

Research Partnership	<b>The State and Indigenous Legal Cultures: Law in Search of Legitimacy</b>
Sub-Project	<b>Coast Salish Laws Governing Administration of Justice (Civil Procedure) [Theme: Justice]</b>
Integration Report	<b>How Does Legal Pluralism Manifest Itself?</b>
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## PART ONE: SUB-PROJECT DESCRIPTION AND METHODOLOGY

Contemporary disputes and negotiations are thereby transformed from the limited exchange of practical reasons over reforms within a practice of governance and its modes of argumentation to a broader exchange of practical reasons over the comparative values of a range of possible practices and the relations of governance, forms of subjectivity and practices of freedom they institutionalize.<sup>1</sup>

### **Background and Objectives of the Sub-Project:**

Fundamentally, Indigenous or Coast Salish civility is a relational commitment to others to enable the management of individual and collective selves through diverse legal and political orders—which were never perfect historically and which require ongoing negotiation to deal with contradictions and power imbalances in context and through time.<sup>2</sup> This means that both historically and currently, the commitment to civility and more broadly to justice, inheres in how Indigenous peoples treat one another and non-human life forms. Civil practices must not only be reflexive, but adapted and continued through Indigenous disagreement and conflict.

At its heart, civility and civil practices are about disagreeing with respect and about the preservation of reciprocal kinship, community, societal, and inter-societal relationships. Civility is also about individual and collective agency, and is a way to create inclusivity so that all voices are heard through healthy contestation, and law – in its best form – can facilitate this to allow the effective management of messy human societies. Most importantly, civility is not about being noncritical or silencing dissent, but about intelligent and respectful public debate. Civil discourse is about the quality of our interactions with other human beings—those we agree with and those we disagree with.

In all societies, disagreement and conflict is simply the ongoing and necessary consequence of human beings living together. However, when for whatever reason (e.g., colonialism), conflict is not effectively or legitimately managed through legal and political orders and their corresponding practices of civility, conflict can become polarizing, corrosive, and debilitating. When this happens, conflict pervades the social fabric of community life from the political to the personal where it can effectively undermine the ability of citizenries' to effectively manage their collective life. In this way, civility and civil practices can be understood as the site where the possibility of diverse, civic citizenship<sup>3</sup> is made possible. In other words, practices of civility are a prerequisite for justice and civic citizenship.

As mutual engagements deepen in a community of practice, it may be possible to enrich shared expectations to allow for more demanding substantive rules to be constructed.<sup>4</sup>

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<sup>1</sup>. James Tully, *Public Philosophy in a New Key: Volume I, Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008) 35. [Tully, *Democracy and Civic Freedom*]

<sup>2</sup> Val Napoleon, “Demanding More From Ourselves: Indigenous Civility and Incivility”, in Dimitrios Karmis, et al, eds. *Civic Freedom in an Age of Diversity* [forthcoming 2015].

<sup>3</sup>. James Tully, *Public Philosophy in a New Key: Volume II, Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008) 246-47. [Tully, *Imperialism and Civic Freedom*]

<sup>4</sup>. Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) [Brunnée and Toope] at 354.

Law is not simply declared through formal processes. It is built in everyday interactions. It can also be destroyed in the same way. Formal law, be it in treaty, custom or even soft law plays an important role in providing fixed points for social engagement. If the hard work of law-building has been done, those fixed points will have emerged through inclusive processes of participation and may reflect shared understandings.<sup>5</sup>

As a result of the research we have been doing with Indigenous legal orders across Canada over the past few years, we are asking new questions about: How we create or recreate spaces where there can be respectful debate and disagreement? Whose voices are heard in those spaces? Whose voices are missing? According to Tully, “If we want equal relationships then we must treat each other equally in working on unequal relationships” and “If we want democratic relationships, then we must change them by being democratic.”<sup>6</sup> Furthermore, for the work to be substantively “ethical”, it must be “grounded in ethical practices of the self on the self.”<sup>7</sup> So for justice to exist we have to “change ourselves in the course of unjust or oppressive or destructive or unequal relations”.<sup>8</sup>

Often, legal Indigenous civil practices, including civil procedure, are called protocols, ceremonies, prayers, or cultural practices. Characterized in this non-legal way, they are simply added on the other public processes, usually at the beginning and the end, but with no recognition of their importance to facilitating the actual business of law or the basic requirements of justice. In this way, Indigenous civil practices and procedures remain external to the “real” business conducted (e.g., meetings, courts, or political events) without informing the substantive content or process of such business. With this research project, we have focused specifically on the civil procedures within the larger field of civil practices. We take the position that Indigenous civil procedure law governing the way justice is administered, be taken seriously in the way analogous common-law civil procedure is.

Here we have set out Coast Salish civil procedure for the administration of justice as including all of the structures in place that facilitate the business of doing law (not restricted to or entirely framed by analogous state court processes). This includes (but is not limited to): rules and practices, social institutions, physical structures, clothing, ceremonial objects, and songs, dances, and stories. Nonetheless, this research corresponds with many of the basic elements of state civil procedure: standing, jurisdiction, procedures for initiating a claim, identifying decision makers, role of experts, legal venues, speakers and witnesses, rituals involved in the performance of law, physical symbols of legal authority, categories of legal transactions, provision for novel claims, and remedies.

Thus far, these research materials have been developed into a draft Coast Salish civil procedure course and we are awaiting additional feedback from key community members before finalization. As with other legal traditions including state law, this is a very complicated area because it links with a broad range of substantive law in Coast Salish society. According to former chief, Doug White, the big houses are a location where civil procedure happens all the

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<sup>5</sup> *Ibid.*, 355.

<sup>6</sup> *Ibid.*, 1.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

time, because it is where property is sorted out, as well as teachings, traditions and laws are passed down.<sup>9</sup>

### **Research Questions:**

The research questions posed for our research and analysis was, “What structures and legal practices are in place in Coast Salish society to facilitate the business of doing law? And what are the Coast Salish legal processes that govern the maintenance Coast Salish justice through the operation of law?”

### **Theoretical Framework/Methodology:**

The logical first step to achieving more specific research outcomes from our engagement with Indigenous laws is to ask more specific research questions *of* Indigenous laws. This is both practical and in keeping with our commitment to approach Indigenous laws as *laws*. ... All law has to be capable of being specific, responsive, and applied to the real and messy life of human communities. For instance, general statements about equality in Canada reflect normative commitments and provide us with very important aspirations, but at some point, what equality means can only be determined when it is applied to the mundane and to the everyday where it can actually help to solve problems in real relationships between people.<sup>10</sup>

Indigenous stories are rich and complex sources of normative material.<sup>11</sup> We can bring questions to Indigenous stories and draw a range of legal principles, processes, and procedures from them according to the problem at hand. While there are many interpretations of each story, the key is that interpretation must be part of a collaborative process, and it must also be transparent and accountable to the legal tradition one is working within. It is this collective enterprise that serves as a legitimizing factor for local communities. Indigenous legal processes of collective engagement comprise individual and collective agency operating within the form through which law is constituted in each Indigenous society.<sup>12</sup>

Research and engagement with Indigenous legal traditions must 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. This means we do not simply describe behaviours or ideals, make unsupported assertions about law, and we consider actual decisions or responses. This includes deliberately making our own thinking explicit,

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<sup>9</sup> Interview with Doug White, 2014.

<sup>10</sup> Hadley Friedland and Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” forthcoming *Lakehead Law Journal*, 2015 [Friedland and Napoleon, Gathering].

<sup>11</sup> *Ibid.* Our methodology is fully described in the above publication and this section draws heavily on that paper. Also see Val Napoleon and Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” in Dale Turner, ed., *Oxford Handbook on Governance* [forthcoming 2015] [Napoleon and Friedland, Inside Story]; Emily Snyder, Val Napoleon and John Borrows, “Gendered Violence: Resources from Indigenous Legal Orders” *UBC Law Review* 48:1 2015 [Snyder, Borrows, Napoleon]; Val Napoleon and Hadley Friedland, “From Roots to Renaissance”, in Markus Dubber, ed., *Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) [Napoleon and Friedland, Roots to Renaissance].

<sup>12</sup> Kirsten Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford, UK: Hart Publishing, 2012) at 9-10 [Rundle].

including our experiences, interpretation, and inferences. This methodological approach also enables us to develop an internal view of “how arguments are fashioned and deployed within legal practices”.<sup>13</sup> It is this internal perspective of law that is necessary to applying and practicing Indigenous law.<sup>14</sup>

### **Methodology: Phase One**

The first phase requires setting out a specific research question (see above).

### **Methodology: Phase Two**

This phase starts with collecting all the publicly available stories or oral histories and going through them to see which ones relate to the question being asked.

- What are the facts that matter to the research question?
- What is the main problem or concern in the story/oral history?
- How was the problem or concern responded to?
- What were the reasons for this legal response?
- Bracket information for which there is not yet a terms of reference.

### **Methodology: Phase Three**

This phase involves analysing the case briefs to find similarities and differences, and to organize the information into an accessible, understandable framework or synthesis that can be draw on for application today.

- (i) *Legal Processes*: Final decision-makers and the procedural steps for determining a response or action
- (ii) *Legal Responses and Resolutions*: Principles governing appropriate responses to legal/ human issue.
- (iii) *Legal Obligations*: Principles governing individual and collective responsibilities
- (iv) *Legal Rights*: Procedural and substantive
- (v) *General Underlying Principles*

### **Methodology: Phase Four**

This phase is beyond the scope of this report, but very briefly, it is the application phase of taking a problem and working through each step of the synthesis. For example: Who has to be involved? How are they involved? What do people need to learn about the problem? What do people do about the problem? This requires a critical and ongoing evaluation process.

Historically, most Indigenous peoples were not centrally organized with formal bureaucracies. Their legal traditions were organized de-centrally through relationships and kinship systems (e.g., families, clans, communities). These were the historic legal institutions that law operated through. Today, there are new laws and new legal institutions in the various forms of band councils, tribal councils, or other governing entities. Future application will require reconciling the historic legal institutions and law with today’s legal institutions and law.

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<sup>13</sup> Jeremy Webber, “The Past and Foreign Countries” (2006) 10 Legal Hist 1 at 2.

<sup>14</sup> For further discussion on this point, see Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” 11 (1) Indigenous Law Journal 1at 29-31 [Friedland, Reflective Frameworks].

