

Canadian and International Traditional Knowledge and Cultural Expression Systems

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This report examines international and domestic laws and policies affecting traditional knowledge (TK) and traditional cultural expression (TCE). It begins with a survey of the most relevant international legal instruments. It then examines legal initiatives in other countries to assess insights they provide in addressing Aboriginal concerns about TK and TCE, and their potential for guiding future change, in Canada. Finally, the report discusses Canadian laws and practices relating to Aboriginal concerns about protecting TK and TCE by assessing the various intellectual property rights' (IPR) laws usually seen as pertinent to Aboriginal concerns, along with laws and practices outside the IPR regime. Based on its discussion, the report concludes with legal and policy change suggestions aimed at more effective protection for Aboriginal TK and TCE in Canada.

Dans ce rapport, l'auteur examine les lois et les politiques internationales et nationales concernant les connaissances traditionnelles et les formes d'expressions culturelles traditionnelles. Il commence par un examen des instruments juridiques internationaux les plus pertinents. Il examine ensuite les initiatives juridiques menées dans d'autres pays afin d'évaluer les renseignements qu'ils fournissent pour répondre aux préoccupations des Autochtones concernant les connaissances traditionnelles et les formes d'expressions culturelles traditionnelles, et leur potentiel d'orienter les changements futurs au Canada. Enfin, il examine les lois et pratiques canadiennes relatives aux préoccupations des Autochtones quant à la protection des connaissances traditionnelles et des formes d'expressions culturelles

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traditionnelles en évaluant les diverses lois sur les droits de propriété intellectuelle (DPI) habituellement perçues comme pertinentes aux préoccupations des Autochtones, ainsi que les lois et pratiques en dehors du régime des DPI. À la lumière de cet examen, l'auteur conclut avec des suggestions en matière de changements juridiques et stratégiques visant une protection plus efficace des connaissances traditionnelles et des formes d'expressions culturelles traditionnelles autochtones au Canada.

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INTRODUCTION

This report examines international and domestic laws and policies affecting traditional knowledge (TK) and traditional cultural expression (TCE). It begins with a survey of the most relevant international legal instruments, some of which Canada is party to. The report then examines legal initiatives in other countries — including the United States, New Zealand, Taiwan, Peru and elsewhere — to assess insights they provide in addressing Aboriginal concerns about TK and TCE in Canada, along with their potential for guiding future change in this country. Finally, the report discusses Canadian laws and practices relating to Aboriginal concerns about protecting TK and TCE. This discussion will include assessing the various intellectual property rights' (IPR) laws that are usually seen as pertinent to Aboriginal concerns, along with laws and practices outside the IPR regime. The report will then, based on its discussion, make suggestions regarding legal and policy changes which could provide more effective protection for Aboriginal TK and TCE in Canada than is currently the case.

DEFINING “TRADITIONAL KNOWLEDGE” AND “TRADITIONAL CULTURAL EXPRESSION”

Western law has only relatively recently seriously engaged with issues surrounding indigenous peoples and their cultures. The character of indigenous culture presents values and phenomena that appear incompatible with the priorities of most Western legal systems like Canada's. Indigenous cultures are often characterized by communal relationships that have developed over hundreds or thousands of years and relate in complex ways to the occupation of traditional territories. The cultural heritage of indigenous peoples includes beliefs and expressions that are both tangible and intangible in nature.

The question of terminology is one of the most difficult challenges to exploring means to resolve the incompatibility between legal systems and indigenous values. Many terms in general use have not been precisely defined or have only been narrowly defined for specific purposes. Even the term “indigenous” has proved controversial. During the drafting of what emerged as the UN Declaration on the Rights of Indigenous Peoples, states were unable to agree on a definition so none appears in the final document.¹ The Chairperson-Rapporteur of the UN Working Group on Indigenous Peoples has furnished a list of factors relevant to an understanding of the term as follows:

- a. Priority in time, with respect to the occupation and use of a specific territory;
- b. The voluntary perpetration of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- c. Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- d. An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not those conditions persist.²

These characteristics appear to capture those of the indigenous peoples of Canada-First Nations, Inuit and Métis.

¹ GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

² “Working Group on Indigenous Peoples,” Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of “indigenous peoples”, UN Doc.E/CN.4/Sub.2/AC.4/1996/2.

Discussions about the protection of indigenous culture incorporate the use of several terms, including “cultural property,” “cultural heritage,” “folklore,” “intangible cultural heritage,” “traditional knowledge” and “traditional cultural expression.” None have precise legal meanings, but are usually adopted as a framework for discussion or for drafting new norms. It is not proposed to revisit debates over definitions here, but the choice of the terms traditional knowledge (TK) and traditional cultural expression (TCE) seems a workable platform from which to examine existing norms and suggest new ones.

In 2014 the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore set out the following definitions of TK and TCE:

“Traditional Knowledge” was described as follows:

There is as yet no accepted definition of traditional knowledge (TK) at the international level.

“Traditional knowledge”, as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (traditional knowledge in a general sense or *lato sensu*). In other words, traditional knowledge in a general sense embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge.

In international debate, “traditional knowledge” in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc.³

³ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 28th Sess. (2014), “Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions,” WIPO/GRTKF/IC/28/INF/7 (May 19, 2014).

The term “Traditional Cultural Expressions” is explained as follows:

WIPO uses the terms “traditional cultural expressions” and “expressions of folklore” to refer to tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms. The terms “traditional cultural expressions” and “expressions of folklore” are used as interchangeable synonyms, and may be referred to simply as “traditional cultural expressions”, often in its abbreviated form “TCEs”. The use of these terms is not intended to suggest any consensus among WIPO Member States on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.⁴

Without consensus on established definitions of either term, in both international and domestic law, the general content of these definitions will be used in this report.

One of the most striking and problematic aspects of the vast amount of legal and non-legal literature surrounding this topic has been the elusiveness of its subject matter. The definitional problem is thus exacerbated by the fact that characteristics of traditional peoples vary significantly — even within individual countries (like Canada). So, any existing or proposed means to address TK or TCE requires an awareness of the unique cultural character of specific human situations. This means that an approach suitable in one context may not work in another and that any proposed measures must be compatible with the particular characteristics of the culture to which they are to apply.

Because of its intangible character, an effective approach to TK should emphasize protective means. There are instances, for example, where non-indigenous peoples have used deceptive means to gain unauthorized access to TK. This suggests that both legal and non-legal methods to protect TK from unauthorized divulgence should be considered (the tort remedy for breach of confidence and protocols governing relations with outsiders are examples). TCE necessarily involves some sort of cultural manifestation (intangible or tangible) that may already be addressed by IPR or other laws or can also be the subject of specific contractual arrangements or pre-existing protocols. IPR

⁴ *Ibid.*

laws cannot protect undisclosed information but, as explained below, they also do not address many of the particular cultural concerns of traditional communities. This inevitably leads to proposals for other (legal and non-legal) strategies to protect TCE.

Most legal discourse surrounding TK and TCE has involved the level of protection that IPR laws can provide. As noted, there has been considerable scholarly legal debate over the extent to which IPR laws can or even should offer protection for TK or TCEs. This issue will be explored below, primarily in relation to existing IPR in Canadian law.

Besides the relationship of TK and TCEs to IPR, there has been discussion of other legal and non-legal means to afford protection for indigenous cultural traditions. These include constitutional and treaty rights, *sui generis* legislation, and various non-legally binding protocols and other strategies. Not every strategy can be fully addressed here, but this report attempts to evaluate the most significant examples (including drawing on laws and practices of individual countries) to furnish recommendations on specific legal and policy measures that could be adopted in Canada.

PART ONE

THE INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSION

Since the 1970s, several international legal initiatives have, at least in part, addressed the perception that the TK and TCEs of indigenous peoples receive inadequate protection under both domestic and international law. These vary from binding international treaty obligations to aspirational statements of principle. At the international level the major institutions responsible for responding to concerns about the inadequate protection of TK and TCE have been World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). Though other organizations have also introduced initiatives (such as the World Trade Organization), these have mostly been in relation to how indigenous concerns relate to the other activities of these organizations.

(a) **The 1989 International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)**

The International Labour Organization Convention (ILO Convention) came into force in 1991.⁵ Most of its 22 members are developing countries. Canada has not ratified this agreement. The provisions of the ILO Convention do not expressly refer to TK or TCE, but its language is broad enough to include their protection. The ILO Convention supports consultation and the adoption of measures to protect traditional activities (see Article 23) as well as recognizing the right of indigenous peoples to decide their own priorities respecting their economic, social and cultural development (Article 7(1)). However, its provisions fall short of imposing specific international legal obligations.

Most of the signatories to the ILO Convention are Central and South American states. The Convention has influenced constitutional and legislative development in member states. Thus, Article 64(2) of the 1992 Paraguayan Constitution prohibits the resettlement of indigenous peoples without their consent. This complies with that country's obligations under Article 16 of the ILO Convention. In Norway, the ILO Convention has influenced that country's relationship with its indigenous Sami population in the form of a 2005 agreement with the Sami Parliament on consultation procedures (as provided for in Article 6 of the ILO Convention).

Parties to the ILO Convention must report on steps they have taken to implement the ILO Convention and a procedure is in place for indigenous peoples being able to file complaints about states not fulfilling their Convention obligations. In 1999, a Danish trade union submitted a complaint on behalf of the Thule people of Greenland alleging the Danish government had not adequately protected their traditional lands. The case arose out of the forced relocation of Thule people to accommodate a United States military base. The ILO Committee of Experts, who heard the complaint, concluded that the Danish government had adequate legal procedures in place to resolve the claims being made and was otherwise in compliance with its obligations under the ILO Convention. The rulings in this and other complaints are

⁵ Online: < http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:C169 >.

themselves part of the developing customary international law on the rights of indigenous peoples. In other cases, ILO Committees of Experts have upheld violations of the ILO Convention (such as lack of consultation or lack of recourse to judicial review) and states-parties have been asked to amend various laws or policies to accommodate Committee findings.

(b) The 1992 UN Convention on Biological Diversity (CBD)

This treaty focuses on the conservation and sustainable use of biological resources, along with the fair and equitable sharing of the benefits of their utilization. The CBD was ratified by Canada in 1992 and came into force a year later. The secretariat of the CBD is located in Montreal.

Article 8(j) of the CBD is as follows:

Each Contracting Party, shall, as far as possible and as appropriate:

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Despite its limitations, the CBD is the only binding multilateral agreement that expressly references TK protection. The means to achieve such protection, however, are largely left to the individual initiatives of the State Parties, either by adopting *sui generis* solutions or implementing a model law developed by WIPO or some other organization. Under Article 15 of the CBD, the rules concerning access to genetic resources are those laid down by national governments and legislation. Indigenous communities would therefore seem to lack grounds to claim rights under the CBD on their own behalf.

The two primary obligations of the Parties contained in Article 8(j) are to obtain the prior informed consent of indigenous knowledge-holders and to share the benefits of the utilization of that knowledge. Whatever protection is guaranteed indigenous people by the CBD, it need not take the form of IPR. If IPR protection is not seen to be feasible, protection must be afforded by

other legal or policy means. However, the CBD does not clarify what limits there are on Parties that seek to manage and exploit the TK of their indigenous populations.

The CBD lacks language respecting enforcement of its provisions and, significantly, it is subordinate to all other international obligations of the Parties (such as the TRIPS Agreement).⁶ The only expressed limitation is if the exercise of such extraneous rights “would cause a serious damage or threat to biological diversity” (Article 22.1).

In 2002, the CBD Parties adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization.⁷ The Guidelines are designed to assist countries develop access and benefit-sharing strategies respecting genetic resources. These Guidelines are non-binding.

In 2010, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity was adopted by a Conference of the Parties to the CBD.⁸ The Protocol is now in force but Canada has not signed it. The provisions of the Protocol, like those of the Guidelines, defer to national legislation, rather than setting out specific ways in which the relationship between indigenous peoples and governments should develop. Some countries, like Peru (2002), have introduced legislation that requires the prior informed consent of indigenous people in possession of collective knowledge prior to its utilization. Peru also includes similar provisions in its trade agreements with other countries. This sort of implementation of the CBD and its protocols can be argued in support of the emergence of indigenous rights under customary international law.

Canada itself has a Free Trade Agreement with Peru (2009), which incorporates a separate *Agreement on the Environment*. Article 5 of the separate *Agreement* deals with biological diversity and provides:

⁶ *Agreement on Trade-Related Aspects of Intellectual Property Rights* (15 April 1994) online: < https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm > .

⁷ Online: < <https://www.cbd.int/abs/bonn/> > .

⁸ Online: < <https://www.cbd.int/abs/> > .

(2) The Parties also reiterate their commitment, as established by the *Convention on Biological Diversity*, to respect, preserve and maintain traditional knowledge, innovations and practices of indigenous and local communities that contribute to the conservation and sustainable use of biological diversity, subject to national legislation.

...

(6) The Parties shall endeavour to cooperate in order to exchange relevant information regarding:

...

(b) the avoidance of illegal access to genetic resources, traditional knowledge, innovations and practices.

The Canada-Peru Free Trade Agreement has been implemented by the *Canada-Peru Free Trade Agreement Implementation Act* (see section 7(f)).⁹ Canada also has similar environmental side agreements with Chile (1997), Costa Rica (2010), Colombia (2011), Panama (2013) and Honduras (2014). While some of these agreements contain references to TK, they do so in a somewhat aspirational sense that is expressly subject to the content of domestic law, and impliedly subject to international agreements besides the CBD (such as the TRIPS Agreement — see 1(c), below). The focus of the bilateral environmental agreements to which Canada is party is their relationship with free trade agreements entered into at the same time.

The CBD does little to supply the means to enhance indigenous participation in its implementation. Instead it focuses on the role of governments in furthering its objectives. While it contains a means for parties to resolve their disputes over the meaning and application of the CBD (Article 27), this process could be overridden by claims to rights under other agreements and, given the lack of any enforcement mechanism, be of little value. Even if Parties were to introduce their own laws in response to indigenous concerns, it remains somewhat unclear how these would interface with traditional IPR laws — such as those that are the subject of the TRIPS agreement.

⁹ S.C. 2009, c. 16.

(c) **The 1994 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**

TRIPS is part of the 1994 *Agreement Establishing the World Trade Organization* (WTO) and establishes minimum standards for countries to follow in protecting IPR by building on pre-existing multilateral treaties (such as the Paris and Berne Conventions). These treaties were already administered by the World Intellectual Property Organization (WIPO), but TRIPS linked them to the highly-effective system of dispute settlement set out in the WTO *Dispute Settlement Understanding* (DSU). In so doing, TRIPS created an enhanced level of international legal protection for conventional IPR that has no equivalent in the case of *sui generis* and other national strategies that might be designed to protect TK and TCE. To the extent that a TCE can be the subject of an existing IPR it can, of course, receive enhanced protection because of TRIPS.

The major objective of TRIPS is to establish minimum standards for members to follow in affording IPR protection. Canada included amendments to its IPR legislation in implementing provisions of the TRIPS into federal law. (See *World Trade Organization Agreement Implementation Act*).¹⁰ TRIPS lacks specific reference to TK or TCE, but insofar as it allows members to enact IPR in addition to those that are mandated, it seems to allow members (like Canada) to enact such laws. These could include *sui generis* protection for TK or TCE. However, there is a risk, depending on the types of measures introduced, that they could be challenged as being inconsistent with TRIPS. For example, the requirement in Article 27.1 that an “invention” must be “new, involve an inventive step and [be] capable of industrial application” to qualify for patent protection may exclude a proposal based on TK that is of long-standing in a community and could even be regarded as being in the public domain.

A particularly divisive issue has surrounded the relationship of the CBD and Article 27.3(b) of TRIPS. Article 27.3(b) allows WTO members to exclude plants and animals from their patent laws but, in the alternative, mandates the protection of plant varieties “either by patents or an effective *sui generis* system or by any combination

¹⁰ S.C. 1994, c. 47.

thereof.” We will see that Canada has done this in the form of the *Plant Breeders’ Rights Act* (see 3(b)(vi), below).¹¹ Some commentators have expressed concern that this provision may allow members to exclude traditional medicinal and ecological TK from patentability if they so wish.¹² Most countries, like Canada, have implemented some form of plant variety protection, but few (including Canada), in so doing, have specifically addressed the concerns of indigenous peoples.

Professor Susy Frankel has explored the complexities that surround attempts by individual countries to afford enhanced protection for TK and the provisions of TRIPS. She notes considerable uncertainty in the distinction between affording such protection for TK when it is seen as within the subject matter coverage of TRIPS (what she calls “TRIPS-plus”) and when it is seen as outside the scope of TRIPS or any intellectual property agreement (what she calls “Outside of TRIPS”).¹³ Depending on how it is perceived, a domestic measure affording legal protection to TK (such as *sui generis* legislation) could be seen as being either within the agreement and required not to be in conflict with other parts of it, *or* outside the agreement and not subject to (for example) the requirement that it be afforded on a national treatment basis. This issue remains unresolved either within the TRIPS Council or at WIPO.

Another issue that Frankel explores is the meaning of national treatment in relation to TK.¹⁴ Under Article III of TRIPS, each member must “accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.” Frankel notes that the whole point of attempting to protect TK is to acknowledge the complexity and variety of indigenous knowledge and practices that exist around the world. She points out that national treatment is not a good fit since it is about applying a common set of

¹¹ S.C. 1990, c. 20.

¹² See M. Battiste, *et al.*, *Protecting Indigenous Knowledge and Heritage* (UBC Press, 2000) at 185.

¹³ See S. Frankel, “Attempts to protect indigenous culture through free trade agreements” in C.B. Graber, K. Kuprecht & J.C. Lai, *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar Publishing, 2012) 118 at 134-35.

