigid and unchanging ideas about the law.[184] Natural law is considered to be heavily integrated into Anishinaabe law as they both emphasize the dominant importance of understanding and respecting balance within natural systems.[185]

ii) Stories, Songs, Language and Dreams: the elders recounted and retold stories that had been passed down to them from their grandparents and it was expressed that there is significant importance in transmitting laws in this way.[186]

iii) Relatedness and Equality: It is understood that there is relation between all plants, animals and beings on earth.[187] Within these relationships is an inherent understanding of equality. This means that all living beings should be treated equally and this is expressed through the common saying "all of my relations."[188]

iv) *Mino-bimaadiziwin* (now and for seven generations): It is understood that the laws are passed down from ancestors who were conscious and considerate of the next seven

[181] *Supra* note 45 at 12.
[182] *Supra* note 45 at 4.
[183] *Supra* note 45 at 12.
[184] *Supra* note 45 at 13.
[185] *Supra* note 45 at 14.
[186] *Supra* note 45 at 15.
[187] *Supra* note 45 at 18
[188] *Ibid.*

generations to come. This way of thinking and acting is carried forwards, with Anishinaabe people working to have the laws and teachings passed down and also leaving the earth in a way that will benefit the coming generations.[189]

v) Governance: Animals and clans inform governance by providing a democratic process by which clan leaders are selected by clan mothers and must represent the interests of the clan.[190]

Application: Anishinaabe Nibi Inaakonigewin Report

Another paper by Craft specifically explores Anishinaabe water laws and summarizes a four-day gathering of elders in Roseau River, Manitoba. The central intention of the gathering surrounded the idea that "water is living and water is life, in a spiritual and physical way."[191] Anishinaabe water governance is informed by *Anishinaabe inaakonigewin* (law), which is expressed more as a way of life and worldview than a theory and is grounded in recognizing the inherent responsibility that we have as humans.[192]Water carries significant spiritual and practical importance for Anishinaabe people.[193] There are several key principles about water law that emerged from the discussions:

1. Water has a spirit (and is looked after by spirits)
2. We do not "own water": "water is everything!"
3. Water is life: healthy environments and bodies and all life depend on clean water. Water is also responsible for bringing us into the world – and therefore must be respected as being living and having a spirit.

[189] *Supra* note 45 at 19.
[190] *Supra* note 45 at 20.
[191] Aimée Craft, "Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders" (2014) *Anishinaabe Nibi Inaakonigewin Report* at 4.
[192] *Ibid*, quoting Peter Atkinson at 4.
[193] *Supra* note 45 at 25.

4. Water can heal: through walking, carrying and using water in ceremony it can be healing.
5. Women are responsible for water: this is linked to the ability that women have to give life and to carry this life in water within them. Women are also responsibility for leading the water walks.
6. We must respect the water: offerings (particularly of tobacco) need to be made to the water to show respect and good intentions.
7. Water can suffer: this happened most notably when the Europeans arrived and the agricultural/ industrial revolution began. This is also seen in the building of dams and the contamination of water sources.
8. Water needs a voice: some Anishinaabe people have been told that they have a gift /obligation to teach about the water and advocate for it.
9. Seven water stories: there are seven water stories that follow.[194]

Common themes/principles that came out of what was shared over these days:

- "Water has a duality"
- "Water can give life but it can also take away life"
- "Women have responsibility for water"
- "Water is sacred and healing"

Three identified ways to continue this work:
1. Involve youth and more knowledge holders
2. Frame discussions in Anishinaabe language
3. Continue working with ceremony

Limitations

Craft's approach goes deep into ceremony and community building and development. While this approach has been quite effective in its application thus far, it does have some limitations. By conducting immersive ceremony over several days with one community at a time, this process provides detailed and in depth accounts of the knowledge and experiences in that specific community. There are limited constraints on how this information can be communicated and interpreted and so in this way it might be more beneficial for internal use within that community. One challenge that may arise with using this methodology alone is that the information that results from the process may be

[194] *Supra* note 45 at 25-36.

very specific to that community and may have a more difficult time being translated to broader audiences or for interpretation by or inclusion by other governance systems. Also due to colonial forces and intergenerational trauma, not all First Nation (Anishinaabek) communities are "traditional," which has the result of generating fear in many people in expressing their traditions.

