

# *Indigenous IP – Is it Possible to Square the Circle?*

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## Focus

- . Colonial underpinnings of the Western IP system
- . Opportunities and challenges in utilizing IP law and tools to respond to rights and concerns of Indigenous peoples
- . Ideas for reform and reconciliation

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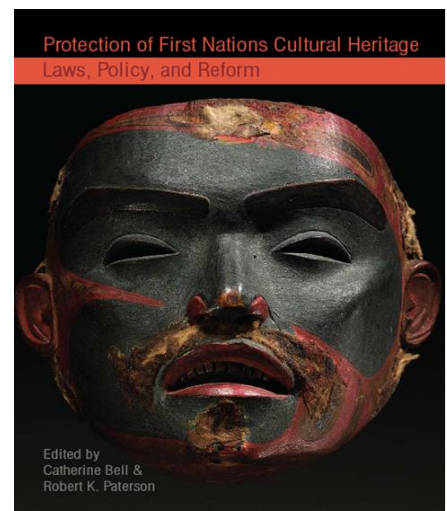
 Indigenous Heritage Circle  
 Cercle du patrimoine autochtone

- to celebrate and promote Indigenous heritage;
- to advocate for cultural heritage programs, protocols, laws, policies, and funding opportunities that recognize Indigenous Peoples as the rightful caretakers of their heritage;
- to support Indigenous communities in stewarding and safeguarding their heritage; and
- to further the understanding and respect for Indigenous heritage, laws, values, and protocols through facilitating dialogue and learning opportunities.

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## First Nations Cultural Heritage And Law Project



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## Intellectual Property In Cultural Heritage

[www.sfu.ca/ipinch/](http://www.sfu.ca/ipinch/)



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## Case Study: Maliseet Language Stories

- **Andrea Bear Nicholas** (Tobique First Nation, NB) Professor Emeritus and former Chair, Native Studies, St. Thomas University (2017 Policy Options)
- 5,000 pages of stories in the Maliseet language originally recorded on reel to reel tapes
- Tapes purchased on condition copyright be conveyed to families.
- To acknowledge collector's copyright in publications would constitute consent to what under Maliseet law/protocols was theft of their stories
- Maliseet language has dropped two categories in UNESCO scale of endangered from "definitely endangered" to "critically endangered."
- Outcome

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## Case Study: Repatriation of Medicine Bundles

- Narcisse Blood, Adam Delaney, Francis First Charger, Martin Heavy Head, Mary Louise Oka, and Frank Weaselhead - Kainai Nation/Blood Tribe of Alberta).
- Ceremonial items and associated songs, dances, and other cultural knowledge necessary for the performance of religious ceremonies and transmission of knowledge within sacred Blackfoot societies
- Repatriation of bundles alienated or taken contrary to Blackfoot law and under duress (Canadian law 1884 – 1951).
- WIPO fact finding mission (Calgary 1989)

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## Repatriation Stories: Broad Lessons

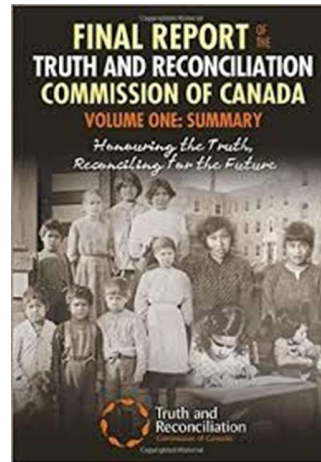
- First Nation concepts of property and legal orders may not situate easily within western industrialized property rights frameworks
  - No equivalent concept – Gitxan law and language “we are this”
- Meaningful response requires comprehensive review of a wide range of property relations that include and extend beyond IP
  - First Nations Sacred Ceremonial Objects Repatriation Act
- Indigenous control over cultural heritage in all of its forms is part of a broader movement for self-determination , including reparation of injustices and respect for Indigenous legal traditions and institutions
  - RCAP, TRC, UNDRIP

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## Truth and Reconciliation Commission of Canada (2016)

- Destroy political and social institutions
- Land is seized
- Populations are forcefully transferred
- Families are disrupted to prevent transmission of cultural values and identity
- Spiritual leaders are persecuted, practices forbidden and objects confiscated