¹⁴ *Ibid.* at 139-42.

minimum standards. This is largely the case with modes of IPR protection that, based on long-standing treaties, have a high level of universal applicability. Attempts in international fora to formulate similarly common standards for TK and TCE protection are still underway. Until these efforts produce concrete results there will continue to be uncertainty as to whether individual countries' attempts to protect TK and TCE are TRIPS compliant.¹⁵

(d) The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (the UNESCO Convention)

The 2003 UNESCO Convention symbolizes a new international dimension towards the protection of TK and TCE. Ongoing efforts to address concerns about the intangible cultural heritage (ICH) had emerged before the 1989 UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore*.¹⁶ After a UNESCO/WIPO World Forum on the Protection of Folklore in Thailand in 1987, the two organizations embarked on regional consultations about the promotion of folklore protection, but these were overshadowed by the seemingly intractable difficulty of reconciling IPR with broader concerns about the protection of traditional culture.

The UNESCO Convention came into effect in 2006. It has 161 state parties, not including Canada or the United States. One explanation for Canada not signing the UNESCO Convention is that its subject matter is seen as too vaguely defined and the obligations it contains, especially regarding inventories — too impractical to fulfill. Despite this lack of national action, some individual Canadian provinces (including Québec and Newfoundland and Labrador) have already introduced schemes to inventory and support aspects of their intangible cultural heritage (such as landscape, and persons and events of historical significance). So far, these initiatives have not involved aspects of the ICH of Canada's indigenous peoples.

The UNESCO Convention obliges parties to take necessary measures to safeguard the ICH in their respective territories, including an official identification of the elements of such heritage

¹⁵ See Daniel Gervais, "TRIPS, DOHA and Traditional Knowledge" (2003) 6 J. of World Intel. Prop. 403.

¹⁶ Online: <http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html> .

that includes the participation of communities, groups and non-governmental organizations. Complementing the 1972 UNESCO *Convention concerning the Protection of the World Cultural and Natural Heritage*,¹⁷ the 2003 UNESCO Convention requires that the ICH of member states be inventoried and that measures be put in place to raise awareness and increase the likelihood of preservation of such local heritage. The UNESCO Convention also establishes the Intangible Cultural Heritage Fund to assist parties carry out their obligations under the Convention.

The UNESCO Convention established the Intergovernmental Committee for Safeguarding of the Intangible Cultural Heritage whose functions are to promote and provide guidance concerning the implementation of the Convention. In particular, the Committee supervises the publication of the “Representative List of the Intangible Cultural Heritage of Humanity” and the “List of Intangible Cultural Heritage in Need of Urgent Safeguarding.”

A controversial aspect of the UNESCO Convention is its relationship to other international agreements, particularly those developed under WIPO or WTO auspices. Article 3(b) of the UNESCO Convention provides that nothing in the Convention may be interpreted as “affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties.” This significantly limits the scope of the UNESCO Convention as it, in effect, preserves the IPR protected under such agreements.

It appears that, during the negotiation of the UNESCO Convention, views conflicted on including any explicit reference to indigenous peoples. This omission, together with the language of Article 3(b), suggests a deliberate effort to leave the development of individual and group rights concerning TK and TCE to WIPO and WTO, rather than intrude on their initiatives. In effect, the UNESCO Convention leaves parties to choose for themselves the form and substance of the strategies they desire to further its objectives. This lack of willingness to define specific legal rights pertaining to the ICH has been a major concern of critics of the UNESCO Convention. Uncertainty about the coherency of the UNESCO Convention may have driven decisions by countries like Canada to not become parties.

¹⁷ Online: < <http://whc.unesco.org/en/conventiontext/> > .

Despite the above concerns, the UNESCO Convention has already produced numerous initiatives by its parties. These have revealed differing interpretations of the Convention amongst various countries and a higher level of community or regional participation than has occurred in respect of other heritage treaties. Over 14 parties introduced ICH legislation and some established new or designated institutions for safeguarding their ICH (Turkey and Hungary). Several countries have seen ICH assist their economic development and integrated the safeguarding of ICH into other fields, such as sustainable development and tourism (Morocco and Nigeria).

While the UNESCO Convention makes no express reference to indigenous peoples, certain countries have focused their safeguarding strategies on indigenous ICH (such as Mexico, Peru and the Seychelles). A further important development has been the utilization of the Convention to address the protection of ICH that is multinational in character. Thus, some 14 nominations to the Representative List have been made for such cross-border ICH as falconry and Nowruz.¹⁸

(e) The 2007 UN Declaration on the Rights of Indigenous Peoples (the Declaration)

The Declaration is the culmination of efforts by the United Nations, beginning in 1982 with the establishment of the Working Group on Indigenous Populations, and represents a consolidation of the interpretation of various UN human rights covenants as they apply to indigenous persons.¹⁹

Two provisions of the Declaration have special relevance to TK and TCE. Article 31.1 provides:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their

¹⁸ See Janet Blake, "Seven Years of Implementing UNESCO's 2003 Intangible Heritage Convention-Honeymoon Period or the "Seven Year Itch"?" (2014) 21 Int'l. J. of Cult. Prop. 291.

¹⁹ Online: < http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf > .

intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 34 reads as follows:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Canada, along with Australia, New Zealand and the United States, initially voted against the Declaration. All four states have since endorsed it, however, as a non-legally binding instrument. Among these countries' initial concerns about the Declaration were the ambiguity of its language and uncertainty surrounding its application under their own legal systems. While not legally binding, the Declaration already serves two functions:

- (1) It could be the basis for arguing in support of the content of an emerging customary international law concerning the rights of indigenous peoples.
- (2) It could also be used as a guide to the interpretation of indigenous human rights in both international and domestic legal contexts.

An example of the latter is reference to the Declaration by the Supreme Court of New Zealand in *Takamore v. Clarke*, where Chief Justice Elias saw its provisions as emphasizing “the collective nature of the rights of indigenous peoples” and used them to support the validity of a consideration of Maori cultural beliefs and customs in assessing the legal responsibilities of an executor of a deceased Maori individual.²⁰ In 2015, the New Zealand government successfully negotiated retention of copyright by Maori artists who had woven 43 panels (TCE) that hang at the UN headquarters in New York. In doing so it relied on Article 31 of the Declaration.

The Declaration is important as a symbol of the increasing significance of indigenous rights in the agendas of international organizations like UNESCO and WIPO. While it does not address in detail the types of protection that should be afforded the TK and TCE of indigenous peoples, it can at least be seen as supportive of their ongoing development. Canada's initial reluctance to vote in its favour does not compromise the functions of the Declaration in supporting the development of customary international law and as

²⁰ [2012] N.Z.S.C. 116 at para. 35.

a basis for the interpretation of indigenous rights by Canadian courts.

PART TWO

NATIONAL LAWS (INCLUDING *SUI GENERIS* MODEL LAWS) ADDRESSING THE PROTECTION OF INDIGENOUS TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSION

(a) Introduction

This part of the report will address initiatives outside Canada to develop domestic legislation, and sometimes common law (often as an alternative to existing IPR laws), as part of efforts to provide improved legal protection for TK and TCE. The individual countries discussed include both those having considerable indigenous populations and levels of economic development similar to Canada (“settler” countries, discussed below), and developing countries with legal traditions based on traditions besides the common law. Model *sui generis* laws developed at the multinational or regional level will also be discussed. These model laws do not comprise international agreements. They are nonetheless important components in world-wide debates about enhancing legal protection for TK and TCE.

(b) *Sui generis* Model Laws

(i) Introduction

Sui generis (meaning unique in its characteristics or of a special kind) is now commonly used to describe regimes that are designed to protect TK and TCE outside of conventional intellectual property law. There is no detailed definition of *sui generis* legislation, but it is usually of two kinds. The first refers to revisions of existing laws (such as IPR laws, and laws concerning research and development). The second refers to stand-alone legislation comprising a coordinated approach to the protection of TK and TCE through various methods that may include IPR law, customary law, contractual arrangements, benefit sharing provisions, and requirements of prior consent for use of plants or animals. The former type of *sui generis* laws is more typical of the

“settler” countries referred to above, while the latter often characterizes legislation adopted by developing countries.

At the domestic level, pre-existing laws and policies specifically addressing the cultural concerns of traditional populations have usually been absent. The most obvious set of norms appearing to address some of these concerns have been the pre-existing intellectual property laws of various countries. Perceiving the inadequacy of such laws, countries in both groups identified above have amended exiting laws or introduced new ones.

Until now, most initiatives concerning the protection of TK and TCE have occurred in two major contexts. One of these is the group of so-called “settler” countries (such as Canada, Australia, the United States and New Zealand) where indigenous populations have newly asserted themselves in political and legal terms. Cultural rights have been a component of changes in these countries.

The other context in which TK and TCE have been the subject of various initiatives is the large number of developing countries whose governments and/or indigenous populations have sought to achieve new forms of protection for TK and TCE, sometimes as a strategy against perceived exploitation by outsiders (such as multinational pharmaceutical companies).

(ii) *The Tunis Model Law on Copyright for Developing Countries (1976)*

This model law was adopted by a committee of government experts who, along with WIPO and UNESCO, met in Tunis in 1976.²¹ Its provisions have been adopted into the national laws of over 30 countries. While the focus of the Tunis model law is on improving copyright protection in the laws of those countries that choose to adopt it, it also eliminates the copyright requirement of fixation for folklore and establishes the concept of payment of fees for use of works that have entered the public domain. The law has been criticized for not resolving the issue of who owns works of national folklore and for undermining the principle of the public domain.

²¹ Online: <http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf>.

(iii) *The WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (1982)*

These model provisions are intended to enhance legal protection for folklore under national laws. While retaining the now dated term “folklore”, the provisions abandoned the word “works” to emphasize that they intended to offer protection beyond that provided by traditional IPR laws. The WIPO-UNESCO provisions establish a concept of prior-authorization for the use of TCEs outside their traditional or customary context. While the relationship of the sorts of protection furnished under the model provisions to existing IPR laws and international agreements remains unclear, the provisions represent a significant early attempt at establishing consensus on a *sui generis* regime.

(iv) *The Pacific Regional Framework Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002)*

This model law, drafted by a group representing a number of Pacific Island states, develops the idea of prior informed consent from traditional owners for outside use (commercial or non-commercial) of TK or TCE. Such traditional rights are to exist in perpetuity and cannot be waived or transferred. As with the Taiwanese law discussed below,²² when no traditional owners can be identified, a central authority is put in control of granting permission for use. There is no system for determining precisely what sorts of TK and TCE would be subject to the model law. It is also unclear if works of a cross-cultural or innovative nature are included. As with most such proposals, it is the uncertainty of the scope of the Pacific model law that gives most grounds for concern about its feasibility in different contexts.

(c) **The Panamanian Law on the Special Intellectual Property Regime for the Protection of Cultural Identity and Traditional Knowledge (2001)**

The 2001 Panamanian law represents the first attempt by an individual state to comprehensively protect the TK and TCE of its

²² See 2(f), below.

indigenous peoples.²³ As such, it has acquired unofficial standing as a model law for possible adoption by other countries.

The Panama law's broad coverage extends as follows:

Article 1. The purpose of this Act is to protect the collective intellectual property rights and traditional knowledge of indigenous peoples in their creations, such as inventions, models, drawings and designs, innovations contained in the images, figures, symbols, graphics, stone carvings and other details; as well as the cultural elements of their history, music, art and traditional forms of artistic expression suitable for commercial use, via a special system to register, promote and market their rights, in order to highlight the social and cultural values of indigenous cultures and guarantee social justice for them.

Thus, the focus of the law is on TCE in such forms as traditional dress and designs. The law establishes a Collective Registry of Intellectual Property that certain recognized indigenous representatives have standing to apply to for registration of works. Once registration has occurred these works are designated as the collective rights of indigenous peoples in perpetuity.²⁴ The commercial reproduction of registered collective works is then prohibited unless it occurs with prior indigenous consent.²⁵ The law provides for the granting of licences by indigenous groups to reproduce indigenous works with proceeds in the form of royalties going to indigenous peoples.

The objective of the Panamanian law is redressing the imbalance between vulnerable indigenous populations and outsiders seeking to exploit aspects of their culture for commercial gain. By targeting the commercial benefits of TCE, the law tries to deal specifically with inappropriate or insensitive use of TK or TCE that involves direct economic loss to source communities. Implementation of the Panamanian law has proven more problematic than expected. It seems so far that only one TCE (the *mola* textile craft) is registered under the Panamanian law. Even in the case of the *mola*, the claim that it is the exclusive cultural tradition of the Kuna indigenous peoples of Panama has been questioned, since the technique of its manufacture appears based on French appliqué.

²³ Online: <http://www.wipo.int/wipolex/es/text.jsp?file_id=188986> .

²⁴ *Ibid.* Articles 6 and 7.

²⁵ *Ibid.* Article 20.

(d) Peru: The Regime for the Protection of the Collective Knowledge of Indigenous Peoples Associated with Biological Resources (2002)

This 2002 Peruvian law was among the first comprehensive *sui generis* domestic laws aimed at protecting collective TK associated with biological resources.²⁶

Indigenous communities in Andean countries like Peru are renowned for their unique practices surrounding the growing and utilization of different crops and plant varieties. The object of the 2002 law was to support Peru's indigenous peoples through various means designed to provide them with the ability to exercise greater control over their own cultural and economic development.

Unlike the Panamanian law described above, the Peruvian law bases indigenous rights over TK on ancestral traditions, rather than through the granting of proprietary rights. In accordance with the nature of indigenous laws, the Peruvian law emphasizes the collective nature of the knowledge indigenous peoples associate with biological resources. Under the law, indigenous peoples must assert their rights through collective organizations structured along traditional lines. The distribution of the benefits flowing from the exploitation of TK must accord with indigenous customary laws already in place.

The Peruvian law introduces the concept of guardianship in relation to the responsibility of indigenous peoples to preserve and develop TK for their collective benefit and that of future generations. The only way that TK can be accessed or exploited is through a licensing procedure which involves benefit-sharing and prior consent. There are minimum requirements for the issuance of licences. Licences must: be written (either in Spanish or a native language); identify the parties and fully describe the collective TK in question; guarantee the equitable distribution of benefits arising from exploitation of the TK along with an estimate of their value; and, include an undertaking that the licensor will be informed of details about the utilization and marketing of the TK.

The other mechanism the law puts in place is a system of registers that is designed to both enhance the preservation of indigenous TK and allow indigenous communities greater control over its dissemination. Three types of registers are provided for in

²⁶ Online: < <http://www.wipo.int/edocs/lexdocs/laws/en/pe/pe011en.pdf> > .

the law. A Public National Register will systematize all information concerning TK already in the public domain. This system is designed to support the distribution of information outside Peru so that foreign patent applications will be dealt with on an informed basis as concerns such issues as novelty and inventiveness. A Confidential Register will protect TK that indigenous peoples wish to keep confidential. This Register will be inaccessible to third parties. Finally, Local Registers will be based on community laws and customs and may impose limits on access according to the wishes of the particular community involved.

A fundamental requirement of the law is that any person wishing to access collective TK for commercial or scientific purposes must obtain prior informed consent from the appropriate indigenous organization. Since TK may often be shared between several indigenous communities, the indigenous organization receiving the request must inform as many other communities as possible that the request has been made. The existence of the different registers will also support the process of obtaining informed consent.

The law contains elaborate provisions relating to unauthorized use of protected TK. As well as prohibiting the use of TK in an improper manner, the law prohibits unauthorized disclosure, including disclosure to a third party, of information that is already the subject of a confidentiality agreement with an indigenous community. Various aspects of the prior consent procedures the law contains are designed to reduce the risk of such infractions, like setting out of the parties' obligations in the licence agreement.

The licensing system the law establishes is not only an essential component of its prior consent requirement but it also facilitates the benefit-sharing system established under the law. This system requires payment of minimum royalties which are placed in a fund for the Development of Indigenous Peoples. This Fund will then use its resources to improve living conditions in indigenous communities. It will also receive financial contributions from the state, development agencies and the proceeds of fines imposed under the law. The law separately addresses TK already in the public domain; it provides that indigenous peoples are entitled to a percentage of the benefits derived from the commercial exploitation of TK that has entered the public domain within the past 20 years. In the case of exploitation prior to this period indigenous peoples

are not entitled to share in the benefits from its use but are entitled to claim rights over it.

The Peruvian law represents one of the most comprehensive and ambitious examples of a *sui generis* approach to the protection of TK. Like other such strategies, it is subject to criticism on several grounds. Amongst these are:

- how to ensure the equitable distribution of benefits from the exploitation of shared TK;
- for shared TK, what happens if some communities favour granting access while others are opposed?
- can use of TK that is already in the public domain really be effectively controlled?
- will transaction costs of implementing such a law be sustainable? and,
- *sui generis* regimes at present receive only limited international recognition and enforcement outside Peru would likely be problematic.²⁷

(e) Thailand: Act on the Protection and Promotion of Traditional Thai Medicinal Intelligence (1999)

This law was a direct response to concerns about the patenting of TK-based inventions in Thailand without prior consultation with or consent of TK-holders.²⁸ Such concerns are widespread in countries besides Thailand, but several Thai patents had been challenged in Thai courts on grounds surrounding lack of consent and sharing of benefits concerning the use of traditional medicinal knowledge.

Thailand has a system of IPR laws resembling that of Canada. Within that system, the 1999 law (“the Law”) specifically responded to political pressure to afford additional rights and enhanced protection over medicinal TK. The law was designed to apply to basic knowledge and capability regarding traditional Thai medicine and to reward traditional healers for their contribution to overall health care by creating incentives for maintaining TK.

The Law establishes control on the part of traditional healers over their TK through a public registry. Traditional medicines are divided into traditional herbs and traditional medicinal

²⁷ See S. Clark, I. Lapena & M. Ruiz, “The Protection of Traditional Knowledge in Peru: A Comparative Perspective” (2004) 3 Wash. U. Global Studies Law Rev. 755.

²⁸ Online: <<http://www.wipo.int/edocs/lexdocs/laws/en/th/th019en.pdf>> .

formulations (TMF). TMF are divided into three further categories, each of which receive different sorts of legal protection:

(1) General Formulae

These TMFs are widely available or over which intellectual property protection has expired so that they are in the public domain.