**PART TWO: PRESENTATION OF THE LEGAL ORDER/SYSTEM OBSERVED**

**(Preliminary distillation only – further community consultation required before finalizing.)**

**Theme: Justice (sub-project Coast Salish Laws Governing the Administration of Justice)**

I.Variables	Coast Salish Law
<p><b>Values/Beliefs</b></p>	<p>Coast Salish creation stories and oral histories affirm the importance of the connection between communities to the land and the corresponding rights that flow from these longstanding connections.</p> <p>Connection to the land must be maintained and recorded in stories and oral histories.</p> <p>Place (land) and its relationship to legal rights and obligations is central to the entire Coast Salish society</p> <p>The Coast Salish language connects people to place.</p> <p>An individual connects to place within Coast Salish society through her or his membership in the family.</p> <p>Every Coast Salish person’s personal identity is historically anchored in the house [close lineage] of one’s birth or early childhood.</p> <p>An individual’s Coast Salish name carries the relationship to her/his ancestors.</p> <p>Coast Salish names include responsibilities and must be upheld by those holding them.</p> <p>Coast Salish names set out people’s connections and relationships, and corresponding legal rights and obligations.</p>
Variables	State Law
<p><b>Values/Beliefs</b></p>	<p>Generally, these concern the protection of rights, fair process, accessibility, and equality.</p>

**Comparative Note**

Indigenous law, including Coast Salish law is non-state, operating through institutions of kinship and relationships. Historically, authority and decision-making was dispersed horizontally and decentrally through these institutions, and law was not delegated to centralized professionals.

The basic state values of protection of rights, fair process, accessibility, and equality generally converge with many Coast Salish values. What differs are the rights holders (individual and collective), the form and structure of law, and adjudicative processes.

<b>II. Variables</b>	<b>Coast Salish Law</b>
<b>Principles</b>	<p>Coast Salish names have attendant responsibilities and authorities that must be fulfilled by the name holder.</p> <p>Coast Salish names set out his or her connections, relationships, legal rights, and obligations that attach to them, and people must develop the ability to articulate this knowledge.</p> <p>Families must teach proprietary knowledge of their family’s history, traditions, and genealogy, as well as certain arts and skills that are not shared with outsiders.</p> <p>Ancestry is the basis of historic class or social status within Coast Salish society.</p> <p>Access to certain benefits comes not only from ancestry and connections, but also from an individual’s personal efforts and agency.</p> <p>Although there are important differences between Coast Salish groups, certain common legal norms apply throughout all Coast Salish lands.</p> <p>There are some variations between legal rights and obligations in force in different Coast Salish communities. Collective agency and autonomy is important in the relationship between communities.</p> <p>The best decision-making process draws on wise or especially knowledgeable people about the issue at stake.</p> <p>Medicine people have specialized spiritual and medicinal knowledge and must help to use their power/knowledge/skill to address harms and protect the community.</p>

	<p>Precedent of the ancestors is an important source of legal and political knowledge today.</p> <p>All transactions require care and attention, and investment.</p>
<b>Variables</b>	<b>State Law</b>
<b>Principles</b>	Canada's civil procedure is divided into civil and criminal cases, and there are further divisions for other courts (military, etc.).
<b>Comparative Note</b>	
There are questions of scale and jurisdiction which need much more critical discussion.	

<b>III.Variables</b>	<b>Coast Salish Law</b>
<b>Rules</b>	<p><b>Substantive Rules</b></p> <p>There are responsibilities that accompany Coast Salish name that must be taken seriously, and if the individual carrying the name fails to fulfill those responsibilities, there is a possibility that the name may be stripped from that person.</p> <p>Children have rights to access resource locations through the acknowledgement of their ancestral connections. In order to be able to claim these resource rights, individuals must be versed in the stories/oral histories that attach to her/his name, and they must understand her/his connections to the ancestors.</p> <p>In addition to resource rights, Coast Salish names linked to ancestors may also confer a range of other rights such as the right to perform particular ceremonial dances and songs, ownership of masks, the right to use particular designs in weaving, houseposts, the right to be trained in medicinal knowledge, and the right to hold a chieftanship.</p> <p>Legal standing to claim rights to access to natural resources can be acquired through marriage.</p> <p>Knowledge of family ancestry is essential to being able to claim legal rights.</p>



A person's knowledge of the names, stories, songs and ceremonies historically associated with property (e.g., fishing site) is evidence of an inherited and therefore legitimate claim.

To be able to claim rights based on ancestry and marriage, individuals must be trained and knowledgeable about their own genealogy and (to a lesser extent) that of their spouse's, and be able to articulate these claims as required.

Certain stories are still regarded as private within families. This governs access requirements to the stories/oral histories including those in the public archives in Victoria on Vancouver Island which contains many recordings of Coast Salish stories. (For example, at the archives, private Coast Salish family stories are stored separately and may only be accessed by family members who can demonstrate their family identity and right to access the stories.)

The individual's identity and role can determine their particular skills, abilities, and responsibilities that he or she possesses (for example as a doctor, hunter or weaver).

Common legal norms Coast Salish apply throughout all Coast Salish lands.

Across different Coast Salish communities, there is some variations exist between legal rights and obligations.

The primary legal venue in the Coast Salish world is the big house where many ceremonies/business is performed and transacted including name giving, marriages, funerals, potlatches and assertion of ritual rights.

The Coast Salish bighouse is where disputes are resolved, important rights bestowed, and progress through the major steps of life celebrated (e.g., birth, name-giving, marriage, and funerals).

In the bighouse, Coast Salish the "blanketing" process is used for people to "cover up their spirit or protect their spirit. When the blanket is placed on a person, they are protected.

Where existing Coast Salish laws and remedies are perceived as inadequate to address a harm or conflict, new strategies may be developed and adopted that build on the old ways.

Once a legitimate decision has been made in regards to a dispute, a number of different remedies are available, including: issuing an apology, giving compensation, and applying force.

Compensation often accompanies an acknowledgement of wrongdoing and helps to restore balance.

If there is danger, sometimes force will be used as an immediate remedy to rectify a situation or punish a perpetrator, but these will be reviewed by the family or community affected.

Training in one's ancestry and related knowledge is crucial to full participation in Coast Salish society, children have a right to expect to be trained by adults and elders in the community.

### **Procedural Rules**

The ancestors' precedents – in the form of oral histories, stories, and practices – may inform and guide present day processes and decisions.

In order for a transaction to be effective, there must be an exchange of value.

An individual's skills, ability and training determine their personal authority and standing to claim certain legal rights. This includes the individual's public history of sharing and gifting.

Family stories are crucial to being able to establish a claim.

Private family stories are not usually shared with outsiders.

Generosity and gifts that are bestowed on others, especially when done in the presence of witnesses, may be considered as debt that the giver can expect to one day be repaid.

Between peaceful groups the initiation of a legal claim might could begin by one group approaching the other group to ask permission to use a resource. This is the first step of articulating a claim.

Between hostile groups, the initiation of a legal claim might occur by the appearance of war canoes.

The legal events that happen at the bighouse are procedurally complicated and often families have to hire speakers. During the performance, the host will hire a speaker/orator "to announce the purpose of the gathering and to explain his inherited right to use the particular type of "ts'exwtén". Speakers are like lawyers because they have so much knowledge about procedure and they conduct the events.

	<p>Special clothing or an outer garment protects the wearer spiritually and emotionally. Swuqw’alh (blankets) that are traditionally worn by high ranking people protect the wearer and also provide strength to their speech.</p> <p>Special clothing may also indicate to others their status and play an important role in legal proceedings</p> <p>Historically, Swuqq’alh (blankets) have many important uses including: currency (for example paying for the services of a doctor), as potlatch gifts, as a form of payment to ceremonial workers, and as gift to the family of the bride from the groom. Blankets have also been used as screens to conceal masked dancers before they emerged onto the fields in front of the longhouses.</p> <p>The Sul’sul’tun (spinning whorls) used to create swuqw’alh (blankets) have legal significance. Sul’sul’tun are frequently engraved with st’eluqum which are supernatural creatures that lend spiritual energy to the wool. The image is carved in such a way that when the whorl spins, the image on it appears to change and move.</p> <p><b>Obligation Rules</b>  Training in one’s ancestry and related knowledge is crucial to full participation in Coast Salish society, adults and elders have an obligation to educate and train children.</p> <p>Purification/cleansing is necessary before a person seeks a spirit guardian or helper, does traditional work or doctoring or goes to sing in the smokehouse. They must bathe and fast because spirit people don’t like the smells of people and food. Dancers must purify or symbolically by "washing" themselves through dancing the sxwayxwuy and they must also take precautions to cleanse themselves of negative energies before they come out to dance.</p> <p>People must pay their debts, but it is up to the person owing the debt to determine when and how to repay the debt.</p>
<b>Variables</b>	<b>State Law</b>
<b>Rules</b>	<p>In state law, civil procedure governs the handling of legal cases and this is organized by each level of provincial or federal court.</p>

**Comparative Note**

Some thought is necessary to consider more fully how the population size determines the efficacy of some aspects of Indigenous law. For example, small communities allow face-to-face relationships versus larger urban centers with relationships between strangers.

