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Traditional Knowledge Governance Challenges in Canada

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Abstract

This book chapter canvasses the fragmented nature of jurisdiction over traditional knowledge in Canada. It relates traditional knowledge governance issues to the operations of Canadian federalism and relationships among Aboriginal Peoples and Canada's federal, provincial and territorial governments. The authors discuss the conceptual nature of traditional knowledge, identify practical challenges associated with its protection, investigate legal jurisdictional issues with implementing legislation or other measures protecting traditional knowledge, and inventory policy initiatives to address traditional knowledge. They propose that federal, provincial and territorial governments can only meaningful engage with Aboriginal Peoples about traditional knowledge if these governments themselves engage in a process of collaborative or cooperative federalism. Doing so is one step toward the fulfilling these governments' duty to not just consult but negotiate with Aboriginal Peoples toward treaties that govern rights to traditional knowledge that are consistent with Canada's international obligations under Article 31 of the *United Nations Declaration of Rights on Indigenous Peoples* and other instruments.

I. Introduction

Creating appropriate policies for governing the knowledge of the world's indigenous and local communities is a tremendous challenge. Just conceptualizing indigenous communities' knowledge is difficult, and often controversial. Communities themselves do not typically differentiate categorically among traditional medicinal, ecological or cultural practices, resources or expressions.¹ Yet those are the terms in which most debate takes place in relevant international and national forums.²

Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) states that indigenous peoples have the right to maintain, control, protect and develop a very wide variety of heritage, knowledge, expressions and intellectual property over such heritage, knowledge and expressions.³ States must work with indigenous peoples to effectively recognize and protect the exercise of these rights.

The Declaration is not the only legal instrument recognizing indigenous peoples' right to protect heritage, knowledge and expressions. A protocol to the *Convention on Biological Diversity* addressing access and benefit sharing is limited to traditional knowledge associated with genetic resources generally.⁴ Parallel provisions exist in a separate agreement to deal with traditional knowledge concerning plant genetic resources used for food and agriculture.⁵ Also separately, model laws and legislative provisions exist to guide countries wishing to protect traditional cultural expressions and folklore.⁶ An inter-governmental committee of the World Intellectual Property Organization

¹ Russell Barsh, *How Do You Patent A Landscape? The Perils of Dichotomizing Cultural and Intellectual Property*, 8:1 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY 14 (1999).

² See World Intellectual Property Organization (WIPO), *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: An Overview*, WIPO Publication No. 933, available at: http://www.wipo.int/freepublications/en/tk/933/wipo_pub_933.pdf.

³ *United Nations Declaration on the Rights of Indigenous Peoples*, Adopted by the General Assembly, Sept. 13, 2007, A/61/L.67/Annex <http://www.un.org/esa/socdev/unpfii/en/declaration.html> [hereinafter Declaration]. ("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 intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.").

⁴ See Convention on Biological Diversity (Biodiversity Convention) June 5, 1992, 1760 UNTS 79; 31 ILM 818 (1992), available at: <http://www.cbd.int/convention/> [hereinafter CBD].

⁵ See *International Treaty on Plant Genetic Resources for Food and Agriculture*, June 29, 2004, 2400 UNTS 303, Resolution 3/2001, Food and Agriculture Organization of the United Nations, available at <http://www.planttreaty.org/>.

⁶ See World Intellectual Property Organization (WIPO), Draft Provisions, available at: http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html.

(WIPO) has tried to tackle several of these issues together, but efforts have so far failed to yield success.⁷

Difficulties in coordinating the specifics of Indigenous peoples' rights to protect traditional knowledge at the international level are reflective of, and perhaps compounded by, local and national coordination challenges. The issues implicated in the debate over traditional knowledge are extraordinarily complex, and cut across issues of health, food, the environment, culture, industry, technology, self-government and self-determination.⁸ Because of this complexity, it has been nearly impossible for Canadian policymakers in different government departments and at different levels of government to coordinate coherent traditional knowledge policies or governance regimes. Acknowledging and respecting the self-governance arrangements of indigenous communities adds a further layer of complexity to the issues.

This chapter attempts to shed light on coordination challenges in respect of traditional knowledge by examining interconnections among principles of Canadian federalism and the rights of Aboriginal Peoples of Canada. Understanding how Canada's constitutional division of legislative powers, inter-governmental and inter-ministerial collaboration, and Aboriginal self-government mechanisms affect traditional knowledge issues helps to explain why policy coherence is so difficult to achieve. Inventorying various policy positions and initiatives helps to expose coordination challenges, and is a first step toward managing complexity and, ultimately, creating appropriate laws and policies that respect the rights of Aboriginal Peoples of Canada pursuant to the Declaration, which Canada signed in November 2010⁹ but has not yet ratified, and other relevant international instruments.¹⁰

⁷ See *Indigenous Forum Holds Dialogue with World Intellectual Property Organization*, Permanent Forum on Indigenous Issues, Eleventh Session, 6th & 7th Meetings (May 10, 2012), United Nations Economic and Social Council HR/5090, available at <http://www.un.org/News/Press/docs/2012/hr5090.doc.htm>; see also Sara Bannerman, *WIPO Meets on Genetic Resources: Participation of Indigenous Peoples at Issue*, INFOJUSTICE, 4 February 2013, available at: <http://infojustice.org/archives/28433>.

⁸ See World Intellectual Property Organization (WIPO), *Brief No. 1: IP and Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions: An Overview* available at: <http://www.wipo.int/tk/en/briefs.html>.

⁹ *Ottawa wins praise for endorsing UN indigenous-rights declaration*, THE GLOBE AND MAIL, 12 November 2010, available at: <http://www.theglobeandmail.com/news/politics/ottawa-notebook/ottawa-wins-praise-for-endorsing-un-indigenous-rights-declaration/article1797339/>.

¹⁰ On January 28, 2013, New Democratic Party (NDP) Member of Parliament (MP) Romeo Saganash, representing the riding of Abitibi-Baie James-Nunavik-Eeyou, Que., introduced a private member's bill, Bill C-469, to ensure that new laws in Canada are made consistent with the United Nations Declaration on the Rights of Indigenous Peoples, *An Act to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples*, First Session, Forty-first Parliament, 60-61

The structure of this chapter reflects the established legal analytical framework for addressing governance issues within Canada’s federal system. That framework first requires identification of the “pith and substance” of a particular “matter” being addressed, and then allocates responsibility for governing that matter according to the constitutional division of powers between federal, provincial and territorial governments.

We recognize that this analytical structure may be ill-suited to integrate Aboriginal Peoples’ perspectives on their own traditional knowledge, but exposing that cultural and legal dissonance is among the objectives of this chapter. In other words, our discussion is intentionally limited to a legal analysis of the division of powers and an inventory of policy initiatives. We purposefully frame the narrow problem of implementation challenges presented by Article 31, and recognize that we provide one of many possible perspectives on these challenges. We do not purport to solve the Canadian traditional knowledge governance dilemma, but merely illustrate the constitutional difficulties as one of many obstacles to overcome.

Part II, therefore, discusses general concepts of traditional knowledge, as well as practical examples concerning the appropriation or misappropriation of the traditional knowledge of Aboriginal Peoples of Canada. Part III of the chapter attempts to align theoretical and practical understandings of traditional knowledge with the conventional governance structures established by Canada’s *Constitution Act, 1867*, and with contemporary policy initiatives undertaken at various levels of government in Canada. Part IV proposes mechanisms that could facilitate greater respect for Aboriginal Peoples Article 31 rights in respect of traditional knowledge governance.

II. The Theory and Practice of Traditional Knowledge

A. Conceptualizing and Situating Traditional Knowledge

Traditional knowledge is an amorphous term when used in the context of legal governance—Oguamanam describes it as a “conceptual and analytical morass.”¹¹ We use it in this chapter to capture all of the various incarnations of heritage, knowledge and

Elizabeth II, 2011-2012-2013 available at:

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5945542>.