(2) National Formulae

These TMFs provide significant health and medicinal values. The Ministry of Public Health can declare certain TMFs to be national formulae, vesting ownership in the state. Anyone wishing to use a national formula for commercial purposes must receive government permission to do so and pay the requisite fees. The rationale behind this category is that the TMF is crucial for public health to such a degree as to justify state ownership.

(3) Personal or Private Formulae

The Law provides that the developer of a TMF or a person who has inherited the formula from its developer can obtain exclusive rights over the TMF through registration. Once the TMF is registered its owner has the exclusive right to sell or distribute any product developed or manufactured through its use. These rights subsist for the life of the registrant plus 50 years.

There are exceptions to exclusive rights such as the use of a TMF for experimental, private or household use or for use by a state hospital. The conventional criteria for patent protection — novelty and inventiveness — do not apply to registration under the Law. Most significantly, the Law only provides for individuals to register TMFs. Communities cannot register TMFs that are only known to the members of a particular community. Thus, the Law leaves open the issue of affording separate protection for collective rights in TMFs, including the need for principles and procedures surrounding access to traditional communities who are custodians of such TK. The overall effect of the Law (unlike that of Peru) is to adopt a modified form of IPR, rather than incorporate the provisions of customary law.

A separate Thai law — the *Plant Variety Protection Act* — protects traditional and new plant varieties and plant genetic resources.²⁹ This law is based on Article 27.3(b) of TRIPS. Local communities can register traditional plant varieties if they are exclusive to the community concerned. Once registered, the community has the exclusive right to use that traditional plant variety. The *Plant Variety Protection Act* also establishes a benefit sharing scheme that involves negotiations between the outsider seeking access and the Thai Ministry of Agriculture. A Plant Variety Protection Fund is established that uses a portion of any royalties arising from commercial use to subsidize activities relating to plant variety research, conservation and development. A similar fund exists for Traditional Thai Medicinal Intelligence.

There is consideration being given in Thailand to the introduction of a law designed to deal with TK generally: referred to as the draft *Protection of Thai Local Intelligence Act*. It has been suggested that the criteria for TK protection should be whether the TK has been created or belongs to an area where it has been protected, restored or used in daily life and has values widely recognized by local indigenous peoples. Any benefits surrounding TK that such a law might provide for should be shared amongst communities. The term of TK protection under the proposed law would be indefinite so long as the TK fulfills the criteria of eligibility for protection.

At present the only concrete step towards the introduction of such a law has been the establishment of a TK database. The *Declaration and Request for data service on Traditional Knowledge* (2002) defines Thai traditional knowledge as:

... knowledge, skills, methods or technologies which are transmitted from the past to the present, including technology or any means that employ a biological system, living things or a derivative thereof, improved to benefit products and services (Clause 1).

The objective is to collect information as a reference database. The *Declaration* itself does not establish any rights on the part of TK holders.

²⁹ Online: <http://www.wipo.int/wipolex/en/text.jsp?file_id=129780> .

(f) The Taiwan Act for the Protection of the Traditional Intellectual Creations of Indigenous Peoples (2007)

Most of the countries that have adopted *sui generis* legislation have been non-Western developing states, like Panama, Peru and Thailand (above). Taiwan is the most recent country to enact comprehensive *sui generis* legislation, but unlike most other countries who have done so it is a developed country that, like Canada, also has significant indigenous populations. While each country is unique, Taiwan's complex history of settlement may also resonate with Canada.

Taiwan enacted its *Act for the Protection of the Traditional Intellectual Creations of Indigenous Peoples* (the "Act") in 2007. Article 1 of the Act states its purpose as being the protection of the "traditional intellectual creations" of Taiwan's indigenous peoples, as well as the promotion of the overall development of Taiwan's indigenous culture. Article 3 defines the scope of the "intellectual creations" the law aims to protect in terms of their expression in such forms as ceremonies, songs, weavings and clothing. This means that the ideas upon which such manifestations are based are not protected by the Act. However, it is unclear whether the word "creations" limits the protection of the Act to cultural expressions that are in some way novel, rather than including the repetition of traditional practices. What seems clear is that the Act is about TCE, rather than TK.

To receive protection, "traditional intellectual creations" must be registered under a government-run system implemented by the Act. This follows the Panamanian legislation of 2001 which set up a similar system influenced by those systems already applicable to IPR, but significantly different. Under the Taiwan Act a committee — including experts, scholars and indigenous representatives, who must form at least half of its members — will vet applications. The rights that registration confers are limited to Taiwanese aboriginal groups or tribes, and representatives are to be elected to represent the appropriate body. Exclusive rights can be awarded to a group or tribe, or to several groups and tribes jointly, but if no group or tribe can be determined to own a particular "intellectual creation," the rights in it are to be registered in the name of the indigenous peoples of Taiwan as a whole (Article 7). The Act avoids the issue of how representation of a tribe or group is to be determined — especially in such cases as when, like Canada, many indigenous

Taiwanese no longer live in their traditional territories, but have moved to urban areas.

The legal nature of the rights protected by the Taiwanese Act are defined as comprising the exclusive right to exploit the “property and moral rights of the intellectual creations” (Article 10). Moral rights are defined to include the right to release the work, to identify an exclusive user, and the right to prevent distortion, mutilation or modification of the work in a manner that violates the author’s reputation (Article 10). Rights are inalienable and non-transferable, and if abandoned or if a tribe or group ceases to exist, automatically revert to the aboriginal peoples of Taiwan (Articles 11, 12 and 15). User rights can be licensed to others, but it is unclear who can grant such licences and what principles apply to the licensing process. Proceeds (such as royalties) derived by a tribe or group from rights cannot be used by individuals for their own benefit, but are to become part of an indigenous peoples welfare fund (Article 14).

What is perhaps most striking about the Taiwanese Act is that it eschews some form of TCE protection through the registration of names, marks or symbols in favour of granting ownership to indigenous groups in the form of property rights over certain tangible expressions of indigenous culture. One difficulty with this approach is that since many TCEs are regarded as sacred or culturally sensitive, turning them into conventional property rights, like IPR generally, may be seen by some as inappropriate.

The Act deliberately omits biological knowledge and is primarily based on the provisions of earlier Taiwanese IPR laws. In this sense its title is misleading since it does not actually seek to protect all the TK of Taiwan’s indigenous peoples. With some 13 indigenous groups, there may well be the possibility of uncertainty as to which group in Taiwan has the better claim to any particular “intellectual creation.” Many practices are shared or no longer performed. Shared and default ownership would seem to involve the same problems that have been raised elsewhere about communal indigenous rights in respect of conventional IPR. Conversely, registration might suggest stasis and an artificial restraint on the lively cross-fertilization of ideas and practices between cultures. If an indigenous group chooses not to engage with the registration system established under the Act, does this mean that its TCEs are unprotected or at least made somehow less authentic than those creations recognized under the legislation?

There is also the question of how protection under the *sui generis* law relates to IPR protection available under other Taiwanese statutes.

While *sui generis* laws like that of Taiwan may seem appealing to many countries, it remains debatable whether they could be appropriate for a country with as complex and dynamic indigenous cultures as Canada. In Taiwan — like Canada — instances of appropriation of indigenous culture by outsiders, have led to young indigenous artists taking a renewed interest in their own culture and, sometimes, in greater public demand for their work. If *sui generis* legislation is overly restrictive, it may compromise the development of the very indigenous cultures it seeks to protect.

(g) The Protection of Aboriginal TK and TCE under Australian Copyright and other Laws

(i) Introduction

The greatest impact that Australian law has had on the international debate surrounding the protection of indigenous TK and TCE has emerged from a series of court decisions that have in various ways supported new and creative means to protect Australian Aboriginals against some of the risks that commercial activities pose to the integrity of their cultures.³⁰ The major change in Australian law that surrounded these isolated court decisions was the decision of the High Court of Australia in *Mabo v. Queensland (No. 2)*.³¹ In that case, the High Court recognized for the first time that Aboriginal title (and customary laws generally) were part of Australian common law and were only capable of extinguishment in limited situations. What is particularly salient about *Mabo* is that the court could reach its decision without the existence in Australia of similar entrenched constitutional protection for Aboriginal rights as exists in Canada. Much like Canada, however, the precise nature of Aboriginal title in Australian law still awaits delineation by future court rulings.

The 1976 decision in *Foster v. Mountford* (see 3(c)(i)(B), below) illustrated early judicial readiness to protect Aboriginal TK

³⁰ There are two distinct indigenous peoples in Australia. The Aboriginal peoples of the mainland are distinct from the Torres Strait Islanders who are of Melanesian origin.

³¹ (1992), 175 C.L.R. 1.

(through breach of confidence) but it did not address what remedies might be available for TCEs that were already protected by copyright.³² This problem was to be the subject of a series of decisions discussed below. While there has been ongoing debate in Australia about the need to afford additional protection to indigenous TK and TCE, it has been the judicial innovations (largely inside the context of conventional copyright law) that have attracted most international interest.

(ii) *Yumbulul v. Reserve Bank of Australia*

This case (pre-*Mabo*) involved the reproduction on a \$10 Australian commemorative banknote of the design of a Morning Star Pole created by Terry Yumbulul, an Aboriginal artist. Such poles are used, *inter alia*, in Aboriginal ceremonies commemorating the deaths of important individuals.³³ The banks' reproduction of the pole design was pursuant to a sub-licence from an Aboriginal Artists Rights' agency that had been granted an exclusive licence by Mr. Yumbulul. Evidence was adduced in the case that the plaintiff has participated in various clan initiations that conferred on him authority to paint sacred objects, like the pole. After the banknote was issued, Mr. Yumbulul had been censured by his clan for using his privileges in a way that offended against the cultural significance attached to the pole. Mr. Yumbulul referenced this to support an argument that his licensing of the design was vitiated by mistake.

The trial judge held that the pole design was an original artwork in which Mr. Yumbulul held copyright and that his assignment of that copyright was valid. It followed that there was no infringement as would justify the setting aside of the licences involved. With respect to the claims surrounding the cultural significance of the pole, the court responded by acknowledging the inadequacy of Australian copyright law to recognize Aboriginal claims to protect communal TCEs, but suggested the issue was one for "law reformers and legislators" to address (at 492).

(iii) *Milpururru v. Indofurn Pty Ltd.*

This post-*Mabo* case is a well-known example of the ability of traditional IPR law to accommodate indigenous beliefs and

³² (1976), 29 F.L.R. 233 (F.C.A.) [*Foster*].

³³ *Yumbulul v. Reserve Bank of Australia* (1991), 21 I.P.R. 481.

customs.³⁴ It involved the unauthorized reproduction of designs by several well-known Aboriginal artists on carpets manufactured in Vietnam and imported into Australia. Each carpet carried a tag which claimed that the artists whose works it reproduced were receiving royalties on the carpets sold. In fact, there was no agreement to either pay royalties or permitting reproduction of the designs used. The claimants were three living and the representatives of five deceased Aboriginal artists who together sought damages for infringement of copyright.

The artist claimants had earlier permitted the reproduction of their designs in publications, such as those of the Australian National Gallery. It had been made clear in those instances that the images were of spiritual and sacred significance and subject to strict control under Aboriginal law and custom. The traditional collective ownership of such artworks was also described to the court. It was explained that if unauthorized reproduction of the images occurred it was the responsibility of traditional owners to protect and punish those seen as responsible for a breach of Aboriginal law.

The Federal Court of Australia upheld the plaintiffs' copyright infringement claim but it was the damages phase of the courts' ruling that attracted most interest. The court thought there was little by way of economic loss caused the artists, who had no intention of commercializing their works, but it agreed that the nature of the infringement had caused personal distress to the artists and potentially exposed them to embarrassment and contempt within their communities, including the likelihood of diminished future earnings and the potential of physical abuse. Based on these factors the court awarded \$70,000 to the plaintiffs to reflect the "cultural harm" they had suffered. In addition, damages were awarded for what the court thought was particularly flagrant disregard for and disrespect of the artists' rights by the defendants.

The *Milpurrruru* case is important because it approves of a consideration of the content of indigenous customary law in awarding damages for copyright infringement. While making it clear that copyright was a pre-condition for awarding such damages, the case still represents a significant integration of common law and indigenous legal principles. There is no reason not

³⁴ *Milpurrruru v. Indofurn Pty Ltd.* (1995), 30 I.P.R. 209.

to expect a similar result under Canadian law, where punitive damages can be awarded for copyright infringement.

(iv) *Bulun Bulun and Milpurrurru v. R & T Textiles Pty Ltd.*

Mr. Bulun Bulun and Mr. Milpurrurru were famous Aboriginal artists and members of the Ganalbingu people of Arnhem Land in Australia's Northern Territory.³⁵ R & T Textiles Pty Ltd. imported and sold clothing fabric that reproduced, without prior permission, a painting by Mr. Bulun Bulun which he had executed with the permission of senior members of the Ganalbingu people. Mr. Bulun Bulun sued the defendants for copyright infringement. The defendants admitted infringement and withdrew the fabric from sale.

The court first dismissed the argument, based on *Mabo*, that the common law of Australia now recognized collective Aboriginal title in artistic works. It reasoned that while Aboriginal customary laws relating to the ownership of artistic works had initially survived the introduction of the common law into Australia, they were extinguished once copyright law became the subject of federal legislation. The court concluded that there was, therefore, no legal basis for the assertion of communal Aboriginal title in Aboriginal TCEs outside of the copyright legislation. [It is at least debatable whether a similar conclusion would apply in Canada. While section 5(1.2) of the *Copyright Act* ("*C Act*") (see 3(b)(i), below) provides that "copyright shall not subsist in Canada otherwise than is provided by subsection (1),"³⁶ it might be argued that Aboriginal customary rights regarding TK and TCE have not been extinguished because copyright and indigenous TK and TCE are different things.]

Mr. Milpurrurru, in his own right and on behalf of the Ganalbingu people, then sought relief against the importer based on the community having an equitable title to the copyright in the painting to which the artist had legal title. This equitable title was said to arise out of the community having the power under customary law to control the utilization of its TK. However, the court concluded, on the evidence, that no express or implied trust had arisen in favour of the artist's community by the artist as owner of copyright in his work. The permission given by Ganalbingu

³⁵ *Bulun Bulun and Milpurrurru v. R & T Textiles Pty Ltd.* (1998), 41 I.P.R. 513.

³⁶ R.S.C. 1985, c. C-42 [*C Act*].

elders to create the work could not, by itself, create a trust. More evidence was needed to show the artist's intention to create a trust than was present in the case.

Despite its findings as to the lack of collective property rights, the court went on to uphold the existence of a fiduciary relationship between Mr. Bulun Bulun and the Ganalbingu people. In its view, this relationship arose out of the trust and confidence placed in Mr. Bulun Bulun by his people, as revealed in them allowing him to make use of their TK for his own artistic purposes. While such a relationship did not give the Ganalbingu an equitable interest in respect of Mr. Bulun Bulun's copyright in his own works, it did mean that he was accountable to them for any breach of his fiduciary responsibilities. On the facts, however, the court concluded that Mr. Bulun Bulun had acquitted himself by suing the defendant for copyright infringement and so was not in breach of his fiduciary duty to the Ganalbingu people.

The case exemplifies the creative use of an equitable principle by resort to TK to extend the situations where a fiduciary relationship can subsist. If Mr. Bulun Bulun had not taken the steps he had to protect infringement of his copyright, he may have been legally accountable to his people. Once more, there is no apparent reason to conclude that similar reasoning could not be applied in Canada.

Furthermore, the case left open the possibility that an indigenous community could have an equitable interest in an artist's work if there was sufficient evidence to support an intention to create a trust in favour of that community. If such a trust were found to exist, the community may have a representative claim (as holder of a beneficial interest in the artist's copyright) against a third party arising out of the misuse of the work.

(v) *Conclusion*

Australian courts have extended an enhanced level of protection for Aboriginal TK and TCE through broad interpretations of both statutory IPR and equitable and common law doctrines. While the recognition of native title in *Mabo* represented a dramatic development in Australian legal history, it has been the innovative application of longstanding common law doctrines that has provided the most concrete solutions towards the accommodation of indigenous cultural interests. Significantly, these innovations have been by way of supplementing existing intellectual property laws.

(h) United States Legislation Respecting Native American TCE

(i) Introduction

While the indigenous peoples of the United States do not receive the same sort of explicit constitutional protection afforded Canada's indigenous populations, they may receive the benefit of the so-called "Free Exercise Clause" of the United States Constitution. The Free Exercise Clause restrains Congress from making laws restricting the "free exercise [of religion]." There are also significant instances of federal legislation pertaining to Native American cultural heritage, including the *American Indian Religious Freedom Act* (1978) and the *Native American Graves Protection and Repatriation Act* (1990).³⁷ For the purposes of this report, two specific federal laws will be examined — the provisions of the *Lanham Trademark Act* of 1946 (*Lanham Act*) that deny registration to "disparaging" marks and the *Indian Arts and Crafts Act* of 1990 (*IAC Act*), which is designed to prevent the misrepresentation of products as being of Native American manufacture.³⁸

(ii) The Lanham Trademark Act and "Redskins" cases

The grounds for denying trademark registration under United States law lie somewhere between those existing under the laws of Canada and New Zealand (discussed below). The United States *Trademark Act*, provides that the United States Patent and Trademark Office must deny registration to marks "which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs or national symbols, or bring them into contempt or disrepute."³⁹ The *Lanham Act* then provides that if a mark is registered in violation of the above criteria, any person who believes he or she is or will be damaged by the registration may bring a petition to cancel it.⁴⁰ These provisions were famously the subject of a petition by seven Native Americans to cancel the registration of six trade-marks that included the word "Redskins."

³⁷ Pub. L. 95-341, 92 Stat. 469 (Aug. 11, 1978); Pub. L. 101-601, 25 USC §§ 3001 *et seq.*, 104 Stat. 3048.

³⁸ Pub. L. 79-489, 60 Stat. 427, 15 USC §§ 1051 *et seq.* (15 U.S.C. ch. 22)) [*Lanham Act*]; Pub. L. 101-644, 104 Stat. 4662, 25 USC §§ 305-305(e).

³⁹ *Lanham Act*, *ibid.* §1052.

⁴⁰ *Ibid.* §1064(3).