IV. Variables	Coast Salish Law
<b>Actors/ Stakeholders</b>	<p>Distinctions may be made between people who live within the Coast Salish world and are subject to its system of social regulation, and those who live outside and are therefore not subject to its system of social regulation. Legal responses to those who are not part of the Coast Salish world may be different than to those who are not.</p> <p><b>Decision-Makers</b> <i>Entire Community:</i> In certain circumstances where everyone in the community will be impacted, then the entire group may make a decision together.</p> <p><i>Principle:</i> Heads of family are authoritative decision makers have a responsibility to address issues as they see them arise Although heads of families are valued as decision makers their power lies in their ability to build consensus and listen to others in the decision-making process.</p> <p><i>Elders</i> are the knowledge keepers and as such are legitimate decision makers. Not every individual who grows old is given status, authority or decision making legitimacy is an elder. The position and title of an elder is earned. This process begins at a young age by learning history and language and continues until the elders become teachers of that they carry. During this process, future elders are mentored by many elders not just one. The authority of elders is not a given. It must be maintained and practiced by, for example, weekly meetings, gathering with other elders, and carrying and passing on the teachings.</p> <p><i>Experts</i> play a special role in decision making. The ideal decision making process involves having the input of wise or especially knowledgeable people on the issue at stake</p> <p><i>Medicine people</i> who have specialized spiritual and medicinal knowledge are relied upon and sought out to use their power to address harms and protect the community</p>

	<p><b>Witnesses</b> When important events are occurring, they must be witnessed by people from the Coast Salish world. This applies to a name giving, or a marriage, or a declaration of rights to use cultural property such as a mask. In recognition of their important role, witnesses will be paid for their work. If in the future someone were to dispute an aspect of the ceremony or a right bestowed during it, those who had witnessed the event could be called on to corroborate that the event had occurred.</p> <p><b>Standing</b> The standing of individuals in relation to actionable legal rights and obligations are linked to a number of interconnecting factors which include:</p> <ol style="list-style-type: none"> <li>1. place,</li> <li>2. family membership through birth or adoption,</li> <li>3. the individual's Coast Salish name and relationship to the ancestors,</li> <li>4. the individual's relationships through marriage,</li> <li>5. the individual's knowledge of his or her connections and relationships and the legal rights and obligations that attach to them, as well as the ability to articulate this knowledge,</li> <li>6. the individual's identity and role in relation to particular skills, abilities, and responsibilities that he or she possesses (for example as a doctor, hunter or weaver),</li> <li>7. the individual's public history of sharing and gifting.</li> </ol>
<b>Variables</b>	<b>State Law</b>
<b>Actors/ Stakeholders</b>	A specific case analysis would be a helpful way to structure this comparative aspect.
<b>Comparative Note</b>	
As with any complex social, political, legal, and economic issue, dichotomies are not helpful. The relationship between Coast Salish law and state law has to be worked out symmetrically from the ground up – from a place of strength for Indigenous law. This means that Coast Salish law or other Indigenous law must be accessible, understood, and applied.	

<b>V.Variables</b>	<b>Coast Salish Law</b>
<b>Processes</b>	A formal ceremony is held when a name is being given, and the bestowal is often legitimated with a potlatch. Specific practices for a naming ceremony vary between families. Typically, when guests are assembled and any ritual performance is completed, the family spokesperson who is

	<p>giving the name announces it and calls on the older generation present to witness the giving. Gifts or monetary payment are given in compensation for witnessing of the event. If in the future a dispute were to arise over the legitimacy of the name, those who witnessed the name giving would be called on to affirm the owner’s right to the name.</p> <p>The primary legal venue in the Coast Salish world is the big house. Many ceremonies can be performed in the big house including name giving, marriages, funerals, potlatches and assertion of ritual rights. The bighouse in the Coast Salish world is where disputes are resolved, important rights bestowed, and progress through the major steps of life celebrated (birth, name-giving, marriage, funerals).</p> <p>Feasting and generously providing food to guests usually accompanies the marking of important events.</p> <p>Practical and legal knowledge around harvesting a particular resource may be gained through apprenticeship with a relative.</p> <p><i>Welcome figures:</i> Traditionally communities had two welcome figures, one male and one female, both with arms outstretched, to welcome other Coast Salish members to the community. The hands on the figures upturned signified that the nation was at peace and that visitors were welcome. However, the hands on the figures turned down meant that the nation was at war and that if unknown or unwelcome visitors entered the territory they could face repercussions.</p>
<b>Variables</b>	<b>State Law</b>
<b>Processes</b>	Varies by jurisdictional levels – federal and provincial.
<b>Comparative Note</b>	
Further research and analysis on Coast Salish law and gender is necessary. <sup>15</sup>	

<b>V. Overall Comparison</b>
<p>Thus far, our approach is to ensure that we identify both convergences and divergences between Coast Salish and Canadian law. At this stage, we are concerned about creating unproductive and unnecessary dichotomies and about over-simplifying or essentializing either Coast Salish or Canadian law. We will revisit the question of overall comparisons over the next year once we have had an opportunity to discuss our preliminary report with Coast Salish leaders.</p>

<sup>15</sup> Snyder, Napoleon, Borrows *supra* note 11.

## APPENDICES

No society can properly be understood or explained without a coherent conception of its law and legal doctrine. The social, moral, and cultural foundations of the law, and the theories which both inform and account for them, are no less important than the law's 'black letter'.<sup>16</sup>

### Arising Discussion for Coast Salish Research

“What structures are in place in Coast Salish society to facilitate the business of doing law?” was the initial research question that animates this research on Coast Salish civil procedure. The elements of civil procedure identified were arrived at through two summers of research conducted by University of Victoria law student Elizabeth Zarpa and graduate student, Hannah Askew in Coast Salish territory in 2013 and 2014. The legal principles and structures described herein were drawn from approximately fifty Coast Salish stories containing elements of civil procedure.

Many of the elements of civil procedure found in the stories were not initially visible to the researchers as non-Coast Salish people. In order to become better able to “see” those elements, we drew from a number of other sources including a meeting<sup>17</sup> with Chief Doug White of the Snuneymuxw First Nation, transcripts of interviews with Coast Salish elders and community members conducted by Indigenous Law Researcher Unit student, Estella Charleson, the websites of a number of Coast Salish nations, academic publications and unpublished theses, a trip to Petroglyph Provincial Park near Nanaimo, and visits to the Royal British Columbia Museum. Finally, because so many of the stories involve non-human characters, we also spent time outside on Coast Salish territory observing interactions between animals, marine life, rocks, plants, trees and water, and reflecting on how these interactions are interpreted and depicted in the stories.<sup>18</sup> Exposure to these other rich sources gradually helped to make visible many elements of Coast Salish civil procedure depicted in the stories. The researchers then returned to re-read the stories and synthesize the legal principles they contained relevant to civil procedure.

We wish to emphasize that the principles of civil procedure contained in this project constitute only a beginning and capture only a small portion of the wealth of complex legal procedures that

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<sup>16</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford: Oxford University Press, 2005) at 5.

<sup>17</sup> Interview with Doug White on July 23, 2013 in Victoria BC.

<sup>18</sup> In doing so, Hannah Askew drew on teachings received from Anishinaabe elder and ecologist Tony Chegahno when she spent the summer of 2012 researching Anishinabek law on the Neyaashinigiimiing reserve on Georgian Bay in Ontario. During that summer, Tony took our researchers outside on the land almost every day and encouraged them to learn from what they saw and to consider how those observations connected to the Anishinabek stories they were reading and the legal principles drawn from those stories. Although Anishinaabe legal perspectives are radically different in many ways from Coast Salish legal perspectives, Tony taught our researchers to pay closer attention to the non-human world and to reflect on the relationship between the non-human world they observed outside and the depiction of the non-human world in the stories. This teaching from Tony led Hannah Askew to be more attentive to these same dynamics when studying Coast Salish legal perspectives.

exist throughout Coast Salish communities. Our hope is that this report will provide a starting point for others to engage with, and that the elements of civil procedure identified here will be built on, debated and corrected by others. One of the most important insights we gained through the process of conducting this research is that Coast Salish civil procedure is extraordinarily complex and multi-faceted, extending into many areas of both daily and ceremonial life. While we identified elements of Coast Salish civil procedure to the best of our ability within the scope and timeframe of this research project, we are aware that many gaps remain and that an enormous amount of work remains to be done.

### **A Note on Our Use of the Sources**

All of the stories used in this research are from published sources. As lawyer and former chief Doug White explained that historically within Coast Salish society, the authority to tell most stories is derived from ancestors. Stories are powerful and the right to tell a particular story is accompanied with certain responsibilities relating to how, when, and to whom the story is told. Rigorously trained Coast Salish storytellers<sup>19</sup> hold many lengthy and complex stories in their minds and make choices about when and how to tell the stories depending on what is appropriate in a particular context based on the listener and situation. A published story taken out of its embedded social context becomes “static” or “flattened” in the sense that the storyteller’s judgment around the timing, place and audience for the story are no longer in force.

In addition to being decontextualized, a published version of a story is typically shorter and less complex than available oral versions.<sup>20</sup> For example, a number of the stories that the researchers case briefed for use in this report were published as shortened children’s versions by Snuneymuxw Elder Ellen White, grandmother of Doug White. He explained that his grandmother’s publication of the stories was controversial within the Snuneymuxw community, and that in making the decision to proceed with publication she had to balance consideration of ownership and rights and responsibilities relating to the stories on the one hand, with her concern that the stories endure and continue to serve people with their teachings on the other. The compromise she arrived at was to publish the shortened, children’s version of the stories rather than the full length adult versions as this posed fewer intellectual property considerations.<sup>21</sup> Dr. White is a trained storyteller who is able to tell epic stories that may take as long as three full nights to tell. In contrast, the children’s versions she published typically take from ten to twenty minutes to read out loud. It is important to acknowledge that the stories we are drawing on for this research are briefer, less complex versions and this may impact the presentation of the principles of civil procedure depicted in the stories.

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<sup>19</sup> An online book created by the Musqueam Nation describes the training that storytellers received within their nation in the following way “Our oral tradition includes a strict set of guidelines on the keeping of our history. Our storytellers were taught to relate stories in verbatim fashion so as not to lose or alter details. Often metre or rhyme was used to make the stories easy to remember. Each story keeper had only specific tales he or she was responsible for, and a family’s stories were passed down by members of that family, from one generation to the next. Storytelling was integrated into other facets of life, such as during mealtime, at community gatherings.” See J Gordon, *Musqueam Living Culture* available at: [http://www.juliegordon.com/uploads/images/Musqueam\\_LivingCulture.pdf](http://www.juliegordon.com/uploads/images/Musqueam_LivingCulture.pdf). Accessed Sept 04, 2014.

<sup>20</sup> Interview with Doug White, *supra* note 1. See also “Introduction to the Bison Books edition” by William Seaburg and Laurel Sercombe in Thelma Adamson (ed) *Folk-Tales of the Coast Salish: Collected and Edited by Thelma Adamson*. Lincoln and London: University of Nebraska Press, 2009 pp. v-xxiii.

<sup>21</sup> Interview with Doug White, *supra* note 1.



Further compounding this problem of simplification is the fact that the stories we relied on in the preparation of this synthesis are English translations. The Anishinabek linguist and storyteller Basil Johnston has pointed out that the vocabularies of distinct, Indigenous languages contain many unique and complex philosophical ideas not readily translatable to English. He has cautioned that because of this Indigenous stories translated into English may lose some of their intellectual power and nuance.<sup>22</sup>

A final consideration that arises in relation to the use of published stories is the issue of how it might affect internal community power dynamics. In our meeting with former Chief Doug White, he explained that important protocols exist within the Coast Salish world regarding who has the authority to tell a story, and that authority is generally derived from ancestors who have passed on permission to tell particular stories. The rights and responsibilities that have historically attached to the telling of these stories play a key role in the functioning of the legal system. This report relies on published stories and may be accessed and cited by any party, regardless of their training, societal knowledge, and family relations which is inconsistent with the historic role of stories within the Coast Salish legal system.<sup>23</sup> Although outside the scope of this research project, this is an issue that merits further reflection and deliberation.