¹¹ Chidi Oguamanam, *Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics*, 11:1 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 29, 29 (2008); see also Chidi Oguamanam, *Genetic Resources & Access and Benefit Sharing: Politics, Prospects and Opportunities for Canada after Nagoya*, 22 J.E.L.P. 87 (2011).

expressions contemplated in the Declaration.¹² Cognizant of the categorical incongruities traditional knowledge presents to western culture and legal doctrine,¹³ such a broad approach brings with it substantial challenges, but at the same time is necessary to reveal the difficulties inherent in policy coordination and legal implementation of Article 31. Furthermore, to speak of Indigenous, or Aboriginal, peoples as a homogenous entity is erroneous because of their vast diversity in culture, language, and geography. We use the term Aboriginal Peoples strictly for convenience, as a legal term of art, not as indicia of cultural hegemony.¹⁴ Our analysis in this chapter is focused on traditional knowledge rights of the Aboriginal Peoples of Canada, including the First Nations, the Inuit and the Métis, as understood in the context of section 35 of Canada's *Constitution Act, 1982*, which recognizes and affirms the rights of these Peoples, including as they relate to Article 31.

Understandably, discussions of appropriate traditional knowledge governance are often caught among the chasms created by Western, or colonial legal perspectives and indigenous perspectives. Despite the indeterminacy of traditional knowledge as a precise legal concept or term of art, the varying perspectives in these debates cut across disciplinary divides and have in common the idea that traditional knowledge *cannot* be classified as intellectual property, or even property *per se*, but at least, if nothing else, is deserving of some kind of political and legal protection as something akin to intellectual property in order to prevent appropriation and misappropriation. Yet “intellectual property” is the term used in the Declaration. The problem, therefore, is: how to legally define and provide for traditional knowledge as “intellectual property” when it is something, in itself, that is conceptually amorphous? Canada expressed such a concern in

¹² Lucy Bell, *Kwakwaka'wakw Laws and Perspectives Regarding Property*, 5 INDIGENOUS LAW JOURNAL 119, 124 (2006) where traditional knowledge is referred to as “treasure” by one First Nation (“The property on which I focus is our *nawalogwatse/gigitsu* (treasure). This includes songs, dances, coppers, boxes of treasures, regalia, names, crests, knowledge, stories and other types of property that are related to these.)

¹³ MARIE BATTISTE & JAMES (SA'KE'J) YOUNGBLOOD HENDERSON, PROTECTING INDIGENOUS KNOWLEDGE AND HERITAGE, 35 (2000) (“The first problem in understanding Indigenous knowledge from a Eurocentric point of view is that Indigenous knowledge does not fit into the Eurocentric concept of ‘culture.’”).

¹⁴ DEBORAH J HALBERT, RESISTING INTELLECTUAL PROPERTY 11 (2005) (“There is a homogenizing tendency when we speak of traditional knowledge and Indigenous groups at the international level. By necessity, one must speak of these concepts as unitary because recognizing the hundreds of different groups and perspectives individually makes conversation at the international level difficult at best. This homogenizing effect must be recognized and understood only as a temporary state because it is the diversity of ideas and concepts that seems critical at this time, not the homogenization of Indigenous claims.”).

its Explanation of Vote when it signed the Declaration, stating that Article 31 “failed to give clear, practical guidance to States” with respect to intellectual property.¹⁵

We suggest an answer to the question by placing Aboriginal Peoples’ traditional knowledge in its wider social, cultural, historical and economic context. An anthropological approach, for example, sees traditional knowledge as imbued within the larger context of culture and social justice—as a “cultural resource.”¹⁶ Coombe points out that traditional knowledge—as “stories, imagery, and themes based on very specific historical experiences and the specific needs of people engaged in contemporary political struggles in which these stories strategically figure”—deserves to be placed in the larger context of Aboriginals’ struggle for cultural and political survival in the form of self-determination within Canada.¹⁷ This is not an unjustified approach, when Canadian legal history shows that First Nations, for example, never relinquished their right of self-governance and continue to demand it.¹⁸

Even an instrumentalist approach that seeks to use intellectual property as a means to empower Aboriginal Peoples, recognizes that a greater expansion of existing intellectual property legal regimes to accommodate the legal issues that traditional knowledge presents may be successful from a legal point of view, but not in itself sufficient to empower indigenous peoples and communities generally.¹⁹

The challenge in Canada, however, is to appropriately situate specific legal recognition and protection of traditional knowledge within the wider context of struggles to protect the fundamental identities of particular Aboriginal Peoples. The established categories of intellectual property recognized by Western common or civilian legal systems seem incapable of accomplishing this task. Western legal thinking serves to further develop the privilege accorded to colonial thought and doctrine, while assigning to Aboriginal Peoples a subordinate role.²⁰ While Aboriginal peoples have throughout Canadian history suffered the violence of colonization, in a modern context it is argued

¹⁵ Aboriginal Affairs and Northern Development Canada (AAND), *Background: Canada’s Endorsement of the United Nations Declaration on the Rights of Indigenous Peoples*, available at: <http://www.aadnc-aandc.gc.ca/eng/1292353979814/1292354016174>.

¹⁶ Coombe et. al., *Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property*, 40 U.C. DAVIS L. REV. 891, 913 (2007).

¹⁷ ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 231 (1998) [hereinafter *Coombe Book*].

¹⁸ Bradford W. Morse, *The Inherent Right of Aboriginal Governance*, in *ABORIGINAL SELF-GOVERNMENT IN CANADA* 17 (John H. Hylton and Phil Fontaine, eds. 1999).

¹⁹ DARREL A. POSEY & GRAHAM DUTFIELD, *BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES* 1 (1996).

²⁰ BATTISTE & HENDERSON, *supra* note 13, at 11.

that Aboriginal identities and cultures continue to be colonized by a mounting Eurocentric worldview.²¹ Globalization also threatens Aboriginal Peoples, with its “cognitive and linguistic imperialism” and continues to demand that they share their traditional knowledge to address many of the resulting problems the western paradigm has brought about by its imposition on Indigenous peoples. As Battiste and Henderson write: “[s]urvival for Indigenous Peoples is more than a question of physical existence; it is an issue of preserving Indigenous knowledge systems in the fact of cognitive imperialism.”²²

While we fully acknowledge the fundamental inconsistencies in attempts to reconcile Aboriginal perspectives, traditional knowledge, and the dominant legal frameworks for protecting intellectual property in Canada, the fact is that very practical and existential problems exist which require immediate governance solutions. We identify Canadian examples of such problems in the next section of this chapter.

B. Translating Traditional Knowledge from Theory to Practice

Conceptual discussions about the nature and importance of Aboriginal traditional knowledge are essential to understanding existing governance systems and potential policy approaches. But workable solutions to the challenges of governing traditional knowledge in Canada also require awareness of concrete practical problems that inform those discussions.²³

For instance, in 2012 legislators dramatically overhauled Canadian copyright law with *The Copyright Modernization Act*.²⁴ Despite extensive public consultations leading up to the statutory revisions, we are aware of only one invitation from government to hear specifically about Aboriginal Peoples’ perspective on the matter. Violet Ford, speaking in her role as Vice President of the Inuit Circumpolar Council, emphasized the misuse of Inuit innovations, cultural expressions and symbols such as the kayak, the inukshuk and more.

She explained Aboriginal Peoples’ perspective that “existing copyright law is inconsistent with constitutional rights that we have under Section 35 [of the *Constitution Act, 1982*]. Our land claims, our Inuit land claims agreements’ objectives is for economic self-reliance, cultural well-being and a certainty of land rights. With this copyright

²¹ *Id.*; see also James (Sákéj) Youngblood Henderson, *Postcolonial Indigenous Legal Consciousness*, 1 Indigenous L.J. 1 (2002).

²² BATTISTE & HENDERSON, *supra* note 13, at 12.

²³ See Oguamanam, *supra* note 11.

²⁴ *Copyright Modernization Act*, S.C. 2012, c. 20.

infringements that we've seen occur interferes with that economic self-reliance because we cannot market our products in the same way that companies that imitate our cultural expressions do." In her remarks, she complained specifically about the appropriation of the inukshuk as the official logo of the Vancouver 2010 Olympics, as well as Canada's inaction related to the work of WIPO's Inter-Governmental Committee.²⁵

Despite her testimony, there is nothing in the *Copyright Modernization Act* that responds specifically to any of the dominant concerns of Aboriginal Peoples. In light of the federal government's inability or unwillingness to take action, other levels of government have considered filling the void. A relevant initiative of the Government of Nunavut, Canada's newest territory, is the development of Artists' Resale Rights, *i.e. droit de suite*, royalty legislation at the territorial level, rather than national level.²⁶ Such legislation would see Nunavut artists receive additional compensation each time their art is bought and sold on the private art markets of the world. Inuit artists are world renowned, and their works are highly sought after in these markets.