The marks were owned by Pro-Football, Inc. which owned the Washington Redskins football team.

The first complaint was filed with the United States Patent and Trademark Office's Trademark Trial and Appeal Board which eventually upheld cancellation of the marks on the basis that they disparaged Native Americans. This decision was then appealed to the United States District Court for the District of Columbia which reversed the Board's decision finding that it was not supported by substantial evidence and was also barred by the equitable doctrine of laches (unreasonable delay in bringing proceedings). The Native Americans then appealed to the United States Court of Appeals for the District of Columbia Circuit which remanded the case to the lower court on the question of laches. Eventually, the United States Supreme Court declined to hear an appeal of the case.

In 2012, another case was brought by other Native Americans to cancel the same registrations: *Blackhorse v. Pro-Football, Inc.*⁴¹ In its June, 2014 ruling, the Trademark Trial and Appeal Board cancelled the marks on the ground that it had been shown that a "substantial composite" of Native Americans found use of the term "Redskins" to be disparaging in connection with professional football during the relevant time frame. The Board found that the term "Redskins" retained the meaning "Native Americans" and had not acquired an alternate or secondary meaning denoting a football team. The Board also relied on the resolution of the National Congress of American Indians (whose membership represents approximately 30 per cent of Native Americans) as satisfying the requirement that the use disparaged a "substantial composite" of Native Americans at the time of the marks' registration. It held that it was not necessary to prove that an absolute majority of the referenced group found the term disparaging. The Board also referred to the views of most lexicographers that the word "Redskins" was offensive or disparaging and to its declining use in reference to Native Americans, beginning in the 1960s. The Board also thought that the laches defence should not be available where the disparagement was of a larger group, like Native Americans as a whole.

Administrative Judge Bergsman's dissenting opinion in the *Blackhorse* case argued that the majority had been wrong to find the term "Redskins" disparaging at the time that each of the

⁴¹ Cancellation No. 92046185.

challenged mark registrations was issued. He thought that the evidence relied on by the majority was inconclusive and insufficient. He also cited evidence submitted by the team to show that the term “Redskins” was favourably regarded, including by groups of Native Americans.

The debate surrounding these cases is germane because it squarely concerns the issue of appropriation of indigenous culture by outsiders for commercial purposes. To the degree that certain usages seen as disrespectful are proscribed, the integrity and resilience of indigenous culture is enhanced. Distortions of TCE might even be seen as a violation of a sort of collective “moral right” not to prejudice the cultural rights of indigenous communities. It has also been suggested that TCEs in the form of indigenous motifs could be trademarked by those peoples themselves but not others.⁴²

(iii) *The Indian Arts and Crafts Act 1990*

The main objective of the *IAC Act* is to make it illegal to offer or display for sale, or sell any art or craft product in a way that falsely suggests it was Indian made or a product of a particular Indian tribe or Indian arts and crafts organization. The impetus for this law was the proliferation of cheap counterfeit or bogus Native American artworks, particularly those imported from abroad. The *IAC Act* seeks to both strengthen the economies of Native American communities and protect consumers of Native American artworks against unknowingly purchasing fakes. The *IAC Act* significantly increased criminal penalties and introduced civil remedies for violations of its provisions. These civil liability provisions were expanded again in 2000 and 2010 by legislation giving standing to individual Indians, Indian tribes and Indian arts and crafts organizations to file civil suits. However, no standing is furnished consumers of misrepresented products.

The Indian Arts and Crafts Board (“the Board”) established to oversee implementation of the *IAC Act* is also authorized to create marks of authenticity for Indian arts and crafts products. Under the *IAC Act*, these marks may be registered with the United States Patent and Trademark Office, in the Board’s name or in the name

⁴² See G. Clarkson, “Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy” (2003) 11 *Cardozo J. Int’l. & Comp. L.* 393.

of individual Indians, Indian tribes or Indian arts and crafts organizations. In the case of government-owned marks, the board may license these marks to others. This provision, however, appears to conflict with the *Lanham Act* under which applicants must have an intention to use the mark they seek to register. This apparently prevents marks from being registered if they would initially belong to the government and not an Indian artist.

Another problem with the *IAC Act* is its definition of “Indian” which is according to membership of a tribe that has received some sort of recognition at the federal or state level. Indian tribes that have received such recognition are able to certify non-members as “non-member Indian artisans” for the purposes of the *IAC Act* but they cannot be forced to do so. The *IAC Act* does not define the term “Indian product” which is left to the Board. What steps that have been taken to define “Indian products” do not seem to establish any sort of qualitative standards but focus mainly on whether the products are of Indian origin. As Daphne Zografos has pointed out, the *IAC Act* also fails to address such issues as the use of modern versus traditional production methods and the “borrowing” of artistic or cultural TK from other tribes.

The 2000 amendment to the *IAC Act* allows Indian arts and crafts organizations and individual Indians to sue sellers who falsely suggest that their goods are of Indian origin. Most of the cases under the *IAC Act* have been brought by a single retailer of Indian-made products who is a certified Indian arts and crafts organization. In *Native American Arts, Inc. v. Waldron*,⁴³ the Seventh Circuit Court of Appeals held that the 1996 regulation under the *IAC Act*, which provides that the unqualified use of the term “Indian” or “Indian tribe” means that a product is “Indian” under the *IAC Act*, meant that, in effect, “Indian” was a trademark denoting products made by Indians. This appears to mean that the *IAC Act* has created a *sui generis* category of protected marks for certain TCE. The implications of this have yet to be fully explored, but they include whether the United States is in violation of its national treatment obligation under the TRIPS agreement. If the *IAC Act* confers “trademark like” rights that are seen to be “TRIPS-plus” (see 1(c), above) then insofar as they do not also protect indigenous groups outside of the United States, they may

⁴³ 399 F.3d 871 (7th Cir. 2005).

violate the national treatment requirement of the TRIPS agreement.

The *IAC Act* is described as primarily attempting to protect consumers against misdescribed products. However, it may have inadvertently added to the ambiguity surrounding the market for Native American art by creating uncertainty as to the scope and legitimacy of the mark registration system it establishes. It might be suggested that the trade-mark aspect of the *IAC Act* is misguided and its focus should be exclusively on regulating false and misleading advertising surrounding Native American arts and crafts.

(i) **Selective Initiatives to Protect the TK and TCEs of the Maori of New Zealand**

(i) *Introduction*

New Zealand has probably taken the greatest steps among common law jurisdictions to address the legal protection of the TK and TCE of its indigenous population; about 15 per cent of the total population is of Maori descent. These changes can be traced to the establishment of the quasi-judicial Waitangi Tribunal which, since 1975, has issued a series of reports in response to Maori claims alleging violations of the 1840 Treaty of Waitangi between the British Crown and numerous Maori tribes. Apart from the findings of the Waitangi Tribunal, there have also been several separate legislative initiatives aimed at addressing Maori concerns about the protection of their culture. Two of these are discussed below, along with the most important Waitangi Tribunal report respecting Maori TK and TCE.

(ii) *The Toi Iho (Maori Made) Mark*

The New Zealand government organized rounds of consultation with Maori in 1996 as part of its plan to embark on a major reform of the country's trade-mark legislation. This led to the establishment of a Maori Trade Marks Focus Group which produced a background paper in 1997. The work of the Group and further consultations by government with Maori led to various proposals for the reform of existing laws.

Among these changes was the introduction of a specific form of certification mark called the Maori Made mark ("*Toi Iho*"). Concerns about cheap imitations of Maori artworks led to a desire

to provide a viable means to assure consumers as to the authenticity and quality of the works they were purchasing. Some saw the mark as an interim means of furnishing protection to Maori TCE by limiting the market for works produced by non-Maori but that evoked Maori cultural expressions. The introduction of the Maori Made mark was part of a strategy to not only protect the integrity of Maori TCE in the marketplace, but also to provide enhanced financial support for Maori artists and their communities. To accommodate the realities of the production of artworks in New Zealand, two other marks were also introduced. The “Mainly-Maori Made mark” is available for groups of artists working together who are predominantly of Maori descent and produce and perform works across art forms. The “Maori Co-production mark” is available for Maori artists who create works co-operatively with persons of non-Maori descent.

The provision of the Maori Made mark is based on the artist being of Maori descent according to a broad set of criteria that can embrace urban Maori with no tribal (*iwi*) affiliation. A regulatory body of Maori “Masters” decides whether a product is of sufficient quality to receive the mark. These persons are respected Maori artists from various disciplines. This aspect of the scheme attempts to objectively measure the quality of products entitled to use the mark. At the same time, it has raised concerns that it may compromise innovative works that more traditional Maori artists may view with skepticism. As a result, the products receiving the mark have tended to be relatively expensive and arguably perhaps less in need of trade-mark protection in the first place.

In 2009, a new government decided to end its financial support of the Maori Made mark and Maori artists themselves took over control of use of the mark. Existing marks were transferred to the *Toi Iho* charitable trust. The withdrawal of government support, while it has led to a decline in financial support for the mark, has also meant that ownership of the mark is now vested in an autonomous Maori-controlled entity.

(iii) *Culturally Offensive Trade-marks*

Another major innovation responding to Maori concerns has been the introduction of legislation dealing with offensive trade-marks. New Zealand’s *Trade Marks Act 2002* prevents the registration of marks whose registration or use is likely to be offensive to a significant section of the community, including

Maori. This language replaced the terms “scandalous” and “contrary to morality” that appeared in earlier legislation. Anyone who claims to be “culturally aggrieved” can apply to have a registered trade-mark invalidated.

Debate has arisen about the meaning of the new test for registration. Some suggest that the word “offensive” should be given its ordinary meaning: likely to annoy or disgust. Others have suggested it means that the mark or word whose registration is sought must desecrate the purpose for which it has traditionally been used. It will obviously be necessary to distinguish between use that is merely in poor taste and that which is likely to give rise to a real likelihood of outrage. Some marks could be offensive when used in relation to certain goods or services, but not others.

The other phrase that has the potential to cause interpretation problems is “a significant section of the community, including Maori.” The phrase seems to have been selected in anticipation of changes in the country’s demographics over time. An issue that might be relevant if Canada were to consider implementing a similar provision, is whether it is enough that offense could be caused to only a section of the Maori community (for example, a particular tribe). It seems that offense taken by a large section of a single indigenous community would satisfy the language of the new law.

The New Zealand legislation gives the Commissioner of Trade Marks the final say as to registration. The new law also provides for the establishment of a Maori Trade Marks Advisory Committee (appointed by the Commissioner) to advise him or her on whether a proposed use or registration of a mark, that appears to be or be derived from a Maori sign, including text or imagery, is likely to offend Maori. The Committee’s (which can include non-Maori members) advice must be used by the Commissioner in the making of the decision as to the acceptability of the mark.

The new *Trade Marks Act 2002* also allows an “aggrieved person,” including a person who is “culturally aggrieved,” to apply to the Commissioner or to a court for a declaration that a registered trade-mark is invalid as being a contravention of the provisions of the new law. It appears, however, that this does not allow for the new criteria of offensiveness to be used to render invalid a mark registered before the new law came into force.

These changes to New Zealand trade-mark law represent a significant development in relation to the legal recognition of

indigenous TCE. No similar system appears to exist outside New Zealand (apart from that contained in the United States law discussed in 2(h)(ii), above) and the new rules seem particularly relevant to the Canadian context. However, the scheme has inherent limitations. It does not protect against the use of offensive unregistered marks in New Zealand or prevent the registration outside that country of marks that would offend Maori. Nonetheless, as a strategy to prevent certain types of inappropriate use, the new law is a significant step towards enhanced legal protection of Maori TCE.

(iv) *The Waitangi Tribunal Report in the “Flora, Fauna and Intellectual Property” Claim (Wai 262)*

(A) Introduction

In 2011, an important report concerning the cultural rights of New Zealand’s Maori people was published.⁴⁴ With no written constitution, New Zealand law furnishes only statutory and common law rights for its Maori population. Nevertheless, the Waitangi Tribunal report in *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (the “Wai 262 report”) is likely to significantly influence future developments in New Zealand law, as well as attract interest from around the world.

The Wai 262 report was in response to a claim originally filed in 1991 by six Maori tribes regarding flora, fauna and intellectual property issues. It is beyond the scope of this analysis to examine the report in detail but certain aspects that address issues surrounding the legal protection of TK and TCE will be discussed.

The Wai 262 report focused on the concept of Maori stewardship or guardianship (*kaitiakitanga*), a concept of caring for natural and physical resources for the overall benefit of peoples and the resources themselves. The object of the report was to address Maori claims that the New Zealand Crown had failed to adequately protect, preserve and respect various aspects of Maori TK and TCE. This included addressing the ongoing tension between indigenous rights and existing IPR. The tribunal itself recognized this conflict by referring to the two different (English and Maori language) versions of the 1840 Treaty of Waitangi which

⁴⁴ Online: <<http://wai262.weebly.com/>> .

form the basis for the jurisdiction of the Waitangi Tribunal over claims like Wai 262. The Wai 262 report centered on the language of Article 2 of the Treaty of Waitangi.

The Maori version of Article 2 emphasizes TK, whereas the English version affirms Western concepts of property, with its use of such terms as “preemption” and “alienation.” Nevertheless, inherent in the fact that the two different versions of the treaty are of equal authority, is the idea that Maori were ceding sovereignty to the (then British) Crown, in exchange for retaining possession of their own lands and other resources. Even if, in a particular case, the tribunal finds that the Crown has breached its duty towards Maori based on the treaty, this does not necessarily mean such breaches are remedial under New Zealand law. However, the identification by the tribunal of violations by the Crown of provisions of the treaty often leads to the New Zealand government introducing changes in legislation, policies and practices affecting Maori.

The Wai 262 report addressed the concept of the public domain by noting that, while Maori possession of its TK was undisturbed prior to European settlement, it is now a shared resource, and, in that sense, irretrievable. This was an important conclusion, since it implicitly rejected the idea of creating *sui generis* IPR for Maori TK. Instead, the tribunal’s report focused on a stewardship principle, which it saw as itself a key component of Maori culture. In so doing, the report also sided with the vast majority of contemporary legal scholarship which finds indigenous TK an ill fit with Western intellectual property concepts.

(B) Offensive Use

The tribunal thought that there needed to be restrictions in place to prevent the offensive or derogatory public use of Maori forms of cultural expression. While, as we have seen, such use is already protected to a certain level under New Zealand law, the tribunal recommended enhanced protection where someone had an existing custodial or guardianship relationship (*kaitiaki*) to the expressions and beliefs in question. The report proposes that the existing Maori Trade Marks Advisory Committee be replaced by a new Commission which would establish guidelines for prospective users of Maori TCE. The Commission could also serve as a

register of the guardians of particular works, but such registration would not be made compulsory.

The idea of a prohibition on offensive or derogatory use of Maori works seems appropriate enough and has well-established precedents elsewhere. What is more problematic about the tribunal's proposals is what exactly it is that can be subject to a "guardianship" relationship and afforded legal protection on that basis. Since these relationships appear to be subject to definition on a case-by-case basis, it seems there could be a good deal of uncertainty as to when a certain use is protected, along with the precise nature of the level of protection itself.

(C) The Concept of Guardianship and Consent

The most controversial aspect of the report's recommendations surrounds its suggestion that any commercial use of Maori culture that is the subject of a "guardianship" relationship require consultation with guardians (*kaitiaki*) and possibly their consent, before use. It should be stressed, however, that this recommendation was based on the tribunal's understanding of the obligations of the New Zealand Crown under the Treaty of Waitangi. As explained in the report, while Western-based intellectual property concepts define specific legal rights connected to certain forms of property, Maori focus on relationships towards their cultural objects (*taonga*) and the customary duties and responsibilities that surround those relationships. The recommendation that consent be required to allow the commercial use of Maori TCEs is basically a suggestion that New Zealand law make such consent mandatory — whether or not the works concerned are in the public domain. It remains unclear how such a requirement would be implemented and what sort of recognition it would receive outside New Zealand.

Even if this requirement of consent for Maori TCEs were made part of New Zealand law, it is not clear what that would involve. The report does not explain what would happen if consent were refused — even assuming there had been prior consultation. Furthermore, the report recommends that the proposed Commission have the power to limit commercial use of Maori cultural expressions in a form that the would-be user already has IPR over — like a photograph. Would this mean, for example, that the owner of copyright in a photograph could not display it for sale

in a gallery if the guardians of its subject matter objected? The report grapples with this problem by suggesting that while existing IPR cannot be compromised, any future rights would be subject to decisions of the Commission. Thus, a future design might be refused registration under the existing registration scheme if the Commission decided that there had been inadequate or no consultation, or an absence of consent. In effect, existing IPR might be made subject to laws giving effect to Treaty of Waitangi principles.

The report distinguished between what it described as “*taonga*-works” (Maori treasures or highly prized possessions) and “*taonga*-derived works”. While *taonga*-works are assumed to always have living individuals or communities that are responsible for them, *taonga*-derived works have a Maori element in combination with other non-Maori influences. For these, there is no guardianship relationship. The report suggests that while derivative works be made subject to restrictions on offensive or derogatory use, they not be subject to prior consultation or consent because of the absence of guardians.

Given the significance of the consultation and consent requirement, it is surprising that the report did not address problems connected with the determination of when it should be required more closely. In effect, the report is dealing here with the concept of “fair dealing” or its equivalent, which in most legal systems is seen as ensuring a basis for the protection of new interpretations of prior art and other creative expressions. If the concept of “*taonga*-derived works” were interpreted narrowly, it might place a significant and undesirable restriction on such creativity.

(D) “Closely-held” TK

Another controversial aspect of the report is its suggestion that certain Maori TK (*matauranga Maori*) that is “closely-held” (specific to a particular community) be afforded additional protection beyond merely a prohibition on offensive or derogatory use. While unable to precisely define the content of such Maori culture, the tribunal thought that TK which was specific to individual Maori communities (such as a particular tribe) should enjoy some enhanced level of protection, possibly against offensive or derogatory use, as well as a requirement of

consultation and consent. As with Maori works, there are unanswered questions here surrounding how and when such use should or could be controlled.