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<sup>22</sup> Basil H Johnston, “One generation from extinction”, available at <http://cinema2.arts.ubc.ca/units/canlit/pdfs/articles/canlit124-Generation%28Johnston%29.pdf>. Accessed July 28, 2014.

<sup>23</sup> Interview with Doug White, supra note 1.

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### **Sites Visited**

British Columbia Royal Museum, Victoria

Museum of Anthropology, Vancouver BC

Petroglyph Park, Nanaimo BC

The City of Victoria Archives, Victoria

## APPENDICES

### APPENDIX 'A'

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The oral histories/stories are the main data. They form the basis for our community discussions and interviews. Community participants discuss the stories, add new stories or new versions of stories, review/add/revise our story analyses and synthesis until they are satisfied with the final report. Given this, I am including only one section, a discussion on standing, from the draft Coast Salish report on civil procedure. We are awaiting community feedback before proceeding further

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Standing  
Jurisdiction  
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Legal venues  
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Selected examples of legal transactions  
Physical symbols of legal authority  
Rituals involved in the performance of law  
Principles Underlying Legal Transactions  
Provision for novel claims  
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#### **Excerpt**

The legal principles and structures described in the following pages were drawn from approximately 50 Coast Salish stories containing elements of civil procedure. Many of the elements of civil procedure found in the stories were not initially visible to us. In order to become better able to “see” those elements, we drew from a number of other sources including a meeting<sup>24</sup> with Chief Doug White of the Snuneymuxw First Nation and transcripts of interviews with Coast Salish elders and community members, the websites of a number of Coast Salish nations, academic publications and unpublished theses, a trip to Petroglyph Provincial Park near Nanaimo, and visits to the Royal British Columbia Museum. Finally, because so many of the stories we case briefed involve non-human characters, we also spent time outside on Coast Salish territory observing interactions between animals, marine life, rocks, plants, trees and water, and reflecting on how these interactions are interpreted and depicted in the stories. These other rich

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<sup>24</sup> Interview with Doug White on July 23, 2013 in Victoria BC.

sources gradually helped to make visible many elements of Coast Salish civil procedure depicted in the stories.

The principles of civil procedure contained in this synthesis constitute only a beginning and capture only a small portion of the wealth of complex legal procedures that exist throughout Coast Salish communities. Our hope is that this synthesis report will provide a starting point for others to engage with, and that the elements of civil procedure identified here will be built on, debated and corrected by others. Coast Salish civil procedure is extraordinarily complex and multi-faceted, extending into many areas of both daily and ceremonial life.

As lawyer and former chief Doug White told us, within Coast Salish society, the authority to tell most stories is derived from ancestors. Stories are powerful and the right to tell a particular story is accompanied with certain responsibilities relating to how, when, and to whom the story is told. Rigorously trained Coast Salish storytellers<sup>25</sup> hold many lengthy and complex stories in their minds and make choices about when and how to tell the stories depending on what is appropriate in a particular context based on the listener and situation. A published story taken out of its embedded social context becomes “static” or “flattened” in the sense that the storyteller’s judgment around the timing, place and audience for the story are no longer in force.

In addition to being decontextualized, a published version of a story is typically shorter and less complex than available oral versions.<sup>26</sup> For example, a number of the stories case briefed for use in this synthesis were published as shortened children’s versions by Snuneymuxw Elder Ellen White, grandmother of Doug White. He explained to us in our meeting with him that his grandmother’s publication of the stories was controversial within the Snuneymuxw community, and that in making the decision to proceed with publication she had to balance consideration of ownership and rights and responsibilities relating to the stories on the one hand, with her concern that the stories endure and continue to serve people with their teachings on the other. The compromise she arrived at was to publish the shortened, children’s version of the stories rather than the full length adult versions as this posed fewer intellectual property considerations.<sup>27</sup> Dr. White is a trained storyteller who is able to tell epic stories that may take as long as three full nights to tell. In contrast, the children’s versions she published typically take from ten to twenty minutes to read out loud. It is important to acknowledge that the stories we are drawing on for this synthesis are briefer, less complex versions and this may impact the presentation of the principles of civil procedure depicted in the stories.

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<sup>25</sup> An online book created by the Musqueam Nation describes the training that storytellers received within their nation in the following way “Our oral tradition includes a strict set of guidelines on the keeping of our history. Our storytellers were taught to relate stories in verbatim fashion so as not to lose or alter details. Often metre or rhyme was used to make the stories easy to remember. Each story keeper had only specific tales he or she was responsible for, and a family’s stories were passed down by members of that family, from one generation to the next. Storytelling was integrated into other facets of life, such as during mealtime, at community gatherings.” See J Gordon, *Musqueam Living Culture* available at: [http://www.juliegordon.com/uploads/images/Musqueam\\_LivingCulture.pdf](http://www.juliegordon.com/uploads/images/Musqueam_LivingCulture.pdf). Accessed Sept 04, 2014.

<sup>26</sup> Interview with Doug White, *supra* note 1. See also “Introduction to the Bison Books edition” by William Seaburg and Laurel Sercombe in Thelma Adamson (ed) *Folk-Tales of the Coast Salish: Collected and Edited by Thelma Adamson*. Lincoln and London: University of Nebraska Press, 2009 pp. v-xxiii.

<sup>27</sup> Interview with Doug White, *supra* note 1.

Further compounding this problem of simplification is the fact that the stories we relied on in the preparation of this synthesis are English translations. The Anishinabek linguist and storyteller Basil Johnston has pointed out that the vocabularies of distinct, Indigenous languages contain many unique and complex philosophical ideas not readily translatable to English. He has cautioned that because of this Indigenous stories translated into English may lose some of their intellectual power and nuance.<sup>28</sup>

A final consideration that arises in relation to the use of published stories to create this synthesis is the issue of how it might affect internal community power dynamics. In our meeting with him, former Chief Doug White explained to us that important protocols exist within the Coast Salish world regarding who has the authority to tell a story, and that authority is generally derived from ancestors who have passed on permission to tell particular stories. The rights and responsibilities that have traditionally attached to the telling of these stories play a key role in the functioning of the legal system. This synthesis relies on published stories and may be accessed and cited by any party, regardless of their training, cultural knowledge, and family relations which is inconsistent with the historic role of stories within the Coast Salish legal system.<sup>29</sup> Although outside the scope of this research project, this is an issue that merits further reflection and deliberation.

### **Defining Civil Procedure**

For the purposes of this synthesis, civil procedure is defined broadly to encompass all of the structures in place that facilitate the business of doing law. This includes (but is not limited to): rules and practices, social institutions, physical structures, clothing, ceremonial objects, and songs, dances, and stories. This synthesis is organized around the following elements of civil procedure:

- Standing
- Jurisdiction
- Procedures for initiating a claim
- Identifying decision makers
- Role of experts
- Legal venues
- Speakers and witnesses
- Rituals involved in the performance of law
- Physical symbols of legal authority
- Categories of legal transactions
- Provision for novel claims
- Remedies

### **Standing:**

Under Coast Salish law, the standing of individuals in relation to actionable legal rights and obligations are linked to a number of interconnecting factors which include:

1. place
2. family membership through birth or adoption

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<sup>28</sup> Basil H Johnston, “One generation from extinction”, available at <http://cinema2.arts.ubc.ca/units/canlit/pdfs/articles/canlit124-Generation%28Johnston%29.pdf>. Accessed July 28, 2014.

<sup>29</sup> Interview with Doug White, supra note 1.

3. the individual's Coast Salish name and relationship to the ancestors
4. the individual's relationships through marriage
5. the individual's knowledge of his or her connections and relationships and the legal rights and obligations that attach to them, as well as the ability to articulate this knowledge.
6. the individual's identity and role in relation to particular skills, abilities, and responsibilities that he or she possesses (for example as a doctor, hunter or weaver)
7. the individual's public history of sharing and gifting

**Legal Principle:** Each of the factors listed above play a role in determining an individual's standing in relation to a particular legal claim, and these factors interact with one another in complex ways. Certain factors may be more determinative than others depending on the circumstance and legal claim at issue.

**i) Place:**

Coast Salish creation stories and oral histories emphasize the ongoing connection of communities to the land and the rights that flow from these longstanding connections. For example, Musqueam and Cowichan creation stories describe the earliest ancestors as a number of people who fell from the sky into the wilderness.<sup>30</sup> The first of these beings to fall from the sky, Syalutsa, constructed with the help of his brothers the first weirs to catch fish and the first deer traps by weaving strong cedar ropes. These first ancestors gifted these skills and knowledge down to their descendants. Specific geographical features of the land are identified in the stories; for example, the Cowichan story "The Travels of Syalutsa and Stutsun" is about the first two brothers who fell from the sky and contains descriptions of Swuqus (Mt. Prevost) as well as Cowichan Lake.<sup>31</sup>

The ongoing and continued connection to the land is emphasized in subsequent stories and oral histories. For example, "The story of the flood" tells of a huge flood that submerged Cowichan territory in ancient times. Some Cowichan people survived the flood because they learned about it in their dreams before it happened and were told to build a large canoe as well as a giant cedar rope. The cedar rope was attached on one end to the raft and on the other it was pinned under a large boulder on the top of Swuqus (Mt Prevost), the highest point on Cowichan territory. The people climbed into the canoe when the rain started and stayed in it as the waters rose, eventually covering all the land including the mountain. The cedar rope was just long enough that they were able to stay anchored to the mountain by the boulder. Once the flood waters receded, the people were able to resume living on the same land they were living on before the flood.<sup>32</sup> The boulder that the cedar rope was pinned under is still there on top of Swuqus today.<sup>33</sup>

The centrality of ongoing connection to place and its relationship to legal rights and obligations is reflected in Coast Salish language. For example, the Saanich people have a word in their Northern Straits dialect called "C'ela'nen" which can be roughly translated to "rights derived

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<sup>30</sup> D Marshall *Those Who Fell from the Sky: A history of the Cowichan Peoples* (Cultural Education Centre, Cowichan Tribes, 1999)

<sup>31</sup> "The Travels of Syalutsa and Stutsun" in D Marshall *Those Who Fell from the Sky: A history of the Cowichan Peoples* (Cultural Education Centre, Cowichan Tribes, 1999) pp. 15-21 and J Gordon, *supra* note 3.