A key question for the purposes of this chapter is: do provincial, territorial or perhaps Aboriginal governments have the constitutional authority to enact such a law? The answer, as explained below, depends partly on the division of legislative powers between Canada's federal and provincial/territorial governments under the *Constitution Act, 1867*. Is this matter, in pith and substance, one concerning Copyright? Trade and Commerce? Property and Civil rights? A purely Local or Private matter? Is this matter fundamentally about "Indians" as that term is understood in Canadian law?

In another area, Ford's reference to the appropriation by the Vancouver Olympic Committee (VANOC) of the inukshuk as the official logo of the 2010 Olympic Games in Vancouver provides an appropriate illustration of tensions around traditional knowledge and Canadian trade-mark law. Perhaps unsurprising in the current era of intellectual property mega-protectionism, the International Olympic Committee managed to have the Vancouver Games' marks legally protectable against other appropriators through the *Olympic and Paralympic Marks Act*.²⁷

²⁵ Copyright Consultations, 29 July 2009, Museum of Civilization, Gatineau, QC available at: <http://www.ic.gc.ca/eic/site/008.nsf/eng/00439.html>.

²⁶ Jane George, *Nunavut pushes for artist resale royalty*, NUNATSIAQ NEWS, 18 October 2012, available at: http://www.nunatsiaqonline.ca/stories/article/65674nunavut_pushes_for_artist_resale_royalty/.

²⁷ *Olympic and Paralympic Marks Act*, S.C. 2007, c. 25; see generally Theresa Scassa, *Faster, Higher, Stronger: The Protection of Olympic and Paralympic Marks Leading up to Vancouver 2010*, 41 U.B.C. LAW REV 31 (2008).

Even though VANOC claimed to have a “commitment to achieving unprecedented Aboriginal participation in the planning and hosting of the Games,”²⁸ our research could not reveal any indication that Aboriginal Peoples of Canada received a share of licensing revenues or other economic benefits directly related to the use of Inuit culture in promoting the games. Indeed, the *Olympic and Paralympic Marks Act* prohibited Aboriginal Peoples of Canada (as much as anyone else) from using their own culture without risking penalty for infringement under the Act.

Another concrete example of the exploitation of traditional knowledge in Canada involves the traditional healing and medicinal practices of the Cree of Eeyou Istchee in Northern Quebec. This particular example, however, provides a positive success story about respect and benefit sharing among Aboriginal and non-Aboriginal Canadians. A team of researchers funded by the Canadian Institutes of Health Research (CIHR) is aiming to alleviate the effects of Type II diabetes by evaluating the anti-diabetic activities of Cree medicinal plants used by traditional healers.²⁹ By combining traditional knowledge and modern science, researchers are working closely with elders and other community representatives to develop value-added natural health products that are culturally adapted to the needs and beliefs of the Canadian Aboriginal populations. The project focuses on reciprocal knowledge translation, as well as training young Cree in traditional medicinal practices. The experiences of this particular group of Aboriginal Peoples, therefore, stands in stark contrast to the legacies of misappropriation of traditional knowledge of indigenous and local communities in other postcolonial societies, such as the San peoples in Southern Africa.³⁰

Nevertheless, what is noteworthy about the anti-diabetic medicines project is the dependency of the Aboriginal Peoples upon the scientific researchers to respect community norms governing traditional knowledge. The scientists involved are laudably conducting the research in compliance with the highest ethical and legal standards through consultation, collaboration and benefit sharing. But the fact is that the non-Aboriginal scientists, not Aboriginal leaders and community members, are the ones practically capable of using existing Canada’s intellectual property system to obtain

²⁸ Vancouver Olympic Committee (VANOC), *Aboriginal Participation and Collaboration*, Sustainability Report 2009-10, available at: http://www.2010legaciesnow.com/fileadmin/user_upload/About_Us/VANOC/7_Aboriginal_Participation_and_Collaboration.pdf.

²⁹ Canadian Institutes for Health Research (CIHR), CIHR Team in Aboriginal Anti-diabetic Medicines Project, available at: <http://www.taam-emaad.umontreal.ca/index.htm>.

³⁰ See e.g. RACHEL WYNBERG, DORIS SCHROEDER, ROGER. CHENNELLS, INDIGENOUS PEOPLES, CONSENT AND BENEFIT SHARING: LESSONS FROM THE SAN-HOODIA CASE (2009).

benefits to share, particularly economic benefits derived through patents. The problem is not that Aboriginal Peoples' traditional knowledge is not worth protecting, but rather, as will be discussed below, that the institutional and structural features of the Canadian (and global) patent system, as one prong of the intellectual property rights regime, are ill-suited to recognize and protect the *Aboriginal* value of this traditional knowledge.

However, in all of these practical contexts—traditional medicinal practices, artistic expression through cultural artifacts, and symbolic communications—identifying more culturally appropriate protection mechanisms requires a better understanding of coordination and governance challenges. That is the focus of the next section of this chapter.

II. Existing Legal and Policy Frameworks for Governing Traditional Knowledge

A. Canada's Constitutional Division of Legislative Powers

If Article 31 of the Declaration is to be meaningfully respected and implemented into Canadian law, the question arises: Who is responsible for doing so? In Canada, unlike some other countries, international treaties are not self-implementing—they must be ratified. In Canada, legal authority to negotiate treaties rests with the federal government under section 132 of the *Constitution Act, 1867*. It is possible, however, that the Declaration merely requires signatory and ratifying states to *refrain* from acting in a manner inconsistent with its provisions. If so, implementing domestic legislation or regulations may not be necessary. But to the extent that the Declaration requires action, rather than inaction, as clearly suggested by clause 31(2), someone must act.³¹

While the executive branch of the federal government of Canada has the power to negotiate and sign international agreements, it does not necessarily have the power to implement them domestically. Potential problems implementing international intellectual property agreements into Canadian domestic law have been identified in several other contexts, most recently in respect of an impending Comprehensive Economic and Trade Agreement between Canada and the European Union.³² It is unclear whether the federal or provincial and territorial governments would have jurisdiction to implement provisions related to protection for technological measures in the field of copyright, for clinical trial

³¹ Declaration, *supra* note 3, Article 31(2) states: “In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

³² Jeremy de Beer, *Implementing International Trade Agreements in Federal Systems: A Look at the Canada-E.U. CETA's Intellectual Property Issues*, 38(4) LEGAL ISSUES OF ECONOMIC INTEGRATION 51 (2011).

data related to pharmaceuticals, or for geographic indications of the origin of goods and agricultural products. Similar legal difficulties may be associated with categorizing traditional knowledge under Canada's legislative division of powers.

The ability to enact provisions protecting the traditional knowledge of Aboriginal Peoples of Canada would depend not on the existence of an international agreement like the Declaration, but on the basic structure of Canada's *Constitution Act, 1867*. In that context, we have identified at least three ways to conceptualize the "pith and substance" of the matter of protecting traditional knowledge. One is to conceive of such protection as fundamentally related to the Aboriginal Peoples themselves. Another is to frame traditional knowledge protection through the lens of existing intellectual property rights. Yet a third conception would relate the protection of traditional knowledge to the field to which the knowledge pertains, such as cultural expression, environmental stewardship, medicinal practices, economic activity, and so on. Framing traditional knowledge in any of these ways would have significant implications on the legal jurisdiction of various levels of government to address the matter, as we explain next.

1. Jurisdiction Over Aboriginal Peoples of Canada

The history of Aboriginal people in Canada is as complex as an understanding of who an "Indian" is under Canadian law. Although today Aboriginal Peoples in Canada, by virtue of section 35 of the *Constitution Act, 1982*, are understood to be comprised of First Nations, Inuit, and Métis peoples, all distinctive groups of people, this was not always the case. Moreover, some Aboriginal Peoples are pejoratively still referred to as "Indians."

This history begins with the *Royal Proclamation of 1763*, issued by King George III of England, which created what would eventually come to be known in Canada as the "reserve system" under the *Indian Act*. Aboriginal peoples in Canada, then referred to as "Indians," had lands "set aside" for them alone to which promises of financial, medical, and cultural support were attached by the King, and later the federal government. Between 1871 and 1921, the federal government would conclude eleven treaties—all of them numbered—with First Nations in Canada. For many years Aboriginal peoples were confined to and not expected to live off-reserve. Modern-day versions of such treaties include "comprehensive claims" such as the *Nunavut Land Claims Agreement*.