(E) The Rejection of Proprietary Rights

For the purposes of this analysis, it is most useful to reference those aspects of the tribunal's report that speak to general issues about the scope for affording legal protection to indigenous TK and TCE. What is most striking about the Wai 262 report is that it completely avoids any suggestion that new forms of property rights be created in respect of Maori cultural heritage. The explanations for this are many, but the most likely must be the daunting task of defining the content of such rights and explaining how they would co-exist with pre-existing IPR norms. New Zealand has struggled over the last few decades to resolve its identity through a new kind of engagement between its Maori and non-Maori (*pakeha*) populations. It seems the authors of the Wai 262 report deliberately chose "stewardship" together with all its attendant uncertainties, over ownership, with the object of avoiding the sort of confrontation that a rights-based approach might have engendered. However, in so doing they may have chosen an equally problematic alternative.

(F) Summary

With similar issues as Canada regarding pressures from its indigenous populations for enhanced levels of legal protection for their TK and TCE, New Zealand has been more active than Canada in implementing such measures. The reforms to its trademarks law provide concrete examples that may recommend themselves for adoption by Canada. The detailed recommendations of the Waitangi Tribunal in the Wai 262 report also provide one of the most thoughtful analyses to date of future options to address broad-based legal protection for indigenous TK and TCE. To date, none of the suggestions contained in the Wai 262 report have been implemented in New Zealand.

PART THREE

THE PROTECTION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSION IN CANADIAN LAW AND PRACTICE

(a) Introduction

This part of the report examines Canadian law and practice as it relates to TK and TCE protection. As with most countries, Canada's IPR regime at first appears to offer the greatest likelihood, among other Canadian legal realms, of protecting TK and TCE. Besides this body of rules, several other laws afford protection to aspects of indigenous TK and TCE. Extra-legal sources will be discussed in the form of practices associated with research and professional institutions (such as museums and universities). This section will also examine protocols developed by indigenous groups to pro-actively secure TK and TCE protection.

(b) Canadian Intellectual Property Law

Policy issues surrounding the legal recognition and protection of TK and TCE are highly complex and often contentious. One of these is the scope of the public domain in IPR laws which separates content subject to property rights from content considered freely available for all to use. IPR are based on a series of compromises involving the recognition of property rights in products of intellectual creativity and the countervailing pressure to eventually give the public free access to these products to energize the cycle of creativity. Most fear that without legal protection for the products of intellectual effort, incentive to make them in the first place would dissolve.

In a sense, IPR constitute a *sui generis* system that emerged as industrialization and scientific advances in the West enabled the mass production of the printed word and other tangible cultural expressions. Some reject the commodification of TK as intellectual property, which begs the question of how interests in such property are then to be defined. In Canada, indigenous peoples have used copyright and trade-mark protection to protect both TK and TCE. To the extent that such IPR protection is unavailable, the question then arises as to whether this should lead to changes to IPR to

accommodate indigenous concerns or whether other *sui generis* modes of protection should be adopted.

The following explores the level of IPR protection available in Canadian law and assesses its effectiveness in terms of safeguarding Aboriginal culture.

(i) *Copyright*

Canadian copyright law is exclusively governed by the *C Act*. Since copyright is designed to prevent the unauthorized reproduction (as well as the performance and telecommunication) of literary, dramatic, musical and artistic works, it immediately suggests itself as a potential tool for the protection of indigenous cultural traditions from inappropriate use. There are, however, situations where copyright has been used by non-Aboriginal persons to obtain legal rights in respect of indigenous TK, such as when indigenous oral traditions are translated and the author of the translation receives copyright protection for the work. Callison gives the example of a non-Aboriginal writer who collected and then published Nuuchahnulth TK which she then claimed copyright in for herself.⁴⁵ Unlike the *sui generis* laws of certain countries, discussed earlier, the Canadian *C Act* contains no express provisions concerning TK or TCE. To obtain copyright protection in Canada, the TK or TCE involved must meet the specific requirements set out in the *C Act*.

Copyright requires, *inter alia*, that a work originate from an author. While a new work can be based on the earlier works of others, it must constitute a new expression to receive protection. Indigenous cultural heritage often emphasizes and reiterates the expressions of past generations and such evolution that occurs often does so only incrementally. In their desire to preserve the past, indigenous authors may limit their eligibility for copyright protection. It may not be possible to attribute a TCE to a particular author because it is seen as the work of a whole community.

In Canada, copyright protection also requires that works be fixed in some material form. This is because copyright does not protect ideas but the forms in which they are expressed. TK without fixation does not qualify for copyright protection. Indigenous cultural traditions are mostly oral and may never have been

⁴⁵ C. Callison, "Appropriation of Aboriginal Oral Traditions" (Special Issue, 1995) U.B.C. Law Rev. 165 at 177.

recorded in any material form. Many TCEs that do occur are often intended to be temporary, such as those connected with ceremonies and celebrations. As mentioned, many indigenous oral traditions have been translated and published in printed form by non-indigenous authors who then themselves receive the benefit of copyright protection. Similarly, a photograph of an indigenous person in traditional attire confers copyright on the photographer, but not the subject of the photograph. In this sense, the copyright requirement of fixation often demands a change in indigenous cultural tradition that may itself represent a forced assimilation of that tradition into Western culture.

In Canada, copyright's minimum term is life of the author and 50 years.⁴⁶ This is usually seen as an attempt to reconcile the existence of a proprietary right, on the one hand, and the competing demands of the public domain, on the other. Most indigenous cultural traditions are seen as requiring indefinite protection which contradicts the whole notion of a finite term. Such indefinite protection is not available under copyright law as it now stands. That law eventually frees up the underlying work to encourage continuing innovation. Indigenous cultures usually put a premium on the preservation and control of the underlying work.

One of the most problematic aspects of indigenous culture in relation to copyright is the collectivity that is usually a characteristic of such cultures. While the *C Act* recognizes joint or collective authorship, it does so only when it is the clear intention of the authors that authorship be so held.⁴⁷ The authors must each be identified which may make the concept of communal ownership by the group problematic. The identification of the author or authors of TCEs may not always be possible, especially when a traditional work is the result of contributions by different generations over centuries. Even if authorship is known, it may be at odds with indigenous beliefs that TK and TCEs belong to the group as a whole and not to individual members of the group. The *C Act* does provide for copyright collective societies, but there is still a requirement of identifying authorship.⁴⁸ Thus, while some sorts of shared ownership of copyright are legally possible, they do

⁴⁶ *C Act*, *supra* note 33, s. 6.

⁴⁷ *Ibid.* s. 2.

⁴⁸ *C Act*, *supra* note 33, s. 70.1.

not appear to be particularly well-suited to the communal characteristics of indigenous cultures.

While it is certainly possible that TCEs — particularly those relating to contemporary, rather than traditional works — could receive copyright protection, there are many requirements for such protection that do not appropriately address the characteristics of indigenous cultures. The focus of copyright law is on the protection of works produced for public consumption. Copyright rewards the authors of such works as an incentive to creativity. TK and TCE as the word “traditional” itself suggests are not always in the nature of exclusive property rights based on financially rewarding intellectual creativity.

(ii) *Moral Rights*

The *C Act* recognizes three moral rights that are separate and independent from copyright: integrity, attribution and association.⁴⁹ Moral rights co-exist with copyright in a work and last for the same period. Moral rights focus on author rights and continue even if the author no longer owns copyright in the work. It appears that moral rights in Canada can be based on common law or civil law principles, as well as legislation. The civil law’s emphasis on natural justice supports a special sense of connection between the author and his or her work.⁵⁰

With its focus on the rights of creators, moral rights law has often been seen as sympathetic to the concerns of indigenous peoples. Indigenous peoples may think that the right to integrity may afford protection against distortion through inaccurate or unauthorized use of their cultural symbols. The right of attribution may also afford protection against claims by non-indigenous persons to original authorship. However, despite its potential advantages for indigenous persons, moral rights law remains focused on the individual author and not the community as a whole. The same problem arises with moral rights as with copyright — the existence of a fixed term, after whose expiration the rights come to an end.

Despite these limitations, moral rights could clearly afford protection in cases where TCEs were distorted or modified in a way that prejudiced the honour and reputation of the author. The well-

⁴⁹ *Ibid.* ss. 14.1, 14.2, 28.1 and 28.2.

⁵⁰ See *Morang and Co. v. William Dawson Le Sueur* (1911), 45 S.C.R. 95.

known case of *Snow v. Eaton Centre Ltd.* is an instance where a violation of the integrity of an artist's work was upheld based on the unauthorized way in which it was modified for public display.⁵¹ However, there may be other sorts of treatments of TCE — like professional conservation, or inappropriate presentation and display — which are offensive to First Nations but do not necessarily violate the moral right of integrity.

(iii) *Trade-marks*

Trade-marks are protected under the *Trade-marks Act* (“*T Act*”).⁵² They may comprise words, designs or a combination of the two (“composite marks”) that distinguish the goods and services of one business from others. Marks operate to correctly inform consumers about the source of what they are buying. Marks must be registered at the Canadian Intellectual Property Office (CIPO) to receive protection under the *T Act* beyond that furnished by the common law action for passing off.⁵³ Registered marks have a 15-year term but can be renewed indefinitely. To be protected, marks must be distinctive and relate to the source of specific goods or services. The definition of “trade-mark” in the *T Act* includes a requirement of use which is expanded upon in section 4 to include the mark being applied to the goods themselves or on their packaging.⁵⁴

For Aboriginal peoples, the use of marks may be an attractive means to prevent outsiders misleading consumers as to the actual provider of certain products and services. The ability of Aboriginal users of marks to obtain protection for an unlimited period may also make trade-marks attractive. Furthermore, there is significant scope to register as a trade-mark something more than a name or an image. TCEs that relate to intangible aspects of indigenous culture — such as dances, ceremonies and songs — might be difficult to use as marks that identify products or services. However, a single image or group of images of a dancer could be used as a trade-mark if it could distinguish the owner's products from others in the market. There is also still some degree of

⁵¹ (1982), 70 C.P.R. (2d) 105.

⁵² R.S.C. 1985, c.T-13 [*T Act*].

⁵³ *Ibid.* s. 7.

⁵⁴ *Ibid.* s. 2.

uncertainty about what may satisfy the representation requirement for sounds and smells.

Under the *Economic Action Plan 2014 Act, No. 1*,⁵⁵ amendments were made to the *T Act* (expected to come into force in 2017). Among these changes (which include de-hyphenating “trade-mark”) will be a change in the definition — of what will now be described as a “trademark” — from being a “mark” to a “sign or combination of signs” which explicitly covers sounds and smells. The term of registration (renewable indefinitely) of trade-marks will be reduced from 15 to 10 years.

Despite the meaningful protection that trade-marks could afford indigenous peoples, they might sometimes be inappropriate. Like other IPR, trade-marks aim to protect economic rather than cultural interests. Thus, use of an indigenous symbol for ceremonial purposes (rather than to indicate the source of a product) would not qualify it for trade-mark protection (see definition of “use” in the *T Act*) or prevent a non-indigenous person from registering it as a trade-mark for their own purposes (unless there was found to be a risk of confusion with the pre-existing mark).⁵⁶ A comparison of indigenous cultural usage with non-indigenous use in connection with a product or service may lead to the conclusion that there is little risk of confusion as to justify protection.

The *T Act* potentially addresses Aboriginal concerns about appropriation and disrespect in paragraph 9(1)(j) which provides that:

(1) No person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for,

(j) any scandalous, obscene or immoral word or device.

The moral standards that this prohibition must be measured against are not clear. For example, the CIPO has accepted “THE RUDE NATIVE” as a trade-mark for a restaurant. In *Miss Universe, Inc. v. Bohna*,⁵⁷ the Federal Court of Canada thought the word “nude” was a perfectly acceptable adjective and not within the prohibition in paragraph 9(1)(j). A Canadian court has never

⁵⁵ S.C. 2014, c. 20.

⁵⁶ *T Act*, *supra* note 49, s. 4.

⁵⁷ [1992] 3 F.C. 682.

discussed the meaning of paragraph 9(1)(j) in relation to the concerns of Aboriginal persons. Note that section 9 lists prohibited marks that, in addition to being incapable of being registered,⁵⁸ cannot be used at all in connection with a business.

Despite the limitations of trade-mark protection in Canada, many Aboriginal businesses and organizations already use registered trade-marks. These include those for the provision of recreational services and the manufacture of clothing and food products. Insofar as this affords protection for Aboriginal business interests, it could be enhanced if the *T Act* included in the list of prohibited marks the official insignia of First Nations and band councils. While addressing purely cultural concerns presents inherent difficulties, this minor step would at least accord First Nations the same kind of protection already conferred on various non-Aboriginal governments and organizations.

(A) Official Marks

Section 9 of the *T Act* lists various bodies and authorities the use of whose identifying marks and symbols is prohibited without prior consent. Paragraph 9(n) also prohibits use of “any badge, crest, emblem or mark ... (iii) adopted and used by any public authority, in Canada as an official mark for goods or services” where the Registrar has, at the request of the public authority, given notice of its adoption and use. Unlike ordinary trade-marks, official marks never expire and they can be used (as in the case of Crown corporations) for both commercial as well as non-commercial purposes. Official marks also afford greater protection than ordinary trade-marks since they cannot be used by anyone besides the holder.

Section 9 appears based on Article 6ter of the *Paris Convention for the Protection of Industrial Property* (1883),⁵⁹ though the language of that article does not include the term “public authority.” The intent of Article 6ter seems to be to create protection for government insignia, but the phrase “public authority” has been interpreted in Canada in a way that it appears that any operation benefiting the public and subject to significant government control or financing can qualify as a “public

⁵⁸ *T Act*, *supra* note 49, s. 12.

⁵⁹ Online: <http://www.wipo.int/treaties/en/text.jsp?file_id=288514>.

authority.”⁶⁰ Several First Nations communities and organizations have qualified as public authorities. These include the Osoyoos Indian Band (NK’MIP), the Kaska Tribal Council (KASKA) and the FIRST NATIONS SUMMIT. The basis for their qualification under “public authority” status may be seen from their relationship to the *Indian Act*.

Professor David Vaver has explained that more institutions have taken advantage of the availability of official marks than was anticipated and the scheme regulating them is too cryptic to function as a self-contained code. He suggests that the ordinary trade-mark system should be the primary basis for official marks and symbols.

Despite its limitations, the use of official marks seems an attractive way for First Nations to acquire perpetual legal protection for a mark that furnishes both the freedom to use it for commercial as well as non-commercial objectives, as well as making it more difficult (than in the case of an ordinary trade-mark) for other users to file applications for similar marks. The Snuneymuxw First Nation in British Columbia has even registered official marks for several petroglyph designs which suggests that images with obvious cultural significance, but that may not be capable of being protected under copyright law, can achieve significant security as official marks.

(B) Certification Marks

Certification marks are a type of trade-mark used to identify products or services as being of a certain defined standard of quality. Under Canadian law, certification marks may only be registered by a person who is not engaged in the sale or provision of the goods or services associated with their use.⁶¹ That person then licenses others to use the mark in association with goods or services that meet the defined standard.⁶² The use of a certification mark may occur in conjunction with an official mark and a geographical indication of origin. Such usage may combine the legal rights associated with these different marks to the advantage of

⁶⁰ *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, (2002), [2003] 1 F.C. 331.

⁶¹ *T Act*, *supra* note 49, s. 23(1).

⁶² *Ibid.* s. 23(2).

indigenous users. Indigenous peoples may see the use of certification marks as a useful marketing strategy in the context of growing consumer interest in traditionally manufactured items.

Certification marks have long been used in Canada to identify the indigenous origin of certain products. In Canada, the Cowichan Band Council has registered three certification marks to indicate that certain clothing products were made in accordance with Cowichan traditions: COWICHAN, GENUINE COWICHAN and GENUINE COWICHAN Design. Another instance of this phenomenon was the Canadian government's registration of the "Igloo Tag" trade-mark in 1958 to allow the certification of authentic Inuit-made art. Only genuine Inuit artists and their agencies are entitled to attach the sign to their products. Despite not all Inuit artists using the trade-mark and the appearance of copies, the certification mark is widely credited with the development of a highly successful international market for high-quality Inuit art. A recent initiative along similar lines in British Columbia is "Authentic Indigenous", a program of the Aboriginal Tourism Association of BC which uses a sticker or tag to certify the authenticity of works.

The utilization of certification marks is also complementary to the collective nature of many indigenous societies. The cost of trade-mark protection may be too great a burden for indigenous individuals, but the use of certification marks allows for a spreading of the cost amongst users through one form of organization or another. The "Igloo Tag" is an example of a government being prepared to shoulder the cost of trade-mark protection for indigenous users. There are several other features of certification marks that make them an especially attractive option for the protection of indigenous TCE — the maintenance of uniform quality and authenticity standards, cost-sharing through administrative structures and the development of uniform marketing and distribution strategies. Above all, the fact that control over certified marks rests with a licensor may be less antagonistic to variable indigenous concepts of property rights.

(iv) Industrial Designs

The *Industrial Design Act* ("ID Act") establishes a registration system for designs that include a shape, configuration, pattern or

ornament applied to a finished useful article made in multiples of 50 or more.⁶³ These designs may also qualify for copyright or moral rights protection, but that is not lost once the article qualifies for registration as an industrial design. To be protectable under the *ID Act*, designs must be original and appealing to the eye. Among popular articles seeking protection based on their design qualities are clothing, jewelry, furnishings and containers. The *ID Act* limits protection to 10 years and cannot be extended.