<sup>32</sup> "The Story of the Flood" in D Marshall *supra* note 8 pp 24-32.

<sup>33</sup> *Ibid* at 31.



from generations upon generations of living it.”<sup>34</sup> The concept of “c’ela’nen” has been introduced in Canadian courts by Saanich witnesses as evidence in support of rights. For example, Saanich member Gabe Bartleman provided testimony on Sept 2 1987 in the Supreme Court of BC in a fishing case around the Douglas Treaty (Action No 2872/85). In describing his understanding of the treaty and why fishing rights couldn’t be taken away he said “because our way of life, we have what they call a C’ela’nen- and the C’ela’nen does not allow any other foreign agreements. [That is,] there’s no way we can sell a C’ela’nen or trade it off, it is a way of life.”<sup>35</sup> Another Saanich member, Tommy Paul who testified in the same case stated that it was “not our C’ela’nen to be stopped from taking our food.”<sup>36</sup> According to Coast Salish researcher Janice Knighton “C’elan’nen is a premise for non-transferable rights- it is inconceivable to “give up” C’elan’nen, because it is so entrenched in the lives of the people.”<sup>37</sup>

## **ii) Family membership through birth or adoption**

An individual’s connection to place within Coast Salish society is mediated through membership in the family. Conceptions of personal identity are traditionally anchored in the house of one’s birth or early childhood. ?al?alted the Lushootseed word for “homeland” literally translates to “one’s own home.”<sup>38</sup> It is through the family that an individual grows up in, that he or she learns of his or her personal connection to ancestors and to the special legal rights and obligations that flow from their connection. The family will be the child’s primary source of knowledge about both more general group rights and obligations, as well as rights and obligations that are specific to the family and to particular individuals within the family.

## **iii) The individual’s Coast Salish name and relationship to the ancestors**

Names are given to individuals in formal ceremonies at the Big House witnessed by community members. At birth, a child is given a “nickname” but when they are older they are given names to which rights and responsibilities are attached. The names that are given belong to the family as a result of ancestral privilege. If the name doesn’t legitimately belong to the family, or if someone else is using the name or wants to use the name, then other people have the opportunity to speak up and object either during the ceremony itself, or prior to the ceremony.<sup>39</sup> Once the name is given, then person who has taken it has the responsibility to uphold the honour and integrity of the name. The individual will be reminded during the ceremony that if they bring down the name they bring down not only themselves but also their ancestors that held the same name.<sup>40</sup>

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<sup>34</sup> JR Knighton “The Oral History of the 1852 Saanich Douglas Treaty: a treaty for Peace” a unpublished thesis submitted for the Master of Arts in Indigenous Governance program at the University of Victoria (August 25, 2004), p. 7. Available at: <http://web.uvic.ca/igov/research/pdfs/Janice%20Knighton%20CGP%20Aug.%202004.pdf>. Accessed on Sept 04, 2004.

<sup>35</sup> Ibid at p. 7.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid at 30.

<sup>38</sup> RL Barsh Barsh, RL. “Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships” 14 Hastings W.Nw J. Env’t’l L. & Pol’y 1375 (2008) at 5.

<sup>39</sup> B Miller, Oral History on Trial (Vancouver: UBC Press, 2012) at p. 52.

<sup>40</sup> Video of speaker conducting events in Coast Salish bighouse.

Jimmy Johnny of the Snuneymuxw nation explained to law student Estella Charleson in an interview given in July 2012 that during a coming of age ceremony in which a name was being given

One of the elders would come and tell you, when you're disciplined, what you're supposed to do and what that name meant. Who it come from and what you are supposed to be doing. I think there's supposed to be responsibilities that went along with that name and if it was a powerful name then you really had watch yourself. Like if it was a chief's name, you know, that sort of thing .... maybe 6 elders would come and talk to you when you, after you've danced and tell you disciplines. Stay away from drugs and stay away from... you know. Be good, don't cheat on your wife, all this sort of thing. All kinds of stories about what you have to do. I think it went on for 4 years... After they put you to dance in the bighouse. It's not adhered to now but that's what you're supposed to do. Some people do it.<sup>41</sup>

The responsibilities that accompany a particular name are taken seriously, and if the individual carrying the name fails to fulfill those responsibilities, there is a possibility that the name may be stripped from that person.<sup>42</sup> In addition to responsibilities, important rights attach to certain names. One of these categories of rights is access to resources. The anthropologist Brian Thom writes that "Names are strategically given to children, linking them to ancestors who have lived in different parts of the Coast Salish world. Children may then grow up to have rights to access resource locations through the acknowledgement of these ancestral connections."<sup>43</sup> In order to be able to claim these resource rights, individuals must be versed in the stories that attach to their name and understand the connections to ancestors. Access to a fishing or berry picking site outside of the individual's home community might involve traveling to that place, asking the family that has control over the site for permission to use it, and articulating the ancestral connection that legitimates access to the resource.<sup>44</sup>

In addition to resource rights, names linked to ancestors may also confer a range of other rights such as the right to perform particular ceremonial dances and songs<sup>45</sup>, ownership of masks,<sup>46</sup>the

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<sup>41</sup> Interview of Jimmy Johnny (June 22 2012) on Snuneymuxw' oral histories and legal traditions. pp 143-145 Cited in Estella's synthesis at p 45

<sup>42</sup> Interview with Doug White, supra note 1.

<sup>43</sup> B Thom, Coast Salish Sense of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World (McGill University, PhD Dissertation, 2005) [unpublished]. Available at: [http://viuspace.viu.ca/bitstream/handle/10613/32/phd\\_mar\\_05\\_final\\_small\\_viu.pdf?sequence=1](http://viuspace.viu.ca/bitstream/handle/10613/32/phd_mar_05_final_small_viu.pdf?sequence=1). Accessed September 04, 2014.

<sup>44</sup> Ibid at 378.

<sup>45</sup> "The Ceremony of the Singing Name" in in Arnett, Chris ed, Two Houses Half-Buried in Sand: Oral Traditions of the Hul'q'umi'num' Coast Salish of Kuper Island and Vancouver Island (Vancouver: Talonbooks, 2007) at p. 100 [Two Houses]; see also RL Barsh, supra note 16 at 20.

<sup>46</sup> "Quil-Kay-Milth, the Carver" in Two Houses supra note 23 at 239; "Origin of Snuneymuxw" in Two Houses supra note 23 at 239 at pp 195-197;"The Man from Yekw'ts" in R Bouchard and D Kennedy Squamish Indian Land Use and Occupancy (Squamish Territory: Prepared for Squamish Indian Council, 1986); RL Barsh, supra note 16 at 20.

right to use particular designs in weaving,<sup>47</sup> houseposts<sup>48</sup>, the right to be trained in medicinal knowledge<sup>49</sup>, and the right to hold a chieftanship.

#### iv) The individual's relationships through marriage

**Principle:** Standing to claim rights and access to intellectual property can be acquired through marriage.<sup>50</sup>

The story “Origin of the Snuneymuxw”<sup>51</sup> tells of how in the beginning the Sun, Sum’shathut, made little people in different places. At the foot of Tetuxutun (Mount Benson) the Sun made a man and woman who were husband and wife. They lived there and had three sons. At the same time another man and woman were made at Sti’ilup (Departure Bay) and these people had three daughters. One day when the girls were nearly grown up, their father heard a Voice in the air calling to him, telling him to get some cedar wood and to make a swayxwi. A swayxwi is a special kind of mask that only certain people may use and that must stay in the family always. It has a big face, has swan’s feathers standing up from it, and hanging down over the shoulders is a blanket. The voice told the father that he must make the mask but not let anyone see it or know what he was doing. So every day the man sent his wife and three daughters out to find food while he secretly worked on the mask inside his cabin.

In the meantime, the three sons growing up at Tetuxutun were also reaching adulthood and they decided to leave their parents to see if they could find other people. Eventually they found the cabin at Sti’ilup and heard strange sounds coming from inside. They wanted to see what was happening, so they climbed up onto the roof of the cabin and looked down into it through a board that had been taken out to let the light in. The father immediately covered up the big face of the swayxwi but it was too late as the boys had already seen it. He was very troubled and asked the boys who they were. The boys told him and the father explained to them that since they saw the swayxwi they would need to stay and marry his three daughters, so that the secret knowledge would stay within the family. So the three boys married the three daughters and stayed with the family at Sti’ilup. Eventually the tribe at Sti’ilup grew so big they had to build three rows of houses. This was the beginning of the Snuneymuxw nation.

**Principle:** Standing to claim rights to access to natural resources can be acquired through marriage.<sup>52</sup>

Coast Salish people generally recognize that marriage into a community brings with it the rights for the incoming spouse (and his or her children) to take part in the common ownership of

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<sup>47</sup> RL Barsh, *supra* note 16 at 20.

<sup>48</sup> RL Barsh, *supra* note 16 at 20.

<sup>49</sup> D Jeness, *he Faith of a Coast Salish Indian* (Victoria: British Columbia Museum, 1955).

<sup>50</sup> “Origin of Snuneymuxw” in *Two Houses*, *supra* note 23 at pp 195-197 and “Legends of the Swayxwi” in Cryer at pp. 304-305.

<sup>51</sup> “Origin of Snuneymuxw” in *Two Houses*, *supra* note 23 at pp 195-197.

