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Constitutionalized Rights to Indigenous Intellectual Property

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Abstract

That modern intellectual property regimes fail to protect Indigenous traditional knowledge is well known. Solutions are less forthcoming. Canada is uniquely positioned to solve this legal gap by affirming and recognizing rights to traditional knowledge under section 35 of the *Constitution Act, 1982*. Through a conventional, even conservative, application of the leading case law, the article establishes that protecting traditional knowledge rights would be but a modest step forward in the jurisprudence. It offers step-by-step guidance to those interested in pursuing such a claim, including considerations of *sui generis* intellectual property rights and self-governance. Doing so is found to accord with many best practices on reconciliation, indicating that the solution is normatively as well as pragmatically appealing.

Résumé

Il est bien connu que les régimes modernes de propriété intellectuelle (PI) ne réussissent pas à protéger les droits en matière de savoirs traditionnels autochtones. Les solutions sont encore moins au rendez-vous. Le Canada se retrouve dans une position unique pour combler ce vide juridique en confirmant et reconnaissant les droits en matière de savoirs traditionnels prévus à l'article 35 de la Loi constitutionnelle de 1982. En appliquant la jurisprudence fondamentale de façon conventionnelle, voire conservatrice, l'article précise que la protection des droits en matière de savoirs traditionnels constituerait cependant une modeste avancée dans la jurisprudence. L'article offre une orientation par étapes à toute personne qui envisage de demander ce genre de revendication, y compris des considérations de droits spéciaux de PI et d'autonomie. Le faire équivaut à se conformer à plusieurs pratiques exemplaires en matière de réconciliation, indiquant que la solution est intéressante, tant sur le plan normatif que pragmatique.

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1.0 Introduction

It is no longer novel to observe that intellectual property (IP) laws fail to protect traditional knowledge.¹ Ancient languages are commercialized under licence.² Art is misappropriated and reproduced.³ Plant and animal science is co-opted, at times patented, without recompense to its pioneers.⁴ The flood of transgressions goes on. Canada's IP protections, focused as they are on new and original creations, are simply not suited to protect knowledge handed down intergenerationally.⁵

Scholars have released a torrent of scholarship calling attention to the problem; solutions have been less forthcoming. Howell and Ripley summarize the state of scholarship in noting that "the available literature is voluminous, but it is repetitious and often politically focused, lamenting the absence of protection and encouraging action. Few discuss what should be done or how remedial action could be formulated at a level of detail sufficient to be effectively implemented and enforced in law."⁶ This legal absenteeism leaves Indigenous groups to manage as best they can. Several First Nations have internal guidelines for the use of

traditional knowledge within their territories.⁷ Some look to private contracts as a means of protection.⁸ Others resort to secrecy in an attempt to prevent dissemination.⁹ None of these strategies, as the literature evidences, are sufficient to close the gap.

This article proposes a novel, made-in-Canada solution. Section 35 of the *Constitution Act, 1982* "recognizes and affirms" existing Aboriginal and treaty rights.¹⁰ It is the contention of this article that section 35 provides a ready pathway by which Indigenous communities could protect their rights in traditional knowledge, requiring but a modest step forward in the jurisprudence. Although scholars have speculated that section 35 may be of use, an instructional gap exists as to how a claim could proceed in practice. This article fills that space.

Methodologically, this article employs a conventional doctrinal research approach.¹¹ It is a conservative doctrinal analysis in that it accepts the state of the law as it is and seeks to work within it. The basic analytic framework for section 35 is now well