Determining precisely which articles can be registered as industrial designs under the *ID Act* can be a complex exercise. For example, the *C Act* provides that a graphic or photographic representation that is applied to the face of an article (such as a mug) or material that has a woven or knitted pattern does not lose copyright or moral right protection despite being made in quantities of over 50.⁶⁴ This may mean that these items can still be registered as industrial designs, but there would seem to be little point in so doing since the copyright protection they enjoy has much greater longevity. *Economic Action Plan 2014 Act, No.2* is intended to make the *ID Act* consistent with the 1994 *Hague Agreement Concerning the International Registration of Industrial Designs* and, once it comes into force, will extend the term of protection for designs in certain cases for up to 15 years.⁶⁵

The system of protection established by the *ID Act* is clearly available for Aboriginal TCEs and has been occasionally used for that purpose. For example, over the last 50 years, the West Baffin Eskimo Co-operative Limited has filed 51 industrial fabric designs. However, the protection the *ID Act* affords may be seen by many as too limited. After the 10-year time period expires, non-Aboriginals would be able to market designs first registered by Aboriginals. The requirement of originality — as with copyright — may also mean that traditional Aboriginal designs do not even qualify for registration in the first place.

(v) *Patents*

Patents protect new technology and confer exclusive rights on inventors to make and sell their inventions for up to 20 years.

⁶³ R.S.C. 1985, c. I-9.

⁶⁴ *Ibid.* s. 64(2).

⁶⁵ S.C. 2014, c. 39; online: <<http://www.wipo.int/treaties/en/registration/hague/>>.

Before the expiry of this time period, the patent holder has a monopoly over the exploitation of his or her invention. Patent applications can be complex and involve several requirements such as novelty and usefulness. In Canada, patents are granted by the Patents Office under the *Patent Act* (“*P Act*”).⁶⁶ Naturally occurring plants and animals are not patentable (except insofar as such protection is available under the *Plant Breeders’ Rights Act* (*PBR Act*)),⁶⁷ but the process of isolation of a substance from nature (such as an active chemical in a plant) can be patented.

Unlike TCEs that may be protected by IPR such as copyright and trademark, patent law seems particularly apt for the potential it offers to protect TK. Patent protection seems an appropriate way to reward the unique insights of indigenous peoples and prevent the appropriation of their cultural heritage in many instances where TK in relation to knowledge of herbal and other medicines can result in treatments for disease. The typical example is where a non-indigenous scientist learns about the indigenous use of a particular plant species and this information leads to the isolation of an active ingredient and the development of a useful drug by a pharmaceutical company that holds a patent. In such instances, often the indigenous group may not even be aware of the profitable exploitation of its TK.

Patents appear scantily utilized to protect indigenous TK in Canada. Several factors likely explain this scenario. Patent procedures are expensive and complex. This suggests that Aboriginal patent applicants would be advised to form partnerships with businesses that have the financial resources and technical expertise to develop patentable inventions.

Another problem with an invention based on TK is that it must be disclosed and becomes public property after the patent expires. This may be fundamentally at odds with the desire of an indigenous community to preserve its TK in perpetuity.

The requirement of novelty also presents challenges for TK. The knowledge system itself is not patentable, but distinctive innovations that arise out of it can be. However, it may be problematic to discern the difference between TK collectively held and innovations made inside of a traditional context. This may evolve in terms of whether the TK satisfies the requirements for a

⁶⁶ R.S.C. 1985, c. P-4 [*P Act*].

⁶⁷ S.C. 1990, c. 20 [*PBR Act*].

joint invention. As Professor Vaver notes, the source of an invention developed by researchers may at least justify a claim to co-ownership if the invention would not have been possible without the starting material.

Most systems of patent registration focus heavily on technological and scientific resources that usually exclude TK. Registration authorities rarely consider TK when the prerequisites of novelty and ingenuity are being evaluated. Even if there is awareness that TK was a source of the invention, it is often viewed in a passive sense as not having contributed actively to the invention for which patent protection is being sought.

One of the most debated issues surrounding patentability involving TK is the concept of disclosure. There is no specific legal requirement in Canada that applicants disclose the source of any TK involved in their invention. Professor Dutfield favours tying the patent system to the CBD's access and benefit sharing principles so that applicants be required to submit with their application documents proving that the genetic resources and/or associated TK were acquired with the prior informed consent of the indigenous community involved and in conformity with Article 8(j) of the CBD. Clearly, such a requirement would need to be associated with another requiring that indigenous communities be informed whenever a TK-based patent application is being made. Even these initiatives may not be without difficulties. An applicant may not be aware of the TK element connected to the invention and of the identity of the source community. How would the application be treated if there was more than a single source community or if there was uncertainty as to the entitlement to the TK involved inside the community?

The issues involved in the relationship between patents and TK are too diverse and complex to be fully discussed here. Presently, the issue of novelty may pose the greatest problem in Canadian law for protecting TK through the registration of a patent. Beyond the limits of the existing law, consideration could also be given to the introduction of a scheme for equitable benefit-sharing and other similar initiatives. Overall, it is perhaps the negative cultural connotations of patents for Aboriginal source communities that require the most attention.

(vi) The Plant Breeders' Rights Act

Article 27.3(b) of the TRIPS agreement provides that WTO members are allowed to exclude plants and animals from patentability but they are obliged to:

provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.

As noted earlier (1(b), above) the CBD requires in Article 8(j) that Parties preserve TK surrounding biological diversity but this obligation is expressly “subject to [the Party’s] national legislation.”

It appears that Canada has implemented its obligations under Article 27.3(b) of the TRIPS agreement in the form of its own *sui generis* legislation, the *PBR Act*.⁶⁸ The 1990 law was based on the 1978 version of the *International Convention for the Protection of New Varieties of Plants* (UPOV).⁶⁹ The Canadian act is administered by the Canada Food Inspection Agency and provides for patent-like protection, for an 18-year period, over prescribed plant varieties that are distinct (such as hybrids and cultivars). The *Agricultural Growth Act*,⁷⁰ amended the *PBR Act* to implement the 1991 version of UPOV. The amendments also increase the term of protection under the *PBR Act* from 18 to 25 years.

While the *PBR Act* makes no specific reference to TK or TCE it seems — given the language of Article 27.3(b) of the TRIPS agreement — that nothing in that agreement prevents Canada from introducing TK and TCE protection as other countries (see Part 2, above) have already done.

(c) Other Canadian laws Relating to Traditional Knowledge and Traditional Cultural Expression

(i) Tort Remedies for Misappropriation, Breach of Confidence, and Invasion of Privacy

The term “appropriation” is often used to describe what has been sustained by indigenous cultures as a result of their encounters with the outside world. This perspective is characteristic of discussions of indigenous cultures in most post-colonial societies

⁶⁸ *Ibid.*

⁶⁹ Online: < http://www.upov.int/upovlex/en/upov_convention.html > .

⁷⁰ S.C. 2015, c. 2.

(such as Canada, Australia and New Zealand) where a sense of loss through the influences and practices of the dominant non-indigenous society is prevalent. Specific instances of appropriation include the use by non-indigenous peoples of indigenous songs, dances, words and other forms of TK and TCE.

(A) Misappropriation

A common law doctrine of misappropriation was first developed by the United States Supreme Court in *International News Service v. Associated Press*.⁷¹ The case involved the publication of summaries of news about World War I taken by International News Service (INS) from Associated Press newspapers. The Supreme Court thought Associated Press had a quasi-property interest in the news it collected and this prevented its competitors from using it. A majority of the court was also of the opinion that INS had engaged in unfair competition by taking news reports from Associated Press and using them without payment.

The misappropriation doctrine was rejected by the High Court of Australia in *Victoria Park Racing and Recreation Grounds Company Ltd. v. Taylor*,⁷² and was referred to but not adopted by the Supreme Court of Canada in *MacDonald v. Vapor Canada Ltd.*⁷³ The analytical basis of the misappropriation doctrine appears uncertain and U.S. law now restricts it to use of costly-to-generate or time-sensitive information in direct competition.

The tort of misappropriation provides a remedy for the unfair use of information that was not necessarily obtained by illegal means. It could conceivably be used to fashion a remedy for the misuse of TK in situations that did not involve any misrepresentation, fraud or other illegality. Like IPR, however, its focus is on economic loss. To the extent that indigenous claims extend to other sorts of relief, they may remain unaddressed by this remedy.

⁷¹ 248 U.S. 215 (1918).

⁷² (1937), 58 C.L.R. 479.

⁷³ (1976), [1977] 2 S.C.R. 134 at 149.

(B) Breach of Confidence and Trade Secrets

TK can be completely protected from appropriation by outsiders so long as it remains undisclosed. If improper means are used to obtain such information, the best remedy available may be an action for breach of confidence. The elements of this remedy were set out by the Supreme Court of Canada in *LAC Minerals Ltd. v. International Corona Resources Ltd.*, where it was described as a *sui generis* action based on contract, equity and property “to enforce the policy of the law that confidences be respected.”⁷⁴

The most well-known example of this remedy in connection with TK is the Australian case of *Foster v. Mountford* where an *ex parte* injunction was issued to a group of Aboriginal elders to prevent the distribution and sale in the Northern Territory of a book containing details and pictures of secret Central Australian Aboriginal stories and images.⁷⁵ The book was subsequently withdrawn from circulation by its publisher. The decision symbolized the willingness of courts to protect against violations of indigenous cultural secrecy and is now part of a body of similar Australian precedents that were examined earlier in this report (see Part 2(g), above). Since the elements of the breach of confidence remedy in Australia and Canada are practically identical, there is every likelihood that a similar result to that in *Foster* would be reached by a Canadian court. In *Foster*, an injunction to prevent publication was an effective remedy but damages for economic loss would also be available where appropriate.

In an action for breach of confidence, the plaintiff must prove three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated so that the plaintiff suffered detriment as a result. In Canada, trade secret appears to be part of the tort remedy for breach of confidence. In most trade secret cases, the plaintiff has sought damages to compensate for economic loss. This may be appropriate in cases involving the production of a craft or work whose techniques of production are secret to a particular First Nation. But in the case of TCEs, such as sacred symbols or rituals that are sought to be kept confidential, a more appropriate remedy may be an injunction against further use,

⁷⁴ [1989] 2 S.C.R. 574 at 615.

⁷⁵ *Foster*, *supra* note 29.

as in *Foster*, or delivery up of any products made based on use of misappropriated information.

A number of First Nations have developed protocols that govern their interaction with outsiders, like researchers and business advisers. Some groups deliberately elect to commercialize certain aspects of their TK. The Unaaq Fisheries, owned by the Inuit of Northern Québec and Baffin Island, have done so in relation to the management of their fisheries' resources.⁷⁶

Overall, the remedy for breach of confidence seems to present a viable basis for relief in respect of abuses surrounding access to confidential TK. Other civil remedies might also arise for breach of contract, breach of fiduciary duty, passing-off, unjust enrichment and wrongful interference with contractual relations.

(C) Invasion of Privacy

The law regarding remedies for invasion of privacy is still in a developmental phase in Canada. In several provinces, violation of privacy is a statutory tort. And, Québec's *Charter of Human Rights and Freedoms* protects privacy. There is no statutory tort of invasion of privacy in Ontario, but in *Jones v. Tsige*,⁷⁷ the Ontario Court of Appeal recognized a new common law tort of invasion of privacy based on "intrusion upon seclusion." The case involved the unauthorized viewing of personal online banking activity. The court referred to the increased risk that rapid technological change has created greater opportunities for such misappropriation.

The tort of invasion of privacy remains unapplied to an indigenous context, but its rationale seems valid concerning unauthorized access to indigenous ceremonies and other secret practices. Though this remedy does not depend on a plaintiff proving economic loss, it is unclear what its availability would add to a remedy for breach of confidence.

⁷⁶ See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, "Elements of a *Sui Generis* System for the Protection of Traditional Knowledge", WIPO/GRTKF/1C/3/8, at 12.

⁷⁷ 2012 ONCA 32.

(ii) *The Cultural Property Export and Import Act*

The *Cultural Property Export and Import Act (CPEI Act)* is the only federal statute that explicitly addresses tangible cultural property generally.⁷⁸ It was enacted in 1977 to establish, for the first time in Canada, controls on the export of cultural property to outside the country. Before 1977, there had been instances where the government had used an emergency purchase fund to acquire Aboriginal cultural property that had earlier been removed from the country — such as the Speyer collection from Germany. The current Act requires that would-be exporters of objects to which it applies must obtain an export permit from the Canada Border Services Agency.⁷⁹

The *Canadian Cultural Property Export Control List* requires an export permit for “an object that was made, reworked or adapted for use by a person who is an Aboriginal person of Canada,” is over 50 years old and not by a living artist, and:

- (a) has a fair market value in Canada of more than \$3,000 and was made, reworked or adapted for use by an Aboriginal person of Canada;
- (b) has a fair market value in Canada of more than \$10,000 and was made, reworked or adapted for use by an aboriginal person of the territory that is now
 - (i) the United States
 - (ii) Greenland, or
 - (iii) the part of the Russian Federation east of 135° longitude.⁸⁰

In effect, the *CPEI Act* requires government permission for TCE that falls within the above definitions (which, interestingly, are cross-border!) to leave Canada, through sale or otherwise. The United States has no similar statute but most other countries restrict the export of various categories of cultural property.

The *CPEI Act* also implements Canada’s obligations under the UNESCO Convention on the Means of Prohibiting and Preventing

⁷⁸ R.S.C. 1985, c. C-51 [*CPEI Act*].

⁷⁹ For a detailed explanation of the permit process see R. Paterson, “Canada”, in J. Nafziger & R. Paterson, eds., *Handbook on the Law of Cultural Heritage and International Trade* (2014) 74.

⁸⁰ C.R.C., c. 448.

the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970),⁸¹ which Canada became party to in 1978, to return objects illegally removed from other convention signatories.⁸² Similarly, if an Aboriginal TCE that came within the above definitions, was removed from Canada without a permit, the country to which it was taken (if a UNESCO Convention signatory) would be required to return it to Canada upon being requested to do so. Unfortunately, given that it is more than likely to be the destination for such material, the United States (though a party to the Convention) only recognizes foreign cultural property export controls when it has a separate bilateral agreement in place with the source country. The United States and Canada once had such an agreement (1997) but it expired in 2002 and was not renewed.

(iii) *The Alberta First Nations Sacred Ceremonial Objects Repatriation Act*

This statute is the only Canadian law specifically dealing with the return of indigenous cultural material (including TCE) from museums to originating communities.⁸³ It provides for the return of “sacred ceremonial objects” whose return is requested by an Alberta First Nation from the Alberta government. The law governs returns from the collections of the two Alberta provincial museums. As a result of the law, some 251 cultural items in the Glenbow-Alberta Institute collection have been transferred to the Blackfoot people of Alberta.⁸⁴

(iv) *Theft or Damage to Aboriginal Cultural Property on Reserves*

The *Indian Act*, provides in section 91 as follows:

(1) *Certain property on reserve may not be acquired* — No person may, without the written consent of the Minister, acquire title to any of the following property situated on a reserve, namely,

⁸¹ Online: < http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html > .

⁸² *CPEI Act*, *supra* note 75, s. 37.

⁸³ R.S.A. 2000, c. F-14.

⁸⁴ For background to the law, see C. Bell, “Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform” in C. Bell & R. Paterson, eds., *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform* (2009) 15 at 41-43.

- (a) an Indian grave house;
- (b) a carved grave pole;
- (c) a totem pole;
- (d) a carved house post; or
- (e) a rock embellished with paintings or carvings.

(2) *Saving* — Subsection (1) does not apply to chattels referred to therein that are manufactured for sale by Indians.

(3) *Removal, destruction, etc.* — No person shall remove, take away, mutilate, disfigure, deface or destroy any chattel referred to in subsection (1) without the written consent of the Minister.⁸⁵

This provision seems to be aimed at the vulnerability of certain indigenous TCE located on reserves that is at risk of damage or theft by outsiders. In the absence of federal archaeological legislation this is the only provision in federal law (besides the *CPEI Act*) concerning tangible moveable indigenous cultural property.

(v) *The Scientists Act*

This territorial law is an example of the consent requirement established in the CBD and represents a small but historically significant endorsement of the policies of that later agreement.⁸⁶ Under the *Scientists Act*, any scientific research not covered by wildlife or archaeological legislation requires a licence. Licensed research includes the gathering of TK. Licences are issued by the Aurora Research Institute which is part of Aurora College. Research involving human subjects is required to have the approval of a research ethics board before a licence can be issued.

(vi) *Modern Treaties and Indigenous Culture and Heritage*

Beginning with the 1998 *Nisga'a Final Agreement* between the Nisga'a First Nation of British Columbia and the governments of Canada and British Columbia,⁸⁷ several modern treaties have dealt in some detail with the issue of repatriating cultural property in the collections of the government parties to the treaty (in the Nisga'a

⁸⁵ R.S.C. 1985, c. I-5.

⁸⁶ R.S.N.W.T. 1988, c. S.4.

⁸⁷ Online: <<http://www.aadnc-aandc.gc.ca/eng/1100100031292/1100100031293>>.

case, the (now named) Canadian Museum of History (Gatineau, Québec) and the Royal British Columbia Museum (Victoria, B.C.). As with later treaties, the Nisga'a treaty only provided for the return of portions of the Nisga'a collections in each museum. Appendices to the treaty itemized the Nisga'a artifacts in each museum and provided for a portion of each to be transferred to the Nisga'a Nation. This dividing up of collections accords with the partnership philosophy developed by the Task Force report discussed below (see 3(d)(iv)).

The Nisga'a treaty also provides for the sharing of possession between the federal museum and the Nisga'a Nation of objects not subject to immediate return under the treaty. Sharing will depend on "custodial agreements" that must respect Nisga'a laws and practices relating to Nisga'a artifacts.⁸⁸ Similar custodial agreements can be negotiated with the B.C. museum.

Along with the provisions concerning repatriation, the treaty also makes the dispute settlement chapter of the treaty applicable to any dispute over whether an artifact is a Nisga'a artifact. The Nisga'a Nation has also approached other museums in Canada and the United States requesting the return of Nisga'a artifacts (and ancestral remains) in their collections. With its repatriation focus, the Nisga'a treaty also builds on the Alberta repatriation legislation discussed earlier (see 3(c)(iii), above). The provisions of the Nisga'a treaty have been enacted by the *Nisga'a Final Agreement Act*,⁸⁹ and the *Nisga'a Final Agreement Act*.⁹⁰

A more recent example of a modern treaty — the *Tsawwassen First Nation Final Agreement* (2007) — contains similar provisions concerning artifacts to those contained in the Nisga'a treaty;⁹¹ it further extends its heritage coverage to the conservation and management of heritage sites and resources and provides for place name proposals, changes or renames to geographic features. Chapter 14 (clause 2) of the Tsawwassen treaty provides that the Tsawwassen government may make laws in respect of:

⁸⁸ See *ibid.* Chapter 17, para. 19.