<sup>52</sup> Thom, *supra* note 21 p. 377-378; RL Barsh, *supra* note 16 at p 14.

community territories.<sup>53</sup> One prominent Chemainus leader explained to anthropologist Brian Thom how this principle operated within his own family, recalling that his wife originally came from Halalt, that her father was from Cowichan, but that she is “100 percent Chemainus” since their marriage. The marriage gives her rights to use the commons property of Chemainus. However, this does not give this her or other Chemainus members collective rights in Halalt. The Chemainus leader explained that:

I have come from a position of respect for a people, basically, and that respect has to be that they are a people and a Nation with their own core territory and a land. That’s why I keep saying things like if a person married me, like my wife, she comes from Halalt. Just because my wife is from Halalt doesn’t mean Chemainus owns Halalt, in terms of a core territory. I have it clear in my mind in terms of how I approach them.<sup>54</sup>

**v) The individual’s knowledge of his or her connections and relationships and the legal rights and obligations that attach to them, as well as the ability to articulate this knowledge.**

**Principle:** Knowledge of family ancestry is essential to being able to claim legal rights. Musqueam member Terry Point recalled in a recent interview that his great grandfather spent his summers along the coast in what is now West Point Grey, listening to his grandmother’s teachings from morning until night. As a result of this instruction, Point said that by the time he was thirty years old his great grandfather could recite the names of his family members 25 generations back and the lineage of other families for 16 generations. “You weren’t allowed to tell a story until you could recite it word for word.”<sup>55</sup> The time that Terry’s Point’s great great grandmother invested into teaching his great grandfather allowed him to be able to benefit from his ancestral inheritance as well as to be able to pass it on to future generations. In Coast Salish culture, family teachings included proprietary knowledge of the family’s history, traditions, and genealogy, as well as certain arts and skills not shared with outsiders.<sup>56</sup> These teachings that accompanied ancestry were the basis of class or social status within Coast Salish culture. Historian Keith Carlon found in his research with Sto:lo communities that “People from low status families were typically referred to as s’téxem, which translates as ‘worthless people’ [...] Elders explain that s’téxem implies ‘people who have lost or forgotten their history. To the Stó:lō, “knowing your history” means knowing who you are related to. Each person has ties that

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<sup>53</sup> Anthropologist Brian Thom states that: “Rights to land come to the person who is marrying into a community, but rights originating in their home community have to be negotiated through relationships with in-laws. It should be noted that this system does not only work with women marrying in, but also men marrying into their wives’ community. Roy Edwards from Lamalchi Bay on Kuper Island married into his wife’s community at Chemainus, and rights to that community extended to him through his wife Christine. Pete Seymour emphasized that he would have to ‘butter up’ his in-laws for access to their areas, but could access other areas (consanguineal) with less trouble. The subtleties of whom a right in the common ownership of residence group land might extend to among non-resident consanguineal or affinal kin is not clear, though I suspect that actual residence is the key. Thus a more restrictive set of rules applies to residence group land as compared to descent group land.” Thom, *supra* note 21 at p. 282.

<sup>54</sup> *Ibid.*

<sup>55</sup> Interview with Musqueam member Terry Point, cited in Cheryl Rossi “Musqueam tell their story through tours” Vancouver Courier, June 24, 2014. Available at <http://www.vancourier.com/news/musqueam-tell-their-story-through-tours-1.1155912>, accessed Sept 03, 2014.

<sup>56</sup> RL Barsh, *supra* note at p. 14.

run across the various Stó:lō tribes, throughout the whole of the nation's territory."<sup>57</sup> Legal scholar Andree's Boisselle's research with Stolo communities also affirmed this.<sup>58</sup>

Director of the Samish Indian Nation research program Russell Barsh states that within the Coast Salish world a person's knowledge of the names, stories, songs and ceremonies traditionally associated with property such as a fishing site is evidence of an inherited and therefore legitimate claim.<sup>59</sup> In order to be able to claim rights based on ancestry and marriage, individuals must be trained and knowledgeable about their own genealogy and (to a lesser extent) that of their spouse's, and be able to articulate these claims persuasively and appropriately.

Principle: Because training in one's ancestry and related knowledge is crucial to full participation in Coast Salish society, children have a right to expect to be trained by adults and elders in the community.<sup>60</sup>

One Northern Straits individual, Andrew Joe, explained to Wayne Suttles that the grandparents were to blame when children didn't know their histories because they didn't give their children advice in the form of family stories. Joe stated that "Those stories have to have a meaning; they're where advice really comes out. The warning comes right out in those stories, and the other guys who think they know so much don't bother to evaluate those stories."<sup>61</sup> In the Snuneymuxw story of "The Boys Who Became a Killer Whale" the children of a community have a meeting because they are upset that they are not being trained properly by the adults in the community. Some of the specific skills that the children complain of not being trained in include how to prepare cedar ropes, how to build a big house, how to make baskets and how to talk to skins that are being prepared so that they "come alive." A Voice speaks to the adults in the community, reminding them of their responsibility to provide training and guidance to the children, but the adults do not listen. The children decide to leave the adults. For the next few weeks they make preparations to leave, while keeping their plans a secret from the adults. After they leave, the children want to show the adults that they are powerful, so they stretched a whale skin over the rocks, painted it, made a blowhole for it. Then some of the boys climbed inside it to make it appear real. The girls sewed up the skin with the boys inside it and then the killer whale began to swim past the community of adults. The whale went out into the ocean, dove down, and came back up wet and shiny looking just like a real killer whale. The boys inside the skin stayed close to the shore so they could move their feet on the water. Then one of the boys said that he could feel the skin moving on its own. All the boys were afraid because they had not intended for

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<sup>57</sup> K.T. Carlson, "Stó:lō Social Structures and Government Assimilation Policy" in *You Are Asked to Witness: The Stó:lō in Canada's Pacific Coast History*, K.T. Carlson, ed. (Chilliwack, B.-C.: Stó:lō Heritage Trust, 1997) 87 at 90. Similar to Professor Carlson's findings, anthropologist Wayne Suttles found that in Northern Straits communities low class people are known as "awene sneps" or "without teachings." W Suttles *Coast Salish Essays* (1987) pp. 17-23.

<sup>58</sup> A Boisselle, "Emerging from Colonial Quicksand: Cultural Hybridity and the Sto:lo Transition to Self-Rule: Examining Sto:lo Discourse Around the Experience of Taking on Responsibility for the Delivery of Child and Family Services." (2008). Available at: [http://web.uvic.ca/vv/stolo/pdf/Boiselle\\_Emerging\\_from\\_quicksands\\_2008.pdf](http://web.uvic.ca/vv/stolo/pdf/Boiselle_Emerging_from_quicksands_2008.pdf).

<sup>59</sup> RL Barsh, *supra* note 16 at 16.

<sup>60</sup> "The Boys Who Became a Killer Whale" and "The Marriage of Sea Gull and Crow"; in Rice White, Ellen (Kwulasulwut) *Legends and Teachings of Xeel's the Creator* (Vancouver: Pacific Educational Press, 2006); "The She-Wolf of Tsleil-Wautt" in MacDonald *Between Forest and Sea: Memories of Belcarra* (Belcarra: Belcarra Historical Group, 1998); Interview with Musqueam member Terry Point, *supra* note 33.

<sup>61</sup> W Suttles *Katzie Ethnographic Notes* (Victoria: British Columbia Museum, 1955).

the whale to become alive with its own power. They asked the whale to go back into the shore but the whale said that it was too late, that the boys had all become one inside the whale now.

In the meantime, the adults in the community had spotted the whale and begun to hunt it with their spears. Xeels the Creator spoke to the adults and told them that they had neglected the teachings of the children. Xeels was said as he said this because he felt that a lot of harm had already been done by the failure of the adults to pass on the teachings. A grandfather heard this and he asked the men to stop hunting, but a spear had already been thrown that pierced the whale. Once the hunters heard the grandfather they pulled out the spear. The grandfather put his head into the ocean to be able to communicate with the children, and the boys told them what had happened. They said that the spear had killed one of them, but that as they had all become one, the boy who had been speared lived on in them. The grandfather wept and apologized. The children also apologized for trying to do something that they did not have the proper teachings for, in making the whale come alive. The grandfather went back to the community and told them everything that had happened, and the community vowed to always teach the younger generations properly moving forward.

Another story that shows the right that children have to learn teaching from adults, and the obligation of the adults to do the teaching is the Snuneymuxw story of “The Marriage of Seagull and Crow.” In this story a grandfather from the seagull community arranges a marriage for his grandson with a young woman from the crow community. The marriage occurs but unfortunately the young seagull has not been properly taught how to be a good husband and father so he mistreats his family for many years, causing them much unhappiness. When the children are almost grown, Xeels comes and treats the seagull a powerful lesson, teaching him how love his family and how to be a proper husband and father.

Both “The Boys Who Became Killer Whales” and “The Marriage of Seagull and Crow” demonstrate the importance of adults passing on their knowledge to children.

Coast Salish Elder George Harris expressed the ongoing obligation of knowledgeable people to pass on teachings in the contemporary context following way:

I know that lots of the problems that exist within each of the individuals that are there is because they are disconnected from their family; disconnected from their community; disconnected from their nation and they don't have the value sets or the teachings – what we call Snuw'uy'ulh – that's the traditional teachings of our ancestors that helps to guide them as they live in the outside world in the communities.<sup>62</sup>

Principle: Because knowing family stories is crucial to being able to establish a claim, private family stories are not usually shared with outsiders.<sup>63</sup>

Legal scholar and Director of the Samish Indian Nation research program Russel Barsh writes that in the Coast Salish world “A family preserved its wealth and status by keeping teachings within the family: ‘If you know your class of people and tell histories (family trees), you are not supposed to tell anything outside your own line. It is their own secret.’ Since claims to share the use of productive property such as fishing sites must be based on kinship ... a high-class person

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<sup>62</sup> Coast Salish Elder George Harris in video on Salish Reflections, available at <http://salishreflections.wordpress.com/>. Accessed September 04, 2014.

<sup>63</sup> “The Travels of Syalutsa and Stutsun” in D Marshall supra note 8 at pp. 15-23.

was better able to set out a convincing claim than a low-class person because a high-class person knew the stories about his family's connections with the custodian of the site and how he was related to them."<sup>64</sup>

Coast Salish creation stories emphasize the privacy of certain knowledge. For example, in the Cowichan story of "The Travels of Syalutsa and Stutsun", Syalutsa explains to his brother Stutsun who has just fallen from the sky to earth that if he wishes to receive a powerful understanding of the natural world, he must bathe in the cold clear waters of every stream, river or lake he encounters in his travels. Syalutsa also admonishes Stutsun that he must eat and drink sparingly and not oversleep. He tells Stutsun that he must keep to this strict regime and eventually he will hear voices which will give him an understanding. Finally, he tells Stutsun that the special knowledge he will receive as a result of following these practices will belong to him alone, and that he should not speak of it to others. Stutsun follows his elder brother's advice for many years and receives many teachings as a result. Finally, he returns to Syalutsa and tells him about many of the things he has seen. When Syalutsa asks him to describe how he got his own power, Stutsun smiles and reminds Syalutsa that he is not allowed to talk of it- instead he tells Syalutsa that maybe one day he will observe Stutsun using his powers.<sup>65</sup> Beryl Cryer, a non-Coast Salish journalist who collected stories from many Coast Salish people in the 1930's for publication in the local newspaper, was told on a number of occasions that certain stories and knowledge were private. For example, in "The Ceremony of the Singing Name" Cryer relates that a Chemainus woman named Mary Rice showed her a sacred rattle that she had inherited from her grandfather and that she used for ceremonies, but that Rice would not share details of how she used the rattle as that was private knowledge to be kept within the family.<sup>66</sup> Legal scholar Russell Barsh gives an example of a situation where knowledge is held privately:

The canoe-maker is a good example. A canoe-maker holds the tools and tricks of the trade as guarded secrets. They will often work alone, sometimes in secret where their techniques cannot be observed by others. The canoe-maker will have certain songs that they have held privately and which were learned in order to aid in the felling, splitting, excavating and steaming of a canoe. Anthropologist Homer Barnett reported from his observations in the 1930s that "it was a serious personal offense for anyone to try to" watch the canoe-maker at work and try to learn the secrets of the trade.<sup>67</sup>

Today, certain stories are still regarded as private within families. This is reflected for example in the access requirements of the public archives in Victoria on Vancouver Island, which houses many recordings of Coast Salish stories. At the archives, private Coast Salish family stories are stored separately and may only be accessed by family members who can demonstrate their family identity and right to access the stories.<sup>68</sup>

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<sup>64</sup> RL Barsh, *supra* note 18 at pp. 14-15.