Despite the conclusion of such treaties, the regime which governs Aboriginal peoples in Canada and their lands has historically been fraught with difficulties and to this day remains highly fragmented. In Canada, primary legislative jurisdiction over

“Indians,” is provided to the federal government under section 91(24) of the *Constitution Act, 1867*. Pursuant to this jurisdiction, one of the early legislative acts of the Canadian government was in 1876 to enact the *Indian Act*.³³ This legislation set out who was, for legal purposes, considered an “Indian” and therefore entitled to certain economic and health benefits provided for in that Act. The Act also imposed different criminal penalties than those for non-Indians, a provision of which was struck down in the seminal case of *R. v. Drybones*, [1970] S.C.R. 282. The *Indian Act* would undergo a number of amendments between 1876 and 2011, and is still in force in Canada today. Section 88 also provided to the provinces the power to make laws of general application, which meant they would apply to everyone in the province including “Indians,” and since the enactment of the *Constitution Act, 1982*, Aboriginal Peoples. A Royal Commission on Aboriginal Peoples was convened in 1991, and proposed a “20-year agenda for implementing changes,”³⁴ with little actually occurring since then.

In the years following passage of the *Indian Act*, one of the crucial problems with the Act was that it defined an “Indian” as a person who was “entitled to be registered as an Indian” under the Act and therefore provided little understanding or guidance both to Aboriginal peoples, lawmakers and the courts as to who an “Indian” actually was.³⁵ In *Re Eskimos*, [1939] SCR 104, for example, the Supreme Court of Canada held that Eskimos, or more properly, Inuit peoples in Canada, were considered “Indians” under the Act even though they were not mentioned in the *Indian Act*. Another significant problem was the unequal treatment of men and women who attempted passage of their registered Indian status through marriage and consanguinity, with provisions overwhelmingly favouring status Indian men. In *Attorney General of Canada v. Lavell; Isaac v. Bédard*, [1974] SCR 1349, for example, the Supreme Court of Canada held that discrimination between men and women in this regard did not exist or at least could be justified. As recently as January 2013, the Federal Court (of Canada) declared in *Daniels v. Canada*, 2013 FC 6 that non-status Indians and Métis people are to be considered “Indians” under the *Indian Act*. Non-status Indians and Métis sought this declaration and spent many years and millions of dollars to obtain it because of the ambiguous approach the federal government has taken to them as a group, at times asserting jurisdiction when expedient and denying

³³ *Indian Act, 1876*, S.C., 1876, c. 18.

³⁴ Aboriginal Affairs and Northern Development Canada (AAND), *Highlights from the Report of the Royal Commission on Aboriginal Peoples*, Aboriginal Affairs and Northern Development Canada, available at: <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>.

³⁵ *Indian Act*, R.S.C., 1985, c. I-5 s.5.(1).

it when it is not.³⁶ In short, there are not only status, non-status, registered, non-registered, reserve, non-reserve and a seemingly infinite number of combinations among status, registered, and reserve “Indians” in Canada, but an enormously and needlessly complex bureaucracy found in the Department of Northern Development and Aboriginal Affairs that administers the *Indian Act*.

Although it has undergone a series of both minor and severely debilitating revisions over the years, the *Indian Act* underwent a major revision in 1985, as a result of Bill C-31, and provided for broader inclusion of who was and was not, for the purposes of *Indian Act* administration, an Indian. Ultimately, however, even in the face of the *Universal Declaration of Human Rights*, and the *Universal Declaration on the Rights of Indigenous Peoples*, and the right to self-determination each of these instruments promises, the federal government of Canada still retains a “separate” jurisdiction over them—unlike any other ethnic group in Canada, evidencing that the “the colonial paradigm is [still] alive and well.”³⁷

In addition to identifying who Canada’s Aboriginal Peoples are, section 35 of the *Constitution Act, 1982*, recognizes and affirms the “existing aboriginal and treaty rights of the aboriginal peoples of Canada”—items which have been the subject of much constitutional litigation at the Supreme Court of Canada. Although post-1982, little has arguably been done legislatively to hasten the recognition and affirmation of such rights, the reality is that Aboriginal Peoples have turned to the Courts for such recognition and affirmation, at times succeeding and at others failing to obtain judicially crafted remedies.

The largely judicially rather than legislatively expressed set of rights enjoyed by Aboriginal Peoples and the legislation which gives them feeble articulation and substance, is problematic when assessing the possibility of governance regimes for traditional knowledge. But we include this history only to address the question: Would the federal government have the jurisdiction (or perhaps responsibility) to implement provisions respecting Aboriginal Peoples’ traditional knowledge rights, pursuant to its obligations under Article 31 of the Declaration or other international instruments? An answer to this question is potentially found in viewing traditional knowledge as *sui generis*. By viewing it as unlike anything else, governance of traditional knowledge would be freed from the legal doctrines which currently trap it in a debate as to whether or not it is amenable to intellectual property rights protection and would allow the federal

³⁶ *Daniels v. Canada*, 2013 FC 6 at para 27, 54-59.

³⁷ See Kiera L. Ladner & Caroline Dick, *Out of the Fires of Hell: Globalization as a Solution to Globalization— An Indigenist Perspective*, 23 Nos. 1-2 CAN. J.L. & SOC’Y 63, 64 (2008).

government to devolve control to Aboriginal Peoples per the Declaration, while at the same time assuaging its fears about Aboriginal sovereignty. If it were to do this, the question persists: does the federal government have the legislative jurisdiction to declare traditional knowledge *sui generis*? What would happen if the courts did?

2. Jurisdiction Over Intellectual Property Rights

At first blush it might seem natural to assume that the federal government has exclusive jurisdiction to enact or amend intellectual property laws protecting Aboriginal Peoples' traditional knowledge by virtue of sections: 91(2), the Regulation of Trade and Commerce; 91(22), Patents of Invention and Discovery; and, 91(23), Copyrights.

We say “natural”—at least in respect of intellectual property—because the subject matter of what we are dealing with in traditional knowledge is often the subject matter of what might, for example, be protected by the *Trade-mark Act*. Unlike some other countries, the federal government of Canada is not expressly empowered to enact trade-mark laws. Rather, it has found the authority to do so pursuant to its power to regulate “trade and commerce” bestowed by section 91(2). That power is not unlimited, however. In *MacDonald v. Vapor Canada Ltd.*, [1977] 2 SCR 134, the Supreme Court of Canada struck down paragraph 7(e) of the *Trade-Marks Act*, which addressed unfair competition generally, as a matter constitutionally allocated to the provinces, not the federal government. In *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 SCR 302, in contrast, the Supreme Court upheld the constitutionality of paragraph 7(b), which protects unregistered trade-marks.

To the extent the federal government attempted to enact a scheme of trade-mark protection addressing *specifically* the rights of Aboriginal Peoples, it seems unlikely it could do so pursuant to section 91. Of course, there has been some suggestion that various characteristics of Aboriginal traditional knowledge could be protected by the use of Canada's general trade-mark laws. The idea is that cultural works of Aboriginal Peoples could be trademarked in order to brand their uniqueness and any competitor's attempt to produce similar wares or services would be liable for “passing-off,” for example. However, irrespective of the fact that trade-marks protect “wares and services,” trade-marks are meant to be unique and it appears to be too onerous to expect all of Canada's heterogeneous aboriginal communities interested in protecting their traditional

knowledge, to trademark those aspects it wishes to protect by trade-marking or registering them all—although it has been done in at least one case.³⁸

Moreover, Canada’s current system of protecting trade-marks, including official marks, did not prevent VANOC from adopting the inukshuk as its logo. The *Act*’s prohibition on adopting marks “consisting of” or “nearly resembling” flags included Nunavut’s official flag. The inukshuk’s central presence on Nunavut’s flag demonstrates its centrality to the Inuit territorial and cultural identity, but Canada’s trade-mark regime proved incapable of protecting it from VANOC and IOC appropriation. That the *Olympic and Paralympic Marks Act* facilitated exclusive commercial and non-commercial use by VANOC, and prohibited such use (whether enforced or not) by Aboriginal Peoples of Canada, makes the injustice even clearer.