⁸⁹ S.C. 2000, c. 7.

⁹⁰ R.S.B.C. 1999, c. 2.

⁹¹ Online: <<https://www.aadnc-aandc.gc.ca/eng/1100100022706/1100100022717>> [*Tsawwassen*].

- a. the preservation, promotion and development of the culture of Tsawwassen First Nation and the Hun'qum'i'num language on Tsawwassen Lands;
- b. the conservation and protection of and access to Heritage Resources on Tsawwassen Lands;
- c. archaeological sites on Tsawwassen Lands and archaeological material found after the Effective Date on Tsawwassen Lands;
- d. Tsawwassen Artifacts owned by Tsawwassen First Nation;
- e. Archaeological Human Remains found after the Effective Date on Tsawwassen Lands and any Archaeological Human Remains that come into the possession of Tsawwassen First Nation from Canada or British Columbia after the Effective Date; and
- f. the devolution of Cultural Property of a Tsawwassen Member who dies without a valid will.

It is further provided that a Tsawwassen law made under Clause 2 prevails in the case of its conflict with a federal or provincial law. For the purposes of subclause 2.a, the culture of the Tsawwassen First Nation includes its history, feasts, ceremonies, symbols, songs, dances, stories and traditional naming practices. It is then provided that the Tsawwassen government does not have the power to make laws in respect of intellectual property.⁹² The overall effect of these provisions seems to be the enhancement of Tsawwassen customary laws concerning TK and TCE, but the reservation of these powers in respect of intellectual property is significant.

Similar provisions to those appearing in the Tsawwassen treaty appear in the *Maa-Nulth First Nations Final Agreement* (2008),⁹³ the *Land Claims Agreement between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada* (2005) (Chapter 15),⁹⁴ and other modern treaties.

(vii) *Other Federal and Provincial Laws*

Most Canadian provinces have enacted heritage resource legislation. These laws mainly concern heritage protection for

⁹² *Ibid.* Clause 4.

⁹³ Online: < <https://www.aadnc-aandc.gc.ca/eng/1100100022581/1100100022591> >, Chapter 21.

⁹⁴ Online: < <https://www.aadnc-aandc.gc.ca/eng/1293647179208/1293647660333> >, Chapter 15.

buildings and sites and have only incidental relevance to TK and TCE. Under the British Columbia *Heritage Conservation Act*,⁹⁵ the province can register objects (as well as sites) as possessing heritage status. The implementation of these various heritage protection systems now involves informing Aboriginal communities who may have an interest in the heritage conservation process involved.

Other provincial and federal legislation relates to parks and historic sites. The two most important federal statutes are the *Canada National Parks Act*,⁹⁶ and the *Historic Sites and Monuments Act*.⁹⁷ The *Canadian Shipping Act* deals with archaeological wrecks which could include indigenous craft.⁹⁸

(d) Extra-legal Regimes for the Protection of Traditional Knowledge and Traditional Cultural Expression

(i) Introduction

Indigenous concerns about TK and TCE protection in Canada are being addressed in an increasing variety of means other than through legislation and the courts. This section addresses four examples of these sorts of regimes. The first is the consideration of TK in the context of government support for academic and scientific research. The second explains how TK is part of the environmental assessment process. The third represents the many and varied ways in which scholarly and professional associations have developed codes of ethical conduct that include consideration of the impact of their activities on TK and TCE. Finally, reference will be made to the increasing use by indigenous communities of their own protocols and other methods to increase the overall level of protection for TK and TCE.

(ii) The Tri-Council Policy on Ethical Conduct for Research Involving Humans

In Canada, a significant amount of university research receives support from three federal granting agencies — SSHRC (the Social Sciences and Humanities Research Council), NSERC (the National Sciences and Engineering Research Council) and CIHR (the

⁹⁵ R.S.B.C. 1996, c. 187, s. 3(1).

⁹⁶ S.C. 2000, c. 32.

⁹⁷ R.S.C. 1985, c. T-7.

⁹⁸ S.C. 2001, c. 26.

Canadian Institutes of Health Research). All three agencies have adopted a national ethics policy that applies to university research involving humans: the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans (TCPS 2)*.⁹⁹ Given the importance of such research for Canada's indigenous peoples, the content along with the implementation of these policies has significant implications for the overall level of protection afforded TK and TCE in Canada.¹⁰⁰

Chapter 9 of *TCPS 2* contains detailed guidelines for the application of ethical standards to research involving First Nations, Inuit and Métis. Its preamble states:

Research involving Aboriginal peoples in Canada has been defined and carried out primarily by non-Aboriginal researchers. The approaches used have not generally reflected Aboriginal world views, and the research has not necessarily benefited Aboriginal peoples or communities. As a result, Aboriginal peoples continue to regard research, particularly research originating outside their communities, with a certain apprehension or mistrust.

The landscape of research involving Aboriginal peoples is rapidly changing. Growing numbers of First Nations, Inuit and Métis scholars are contributing to research as academics and community researchers. Communities are becoming better informed about the risks and benefits of research. Technological developments allowing rapid distribution of information are presenting both opportunities and challenges regarding the governance of information.

This chapter is designed to serve as a framework for the ethical conduct of research involving Aboriginal peoples. It is offered in a spirit of respect. It is not intended to override or replace ethical guidance offered by Aboriginal peoples themselves. Its purpose is to ensure, to the extent possible, that research involving Aboriginal peoples is premised on respectful relationships. It also encourages collaboration and engagement between researchers and participants.

The provisions of Chapter 9 reveal the influence of sources like the CBD and the concept of stewardship that is contained in some

⁹⁹ (TCPS-2-2014), online: < <http://www.pre.ethics.gc.ca/eng/policy-politique/initiatives/tcps2-eptc2/Default/> > [*TCPS 2*].

¹⁰⁰ See K. Bannister, "Non-Legal Instruments for the Protection of Intangible Cultural Heritage: Key Roles for Ethical Code and Community Protocols" in C. Bell & R. Paterson, *supra* note 84, 278 at 283-286.

national *sui generis* laws. Thus, the free, informed and ongoing consent of research participants is required. This is then made subject to elaborate guidelines relating to the authority structures of particular communities. Such consent is not required if research relies solely upon publicly available or “legally accessible” information.¹⁰¹

The provisions of Chapter 9 emphasize the importance of Aboriginal community participation in research involving members of individual communities. Examples of such participation are provided, such as the involvement of Aboriginal people as co-investigators or beneficiaries. In these situations, there is an obligation on researchers to become informed about and respect relevant customs and codes for research that apply in particular communities. When Aboriginal involvement is anticipated, it must be disclosed in advance. The results of research should also be revealed to indigenous community representatives before being finalized.

Specifically in regard to IPR, Chapter 9.18 provides:

Some knowledge collected as a result of the research may have commercial applications, and lead to the development of marketable products. With respect to commercialization of results of collaborative research, researchers and communities should discuss and agree on the use, assignment or licensing of any intellectual property (e.g., any patents or copyright), resulting from the marketable product, and document mutual understandings in an agreement. If the proposed research has explicit commercial objectives, or direct or indirect links to the commercial sector, researchers and communities may want to include provisions related to anticipated commercial use in research agreements. These provisions should be clearly communicated to all parties in advance, consistent with the consent process.

There are also provisions regarding the secondary use of information or human biological materials. A cautionary example of the absence of such practices was the vigorous protest by members of the Nuu-chah-nulth communities in British Columbia over the unauthorized use of blood samples in outside research.

The current version of *TCPS 2* represents a significant improvement on earlier versions and will increase the impact of emerging norms (surrounding TK and TCE) like stewardship and

¹⁰¹ *TCPS 2*, *supra* note 99, 9.21.

consent. While the content of the policy concerning Canada's indigenous peoples leaves considerable scope for varying interpretations, the significance of federal research funds for Canadian universities means the policy will continue to have important impacts on the overall level of TK and TCE protection in Canada.

(iii) *Environmental Assessment and Traditional Knowledge*

The *Canadian Environmental Assessment Act (CEA Act)* provides that: "The environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge."¹⁰² The Crown has a mandatory constitutional duty to consult, the content of which varies with each nation and project. The Crown's duty to consult is a partial explanation for the consideration of TK in discretionary terms found in the *CEA Act*. However, the *CEA Act* also encourages decision makers to understand and incorporate into their assessment TK held by Aboriginal people relevant to the physical environment impacted by a proposed project.

The *CEA Act* is administered by the Canadian Environmental Assessment Agency which has published a *Reference Guide Considering Aboriginal traditional knowledge in environmental assessments conducted under the Canadian Environmental Assessment Act, 2012 (the Guide)*.¹⁰³ The *Guide* outlines the importance of Aboriginal knowledge about the local environment and that TK is an important aspect of project planning, resource management and environmental assessment. The *Guide* addresses the need to work with community TK-holders and access TK in collaboration with communities, along with respecting IPR.

Modern treaties also have specifically addressed environmental assessment. Chapter 15 of the *Tsawwassen First Nation Final Agreement (2007)* sets out various obligations to inform the Nation of assessments and respond to feedback.¹⁰⁴ While these provisions do not expressly refer to TK, they can reasonably be expected to require inclusion in the assessment process of any implications it might have for TK.

¹⁰² S.C. 2012, c. 19, s. 52, s. 19(3).

¹⁰³ Cat.No.En106-124/2013E-PDF, Online: < <http://publications.gc.ca/site/eng/455891/publication.html> > .

¹⁰⁴ *Tsawwassen*, *supra* note 88.

(iv) *Codes of Ethical Conduct of Scholarly and Professional Organizations*

Many Canadian professional and scholarly organizations have adopted codes of ethical conduct that are binding on their members and can affect indigenous TK or TCE. Though they lack legal force, non-compliance with such codes of conduct carries with it the risk of expulsion from membership along with other potential adverse consequences. These sorts of codes have been developed at the international, regional and national level and have sometimes been developed by indigenous communities themselves. Organizations and conferences have also, from time to time, issued various “declarations” that, while also not legally binding, have sometimes had considerable impact on the development of indigenous rights. These initiatives have sometimes involved the participation of Canadian indigenous representatives. A well-known example is the 2003 *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples* which highlighted the inadequacy of existing IPR laws to protect TK and TCE.¹⁰⁵

The Canadian Museums Association (CMA) and the Association of Art Museum Directors (AAMD) — whose members include art museum directors in Canada, the United States and Mexico — have both promulgated codes of ethics and statements of professional practices that significantly impact the conduct of their member institutions. Cooperation between the CMA and the Assembly of First Nations led to a ground-breaking 1992 report: *Turning the Page: Forging New Partnerships Between Museums and First Peoples*.¹⁰⁶ This report has had an enormous impact on the relationship between Canadian museums and indigenous peoples. Individual museums, in turn, have published their own codes of ethics on issues affecting TK and TCE, such as collection and display practices, the interpretation and display of exhibits, the utilization of indigenous oral history, and the repatriation of ancestral remains and material objects in their

¹⁰⁵ Online: < http://www.wipo.int/tk/en/databases/creative_heritage/indigenous/link0002.html > .

¹⁰⁶ Online: < <http://www.worldcat.org/title/turning-the-page-forging-new-partnerships-between-museums-and-first-peoples-tourner-la-page-forger-de-nouveaux-partenariats-entre-les-musees-et-les-premieres-nations/oclc/53287048> > .

collections. Canada's National Committee for ICOM (the International Council of Museums) also plays a role in enhancing ethical and professional museum practices in Canada based on standards developed by ICOM at the international level.

Organizations like the Canadian Anthropology Society and the Canadian Archaeological Association also influence the practices of their members in relation to their impact on indigenous TK and TCE. For example, the Canadian Archaeological Association opposes trade in cultural material excavated from indigenous archaeological sites, together with the removal of such material from sites except in accordance with professional standards imposed in cooperation with affected indigenous communities.

(v) *Traditional Knowledge Protocols*

Apart from the ethical standards and codes of conduct discussed above, there are numerous statements originating from indigenous communities themselves that surround the utilization of and access by outsiders to TK and TCE. These statements are difficult to categorize since they vary considerably depending on the time they were made and the objectives of the community concerned. Dr. Kelly Barrister points out that they can vary from statements of general principle, to detailed prescriptions regarding certain protocols and requirements — often based on customary law. Depending on the circumstances, they may have the effect of a legally binding contract or be non-legally binding in the same manner as the statements of principle described above.

Typically, protocols that involve outsider access to TK or TCE will deal with at least some or all the following:

- **Consent:** Agreements will often contain detailed requirements as to collective and individual consents.
- **Ownership:** Agreements may state that communities maintain ownership of TK — including IPR — and have copyright in any TK that is published.
- **Community participation:** Agreements often provide for a high level of community engagement with and control over any research involving TK. Researchers may be required to access TK via stewards or guardians who will interact directly with knowledge-holders.
- **Benefit-sharing:** This could include the payment of royalties, reimbursement of community expenses and payment of honoraria.

- **Restrictions on access:** There could be a prohibition on any collection of TCE or other cultural material, along with a prohibition on disclosure of TK outside of the terms of the agreement.

Some indigenous communities have developed their own cultural research committees with ongoing responsibilities to evaluate research and other proposals and ensure that the rights and interests of the community and its members are protected. Such committees can make recommendations to the community as to the merits of specific proposals and generally act as an intermediary between the community and the outside party.

In 2005, as part of the construction of the Alaska Highway Pipeline Project the Kaska Nation (which includes five First Nations in southeast Yukon and northern British Columbia) entered into a “Traditional Knowledge Protocol” with Foothills Pipe Lines Ltd., a wholly-owned subsidiary of TransCanada Corporation. The protocol sets out how Kaska TK will be integrated into the planning, construction and operation of the pipeline project. Provisions of the protocol included the following:

- Recognition of the role Kaska Elders play in decision-making related to gathering, use and management of TK.
- Affirmation of Kaska ownership rights over their TK, including IPR.
- Specific provisions addressing the appropriate protection and preservation of Kaska sacred sites.
- Acknowledgement that prior informed consent of the Kaska must be obtained prior to access to Kaska TK.¹⁰⁷

The Nagoya Protocol to the CBD refers to “community protocols” as follows:¹⁰⁸

3. Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of:

(a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge;

¹⁰⁷ See online: < <http://www.transcanada.com/3181.html> > .

¹⁰⁸ See 1(b), above (in Article 12).

(b) Minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources; and

(c) Model contractual clauses for benefit-sharing arising from the utilization of traditional knowledge associated with genetic resources.

Though Canada is not a signatory to the Nagoya Protocol, the extensive use of what the protocol calls “community protocols” in Canada by indigenous communities suggests a new sort of linkage between these practices and international developments. Just as indigenous communities seek through protocols to be equal partners with outside researchers and businesses, so should they be seen by governments as essential partners in the development of government policy regarding TK and TCE in general.

While protocols in themselves are not legally binding, their implementation in particular situations will normally involve the creation of legally-binding contractual obligations. A significant advantage of these specific agreements is that they can create legal rights for Aboriginal people that are outside the confines of the general law — there is no need, for example, for TK to be confidential or original to be subject to separate contractual protection. The Supreme Court of Canada has recently affirmed a general principle of good faith and honest performance respecting contractual obligations that may also enhance their value for indigenous people.¹⁰⁹

PART FOUR

CONCLUSIONS AND RECOMMENDATIONS

The debates are now several decades old surrounding both legal and extra-legal means to afford enhanced protection for indigenous TK and TCE, but little has emerged by way of consensus about the most feasible alternatives. At one extreme are those who advocate full-scale legal recognition of the cultural rights of indigenous peoples according to their own laws and customs. At the other are those who reject any accommodations of Western-based property

¹⁰⁹ See *Bhasin v. Hrynew*, 2014 SCC 71.

law regimes to afford additional protection for indigenous TK and TCE.

Roughly speaking, there are three sorts of proposals that have emerged out of the practices of individual countries and changes in international law and practice. The first suggests the introduction of a completely new legal regime to address TK and TCE along the lines of the *sui generis* approaches taken in countries such as Peru and Taiwan. The second involves making relatively modest changes to existing IPR and other laws to increase their effectiveness in the level of protection they afford indigenous TK and TCE. The third advises implementing non-legal policies (in the form of extra-legal or administrative changes) to supplement IPR and other laws already in place. Of course, the choice is not necessarily between only one approach; measures could be implemented that borrowed from all three.

Before discussing the most suitable alternatives available to Canada should it decide to expand the level of legal and non-legal measures in place to protect TK and TCE, it is important to remember that any of these possibilities are subject to three significant legal limitations:

- (1) Any measures that are adopted (even if they do not take the form of legislation) must take into account the international legal obligations that already bind Canada. In relation to IPR the most significant of these is the TRIPS agreement, but other customary and conventional international laws may also be relevant.
- (2) Proposed legislative measures must account for the constitutional division of powers. Tort remedies — like breach of confidence and passing-off — are within provincial jurisdiction, while Parliament clearly has broad jurisdiction to legislate in most matters surrounding IPR. Nevertheless, if *sui generis* laws are proposed, the competence of Parliament to enact them (presumably in reliance on the trade and commerce power or federal jurisdiction over “Indians”) will need to be considered.
- (3) Finally, any new laws must consider section 35 of the *Constitution Act* (1982), now the subject of several significant rulings by the Supreme Court of Canada. While none of these have specifically discussed intangible

Aboriginal cultural rights, it is clear from the principles developed so far that Aboriginal rights in existence after 1982 can no longer be extinguished by legislation. The cases suggest that Aboriginal title that is protected under section 35 is *sui generis*. In principle, there seems nothing to prevent the courts applying these principles to recognize indigenous TK and TCE as receiving constitutional protection under section 35 based on the content of Aboriginal customary laws. This would necessitate a completely new exploration of the relationship between existing IPR and Aboriginal title.