<sup>65</sup> "The Travels of Syalutsa and Stutsun" in D Marshall *supra* note 8 at pp. 15-23.

<sup>66</sup> "The Ceremony of the Singing Name" in Two Houses, *supra* note 23 at pp. 100-104.

<sup>67</sup> RL Barsh, *supra* note 16 at pp. 14-15.

<sup>68</sup> Personal conversation with archivist at City of Victoria archives, July 17, 2013.

**iv) The individual's identity and role in relation to particular skills, abilities, and responsibilities that he or she possesses (for example as a doctor, hunter or weaver)**

**Principle:** Important powers correlated with legal rights are not merely inherited, but must also be earned through the effort and skill of individuals.<sup>69</sup>

An individual's skills, ability and training impact on their personal authority and standing to claim certain legal rights. In the Cowichan story of "The Travels of Syalutsa and Stutsun", Syalutsa explains to his brother Stutsun who has just fallen from the sky to earth that if he wishes to receive a powerful understanding of the natural world, he must bathe in the cold clear waters of every stream, river or lake he encounters in his travels. Syalutsa also tells Stutsun that while he is searching for this power he must eat and drink sparingly and not oversleep. He tells Stutsun that he must keep to this strict regime and eventually he will hear voices which will give him an understanding. Finally, he tells Stutsun that the special knowledge he will receive as a result of following these practices will belong to him alone, and that he should not speak of it to others. Stutsun follows his elder brother's advice for many years and receives many teachings as a result. Finally, he returns to Syalutsa and tells him about many of the things he has seen. When Syalutsa asks him to describe how he got his own power, Stutsun smiles and reminds Syalutsa that he is not allowed to talk of it- instead he tells Syalutsa that maybe one day he will observe Stutsun using his powers.<sup>70</sup>

Another story that demonstrates the great effort that an individual underwent to obtain a power, in this case hunting power, is called "Little Island of Kuper."<sup>71</sup> In this story there are two families and the head of the first one is named Hola-Pult and the head of the second, At-Thult. Hola-Pult and his brothers and their families were all great hunters who had good luck killing seals, sea lions, duck and fish. But At-Thult and his family had great difficulty and could catch very little. Finally At-Thult went to see Hola-Pult to ask him what his secret was. Hola-Pult advised At-Thult that his poor luck might be due to not being clean enough. At-Thult then went to his wife and told her that he and his brothers might not be clean and pure enough to be good hunters, and that he was going to go up into the mountains to become clean. Early the next morning he said out up into the mountains. After a few days he came to a big lake and made a camp. All day long and many times in the night he would run into the water and swim until he was tired out, and then he would lie on the bank and scrape his skin with branches of hemlock and cedar, rubbing until he bled. Throughout he called to the spirits to help make him clean and drank only water and ate no food. Eventually he fell into an exhausted sleep and heard a voice telling him where to find medicine to make his body clean. The voice told him to take a sharp stone and rub his skin with it until he bled, and then to mix water with the medicine and rub it into the wounds to make himself clean. At-Thult made the medicine out of green leaves and rubbed the paste into his skin. It burned so badly that he ran into the lake and swam out into the middle. When he had reached the middle of the lake his strength left him and he began to sink.

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<sup>69</sup> "The Travels of Syalutsa and Stutsun" in D Marshall supra note 8 at pp.15-23; "Little Island of Kuper" in Two Houses supra note 23 pp. 319-234; "The Myth of the Ghost Lover" and "Story of Semat" in C. Hill-Trout The Salish People Vol IV The Sechelt and the South-Eastern Tribes of Vancouver Island (Vancouver: Talonbooks, 1978) at pp. 139-142 and pp. 153-157.

<sup>70</sup> "The Travels of Syalutsa and Stutsun" in D Marshall supra note 8 at pp.15-23.

<sup>71</sup> "Little Island of Kuper" in Two Houses supra note 23 pp. 319-234.



Once he got to the bottom of the lake he found himself in a large house. He tried to run away but found he could not move his legs. Eventually he fell asleep, and when he woke up a seal was shaking him from side to side. Ah-Thult found that the whole house was full of sea lions and seals. The sea lions and seals decided to help him get clean, so they got a long rope made from the intestines of sea lions and they threw this over one of the cedar logs that supported the roof. They tied it around Ah-Thult and pulled him high in the air. They got sharp stones and cleaned rubbed them until they shone; and then scraped him until there was very little skin left on his body and blood was dripping to the ground. At last they thought he was clean and gave him a basket of medicine. The sea lions and seals told Ah-Thult to take the medicine home with him and to rub it on his body before he went hunting so that the seals and sea lions would not be able to smell him. Then, they told him, you will be able to hunt as many of us as you like. The biggest sea lion also gave Ah-Thult a song and told him to sing it when hunting as then the sea lion would only listen to the song and not see Ah-Thult approaching. After this Ah-Thult fell into a deep sleep and while he slept he was washed back up onto the shore. As he was washing up, one of the sea lions swam beside him and told him that when he got to the land he should make a wooden sea lion, cut the wood with sharp stones until it came alive, and then bring it back home with him. For two days Ah-Thult slept, and when he awoke he felt strong and happy and began to sharpen stones to make the sea lion with. He chose a tree growing close to the water, cut it down and began cutting and trimming it into the shape of a sea lion. It was hard work and took many months. When at last it was done he took it to the water but it sunk to the bottom. Disappointed, Ah-Thult then chose an oak tree and again spent many months carving a sea lion. Again, the wooden creature sunk to the bottom. Finally, Ah-Thult chose a cedar tree and carved a large and fine seal lion out of its soft, fragrant wood. This time, when he put the wooden sea lion in the water it began to swim and dive, making breathing sounds as it came up out of the water. Ah-Thult then began the journey back to his people, carrying the sea lion on his back. When he reached home he rested for two days and told his family the story of what had happened to him. On the third day he went off to hunt and by nightfall had caught ten fat seals. Hola-Pult smelt the meat of the seals cooking and came over to see. Ah-Thult told him that he was now clean and that he had good medicine to help him hunt. Hola-Pult wanted to steal the medicine from Ah-Thult, but Ah-Thult guessed his plans and used the wooden sea lion as a decoy to lure Hola-Pult away. Hola-Pult wanted to catch the wooden sea-lion, and told his brothers to jump in their canoes to help him catch it, but the wooden sea lion kept just ahead of all of the canoes, eventually leading them to Cowichan Gap and through the pass and across the Channel to Kuper Island. Here the sea lion finally stopped, and when Hola-Pult and his brothers got out of their canoes they decided that Kuper Island was a better place to live, so they got back in their canoes to get the women and children and pack their blankets, mats and food. Both of these stories demonstrates the principle that access to certain benefits comes not only from ancestry and connections, but also from an individual's personal efforts. Principle: Practical knowledge around harvesting a particular resource may be gained through apprenticeship with a relative.<sup>72</sup>

Legal scholar Russell Barsh has observed that practical as well as ritual expertise involved in harvesting technologies such as reef nets, duck nets, or tidal weirs was privately held knowledge. An individual generally obtained access to this knowledge by finding a relative who had the knowledge and was willing to share it in exchange for apprenticeship labour. Control of practical

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<sup>72</sup> RL Barsh, *supra* note 16 at pp. 22-23.

knowledge by families and house groups allowed them to maintain a competitive advantage in the trade network. For example, the salmon of the Klickitat was highly prized by the Nisqually because it was dried in a way to give the salmon a certain flavor which the Nisqually were not able to produce. Likewise, the Snohomish brought their flint arrowheads from the Snoqualime in the Cascade Range and sent slaves and shell money to the Makah at Neah Bay on the Pacific seacoast to buy superior canoes.<sup>73</sup>

#### v) The individual's public history of sharing and gifting

**Principle:** Generosity and gifts that are bestowed on others especially when done in the presence of witnesses, may be considered as debt that the giver can expect to one day be repaid.

Mary Rice told Beryl Crier that after some men from her community helped her to bury her husband that she knew she would have to repay them. When she hosted a potlatch many years later, she repaid the men in the presence of witnesses and also repaid other people who had given her gifts at previous potlatches that they had hosted.<sup>74</sup>

**Principle:** Although the debt is “real” and the donor expects to be repaid at some point, it is up to the recipient to determine when and how to repay the debt.<sup>75</sup>

In a story that was told to Josephine LeClaire, a grandmother found a wolf that had a bone stuck in its throat and pulled the bone free, saving the wolf from dying in agony. When the wolf offered to repay her, she said “You need not repay me now, but remember to give me something later.” The wolf went on its way but Josephine’s grandmother found a deer left for her at the same place for the next five years. The grandmother generously allowed leaving the other party free to choose how, when and with what to reciprocate.

In the story of “Siamtunaat’s Potlatch”, Chemainus member Mary Rice describes to journalist Beryl Cryer how she threw a potlatch once to repay some men from her community for helping her to bury her first husband decades before at a time when she had very little money and small children to look after. Mary Rice told Cryer that “Now always after that I kept thinking, ‘Those men did that for me and they must be paid back’ but I never had enough money to pay.” Many years later when her children were grown, she told one of her sons that they must host a potlatch in repayment for the burial. They called all the people from Esquimalt, from Saanich, from all the Islands, up to Nanaimo. They invited everyone to the big house at Puneluxtth’, which can hold 800 people. The big house had two holes in the roof to let out smoke and a raised platform for people to put their things and sleep. Mary Rice bought a canoe, nearly 200 yards of cloth and cut it into pieces (one piece for each woman that attended), 600 cups, many pans, ten double blankets, and money also was set aside to give back. The potlatch was used as an opportunity to pay back not only the men who had helped at the burial but also other people who had given her things at other times. For example, one man at Kwa’mutsun had given her five dollars at a potlatch, so she returned that to him, and a woman had given her two and half dollars at a potlatch on another occasion, so Mary Rice returned that to her also: “All the people who had

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<sup>73</sup> Ibid at 23.