5.5 Aaron Mills

Aaron Mills is currently a PhD candidate at the University of Victoria and the focus of his research is on Anishinaabe constitutionalism. His writings on Anishinaabe legal order (ALO) is done in a way that is comprehensive and accessible for all. Underscoring his writings is the importance he places on the legal profession broadly having an understanding of existing legal orders beyond the common law/civil law institutions currently in place. He notes that this is of particular importance within the criminal bar but he emphasizes that an appreciation and understanding of ALO is beneficial for both Indigenous and non-Indigenous peoples in Canada. The goal in Mills' writing is "to demonstrate that indigenous peoples have law and have always had law, even though indigenous legal orders look quite different from familiar western ones."[195]

Mills discusses the importance of avoiding singularity and recognizing that there is significant plurality within ALO and more broadly within Indigenous legal orders. It is therefore important to seek out different perspectives, stories and experiences to gain a more fulsome understanding of the various legal orders that exist in Canada. ALO holds that the self and the larger existence of life are not separate, "instead, I and the whole exist in respect of one another, dialogically ("whole" is a placeholder for any community

[195] Aaron Mills, "Opichi: A Transformation Story, an Invitation to Anishinaabe (Ojibwe) Legal Order" (2016) *For the Defence*, 32:3 at 41.

in which I hold membership, and today there are many)."[196] Mills describes how Anishinaabe societies have historically had a more decentralized model of governance that was stable but flexible and did not grant unilateral, sovereign and coercive power to any one person or entity. [197]

Mills writes that Anishinaabe law is not unlike Canadian law in that it evolves and is in flux to reflect societal and environmental changes.[198] One central difference between Anishinaabe and settler concepts about the relationship with the natural world is that while the Anishinaabe believe in a reciprocal and equal relationship, the colonial worldview originated with the notion of striving for dominion over the land, and while it has shifted to integrate practices of sustainability, it still regards the natural world as something that can and should be controlled and possessed – with humans holding the ultimate control.[199] An appreciation and application of Anishinaabe law will require this distinction to be understood and for the Anishinaabe way of thinking about the natural world to be integrated.[200]

Mills talks two central legal concepts: the Law of Respect and "natural law". The Law of Respect is an Anishinaabe legal principle that is concerned with ensuring the "continued viability" or living plants and animals.[201] This law governs actions that extract or affect natural resources or creatures to ensure that they are not detrimentally affected in a disproportionate or unnecessary way. The concept of "natural law" has been used by Professor Linda Robyn and Basil Johnston – notable Anishinaabe legal thinkers and

[196] *Ibid* at 44.
[197] *Ibid* at 46.
[198] Aaron Mills, "Aki, Anishinaabek, kaye tahsh Crown" (2010) 9:1 Indigenous Law Journal 107.
[199] *Ibid* at 131.
[200] *Ibid.*
[201] *Ibid* at 127.

knowledge holder. "In our language, *Anishinaabemowin,* almost everything is considered alive – even rocks, drums or tea kettles."[202] Mills emphasizes that the overarching Anishinaabe worldview can be best described by the three words: "all my relations" – which extends far beyond humans to include all elements of the natural environment.

Reciprocity is a core principle within natural law and holds that all living creatures on earth are gifts from the creator, and so one cannot be taken without giving an offering in return.[203] This is often done in the form of tobacco, but it provides a fundamental reminder to not overuse resources and to strive to maintain balance within the natural systems. The National Assembly of the Ashinishanbek Nation of Treaty #3 wrote a document called the *Manito Aki Inakonigaawin,* which reflects on treaty relationships and presents the traditional Anishinaabe natural resource law in positivist form.[204] This document emphasizes the reciprocal relationship between the Anishinaabek and their territory.