Figure 1: “Ilanaaq the Inukshuk”



Figure 2: Flag of the Territory of Nunavut

Similarly, Canadian biodiversity issues would seem to be incongruent with the internationally-driven patent system of legally protecting biological discoveries, inventions, and methods under s.91(22), which govern patents in Canada. To suggest in an Aboriginal biodiversity context that patents offer a suitable protection mechanism, is to simply place Aboriginal peoples in no better position than they are now: to continue to put them in the race to apply for a patent first. Moreover, much of Aboriginal Peoples’ biodiversity, medical and agricultural technology has already been appropriated, or at least disclosed, making patents impossible to obtain. Much of what can even be classified as patentable traditional knowledge is immediately foreclosed from patent protection because it is all deemed to now exist in the public domain.

³⁸ The Snuneymuxw First Nation, for example, was under section 9(1)(n)(iii) of the Trade-marks Act able to trade-mark ten of its petroglyphs and other designs. See Catherine W Ng, *Some Cultural Narrative Themes and Variations in the Common Law*, 99 TMR 837 (2009).

It is doubtful whether the federal government would have the authority to enact a *sui generis* regime protecting Aboriginal Peoples' traditional knowledge pursuant to its constitutional jurisdiction over patents. The federal government has stretched its authority to enact legislation in other fields tangentially related to patents, such as data protection for clinical trials or testing of chemicals and pharmaceuticals, and pricing of patent medicines.³⁹ Such laws have, however, been challenged on constitutional grounds. So far, such challenges have not been successful, but the cases have all been controversial and narrowly decided.

Finally, as with discussions of trade-marks and patents above, it would also seem natural to conclude that the *Copyright Act* and the copyright regime are suitable mechanisms by which to legislate in the traditional knowledge arena. Yet, the copyright regime presents problems of its own.

For example, the hallmark of Canadian copyright law is that the economic and moral rights of a given work vest to the single author, provided he or she has demonstrated "originality" and "fixation" in the production of his or her work. Furthermore, copyrights only exist for a limited duration of 50 years. These fundamental aspects of copyright law are particularly problematic for Aboriginal peoples for several reasons. First, much of aboriginal traditional knowledge is collectively authored and is not seen to have a single creator or owner in which a copyright might vest. Second, much of aboriginal culture is contained within an oral tradition. Much of the stories, songs, dance, art and music have been handed down through multiple generations through a process that is sometimes seen as sacred. To hand it over to one person, even in the spirit of guardianship as a copyright holder, is an alien and ultimately disrespectful proposal to Aboriginal Peoples. Finally, the traditional knowledge which might even be the proper subject matter of copyright has largely been existence for much longer than 50 years and the idea and effort of any governance regime should not be to reduce the protection of aboriginal culture, vis-à-vis traditional knowledge governance and protection, to a finite period, but to ensure its survival for the many Aboriginal generations to come. While the federal government could amend the *Copyright Act* to solve these issues, it is more doubtful whether it could create a *sui generis* system of protecting Aboriginal Peoples' cultural expressions under the auspices of its power to regulate copyrights.

³⁹ Jeremy de Beer and Craig Brusnyk, *Intellectual Property and Biomedical Innovation in the Context of Canadian Federalism*, 19 HEALTH LAW JOURNAL 45–82 (2011).

The most fundamental problem with nearly any trademark, patent or copyright solution is that they are all cabined with the intellectual property regime itself, a legal system which is many ways anathema to the Aboriginal communities seeking traditional knowledge protection and Article 31 recognition. Some scholars have even argued that forcing Aboriginal traditional knowledge and culture to fit within the intellectual property paradigm recreates the violence of territorial colonization.⁴⁰ Aboriginal Peoples are not necessarily seeking economic protection or better litigation tools, but rather some means that will ensure rigorous and enduring cultural protection—a way of ensuring the longevity of their own culture and as a means of ensuring against further misappropriation. Unfortunately, while the federal government might assert jurisdiction through one of these heads of power in which to legislate with respect to traditional knowledge, any such legislation is likely to be superfluous, unless perhaps a *sui generis* system were integrated into any such governance regime.

3. Jurisdiction Over Other Fields

In the context of discussing Canada's problem with the "inherent right to self-determination" posited by the *Universal Declaration of Human Rights* (UDHR), Morse identifies the problem of attempting to resolve the issue with "a national, standard, abstract legal definition of the inherent right."⁴¹ He adds: "It is expected that self-government arrangements will differ significantly in order to respect the varied circumstances, as well as the different cultures and aspirations, that exist across the country."⁴² Although Canada has only so far negotiated self-government agreements, a similar approach might be adopted, by treating or regulating the particular kind of traditional knowledge according to the field to which it pertains; for example, health, environment, culture, and so on. Before considering this possibility, it is necessary to examine the jurisdictional challenges presented by provincial legislative authority

Because of the amorphousness of traditional knowledge as "intellectual" property and the more holistic resonance it seemingly finds with the ideas of (personal) "property" and perhaps even elements of contract law, it might be the case that the provinces are equally suited to assert jurisdiction under s. 92(13), Property and Civil Rights in the Province. In this interpretation, because the traditional knowledge is *not* intellectual property, and instead has been reduced to fungible goods, chattels and land, the provinces

⁴⁰ COOMBE BOOK, *supra* note 17, at 232.

⁴¹ Morse, *supra* note 18, at 31.

⁴² *Id.*

might legislate in the ways that Aboriginal culture can be protected, *i.e.* by protecting against its commoditization as a whole through property laws. In that case, traditional knowledge governance seems to be removed from its inclusion as part of the Declaration's ratification on a national level in Canada. Yet, even under such a scenario the problem remains that Aboriginal Peoples are resistant to the propertization of their culture—they are seeking means in which to protect against misappropriation. In this sense, the limited purview of s.92(13) is also anathema to needs and desires of Aboriginal Peoples seeking to protect their traditional knowledge from misappropriation. For similar reasons, civil rights such as the freedom to contract are likely to provide insufficient legal tack in which to anchor a solution.

Section 92(16) gives jurisdiction to the provinces over matters “[g]enerally...of a merely local or private Nature”, which is worth considering in the context of protecting traditional knowledge. There is no homogenous Aboriginal community in Canada, however. In fact, the recognized communities are First Nations, Inuit and Métis people. The reality is, however, that there are many more Aboriginal Peoples in this country each with distinctive needs and aspirations that arguably exist in a local and private nature—although they might still be of national importance. Scholars such as Bell have emphasized how traditional knowledge governance *is* an inherently local and culturally specific matter.⁴³ The locality and specificity, however, is to the Aboriginal community concerned and *not* to the province or territory in which the People happen to reside. That alone would make the exercise of jurisdiction by provincial/territorial governments problematic.

Returning to the biodiversity context, section 92A which gives the provinces jurisdiction over “Non-Renewable Natural Resources, Forestry Resources and Electrical Energy,” the agricultural technology that Aboriginal Peoples have shared for hundreds of years and yet seen unscrupulously misappropriated, might also have a bearing on a governance framework. Many federal and provincial treaties protect Aboriginal Peoples' rights with respect to fishing, hunting, forestry and the environment. In this sense, because traditional knowledge is as much about respecting and protecting the earth, which culturally is as important as the linguistic traditions, customs, art, music, song, dance and other traditional knowledge aspects are, the provinces might be able to assert jurisdiction under this head of power. However, the federal government has ministries that deal with fishing, natural resources, forestry, and the environment, so any assertion of provincial power is likely to be thwarted by federal assertions in the same area.

⁴³ Bell, *supra* note 12.

What this analysis of the various constitutional heads of power illustrates, again, is the existing fragmentation of the government authority to effectively deal with traditional knowledge on a legal level. The legal problem of fragmented governance mirrors the general challenges of policy coordination regarding Aboriginal Peoples' traditional knowledge. Currently, such policies are divided across the spectrum of government ministries responsible for addressing the numerous fields to which traditional knowledge relates: cultural heritage, health and medicine, agriculture, the environment, industry and more. The next section of the chapter describes the current policy environment in more detail.

B. Canada's Traditional Knowledge Policy Coordination Paradigm

Irrespective of Article 31, attempts to successfully deal with traditional knowledge are fragmented across governmental levels and, as a result, a cohesive policy framework is difficult to achieve. By canvassing some of the policy challenges faced by these governments, strategies to overcome them become somewhat clearer.