- 1 Proceeding with the correct terminology is not an insignificant task. A term like "traditional knowledge" can be misleading in its suggestion that the knowledge at stake is anachronistic: see Gordon Christie, "Aboriginal Rights, Aboriginal Culture, and Protection" (1998) 36 Osgoode Hall LJ 447 at 465. It is the term encouraged by Robert Howell & Roch Ripley, "The Interconnection of Intellectual Property and Cultural Property (Traditional Knowledge)" in Catherine Bell & Robert K Paterson, eds, *Protection of First Nations Cultural Heritage: Laws, Policies and Reform* (Vancouver: UBC Press, 2009) 223 at 224 [Howell & Ripley]. This volume is arguably the leading Canadian text on the issue and has been well received by Bell and Paterson's contemporaries: see reviews by Katherine Pettipas (2010) 20:1 Great Plains Research 144; Andrea Laforet (2011) 34:1 Museum Anthropology 71. In the end, we understand there exist by virtue of Indigenous creative or dialogic processes that to which laws should apply regarding their use, transfer, and preservation — this we shall call "traditional knowledge." It is a broad definition, potentially referring to everything from artistic manifestations like songs, recipes, and sculptures to legal knowledge, medicinal expertise, and geographic or biological insights. Lastly, this paper adopts the Carpenter style guide by referring to specific groups by name when possible and using "Indigenous" otherwise, except as required by legal terms of art: see Lenny Carpenter, *Reporting on Indigenous Peoples* (Toronto: Journalists for Human Rights, 2017), online: <jhr.ca/en/wp-content/uploads/2017/12/JHR2017-Style-Book-Indigenous-People.pdf>.
- 2 A Montreal manufacturer has trademarked the Inuit word for a type of boot: see "Kamik," Genfoot Inc, Can, No TMA216457 (1 October 1976) registered.
- 3 Tonina Simeone, "Indigenous Traditional Knowledge and Intellectual Property Rights" (Ottawa: Library of Parliament, 2004) at 3.
- 4 *Ibid* at 3; Assembly of First Nations, "Aboriginal Traditional Knowledge and Intellectual Property Rights" (undated) Discussion Paper at 8, online: <afn.ca/uploads/files/env/atk_and_ip_considerations.pdf> [AFN Discussion Paper].
- 5 See Marie Battiste, "Indigenous Knowledge — Foundations for First Nations" (2005) 1 World Indigenous Nations Higher Ed Consortium J 1 at 11; Simeone, *supra* note 3; Howell & Ripley, *supra* note 1 at 227; AFN Discussion Paper, *supra* note 4 at 7. Indigenous creators do try to avail themselves of conventional protections when possible. British Columbia's Snuneymuxw First Nation holds trademarks over petroglyph designs to prevent their unauthorized reproduction: "Petroglyph & Design," Snuneymuxw First Nation, Can, No 0910398 (13 October 1998) advertised. Ontario's M'Chigeeng First Nation has registered a copyright over a piece of law: *M'Chigeeng First Nation Custom Election Code* (literary) M'Chigeeng First Nation, Can 1034845 (15 December 2005) registered. For more, see Robert K Paterson, "Canadian and International Traditional Knowledge and Cultural Expression Systems" (2017) 29:2 IPJ 191 at 236ff.
- 6 Howell & Ripley, *supra* note 1 at 225.
- 7 See Gwich'in Tribal Council, *Working with Gwich'in Traditional Knowledge in the Gwich'in Settlement Region* (21 January 2004), online: <www.grrb.nt.ca/pdf/GTCTKPolicy.pdf>; First Nation of Na-Cho Nyak Dun, *Traditional Knowledge Policy* (4 February 2008), online: <www.yumpu.com/en/document/read/18048040/traditional-knowledge-policy-framework-first-nation-of-na-cho->; Chiefs in Ontario, *First Nations Environmental Assessment Toolkit for Ontario* (Toronto: Chiefs in Ontario, 2009) at section 3; for more, see online: <coeatoolkit.org/traditional-knowledge.php>..
- 8 AFN Discussion Paper, *supra* note 4 at 5.
- 9 *Ibid*.
- 10 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.
- 11 See Terry Hutchinson, "Doctrinal Research" in Dawn Watkins & Mandy Burton, eds, *Research Methods in Law* (New York: Routledge, 2013) 7. A similar research approach is used in David Leitch, "Canada's Native Languages: The Right of First Nations to Educate Their Children in Their Own Languages" (2006) 15 Const Forum Const 107.

established in leading cases of such as *Sparrow*¹² and *Delgamuukw*.¹³ I acknowledge that there are those who are critical of how section 35 has been interpreted and who wish further claims would proceed under a fresh, Indigenized analytic approach.¹⁴ Others too suggest the most interesting avenues for Aboriginal rights litigation lie not in section 35, but in uses of the *Canadian Charter of Rights and Freedoms*,¹⁵ section 91(24),¹⁶ or international law.¹⁷ However meritorious these suggestions might be, our present purpose is closer to that of an *amicus curae* than a reformer. The article provides practical insights on how to found a traditional knowledge claim with as little legal innovation as possible.