Mills argues that an understanding of all legal traditions that exist in Canada is a requirement for a just and well-functioning legal system. He writes about bringing the two types of law into alignment: "Although far from the present reality, with all sides to a conflict genuinely engaged in achieving a result that recognizes and validates interests other than their own, it may be possible for Anishinaabe and Canadian law to align, not in their respective underlying theories and assumptions about the world, but at least in the courses of action they support in a specific factual context."[205]

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[202] *Ibid* at 115.
[203] *Ibid* at 128.
[204] *Ibid* at 143.
[205] *Ibid* at 141.

Conceptual Model for Indigenous Law and Application

In December 2016, the Assembly of Manitoba Chiefs submitted written submissions to the Expert Panel for the Review of the Environmental Assessment Process.[206] In this report, Aaron Mills develops a model for understanding and conceptualizing Indigenous law. This model is grounded in the concept of The Great Binding Law, which is separate and distinct from Western laws and is drawn from Indigenous constitutional orders which are derived from Indigenous worldviews and cultural contexts.[207] Mills describes this process of drawing out law from worldviews using the imagery of a tree: the **leaves are the laws** which are created and just like leaves, laws change periodically; the **branches are the legal traditions** which include the processes and institutions that "create, sustain, and unmake law"; the **trunk represents the society's constitutional order** which is the organizing structure generated by the roots; and the **roots of the tree are the stories each society tells** about their creation – "what a person is, what community is, and what freedom looks like" for that community.[208]

Limitations:

The limitation of the model put forward by Aaron Mills is that it has not been applied at the community level in the way that the other models have. Being one of the newer models and without a strong institutional backing – as Napoleon and Friedland have – there are simply limited examples of how a community can bring this into their community and engage with it.

[206] *Supra* note 16.
[207] *Ibid* at 9.
[208] *Ibid* at 9-10.

5.6 Similarities Between Methodologies

The Indigenous legal scholars mentioned all highlight the complexity and diversity that exists within Indigenous law in Canada. Some of these scholars have developed a specific methodology for weaving together stories, customs and norms to develop a comprehensive account of different legal systems in Canada. Others have written on the specific laws within these systems and about the laws that govern water. A common thread through these writings is the emphasis of the importance of thorough consultation with and inclusion of community members and an appreciation of the diversity between legal systems in different nations.

Similarly to Borrows, Mills states his objective in simplistic terms: he wishes to demonstrate that Indigenous laws are not so different from Canadian laws and have always existed but just in sometimes different forms. With regards to Anishinaabe law specifically, while there are many similarities between Anishinaabe and Western law, a key difference that exists is that while Western law is more concerned with a dogmatic prescription of rights, responsibilities, and holds itself as the ultimate authority on how to act, Anishinaabe law takes the position that there are greater forces of nature (literally) at play that need to be respected and fundamentally understood.[209] Anishinaabe law is concerned with the deep integration of principles into every day life so that personal autonomy prevails and is guided by this entrenched understanding of the principles.[210]

A central argument for Borrows is that Indigenous legal structures may have been "built over", but they are not destroyed and, "the power of Aboriginal law can still be

[209] *Supra* note 45 at 21.
[210] *Ibid.*

discerned despite the pervasiveness of imported law."[211] The other scholars agree with this underlying premise thereby focusing their work on the drawing out of these laws. Borrows examines common law stories through the lens of Anishinabek stories. This methodology is used to reveal similarities between the two legal systems and to judge the common law from an indigenous perspective.