The federal Department of Heritage has probably taken the most comprehensive approach to dealing with traditional knowledge. Its approach placed traditional knowledge in context, going beyond mere questions of intellectual property rights, addressing complex questions such as health, education, living standards, and linguistic, cultural and historical disintegration.⁴⁴ With a twelve-person Advisory Group of respected individuals drawn largely from Aboriginal communities across Canada, the Department conducted what it called a “dialogue” with First Nations, Inuit and Métis peoples about indigenous knowledge and aimed to establish a collaborative process towards developing effective policy.⁴⁵

The Advisory Group recognized the “gap” in policy formation and the need for better legal mechanisms respecting indigenous or traditional knowledge. It made three important findings. First, due to differences between indigenous knowledge and the mainstream intellectual property regime, functional cultural items such as clothing are difficult to protect. Second, there have been instances in which intellectual property laws have been used to protect those who have appropriated traditional knowledge. And third, concepts like “time-sensitive” and “public domain” are difficult to apply to Aboriginal

⁴⁴ Canadian Heritage, *Traditions: National Gatherings on Indigenous Knowledge Final Report*, available at: <http://www.pch.gc.ca/eng/1288012608478/1288012608481>.

⁴⁵ Canadian Heritage, *Indigenous Knowledge: Place, People and Protocol*, available at: <http://www.pch.gc.ca/eng/1288012803946/1288012803948>.

traditional knowledge because much of it needs an indefinite period of protection and can never enter the public domain in the way that other cultural properties might.⁴⁶

While these identified issues more or less center on points of law, their resolution depends upon policy coordination across various agencies and departments. The Advisory Group recognized the need for responsibility of federal, provincial and territorial governments.⁴⁷ In this sense, they properly placed within the ambit of dialogue issues of language, cultural song and dance, agriculture and biology, and cultural artifacts, and provide a number of suggestions for future action that might be embraced in a cooperative or collaborative effort.⁴⁸

In terms of intellectual property rights, specifically, the Advisory Group concluded that “[t]here is a *need for collaboration* between Aboriginal communities and government on issues related to Indigenous Knowledge and intellectual and cultural property.” What is striking about this group’s study, however, is its recognition of the incongruence with the current intellectual property regime and the needs and desires of Canada’s Aboriginal Peoples. While it is not a novel position in its own right, it is remarkable that the federal government has recognized that Canadian law bears little relevancy to Aboriginal Peoples’ traditional knowledge and that some form of legal governance, whether it be *sui generis* or some other manifestation, is indeed required.

Under the suggestions for future action with respect to *Indigenous Knowledge and Cultural Properties* rubric, the Advisory Group made a number of important suggestions.

⁴⁶ Canadian Heritage, *What Was Said*, available at: <http://www.pch.gc.ca/eng/1288012803963/1288012803966>.

⁴⁷ *Id.*

⁴⁸ *Id.* Among others, these suggestions included: (a) the establishment of a National Elders Council for Knowledge to recognize and support First Nations, Inuit and Métis Elders; (b) the designation of Elders as National Treasures at the local, regional, national and international levels; (c) the declaration of First Nations, Inuit and Métis languages official languages in Canada and protect them through a rights framework, supportive language policies and adequate resources; (d) the enhancement of support for language at every level; (e) the supporting of First Nations, Inuit and Métis peoples in their discussions with the provinces and territories on language instruction, curricula and other related issues; (f) the exploration of opportunities to integrate language learning and cultural programs on and off reserves; (g) the recognition that First Nations, Inuit and Métis language recovery is a right, not a privilege and the acknowledging of the role of government in language loss and respect the legitimacy of the grieving process for this loss; (h) the creation of public monuments, the writing, production and distribution of Indigenous philosophies, histories, literatures and traditions, and the compensation of former students of residential schools in acknowledgement of responsibility for loss of languages and cultures; (i) that the federal government should rally support from the Council of Ministers of Education for the implementation of mandatory courses at Canadian universities and colleges on First Nations, Inuit and Métis languages, histories and perspectives; (j) that Canadian Heritage should lead an interdepartmental strategy and working group on First Nations, Inuit and Métis languages; and (k) that the definition of culture ought to include the environment and that Canadian Heritage, Parks Canada and Environment Canada should raise awareness of the importance to all Canadians of Indigenous Ecological knowledge.

Some of the most notable suggestions were considering ways to reconcile western-based notions of authorship and ownership with Aboriginal Peoples' notions of collective rights and guardianship, creating an exemption for intellectual and cultural properties relating to traditional knowledge from the time limits under copyright law, collaborating on a federal interdepartmental strategy for action on copyright and intellectual property, funding research of *sui generis* models for the protection and control of traditional knowledge, and supporting communities by providing resources to enforce copyright and intellectual property rights.⁴⁹

In terms of artistic expression, or “intangible” cultural expression, an important area of the traditional knowledge debate that is often overshadowed by biodiversity concerns, the Advisory Group suggested that permission be sought from Aboriginal communities before using their symbols and icons in federal promotional materials, establishing trade restrictions to discourage appropriation through the imposition of a tax on the import, export and sale of inauthentic Aboriginal cultural items, modifying legislation to recognize that access by Aboriginal peoples to the natural resources necessary for traditional artistic and that cultural expressions are treaty and constitutional rights that must not be infringed.⁵⁰

Although the Heritage Department's initiative is perhaps the most comprehensive of any government, others have also attempted to address issues related to traditional knowledge. Industry Canada is the department with the most direct and extensive responsibility for intellectual property policy at the federal level. It shares responsibility with Heritage over copyright issues, reflecting the commercially and culturally hybridized aspects of copyright policy, and has primary responsibility for both patent and trade-mark issues under the auspices of the Intellectual Property Policy Directorate (IPPD).

Representatives of Industry Canada have posed an important question: “What can be done to stop the commercial use of pictures of totem poles, crests or other symbols by third parties? In Aboriginal culture, ownership of intangible cultural property is often vested in the house group, whereas IP rights are generally individual, private rights. Could the IP system allow for the extension of rights to a community?”⁵¹ This question

⁴⁹ *Id* [emphasis added].

⁵⁰ *Id.*

⁵¹ Industry Canada, Intellectual Property Policy, *Traditional Knowledge*, available at: http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/h_ip00068.html.

was addressed in a series of workshops held by IPPD and Heritage,⁵² and reflects ongoing inquiries that many scholars working in the area have undertaken.

The IPPD also conducted an ethnographic study of intangible aboriginal property in Canada.⁵³ But this study did “not focus on the issues and implications of the appropriation of Aboriginal traditional knowledge and traditional cultural expressions by non-Aboriginal people for commercial purposes, or how traditional knowledge and traditional cultural expressions may (or may not adequately) be protected by the western intellectual property system.”⁵⁴ While the study is useful for what it does discuss, this unaddressed issue is one that the Canadian government cannot haphazardly address or completely ignore. Not only are Canada’s Aboriginal Peoples demanding a strategy in this respect, so too are scholars from a variety of disciplines as well as social justice oriented Canadians.

Separately from the work of the IPPD, in 2004 the Library of Parliament produced a short paper on traditional knowledge, titled “Indigenous Traditional Knowledge and Intellectual Property Rights.”⁵⁵ It is a useful document that once again reflects that the federal government is in some ways cognizant of the major issues. But it too, as a reflection of current policy, is wedded to resolving traditional knowledge issues within the existing intellectual property law framework.

Reflective of the fragmentation at the federal level, several other federal departments, including Indian and Northern Affairs Canada (INAC)⁵⁶ (now known as the Department of Aboriginal Affairs and Northern Development (AAND)) Natural Resources Canada,⁵⁷ and Parks Canada⁵⁸ have acknowledged the importance of

⁵² *Id.*

⁵³ Brian Thom & Don Bain, *Aboriginal Intangible Property in Canada: An Ethnographic Review*, 2004, available at: [http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/Thom_Final_Report_e_proofed_28feb05.pdf/\\$FILE/Thom_Final_Report_e_proofed_28feb05.pdf](http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/Thom_Final_Report_e_proofed_28feb05.pdf/$FILE/Thom_Final_Report_e_proofed_28feb05.pdf); Industry Canada; Industry Canada, Intellectual Property Policy, *Aboriginal Intangible Property in Canada: An Ethnographic Review*, available at: <http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/ip01204.html>.

⁵⁴ *Id.*

⁵⁵ Tonina Simeone, Political and Social Affairs Division, Library of Parliament, Canada, PRB 03-38E, *Indigenous Traditional Knowledge and Intellectual Property Rights*, 17 March 2004, available at: <http://www.parl.gc.ca/information/library/PRBpubs/prb0338-e.pdf>.

⁵⁶ Aboriginal Affairs and Northern Development (AAND), *Statement - Indigenous Peoples and the International and Domestic Protection of Traditional Knowledge*, Geneva, 19 July 2005, available at: <http://www.ainc-inac.gc.ca/ap/ia/stmt/unp/05/pop/int-eng.asp>.