(a) *Sui Generis* Legislation

Despite ongoing efforts at WIPO there is still no template for a set of specialized international legal rules that specifically address the protection of indigenous TK or TCE. The following will assess the strengths and weaknesses of some of the most widespread *sui generis* provisions contained in national laws for the purpose of evaluating their suitability in the Canadian context.

(i) Subject-Matter

Most national *sui generis* laws use terms to define their subject-matter that have no precise meaning in Canadian law. Thus, Taiwan uses the term “traditional intellectual creations” which is defined as the “property rights and moral rights of intellectual creations”. The Thai law restricts its coverage to traditional medicinal knowledge. The Taiwanese law seems to apply to TCE, while the Thai and Peruvian laws regulate TK. New Zealand’s Wai 262 report avoided recommending the creation of new forms of property rights over Maori TK and TCE, but instead focused on the concept of guardianship. Where this becomes most complex is in the case of a TCE (such as an artifact or what the report calls a “taonga work”) which can be exclusively owned, but in respect of which Maori may have concerns about modes of display or reproduction. The report attempts to resolve this problem by its development of a guardianship concept (see below).

The issue of prescribing the subject-matter of any *sui generis* approach engages the issue of legislating in respect of intangibles and the problem that presents for defining the subject-matter of any new law. This problem also relates to how a *sui generis* regime will co-exist with existing IPR laws. These have long been criticized for

their inadequacy in affording protection for indigenous collective ownership of TK and TCE, but the Wai 262 report recommended against the recognition of new forms of IPR for Maori TK.

An issue in Canada is how the TK and TCE of the diverse cultures of our indigenous peoples can be defined generically for the purposes of a single law. The issue is avoided in relation to section 35 by the approach the Supreme Court of Canada takes to defining Aboriginal title on a case-by-case basis. If TK and TCE were defined for the purpose of a *sui generis* statute, it would constitute a new category of property in Canadian law, and exist alongside the evolution of recognition of Aboriginal title to intangibles by the courts.

Another related issue concerns the public domain. The Wai 262 report rejected the suggestion that IPR could be established for TK or TCE that was already in the public domain. The ordinary understanding of the public domain is that it comprises information that is without any IPR law protection, like when a copyright term expires or no copyright arose in the first place. While this is correct insofar as IPR are concerned, it does not necessarily mean that TK or TCE that is without IPR protection cannot be afforded other sorts of protection (such as permission for use or benefit-sharing) that do not necessarily involve exclusionary property rights. Thus the Tunis Model Law establishes the concept of fees for use of TK in the public domain which Peru has implemented in its *sui generis* law. These sorts of measures seek recognition of the idea that property is not the only form of ownership. Many indigenous peoples would say that the law should enhance their sorts of concepts of ownership in the same way it already protects Western-based concepts of property rights. Accordingly, the public domain is a construct of IPR law and should not necessarily limit the separate recognition of indigenous rights over TK and TCE presently outside its reach.

Another issue still is whether any *sui generis* rights that receive recognition should be perpetual? The idea of perpetuity is incompatible with the Western construct of IPR since it limits the resources available for the development of new intellectual works. The proposed Thai law for the protection of TK envisages that the term of such protection be indefinite and the Taiwanese law also protects TCE in perpetuity. These provisions are consistent with indigenous cultural traditions which — while not static — are also seen as emphasizing historical practices and beliefs.

(ii) *Registration, Licensing and Benefit-Sharing*

Most *sui generis* regimes establish some sort of government administered registration system for TK and TCE whose use can then be licensed to outsiders. Such schemes are less about establishing property rights than ensuring indigenous participation in and benefits for indigenous peoples respecting the exploitation of their cultures. In Panama, registration of TCE by recognized indigenous representatives is provided for and Taiwan has a system for tribal election of representatives to a licensing authority. The Wai 262 report recommends that a Commission be established to oversee registration of guardians of TCE.

In Peru, the issuance of licences to exploit registered TK is conditional on the licensee providing material information about the utilization of the TK involved. The Peruvian law seems to be focused on biological resources and any Canadian law might also be limited to plant varieties, to accord with Article 27.3(b) of the TRIPS agreement.

The sharing of the benefits of the exploitation of indigenous TK is a basic tenet of the CBD. Many national *sui generis* laws contain provisions on benefit-sharing with the proceeds of outside use going to the indigenous peoples themselves (Panama) or to a fund established on their behalf (Taiwan and Peru).

(iii) *Prior Consent*

The obtaining of the prior consent of knowledge holders is usually seen as a vital component of any *sui generis* scheme. The concept of prior consent was part of the 1982 WIPO-UNESCO Model provisions and is an integral aspect of the CBD. Prior informed consent is also required by the laws of Taiwan, Panama and Peru. In Peru, other communities besides the one receiving the request must be informed if the TK is shared across several groups. This would be facilitated by the existence of a licensing authority overseeing TK registration.

The discussion of consent was an important part of the Wai 262 report (see 2(i)(iv)(C), above) where it was analyzed in terms of the responsibilities of guardians of TK and TCE. The main problem that a consent requirement might give rise to in Canada is identifying the consequences of its being refused. A non-indigenous person who had property rights over a TCE might be seen as needing indigenous consent for using or disposing of it in

certain ways. One partial solution to this might be along the lines of the Thai medicinal TK law which enumerates exceptions to the requirement of prior consent, like private or household use. Similar exceptions could be included in any Canadian *sui generis* law.

Another aspect of the requirement of prior consent is the need for a *sui generis* law to prohibit disclosure of TK or TCE in violation of the licensing requirements of the law or any separate confidentiality agreement with a community. A more effective sanction for such infractions than fines might be disqualifying the person involved from being able to obtain future licenses.

(iv) The Concept of Guardianship or Stewardship

The Wai 262 report avoids proposing new forms of property rights to protect Maori TK and TCE along the patterns of conventional IPR. Instead, the report recommended that the Maori customary law concept of guardianship should be the primary vehicle to address Maori concerns about cultural appropriation. Though the report found support for this concept in Maori custom itself, it is a proposal that has been extensively discussed by scholars and adopted by some national laws such as that of Peru.¹¹⁰

The principle of guardianship accords with the concept that most traditional cultures understand their TK and TCE in communal terms. For example, the Taiwanese law only permits the registration of TCEs in the names of aboriginal groups or tribes. While this may fit some Canadian indigenous TK and TCE, it is not inevitable and sometimes traditional owners may be individuals or families. Thus, any *sui generis* law needs to embrace whatever forms of traditional ownership are characteristic of the populations to which it applies. There may also need to be rules about default ownership when no indigenous owners can be identified. Taiwan does this by providing that, in such cases, ownership is registered in the name of the indigenous peoples of Taiwan as a whole.

A major attraction of any stewardship model is its apparent avoidance of many of the perceived difficulties surrounding the relationship between existing IPR and the creation of new rights in the form of a *sui generis* law. However, it may be that this dilemma is not entirely avoided by choosing the stewardship model. A major

¹¹⁰ See K.A. Carpenter, S.K. Katyal & A.R. Riley, "In Defense of Property" (2009) 118 Yale L.J. 1022; and see 2(d), above.

focus of the stewardship principle is its focus on the cultural responsibilities of indigenous people for the use of their TK. If this means that their consent is required for outside commercial use (as recommended in the Wai 262 report) then how will such consent or the lack of it affect TK and TCE already in the public domain? If such consent were not obtained, what would the legal consequences be? What if it was unclear whose consent was needed? The scheme suggested in the Wai 262 report has not yet been implemented and there are no detailed reports as to how successful similar approaches have been elsewhere.

The theoretical basis of stewardship is that indigenous peoples have custodial customary responsibilities towards their TK and TCE which can be fulfilled by according them legal recognition. This may be functional in relation to confidential information, but it is more problematic if the TK is not confidential. If TK is publicly available or TCE is privately owned, how will stewardship responsibilities on the part of indigenous peoples affect their use by others? While stewardship could perhaps play a role analogous to moral rights for TCEs, it seems less plausible in relation to TK that has otherwise been lawfully made public and is not protected by IPR.

Existing laws and practices already place limits on the utilization of TK that constitutes a breach of confidence, a contractual obligation, a fiduciary duty or a protocol of some kind. Further limits surround the use of TCEs in the form of marks that are offensive or disparaging. Stewardship would involve a significant extension of the level of legal protection currently afforded TK or TCE and, conversely, compromise the interests of those who seek to exploit what is otherwise freely available information.

(v) *Conclusions and Recommendations*

Most of the *sui generis* laws that have been enacted have been in force for limited periods of time and there appears to be little detailed empirical evidence as to their success or otherwise. The adoption of a *sui generis* law in Canada would necessarily involve extensive consultation with indigenous groups and it is unclear what the results of such consultations might be. Experience elsewhere suggests that while such a law would be supported by some indigenous peoples, it may have less support from others. There are several reasons why I believe Canada should be cautious

about introducing such a law, at least not without further investigation and study:

- (1) The cultural characteristics of Canada's First Nation, Inuit and Métis populations are highly varied and complex. Given this level of diversity it is more difficult — than in a country such as New Zealand with only one principal indigenous group — to make assumptions as to how such a law would apply.
- (2) As discussed above, there could be constitutional implications about the implementation of such a law, depending on its content, in relation to the issue as to whether its subject-matter is within Parliamentary competence and how it would interface with decisions of the Supreme Court of Canada on the scope and meaning of section 35 of the *Constitution Act*.
- (3) Any proposed *sui generis* law raises issues about its relationship with existing IPR laws. The Wai 262 report left existing IPR in place, but it did not attempt to predict to what degree New Zealand courts would be prepared to modify the effect of such laws if its other recommendations concerning stewardship were implemented. A *sui generis* law (as set out above) raises other practical issues concerning its implementation, such as how royalties would be collected and distributed and what form licensing and other procedures would take. Another problematic aspect of stewardship in North America is that often TK or TCE can exist across borders where indigenous groups (such as the Haida) live in two countries but might only receive the benefits of *sui generis* protection in one of them.
- (4) A major concern that has been raised about rights created by *sui generis* legislation is how they would be recognized outside Canada. Presently, there are no international agreements to ensure the reciprocal recognition of such laws outside their country of origin.¹¹¹ The slow progress at WIPO on achieving agreement on model provisions for national laws also undermines the idea that there is

¹¹¹ For a detailed discussion of this issue, see R.G. Howell & R. Ripley, "The Interconnection of Intellectual Property and Cultural Property (Traditional Knowledge)" in C. Bell & R. Paterson, eds., *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform*, *supra* note 84, 223 at 238-241.

presently consensus that international public policy favours *sui generis* legislation.

(b) Changes to Existing IPR and Other Laws to Enhance Their Effectiveness

The various national and international laws discussed in this report provide concrete examples where changes or additions to existing legislation could provide meaningful and enhanced protection for Aboriginal TK and TCE in Canada.

(i) Prohibiting Offensive or Disparaging Marks

Paragraph 9(1)(j) of the *T Act* should be amended to prohibit the use (as a trade-mark or otherwise) of any mark “likely to be offensive to a significant section of the community, including First Nations, Inuit and Métis.” This suggestion is based on the language of the 2002 New Zealand law and could also be accompanied by the establishment of an “Aboriginal Trade Marks Advisory Committee” to advise the Registrar on the proposed use or registration of marks that appear to be derived from First Nations, Inuit or Métis words or signs and are likely to offend a significant section of these communities. Thought could also be given to the inclusion of the test of “disparaging” that appears in United States law and which may allow more scope for the consideration of the views of the potentially offended group rather than just those of the public in general. Any person claiming to be “culturally aggrieved” could also be given standing to have an already registered mark declared invalid. As in New Zealand, the Registrar would not be bound by the advice of the Advisory Committee but it could work with the Registrar to develop guidelines as to the application of the new statutory language, as well as consult with individual Aboriginal groups regarding their concerns.

(ii) Official Marks

The liberal approach by Canadian courts as to the organizations that qualify as “public authorities” under section 9 of the *T Act* would suggest that this is an attractive option for organizations wishing to secure the benefits of such marks. Given the scope of the present law it seems unnecessary to suggest that the names of specific indigenous organizations be expressly listed as prohibited marks. In 2013 the Parliamentary Standing Committee on Industry, Science and Technology recommended that the scope of official

marks be restricted to important national government symbols and that the definition of public authorities be narrowed. If the law were made more restrictive then consideration might be given to expressly prohibiting the use of the insignia of major indigenous organization such as the Assembly of First Nations, the Congress of Aboriginal Peoples, the Métis National Council and the Inuit Tapiritt Kanatami, together with the official insignia of individual First Nations and band councils.

(iii) *Certification Marks*

Canadian trade-mark law has long been successfully used by indigenous communities to brand their TCE through the use of certification marks. The best-known example being the “Igloo Tag” mark.¹¹²

The most innovative recent use of certification marks for indigenous TCE is probably the Maori Made mark (*Toi Iho*) in New Zealand.¹¹³ The Maori Made mark is now administered by Maori themselves after the withdrawal of government support for the scheme. Given the greater diversity and complexity of Canada’s indigenous populations, a generic system like that used in New Zealand may be unsuitable. One useful step might be to assign to an “Aboriginal Trade Marks Advisory Committee” (should one be established) the responsibility to oversee, coordinate and support the creation of marks of authenticity for indigenous products. The creation of specific certification marks would still remain in the hands of particular communities or indigenous associations. Another precedent for a supervisory body is the Indian Arts and Crafts Board established under the United States’ *IAC Act* which is authorized to register marks its own name or in the name of individual Native Americans or tribes.

(iv) *Misrepresentation of Indigenous TCE*

The *IAC Act* also criminalizes the sale of products which are falsely represented to be Indian-made. The law was a direct response to high levels of counterfeit or bogus Native American artworks being sold. Such a law in Canada would support and protect the sale of genuine marked indigenous products. It could be made a criminal offence to falsely represent or offer for sale a

¹¹² See 3(b)(iii)(B), above.

¹¹³ See 2(i)(ii), above.

product as being of First Nation, Inuit or Métis origin while knowing that it was not. The issue of defining these terms for the purpose of such a law would need to be addressed along with the issue of hybrid goods. This latter issue might be resolved by studying the alternate marks established by New Zealand law for products that involve TCE made through collaboration between Maori and non-Maori artisans. While common law remedies for breach of contract, negligence or fraud already offer civil relief to deceived purchasers in cases of misrepresentation, there appears to be a need in Canada to supplement this relief with criminal penalties and civil remedies for affected indigenous individuals and communities,

(v) *Patents and Plant Breeders' Rights*

There does not appear to have been any significant pressure from Canada's Aboriginal communities to afford *sui generis* legal protection for TK relating to plant varieties, but such a law would be in compliance with Canada's obligations under Article 27.3(b) of the TRIPS agreement (see 1(c), above). The law could be based on similar laws in Peru, Panama and Thailand and incorporate the elements of prior consent and sharing of benefits set out in Article 8(j) of the CBD. Along with a *sui generis* plant varieties law, support might also be given to amending the *Patent Act* to require disclosure of any indigenous TK (Canadian or otherwise) related to the invention seeking patent protection.¹¹⁴

(c) **The Role of Extra-legal Policies and Practices in Protecting Traditional Knowledge and Traditional Cultural Expression**

Discussions of the perceived deficiencies of many legal strategies to protect indigenous TK and TCE in Canada have been accompanied by the development of several extra-legal approaches that are likely to remain in place, even if significant changes to the existing level of legal protection are introduced.

The ethical guidelines imposed by the major research granting agencies aim to ensure the informed consent of Aboriginal peoples and respect for their cultural traditions. Environmental assessment practice, at the federal, provincial and territorial level, not only involves constitutionally mandated consultation, but ensures collaborative involvement of Aboriginal peoples in the overall

¹¹⁴ This suggestion is discussed in more detail above — see 3(b)(v).

planning and assessment process. Resource and infrastructure developments impacting Aboriginal communities have also provided those communities with the ability to leverage protection of TK as an integral part of the planning and operation of such projects.

Another important source of extra-legal norms that have increased the overall level of effective protection for TK and TCE have been the codes of ethical conduct and good management voluntarily adopted by many scientific, scholarly and professional organizations. Particularly museums and anthropologists, once perceived as having attitudes and practices likely to undermine Aboriginal interests, have now adopted procedures that seek to accommodate and even promote Aboriginal TK and TCE. That these are not legally binding is of little consequence given the likely prejudice that non-compliance will cause organization members.

For some time, Aboriginal peoples have been developing protocols to govern their relationship with outsiders seeking access to their TK and TCE for commercial as well as non-commercial purposes. These procedures are often based on the customary laws and practices of the peoples involved, so that they can achieve a level of specificity in addressing a community's cultural concerns that universally applicable laws cannot. Government or non-government support for protocols can also achieve a valuable linkage between national and international policies on TK and TCE and their implementation at the local level. One such example is the Inuit Circumpolar Council, representing Inuit from the four polar nations (including Canada), which has proposed a protocol on TK. These extra-legal strategies often incorporate principles already contained in international agreements, such as the UN Declaration on the Rights of Indigenous Peoples, whose legal and moral significance is enhanced by their use in the context of extra-legal frameworks.

The development of Aboriginal protocols and procedures along with the initiatives of non-governmental organizations has led to a growing body of extra-legal strategies to protect indigenous TK and TCE. This is not just a Canadian phenomenon as similar techniques are being used in New Zealand, Australia and the United States, together with some developing countries like Panama and Peru. A possible strategy to enhance their overall effectiveness might be for a database to be established that collects these principles and connects the peoples and organizations

responsible for them. WIPO, to a certain degree, already fulfills this function.

Consideration might also be given to the establishment of an Office of Aboriginal TK and TCE that could serve as a resource for indigenous communities seeking information about and assistance with both the legal and extra-legal forms of TK and TCE protection available in Canada and elsewhere. The overall level of support furnished by these programs, together with the legal avenues already in place to protect TK and TCE at the national and international level, need to be carefully assessed before consideration is given to the introduction of more comprehensive *sui generis* legislation. That said, certain changes to existing laws (such as those suggested above) would seem timely.

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