One of the interview participants who works for an Indigenous council distinguishes between a rights or law based system of water governance (settler) and a responsibility based system of water governance (Indigenous): Settlers spend much more time focusing on rights and what they are entitled to, whereas the Indigenous model is more concerned with responsibility and where that lies.[212]

5.7 Differences Between Methodologies

Despite these similarities, there are notable differences between some underlying principles that inform colonial and Indigenous laws. John Borrows has repeatedly highlighted the importance of recognizing the diversity of laws and perspectives in the Indigenous community and responding accordingly. Within each community as well, there are differences in the ways in which issues are considered and addressed, and environmental management is no exception to this. Borrows writes, "… it must be taken into account that Indigenous knowledge in one place may not apply in others, and that some Indigenous peoples/communities have been colonized away from their traditional knowledge towards environmental degradation and self interest. Despite this, there still

[211] *Supra* note 19.
[212] Interview Participant 4.

exists an overwhelming net benefit from seeking out the Indigenous knowledge of the land, which has existed and grown here for time immemorial."[213]

In the same way that Indigenous laws can vary from community to community, there are also differences in the ways in which Indigenous legal methodologies are used and applied. Therefore the unique limitations previously written about for each methodology makes them distinct and will be important to take into consideration when deciding on which one (or more than one) model is being selected and employed within a community.

5.8 Challenges With Inclusion of Indigenous Law at a Broader level of Governance

To begin with, the idea of integrating or "using" traditional/Indigenous knowledge and laws can become problematic. Some communities do not want their laws to be enveloped by the broader legal and policy frameworks for water governance. That being said, there will likely need to be greater understanding of these water laws on the part of government decision-makers before any sort of accommodation may be made. Concern about integrating traditional knowledge in water governance arises from the fear of "loss of sacredness when being removed from context." This concern stems from the Western way of viewing applications of law, which would be to reduce it to ways in which it is directly applicable, possibly ignoring broader relationships and connections.[214]

<u>Access to Elders/ knowledge</u>

One challenge that was repeatedly expressed by interview participants of all different positions and interests was that access to oral knowledge presented some practical challenges. Given the time constraints that are imposed in water planning and

[213] John Borrows, "Living between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) U of T Law J 47:4, 417 at 424-425.
[214] Interview Participant 5.

management processes, it becomes practically very challenging to first identify whom to talk to and then to actually get out there and talk to them. This problem with identification was described by one interview participant as follows:

> … and then we ask who is an elder in that area, its not a title like mayor, in FN community, you were in an elder if someone else thought they were, and it was a challenge, in implementing TK its difficult to decide who in that field might be an expert in one area, you might ask and get six different answers.[215]

Even if one or more people are identified, it can become challenging in other ways. One interview participant described it in the following way "[i]t's hard to say that one person's knowledge of the past takes precedent over another person's and how do you put that into policy, and seek that knowledge and once in policy hard to apply, there are barriers."[216]

5.9 Summary and Conclusion

These four scholars all put forward methodologies that share more similarities than they do differences. They find legitimacy in Indigenous laws both in their historical roots and parallels to colonial models of law, while emphasizing the unique characteristics and sources of these laws. They all propose specific frameworks for revitalizing and codifying Indigenous laws that puts the individual community at the centre and looks to uncover these laws in a way that is respectful and is grounded in responsibility and is constantly adapting to the needs of each community. There are and will continue to be challenges to this work, such as accessing elders and knowledge holders and reconciling these laws within the broader and more rigid colonial legal systems but these methodologies have made significance progress in the process of revitalizing Indigenous

[215] Interview Participant 6.
[216] Interview Participant 7.

law. The following chapter will explore some recommendations for steps forward in this work.

6. Recommendations

Drawing on the data gathered, there are several recommendations that can be made for going forward with the process of revitalizing Indigenous law. In considering these recommendations, the following questions must be asked at the outset of this work and returned to continuously throughout the process: who should be documenting the law? Should the law even be documented or codified? If so, for what purpose? How might indigenous law or legal order interact with broader government policies and laws? The aim of this chapter is to provide interested Indigenous communities with a comprehensive overview of the current scholarship on Indigenous law in Canada and drawing upon the strengths of the existing methods for understanding and revitalizing Indigenous law.