⁵⁷ Natural Resources Canada, *Polar Continental Shelf Program (PCSP)*, available at: http://polar.nrcan.gc.ca/app/knowledge_e.php.

⁵⁸ Parks Canada, *Establishment Agreement: Traditional Knowledge and Archaeological Specimens*, available at: http://www.pc.gc.ca/pn-np/nt/aulavik/docs/plan1/sec5/index_E.asp.

protecting traditional knowledge and have taken limited steps to move beyond the usual rhetoric of intellectual property rights as a proper governance framework.

For example, in a statement given at Geneva in July 2005, the INAC minister stated: “In the context of intellectual property rights, work is ongoing in Canada to assess how existing protection mechanisms can effectively address the issue of traditional knowledge. However, *what specifically needs to be done on the part of governments domestically and internationally* is still unresolved...”⁵⁹

Natural Resources Canada highlights that its Polar Continental Shelf Program (PCSP) “has adopted a program specifically tailored to provide logistics support to projects related to Traditional Knowledge in order to contribute to the preservation of this rich repository of information for future generations.”⁶⁰ This preservation, the department claims, has been achieved by “provid[ing] logistics support to projects covering a variety of interests: traditional sources of lithic material for carvings and other uses, a reconnaissance survey of spiritual sites, an inventory of the location and nature of heritage sites; all of these and other similar projects have involved community elders. As well, community elders have used PCSP logistics support to visit traditional hunting grounds or campsites and to record the oral history of their recollections of past lifestyles.”⁶¹ While traditional knowledge preservation and recordation is an inherent step in developing a governance regime to deal with the protection, little is achieved to protect against appropriation or misappropriation without meaningful political (and legal) mechanisms to provide a solutions framework for the totality of the issues we have canvassed so far.

Parks Canada has recognized the importance of protecting traditional knowledge and implemented an agreement to protect Aboriginal cultural resources, burial sites, and archaeological specimens within Canadian parks.⁶²

Environment Canada places its focus on biodiversity, access and benefits sharing (ABS)—another crucially important aspect a traditional knowledge governance framework. In fact, Environment Canada conducted a series of ABS workshops across the country each of which dealt with ABS in a thematically different way. One important 2005 study, which provides encouragement that the federal government and the Canadian polity is moving in the right direction is the *ABS Policies in Canada: Scoping the Questions and Issues* report prepared by prepared by the Federal/Provincial/Territorial

⁵⁹ AAND, *supra* note 56 [emphasis added].

⁶⁰ Natural Resources Canada, *supra* note 64.

⁶¹ *Id.*

⁶² Parks Canada, *supra* note 65.

Working Group on Access and Benefit Sharing of Genetic Resources and approved by Federal/Provincial/Territorial Ministers Responsible for Forests, Wildlife, Endangered Species and Fisheries and Aquaculture. This study, although brief, touched on the importance of implementing an ABS regime to protect Canada's indigenous peoples economically, socially, culturally and legally, the importance of a common intergovernmental approach that develops policy coherence between key policies including sustainable development, intellectual property, and foreign policies, the importance of safeguarding traditional knowledge and safeguarding against future losses.⁶³ However, in October 2010, Aboriginal groups accused Canada of thwarting the development of an international biodiversity protocol by demanding that any such protocol exist independently of the Declaration.

Environment Canada also sought input from relevant Stakeholders on the *Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*,⁶⁴ which implements the third objective of the Convention on Biological Diversity, and when implemented, will be “be a core element of the international regime on ABS.”⁶⁵ ABS is a complicated regime in itself, but nevertheless should be recognized as part of any coherent policy framework or governance regime that might be implemented.

In short, we canvassed at least six federal departments having some kind of consciousness towards traditional knowledge. Once again, however, these departments seem to work in isolation of one another, and in that sense, seem to be missing one another on the mark. A good example of where these departments have come together, however, is a case study of intellectual property rights and the Inuit Amauti performed for the Pauktuutit Inuit Women's Association of Canada in partnership with the Federal Departments of Indian and Northern Affairs Canada (as it was then known), Foreign Affairs and International Trade, Status of Women Canada, Canadian Heritage, and

⁶³ Environment Canada, *ABS Policies in Canada Scoping the Questions and Issues*, November 2005, available at: <http://www.ec.gc.ca/publications/4122ED2C-697C-45A7-9328-971F013E1B33/ABSPoliciesInCanadaScopingTheQuestionsAndIssues.pdf>.

⁶⁴ New Brunswick Environmental Network, Public Consultation Archives, *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*, September 2011, available at: <http://nben.ca/en/public-consultation-archives/category/58-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-september-2011>.

⁶⁵ Environment Canada, *Access and Benefit-Sharing (ABS) in the World*, available at: <https://www.ec.gc.ca/apa-abs/default.asp?lang=En&n=E8EA3467-1>.

Environment Canada.⁶⁶ If traditional knowledge is to be governed by an effective and coherent legal and policy framework, it is essential that such collaborative efforts be replicated in future initiatives.

While each government effort is geared towards developing solutions, it is instructive to note that the will or desire to create policy to deal with the issues is not necessarily lacking, but rather to some degree, sufficient inter-governmental and inter-ministerial discussion and cooperation is. If the federal, provincial and territorial governments and their respective departments can transcend the constitutional division of powers which can be characterized as “classic federalism” and embrace what has been termed “collaborative” or “cooperative” federalism, Canada might emerge from a policy impasse in respect of traditional knowledge governance.⁶⁷ We take this up in the next section of the chapter.

IV. Moving Toward More Appropriate Traditional Knowledge Governance

Traditional knowledge issues—to the degree that they exist in the collective governmental consciousness—may be lost in a haze of inter-ministerial initiatives or caught in the shuffle of ascribing substantive traditional knowledge jurisdiction to one or another constitutional head of power. The point that becomes clear is that Canada’s governments should consider an intergovernmental approach to deal with traditional knowledge. A larger question is “whether the self-rule, shared rules, and intergovernmental features of Canada’s federal geometry are sufficiently flexible to adapt to these challenges.”⁶⁸ Murphy, for example, concludes that while there have been changes to the federal-provincial-territorial machinations of government and executive federalism, the gains that Aboriginal communities have made in terms of representation have arguable been slower, with some claiming a paradigm shift and other claiming a paradigm paralysis.⁶⁹

⁶⁶ Pauktuutit Inuit Women’s Association, *Intellectual Property Rights And The Inuit Amauti: A Case Study*, prepared for The World Summit on Sustainable Development, available at: http://www.wipo.int/tk/en/igc/ngo/wssd_amauti.pdf.

⁶⁷ See Richard Simeon, *Recent Trends in Federalism and Intergovernmental Relations in Canada: Lessons for the UK?*, 354 THE ROUND TABLE 231, 232 (2000); see also David Cameron & Richard Simeon, *Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism*, 32 PUBLIUS: THE JOURNAL OF FEDERALISM 49, 49 (2002).

⁶⁸ MICHAEL MURPHY, ED., CANADA: THE STATE OF THE FEDERATION 2003: RECONFIGURING ABORIGINAL-STATE RELATIONS, v (2005).

⁶⁹ Michael Murphy, Relational Self-Determination and Federal Reform, in *Id.* at 7.

A first step toward positive progress, beyond identifying certain problems as this chapter has done, is improving inter-governmental cooperation so that governments of Canada can consult and negotiate more meaningfully with Aboriginal Peoples.

There are different types of federalism to be cognizant of when discussing the concept. Under “classical federalism” each level of government stays within its sphere of jurisdiction—“there is little legislative overlap of legislative responsibilities and therefore little need to structures of collaboration between governments.”⁷⁰ Under “cooperative federalism” the opposite is true: there is an amicable sense of cooperation between the levels of government in the attempt to achieve common legislative and policy objectives. “Collaborative federalism” is similar to the cooperative model to the degree that it is “governance in Canada as partnership between two equal levels of government.”⁷¹ Cameron and Simeon liken it to “executive federalism” and argue that the model’s adherents “view the governance of Canada as a partnership between two equal, autonomous, and interdependent orders of government that jointly decide national policy.”⁷² “Executive federalism” describes federalism as “the relations between elected and appointed officials of the two orders of government in federal-provincial interactions and among the executives of the provinces in interprovincial interactions.”⁷³

Despite the division of powers among the federal and provincial governments, collaborative federalism could transcend the traditional division of powers with respect to traditional knowledge if the governments choose to do so *politically* first, and *legally* second.⁷⁴ Because of the novel nature of traditional knowledge, however, it is unclear, as we have seen, whether this subject matter falls exclusively within one sphere of jurisdiction or the other or is even properly within any of the divisions of power. The key then is for both the federal and provincial governments to strike a balance between the legal dimensions of federalism and the political will to be collaborative in establishing coherent traditional knowledge governance. Collaborative federalism is significant because it illustrates the possibility that perhaps under different heads of power both levels of government might be able to cooperate or collaborate in respect of developing a sustainable policy framework to coherently govern traditional knowledge in Canada. This

⁷⁰ JENNIFER SMITH, FEDERALISM 22 (2004).