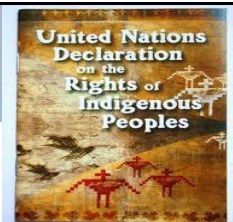


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## International Human Rights

Control over cultural heritage articles 3, 11, 12 and 31



**Article 11** - Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop past, present and future manifestations including archaeological and historic sites, artifacts, designs, ceremonies, technologies and performing arts and literature

**Article 31** Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions ... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

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## Lessons: Maliseet Language Stories

- IP law does not account for how Indigenous cultural expressions may be collectively held and transmitted
- IP law facilitates taking of Indigenous information and cultural expressions through concepts such as author, fixed form, and public domain
- Concepts in IP law may be at odds with Indigenous legal and cultural contexts
  - E.g. Dr. Brian Noble (Dalhousie) Blackfoot Tipi Transfers
- Many photographs, sound recordings, films, manuscripts, language materials etc. (and now being digitized) were collected at a time when Indigenous human and constitutional rights were ignored. As a consequence Indigenous peoples are not the IP holders in Canadian law.
- There is a growing understanding of Indigenous IP as more than an issue of property and constitutional rights.

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## Indigenous Human Rights

- How do current IP laws further colonial ideologies and objectives?
- What might IP law and policy look like if we ground it in the wider context of **UNDRIP**, the calls to action of the **TRC** and **Canada's commitment** to "new relationships on a basis of inclusion, mutual understanding and respect"?
  - Free, prior and informed consent
  - Equitable benefit sharing
  - Respecting, promoting, protecting, practicing heritage
  - Self-determination including right to determine and develop priorities and strategies, promote, develop and maintain distinctive customs, spirituality, traditions, procedures, practices and laws
  - Subject only to such limitations as are determined by law and in accordance with international human rights obligations - nondiscriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society

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## Colonial Underpinnings and Sui Generis Responses

1. Inappropriate, discriminatory uses
2. Denial of rights to determine strategies and priorities for protections
3. Undermine economic opportunities and enable exploitation
4. Violation of Indigenous law
5. Inhibit practice, revitalization
6. Facilitate loss and destruction

### Sui Generis Responses

- Trademark Law and Policy Reform
- Regulating use of registered collective works without consent
- Amendments to state intellectual property law
- Penalizing sale of knock offs

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## Sui Generis Responses (Examples)

- New Zealand Trade Mark Law and Certification
  - Transfer of rights to the Igloo tag (2017)
- Regulating use of registered Indigenous works
  - E.g. Peru, Taiwan, Panama
- Modification of State Intellectual Property Laws
  - E.g. South Africa
- American Indian Arts and Crafts Act
- Policy Responses
  - Indigenous Research Ethics
  - Memory Institutions (museums, archives, galleries, libraries)
  - Traditional Knowledge Licenses and Labels

**SUI GENERIS RESPONSES**  
WIPO 7 May 2020

[Compilation of Information on National and Regional Sui Generis regimes for the Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions](#)

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## Using IP Tools Traditional Knowledge Labels and Licenses

- Dr. Jane Anderson (NYU) and Dr. Kim Christen (Washington State)
- Traditional knowledge labels and licenses  
<https://localcontexts.org/>
- Other examples
  - Mukurtu (Australia)
  - Reciprocal research network (Canada)



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## Case Studies

- Kaska Nation and business name
- Kaska attempt to register an economic development corp noted that their own Nation's name was in use by a construction company
- Solution: negotiate with company to change name and note to register to prevent future registrations without Kaska permission
- Kaska registered "kaska" as an official/public mark as a public authority

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## Heiltsuk-Kisameet Clay Inc.

- Kisameet Clay Inc. is “mining” specialized ice age created clay with medicinal properties
- Kisameet is within the Heiltsuk traditional territories and accordingly there are impact benefit negotiations
- Intersection of indigenous resource law and intellectual property
- Heiltsuk “traditional knowledge” and legal orders apply to the unique healing qualities of kisameet clay
- Within the topics for negotiation includes indigenous knowledge protocol, affirmation of Heiltsuk intellectual property jurisdiction, copyright to Heiltsuk Knowledge and possible co-patent applications for the clay and derivative products

## Questions?

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