6.1 Decolonizing the Standard Practices and Procedures

Many of the interview participants – both Indigenous and Non-Indigenous – identified a failure on the parts of policy makers and implementers to seek out, listen to and incorporate Indigenous laws and knowledge into planning processes. Though there have been improvements in some communities and institutions (on a case-by-case basis) towards a more inclusive and respectful process of co-management, there still exists an underlying assumption that the colonial actors "know what is best" for everyone.[217] This way of dismissing Indigenous knowledge is one that is deeply engrained in the colonial perspective, which used tactics of dehumanization to "justify taking over the resources."[218] It is this covert – and sometimes even overt – assumption of superiority which has allowed the colonial governments in Canada to continue to exert ultimate control and authority over land and water. It is not until the larger questions about the

[217] Interview Participant 8.
[218] Interview Participant 8.

colonial history and context of challenges faced by Indigenous peoples are examined, that these issues can begin to be addressed and we can move forward in building a new relationship.[219]

There may also be conflicting attitudes about water i.e: "the water should be good so I will drink it as opposed to treating it and treating wastewater and water that our community drinks and have the ability to add chlorine to the water to deal with bacteria in the water but have chosen not to because mostly elders do not like the taste of that."[220] This is obviously different from the government, which tends to put an emphasis on accepted scienctific data. In fact, one of the government workers interviewed admitted to this,

> There is a tendency for people like myself and the Ministry of Environment to rely on the science, and we see science as this whole process… I think we have to expand our minds a little bit when it comes to Traditional Knowledge and not see it as something different than the scientific approach. To me, they should really complement each other.[221]

This will really only come when government officials truly learn to listen and engage with what they are hearing on a good faith basis.[222]

One way to begin to achieve this good faith engagement is to integrate long term planning that is not a separate entity from general community planning but instead as part of the "community planning continuum."[223] One Indigenous interview participant and notable environmental planner emphasized the importance of collaborative research and

[219] Interview Participant 9.
[220] *Ibid.*
[221] Interview Participant 10.
[222] Interview Participant 10.
[223] Interview Participant 11.

the inclusion of Indigenous people as equitable members at the table, and not just "another stakeholder."[224]

Borrows talks about the failures in land use planning when they fail to adequately include affected Indigenous communities. A common way that this happens is through inadequate notice to these communities making it difficult for them to adequately prepare and contribute to the process, "[l]ack of notice not only prevented the disclosure of vital information about the environment, it has also assisted in the admission of what, for the Council, is false information."[225] One way to begin to prepare for this type of timeline issue is for communities to begin proactively creating databases of traditional knowledge and laws. As one interview participant stated, this is important because:

> Then, we start to identify the Traditional Knowledge is then a legislative identity within the framework, once we can have that we can the ability to negotiate what First Nations information can be and from that we can have substance to give to the Elders, Technicians or to our knowledge holders. Who can have a database that is secure and security for our information, as the main thing is security of our information.[226]

6.2 Meaningful and respectful engagement with Indigenous law

Many of the interview participants expressed the general inconsistency in the treatment of Indigenous knowledge and laws. While some individuals in the government are enthusiastic about learning and incorporating this knowledge, others view it as a further delay and act accordingly. Even with those select few who are going about the inclusion or application of indigenous knowledge and laws in a good way, the general trend is that TK is being largely ignored in any meaningful way. As one participant said:

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[224] Interview Participant 5.
[225] *Supra* note 155 at 436.
[226] Interview Participant 8.