Section 2.0, the bulk of the article, provides the doctrinal core of the section 35 analysis. Subsections break down aspects of the relevant legal test, offering instruction on the implications of framing a right, how to address extinguishment, how to know a statute infringes a right, and whether such infringements are justified. In section 3.0, a brief discussion considers the merits of a section 35 solution, including its potential to advance reconciliation. The article concludes by noting avenues for further research to advance the section 35 solution in scholarship and in practice.

2.0 Doctrinal Analysis

Indigenous rights were constitutionalized in the *Constitution Act, 1982*. Section 35(1) states that “[t]he existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed.” Section 35(2) clarifies that these protections cover all Indian, Inuit, and Métis people, while section 35(3) provides, for greater certainty, that the mention of “treaty rights” includes rights that exist by virtue of modern or future land claims agreements. Indigenous communities have used section 35 to give effect to a range of rights,

including the right to fish, to hunt, to move goods across borders, and to assert rights over traditional lands. The four-part section 35 framework begins with guidance from *R v Sparrow*.¹⁸

2.1 Step One: Establishing the Right

The first step is to establish the right being asserted. Note that section 35 covers “existing aboriginal and treaty rights.” The two being distinct, either may provide the basis for a claim.

We know that the source of an Aboriginal right is a people’s historic occupation of land in what is now Canada. As Lamer CJC wrote in the leading case of *Van Der Peet*:

The doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were *already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.¹⁹

In order to be an Aboriginal right, an activity “must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”²⁰ “Integral,” in this context, means a “defining feature” of the culture. One is to ask “whether, without this practice . . . , the culture in question would be fundamentally altered or other than what it is.”²¹ The court has given “culture” an expansive meaning in recent years, explaining, “What is meant by ‘culture’ is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits.”²² It is also necessary that the claimant establish that the custom in question has continuity with a custom that predates European contact.²³ Note that this does not require an “unbroken chain” but is rather a purposive measure to reflect that section 35, at its core, is meant to reconcile

12 *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

13 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

14 See Dimitrios Panagos, *Uncertain Accommodation: Aboriginal Identity and Group Rights in the Supreme Court of Canada* (Vancouver: UBC Press, 2016); Gordon Christie, “A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*” (2005) 23 Windsor YB Access Just 17. For a more optimistic view that section 35 already represents an intersection between Canadian and Indigenous law, see Richard Ogden, “Existing Aboriginal Rights in Section 35 of the Constitution Act, 1982” (2009) 88 Can Bar Rev 51.

15 Dwight Newman, “Arguing Indigenous Rights Outside Section 35: Can Religious Freedom Ground Indigenous Land Rights, and What Else Lies Ahead?” in Thomas Isaac, ed, *Key Developments in Aboriginal Law 2019* (Toronto: Carswell, 2019).

16 Kerry Wilkins, “Life Among the Ruins: Section 91(24) After Tsilhqot’in and Grassy Narrows” (2017) 55:1 Alta L Rev 91; Brian Bird, “Federal Power and Federal Duty: Reconciling Sections 91(24) and 35(1) of the Canadian Constitution” (2011) 16:1 Appeal 3; Kent McNeil, “Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction” (1998) 61:2 Sask L Rev 431.

17 See several compelling chapters in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Waterloo, ON: Centre for International Governance Innovation), online: <<https://www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf>>.

18 *Sparrow*, *supra* note 12.

19 *R v Van der Peet*, [1996] 2 SCR 507 at para 30 [*Van der Peet*] [emphasis in original].