<sup>74</sup> “Siamtunaat’s Potlatch” in Two Houses supra note 23 at pp. 80-82.

<sup>75</sup> “Siamtunaat’s Potlatch” in Two Houses, supra note at pp. 80-82.

given to me at their potlatches, I gave back to them, and so I was square.” The people stayed for a week at the potlatch and three heifers, 700 ducks, 1100 loaves of bread, 30 boxes of hard biscuit, 70 pounds of tea (one pound given to each woman), 50 boxes of oranges, 50 boxes of apples, six sacks of sugar and many potatoes. Each family that attended was also given a rush mat. After dinner on the first day, the picture of Mary’s husband was held up to everyone and they were told that the potlatch was to pay back the men who had helped to bury them. Then blankets and money were taken outside and the blankets were thrown at the people who Mary wanted to give them to.<sup>76</sup>

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<sup>76</sup> “Siamtunaat’s Potlatch” in *Two Houses*, supra note at pp. 80-82.

### STUDENT GUIDELINES:

#### 1) **Introduction**

Start by acknowledging the territory you have been invited to, letting them know you are honoured to be invited to their territory. This serves to show your respect for them and acknowledges their presence and time

Then introduce who you are and where you are from. Then you can talk about your community and education. Providing information about yourself and your community serves to bring you in and not be a stranger. Here you may also explain why you are doing this work.

Here is an appropriate place to offer and explain any gifts you are providing.

#### 2) **Group Members Introduction**

A good way to do this is to start by doing a round and maybe give people a topic to say something interesting about themselves. Then maybe mention your academic self and whatever community experience you have that is relevant.

#### 3) **Explain the Project**

Some of this will have been introduced during step one. Start by asking the witnesses/interview participants what law means to them? Explain what you mean by Indigenous Legal Traditions. Take time to explain what you are doing, what the project is and why it is. Be attentive to the way people are responding and give space for participants to voice their concerns.

- **Concern:** Common response is “we don’t have laws.” To this, explain what you mean, don’t challenge the assertion. This means you have work to do to explain the project. Saying something about how there was always a way of doing things, always a way to know right from wrong is a possible way to talk about law.

#### 4) **Explain the Why of the Project – what the research will be used for**

Explain what you are doing is for the benefit of the community and whatever is produced stays with the community. Explain that you have been invited to work with the community to articulate concepts and principles and document them for the community’s use and benefit, such as for governance, policies, programs or regulations. It is completely up to the community to decide how to use it. Note also that it will be shared with UVic to help build teaching materials (JD in Indigenous Laws). .

- **Question:** “How will this be used against us?” You have to be honest and say you aren’t sure, but that the final information is their work for the community and it is for their community to determine how to use it.

- Question: “What can we do with this work?” Possibly to inform governance, policies, programs.
- Question: You may face critique of the process and method. One response is to say “this is just the beginning and we are here to facilitate this process in a way that makes indigenous law accessible to the community. The method is not indigenous – it is a western method that we use to understand the stories that are heard by a court, which helps us understand Canadian law. We are using the same method to look at your stories to help us to understand the legal principles that guide your community. We know it isn’t indigenous and we know it isn’t perfect, but we find value in this method.” Remind participants that we are only looking at a tiny slice in a particular area of law. It is something tangible to say that these legal principles are coming from old places and being passed on through the generations they are able to be dynamic and flexible in the face of change. They do have the ability to be applied to real human problems.

### 5) Ask if Anyone has Any Questions

Allow for silence and percolation time.

- Question “I don’t know anything.” Remind them that we are inviting them to share their knowledge. That we bring the method by they bring what they know – we won’t be asking them for anything they don’t already know.

### 6) Consent Form Signing

We are inviting the community to share their knowledge and have developed this method, as we said, to document legal principles that order indigenous societies. In order for us to do this ethically and professionally, we must use consent forms. The forms give us a way of being accountable both to the community and the university.

- can be confidential – “keep it secret that you participated”
- don’t have to answer anything you do not want to
- print legibly, ensure names are on the consent forms, be diligent and detailed.
- print out a lot of copies and leave one with the community

At the end of the day, we want to understand the legal principles so we can move them into the practical realm; to be used in the community to understand, approach and resolve social issues. We may struggle with the methodology but we must continue moving forward so we have something tangible to work with.

If they do agree to signing the form, start the recording and ask them to consent while recording, stating their name.

*The next two steps are pieces to help you through the interview and wrap it up*

### 7) The Actual Interview

Start recording – don’t forget to use creative ways to say their names for transcription purposes.

The material you will be using in each interview should be prepared ahead of time. In our case the community members will set up the interviews and we will need to determine which stories to focus on and the major topics you would like to hit. There are also questionnaires that will serve as a guide if the conversation stalls.

Generally, when you begin this part of the interview, you can begin with one story. Read it and gather the group's perspective, conversation will organically flow from there and you will have to continue moving the group through the stories, topics and your questions. Allowing them to ask questions along the way as well.

- Issue: someone starts disclosing traumatic personal experiences. You have to be abrupt and interrupt. Note their courage and thank them for wanting to share, but let them know you are not in a position to help and don't want to be the person to make them feel bad.
- Issue: person says they know nothing about stories. Ask about family, bring their lives into the conversation – “who in your family made the decisions about X”, then ask “why.”

#### **8) Wrapping up the Interview**

Thank everyone once again for their insights and the time they took to share their knowledge with us. Ask them if they have any final questions. Give contact information in case anyone has any questions later on.

#### **RESEARCH QUESTION:**

What structures are in place in Coast Salish society to facilitate the business of doing law?

#### **CASE BRIEF OUTLINE (for each story):**

- What are the facts that matter to the research question?
- What is the main problem or concern in the story/oral history?
- How was the problem or concern responded to?
- What were the reasons for this legal response?
- Bracket information for which there is not yet a terms of reference.

#### **SYNTHESIS FRAMEWORK (for all the stories):**

One of the key factors in the analysis is not to just look for the patterns and similarities in the stories (i.e., cases), but to also look for the dissimilarities. It is just as important to discern when a decision was different from the pattern, and to look for the reasons behind the difference. This means identifying the specific factors in the case and examining the “why” and “how” behind the reasoning processes.

- (vi) *Legal Processes*: Final decision-makers and the procedural steps for determining a response or action.
- (vii) *Legal Responses and Resolutions*: Principles governing appropriate responses to legal/human issue.
- (viii) *Legal Obligations*: Principles governing individual and collective responsibilities.
- (ix) *Legal Rights*: Procedural and substantive.
- (x) *General Underlying Principles*

**RESPONSES TO QUESTIONS BY THE INTEGRATION COMMITTEE**

**Question 1:** What is the field covered or potentially covered by what you call « civil » legal issues in Coast Salish law? Could give examples of cases that fall and of cases that do not fall within this legal category?

**Answer 1:** In common law jurisdictions, “civil law” refers to areas of law that fall under the “private” rather than the “public” law category. The term civil procedure is broadly defined to encompass all of the structures and processes in place that facilitate the business of doing law, and signal its legitimacy. In most Indigenous societies, including the Coast Salish, the public/private divide is drawn differently than in Canadian law, and is in accordance with societal political, economic, and legal ordering. In Coast Salish law this includes (but is not limited to): rules, practices, and legal and social institutions that are expressed and performed through physical structures, clothing, ceremonial objects, and songs, dances, and stories. The focus our report is on Coast Salish legal procedure and it applies to the Coast Salish legal order and application of law.

**Question 2:** Could you give examples of specific cases involving the application of Coast Salish civil procedure and showing the kind of justice it delivers in practice in terms of process and results?

**Answer 2:** Civil procedure is about the overall efficacy of the legal order and applies to all the application of all or most legal decisions. It involves leaders (including chiefs according to Coast Salish authority) and citizens rather than specific cases. Our report is organized around the following elements of civil procedure: standing, jurisdiction, procedures for initiating a claim, identifying decision-makers, role of experts, legal venues, speakers and witnesses, rituals involved in the performance of law, physical symbols of legal authority, categories of legal transactions, provision for novel claims, and remedies. The kind of justice these civil procedures ensure is mainly fairness and due process. Essentially, Coast Salish people have a right to be heard, to the examination of evidence, to expertise and knowledgeable people, to assistance and inclusion in Coast Salish legal processes, to collaborative decision-making, and to fair decisions. These processes apply today to decisions which have not been usurped by Canadian law such as Coast Salish selection of chiefs, names, etc. As Coast Salish people resume jurisdiction for other areas of law, their civil procedures will be applied to those decisions.



**Question 3:** The role of various actors in settling a dispute is not totally clear to us. Must the chief consult with the elders? What is the decision-making power of elders, experts and traditional healers today?

**Answer 3:** The purpose of civil procedure is not the settlement of substantive disputes, but rather ensuring that the way disputes are settled is legitimate. As there are more than one decision-making group, the procedures enable the determination of who should be the authoritative decision-makers – and this will depend on the kind of legal problem to be resolved. This is done on a case-by-case basis. While it is likely that chiefs consult with elders on a case-by-case basis, the bigger question of authority and perceived legitimacy of decision-makers today is a crucial one in every community with complex legal problems. There is obviously much more work to do in this area as communities rebuild and restate their laws, and public legal institutions.

**Question 4:** Would you say that a neat dichotomy between so-called “restorative” and “punitive” justice is inappropriate in Coast Salish law? If so, could you explain why?

**Answer 4:** Yes we would it was inappropriate. Dichotomies are rarely useful in critical thinking, let alone legal thinking. Coast Salish legal traditions include an array of legal responses that are dependent on many factors, including the facts of the particular case. Based on published stories and oral histories, historical responses range from avoidance and healing to what appears to be retributive or deterrent based responses in extreme cases. However, it is important to note that the Canadian state has a monopoly on the legitimate use of coercive force, and Coast Salish laws have had to adapt accordingly, like all Indigenous legal traditions have had to. It is safe to say privileged and preferred responses are more supportive and educational than punitive.