> ... so I think it's not just a question of having someone come in and they give their teaching or whatever they give blessing and you move on and you carry on with the meeting. But maybe there's ways of engaging with the land and with the water, and calling upon the land and water itself to be teachers for us, and to guide us in terms of the work that we need to do. There needs to be continuous engagement with the water and just practicing a continuous consciousness of the scarcity and sacredness of the water (not simply taking it for granted) - it's easier to disengage in an urban setting where water seems abundant.[227]

Borrows notes importantly, however, that Indigenous knowledge about the environment and ecosystems cannot always be seamlessly and entirely translated into different systems of knowing and understanding the environment and so, as such, cannot be seen as providing a one stop solution. This over-simplified and stereotype re-enforcing idea that Indigenous people must always be considered protectors of the environment does not always hold true.[228] Despite this, Indigenous people still have an important role to play in the governing of environments as they are often immersed in natural environments by way of living close to the land and can have a knowledge and understanding of the land that dates back far past the settler experience.[229] One way to do this is by democratically inviting participation from Indigenous people into the fold of deliberations so that they can provide knowledge, input and experiences about their territories.[230] This would represent a movement away from treating Indigenous peoples as a fringe group with whom which minimal consultation is acceptable.

> "The knowledge that the traditional knowledge holders have tried and tested, and has not failed out people in the past. We have to seriously give it the weight that it deserves. We have to really begin to weigh what it is we are attempting to do, and

[227] Interview Participant 2.
[228] *Supra* note 19 at 33.
[229] *Ibid.*
[230] *Ibid* at 45.

> that any type of involvement we give the elders has to be truly respected, because it cannot just be a formality as it has been in the past."[231]

Consultation needs to fundamentally change from being a top-down approach where the government is prescribing to Indigenous peoples what they deem to be best, to one that works collaboratively with Indigenous communities in the planning and formulating processes for water.[232] It is therefore likely that better recognition of Anishinaabe laws comes not from partnerships, but instead from allied relationships built on respect. Many of the interview participants and scholars did actually emphasize that Indigenous communities often have very practical solutions to the problems that their communities face because they live on the land and see every day what is going on. But government tends to just stick to status quo or institutionalized knowledge about what solutions exist. These changes need to happen at the beginning so that proper consultation and accommodation has to happen "at the community level, at the grassroots level to take that time to sit with communities and say, ok, on a government to government basis, how do we want to be dealt with, how can we help each other." In this way it's about getting to know each other, learning from each other and honouring treaties. Some of the interview participants talked about how an effective way to do this would be to have government officials actually come to communities – particularly those having water crises or in remote areas – to learn to appreciate the diversity of Indigenous peoples, and their unique challenges.[233]

[231] Interview Participant 8.
[232] Interview Participant 12.
[233] Interview Participant 12.

Many of the interview participants emphasized the importance of including chiefs and elders in processes of decision making and planning.[234] With this inclusion comes the fundamentally important relationship building, as said one participant: "This is all about water governance, jurisdiction, power, authority, relationships. If you don't build a relationship with them, you can't just ask for this and that, and I want it tomorrow."[235] Several interview participants acknowledged that there may be increases in spending on engagement with Indigenous communities, but they asked, what is actually being done with this information? After the consultation is done, there is no clear way or ability to see how that knowledge is being – or not being – incorporated.

6.3 Respecting Choice to Participate or Abstain

When talking about inclusion on Indigenous knowledge and laws within planning and governing contexts, it is also important to recognize that not all Indigenous peoples and communities wish to take part in these processes. Some Indigenous individuals and communities have no interest in participating in federal, provincial or municipal processes because of their inconsistency with their own principles and their fear of further exploitation or undermining of their beliefs and knowledge.[236] One participant stated to this effect:

> I guess the only concern I have is that to be truly understood, and that it not be manipulated or watered down, and that it be recognized for what it is, what it is meant to say, what it is meant to do. Because sometimes it is… I find that in the past, when our people have imparted knowledge a spin is put on it.[237]

Another interview participant described the frustrations with colonial government mechanisms and processes as follows:

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[234] Interview Participant 13.
[235] Interview Participant 13.
[236] Interview Participant 9.
[237] Interview Participant 8.