⁷¹ Richard Simeon, *Recent Trends in Federalism and Intergovernmental Relations in Canada: Lessons for the UK?*, 354 THE ROUND TABLE 231, 232 (2000).

⁷² David Cameron & Richard Simeon, *Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism*, 32 PUBLIUS: THE JOURNAL OF FEDERALISM 49, 49 (2002).

⁷³ DONALD SMILEY, CANADA IN QUESTION, 91 (3rd ed. ,1980).

⁷⁴ Katherine Swinton, *Federalism Under Fire: The Role of the Supreme Court of Canada*, 55(1) LAW AND CONTEMPORARY PROBLEMS 121 (1992).

approach will foster the inclusion of the most important player in the arena: Aboriginal Peoples.

The need to avoid “a national, standard, abstract legal definition” of traditional knowledge is emphasized by scholars suggests that approaches to sub-national solutions, rather than national and international ones, ought to be employed.⁷⁵ Unfortunately, this is an unlikely position for the federal government to adopt. In negotiated self-government agreements made between Canada and Aboriginal Peoples—in the Yukon Territory, for example—the federal government has typically refused to devolve control over intellectual property arguing that it must retain exclusive law-making authority as a matter of national importance.⁷⁶ If the federal government maintains the position that intellectual property “cannot be readily characterized as either integral to Aboriginal societies or internal to their territories,”⁷⁷ it is unlikely that some manner of jurisdiction over traditional knowledge would be shared concurrently with Aboriginal self-governments or provincial governments by Canada.

The objective, however, is to get to a stage where federal/provincial/territorial governments have coordinated amongst themselves well enough to engage with Aboriginal Peoples. This process is not merely desirable, it is demanded by law.

In 2004, in *Haida Nation v. British Columbia*, CJC Beverly McLachlin emphasized that the government of Canada owes a *duty* to consult to the country’s Aboriginal populations.⁷⁸ The content of the duty is to be defined based on a spectrum that accounts for the strength of the claims and seriousness of the potential adverse affect on the right or title claimed.⁷⁹ The government is not required to reach an agreement; however, it is a minimum required—it has the *duty*—to *consult* Aboriginal peoples before making decisions that adversely affect any of their rights.⁸⁰

Could the argument be made that a duty to consult in respect of traditional knowledge also exists as “free-standing legal and equitable duty”?⁸¹ That the government

⁷⁵ Intellectual Property Watch, Inside Views Interview with Graham Dutfield, Queen Mary College of the University of London, IP WATCH, 27 April 2006. available at: <http://www.ip-watch.org/weblog/2006/04/27/interview-with-graham-dutfield-queen-mary-college-of-the-university-of-london/>.

⁷⁶ Morse, *supra* note 18, at 33.

⁷⁷ *Id.*

⁷⁸ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at para 16, 27, 32, 35.

⁷⁹ See DWIGHT G. NEWMAN, THE DUTY TO CONSULT: NEW RELATIONSHIPS WITH ABORIGINAL PEOPLES, 12 (2009).

⁸⁰ *Haida Nation*, *supra* note 90, at paras 39-40.

⁸¹ Richard F. Devlin & Ronald A. Murphy, *Reconfiguration through Consultation? A Modest (Judicial) Proposal*, in MURPHY, *supra* note 88, at 273.

cannot further make any decisions about how Aboriginal culture and traditional knowledge will be protected in law without consulting Aboriginal Peoples? Even if the government does consult in this respect, what becomes of such consultation? If the government need not reach an agreement, what legal weight does the duty to consult carry for Aboriginal communities agitating for change in the traditional knowledge realm? Could it just be a procedural mechanism rather than a substantive one?⁸²

Newman argues that a trilogy of cases (*Haida Nation v. British Columbia*, *Taku River Tlingit First Nation v. British Columbia*,⁸³ and *Mikisew Cree First Nation v. Canada*⁸⁴) have “transformed the discourse of the duty to consult and fundamentally altered the steps that government agencies must take prior to making various decisions.”⁸⁵ Devlin and Murphy conclude that “[g]overnments are beginning to take seriously the Supreme Court of Canada’s injunction to negotiate Aboriginal claims and, as far as is consistent with justice, to avoid recourse to the judicial branch as the arbiter of particular disputes.”⁸⁶

While the duty to consult is usually found in situations that have the potential to affect Aboriginal title, because traditional knowledge issues are equally imbued with questions of land and self-determination claims, it perhaps exists as an equally applicable doctrine to traditional knowledge. In other words, if the federal government has the duty to consult Aboriginal peoples before making decisions that will affect their interests in land, Aboriginal Peoples must be consulted when decisions affecting their culture are imminent? If the federal government is going to develop a coherent policy framework and/or traditional knowledge governance regime it ought equally to have the duty to consult Aboriginal peoples. In fact, the duty to consult ought to be, at a minimum, the threshold by which broader issues affecting Aboriginal Peoples in Canada are resolved and that eventually lead to concrete solutions regarding traditional knowledge governance.

Conclusion

In this chapter, we have canvassed the fragmented nature of jurisdiction over traditional knowledge in Canada and related this understanding to the operations of Canadian

⁸² *Id.* at 277.

⁸³ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550.

⁸⁴ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

⁸⁵ See Newman, *supra* note 91, at 10.

⁸⁶ Devlin & Murphy, *supra* note 93, at 287.

federalism. It is our position that the adoption of a collaborative or cooperative brand of federalism by federal, provincial, territorial and Aboriginal governments is a necessary pre-condition to facilitating a suitable traditional knowledge governance regime in Canada in light of the international obligations pursuant to Article 31 of the Declaration. The issues associated with implementing traditional knowledge governance in Canada described in this chapter would remain, however, even if Canada had not signed the Declaration; the fact that it has signed the Declaration, only further compounds those issues.

In Canada, the core issue is under which constitutional head of power levels of government could assert jurisdiction over the traditional knowledge described in Article 31; however, the amorphous—at least to westernized legal doctrine—nature of traditional knowledge makes traditional knowledge difficult to categorize and classify within Canada’s constitutional division of powers, and thus only further problematizes implementation of the Declaration. Yet, the Declaration refers to the “intellectual property” of Indigenous peoples which only serves to circularize the issue of defining what traditional knowledge is within Canada’s existing legal structures and how they can respond to it.

Our discussion essentially highlights the need for Canada to liberate from the shackles of its colonial legacy, to expose, get out into the open, for real, the self-determination question that Canada’s Aboriginal Peoples, including Indigenous peoples around the world, rightfully demand. Many of the rights that Aboriginal Peoples have were articulated by the Supreme Court of Canada in several instances as *sui generis*, because existing legal doctrine was incapable of articulating them. Given the unique problems traditional knowledge presents to the existing Canadian intellectual property law regime, traditional knowledge might therefore also be viewed as *sui generis*. Such an approach would enable Canada to at least attempt to reconcile the aspirations of Article 31, and the Declaration as a whole.

We recognize that the western law approach used to analyze the problems discussed in this paper will limit potential solutions and if such an approach is not divested in the long-term by governments, will only further the current reality of policy and legal impasses indefinitely. The *sui generis* nature of traditional knowledge struggles to find a home in the existing legal regime—and perhaps will never find one—because the western intellectual property paradigm is continually attempting to define and categorize it and make it amenable within contemporary legal doctrines. In this vein, Aboriginal perspectives, customs and laws must not be underestimated or ignored and

must be seen as an indispensable pathway to workable solutions for, arguably, a discussion of traditional knowledge governance is more than simply a discussion of “indigenous intellectual property,” as it were, but is altogether about Aboriginal Peoples’ rightful place in Canada.