> For us, when we had tried to use outside mechanisms, and by outside I mean government policies, government instruments, government processes, as it applies to protecting our environment or trying to get things sorted out that we can start working to ensure that water is protected, our efforts were disregarded and we were rebuffed at every turn. We've had to revert back to our own laws in order to begin to protect the land and its waters. With KI, we've had to go back to what we know, in order to provide protection for our area, for our territory. This is how serious KI is when it comes down to protecting water or even traditional knowledge to protect the territory… We cannot really put our faith in something that is untried and untested to protect water.[238]

6.4 Education

Borrows, Napoleon, Craft, Mills and Hannah Askew all talk about the importance of education in shifting the legal landscape towards one that is more understanding, respectful and accommodating of Indigenous law. We ultimately need lawyers and judges who have some knowledge about these types of laws and have an open mind about how to integrate them where appropriate. Askew and Borrows specifically have written extensively on the work that needs to be done within the legal community to educate on this. But education needs to happen at a broader level before Indigenous law will be receive the attention and accommodation that is being recommended here. The biggest opportunity for incorporating traditional knowledge is bringing it into the education system – starting at a young age.[239] Youth engagement is key as this is the largest growing part of the Indigenous population in Canada.[240] Education also needs to be a key component in the de-colonizing process to begin to make decision makers more open to new ways of thinking.[241] One of the interview participants explained that the importance of educating politicians comes from the undeniable requirement of collaborative work

[238] Interview Participant 8.
[239] Interview Participants 10 & 12.
[240] Interview Participant 14.
[241] Interview Participant 14.

with them to achieve any kind of change. Along with the importance of educating politicians, is the necessity of educating lawyers to receive "appropriate cultural competency training, which includes the history and … Indigenous law."[242]

One example of where this is happening is at the University of Victoria, which has started a legal education program to assist Inuit students from Nunavut in articulating and learning about their laws. The goal of this program is to understand the legal pluralism that exists in the north and the ways in which Inuit stories and knowledge form Inuit laws. This program is called Akitsiraq and allows students to learn in Iqaluit while obtaining a law degree from University of Victoria.[243] This program is a positive step in the direction of actualizing the Truth and Reconciliation Commission Call to Action #50, which states:

> In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.

6.5 Summary and Conclusion

In order for meaningful and effective change to occur and lay the foundations for the revitalization of Indigenous law in Canada, there will need to be an ongoing process of decolonizing the current legal system. It will take provincial and federal governments that are willing to not only consult with Indigenous communities, but to actually implement their perspectives and needs in a way that is agreed upon and does not occur as a result of

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[242] Truth and Reconciliation Canada. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*. Winnipeg: Truth and Reconciliation Commission of Canada, 2015, #27.
[243] University of Victoria, "Backgrounder: Akitsiraq Law Program" (2005) online: http://communications.uvic.ca/releases/makepdf.php?type=backgrounder&id=70.

unilateral decision making. There will need to be recognition that there is diversity amongst Indigenous communities and that while some are eager to engage in this challenging and time consuming work, some will not. Underlying all of this work is the need for deep education at all levels, ages and positions within this system.

7. Conclusion

Indigenous legal methodologies have been applied across the country in different communities and ultimately share more similarities than differences. They are guided by the same underlying principles that are grounded in Indigenous worldviews that place a primacy on relationships and responsibility. While these methodologies all acknowledge that Indigenous laws can be derived from many different sources, they all engage with these sources differently. These differences in application are based on the intended uses of the outcomes and purposes. Therefore while some may be more rooted in ceremonial community engagement, others may be prefer a model that is focused on receiving legitimacy from and space within Western legal systems.

This research was shaped by Indigenous legal research literature, which emphasizes the inappropriateness of purely prescriptive research.[244] It is therefore of limited value to conclude this paper by giving a definitive answer about which model is "best" and therefore should be universally applied and selectively adopted by Indigenous communities in their process of codifying or revitalizing their legal systems. Instead, Indigenous ethics would suggest that rather than being prescriptive, this research be used to state the legal models and suggest how they may be beneficial or challenging for communities to use, and leave it to communities to apply them as they see fit.

[244] *Supra* note 17.