20 *Ibid* at para 46.

21 *Ibid* at para 59.

22 *R v Sappier*; *R v Gray*, 2006 SCC 54 at para 45.

23 *Ibid* at para 63.

Crown sovereignty with the reality that distinctive societies existed prior to European contact.²⁴ Though little scholarship is available in this regard, prior authors have commented that this framework should be amenable to traditional knowledge claims:

While, unquestionably, the Court in *Van der Peet* had in mind (minimally) protecting physical activities, the test it lays out ... seems oddly constructed to work well in relation to narratives, ceremonies, and other intellectual products.²⁵

Treaty rights stem from agreements made with the Crown. The focus of analysis is on determining the intention of the parties at the time the treaty was signed, keeping in mind that the honour of the Crown is at stake and it is always that assumed the Crown intends to fulfill its promises.²⁶ Determining the scope of a treaty right requires a consideration not only of the written records, but also the knowledge of Indigenous peoples and the context in which an agreement was made.²⁷ Indigenous groups should make use of their treaties to ground IP rights if possible. The *Huron-British Treaty of 1760* includes, for instance, a promise that the Hurons must be “allowed the free Exercise of their Religion [and] their Customs.”²⁸ To the extent that Huron culture includes customs around the use of traditional knowledge, the treaty may provide a starting point for analysis.

2.1.1 Framing the Right

To assert a right, a claimant must first decide what the content of that right is. This choice carries enormous strategic consequences. To begin with, the content of the right must be fit for purpose. This purpose can be defensive, positive, or both.²⁹ A defensive use would allow an Indigenous right holder to resist an action against them, particularly an action for infringement. Analogous to equitable doctrines like estoppel, a defensive use is a shield that prevents enforcement of a monopoly to the extent that the statutory right conflicts with the Aboriginal or treaty right. A positive use would claim a property right in and over something,

making it possible to enforce that right to the exclusion of others. In many cases, defensive and positive uses go hand in hand, because recognition of a property right in something necessarily permits one to use it accordingly.

Second, the content of the right must be supported in fact and law. Framing a right too narrowly or too broadly may sink the case. One recalls the fate of the Indigenous claimants in *R v Pamajewon*, whose assertion that a right of self-government included the right to regulate gambling was rejected by the Supreme Court as an “excessive generality.”³⁰ To get a picture of what rights may exist — and, later, how they might be used — consider the complications surrounding the recent publication of a book of Maliseet stories.

The Maliseet (Wolastoqiyik) are a First Nations people whose traditional territories lie in the watershed of the Saint John River in New Brunswick, Maine and Quebec, and all the way to the St. Lawrence. About 7,600 live in Canada today, primarily residing in the communities of Madawaska, Kingsclear, Oromocto, Saint Mary's, Tobique, and Woodstock.³¹ Between 1971 and 1984, Maliseet elders worked with University of New Brunswick professor Laszlo Szabo to record nearly 40 tapes comprising some 655 of their nation's traditional stories.³² Dr. Szabo made extensive use of these tapes, transcribing and translating the stories into no less than 12 volumes.³³

By the early 1990s, as many of the storytellers began to pass on, community interest turned to publishing the stories contained in the tapes. This necessitated a dialogue with Dr. Szabo because the professor, having recorded the stories, likely gained certain rights over the tapes.³⁴ This led to a period of legal uncertainty that stalemated publication. The Maliseet community had no interest in publishing the stories under the professor's name, because doing so “would have been tantamount to surrendering claim to the oral traditions of their elders,” yet they also feared being sued for potential infringement.³⁵ None of the storytellers lived to see their stories in print by their descendants.

24 *Ibid* at paras 65, 44.

25 Christie, *supra* note 1 at 476.

26 *R v Badger*, [1996] 1 SCR 771 at para 41 [Badger].

27 *R v Marshall*, [1999] 3 SCR 456 at paras 9–14 and 41 [Marshall I].

28 *Huron-British Treaty of 1760*, 5 September 1760, online: <www.rcaanc-cirnac.gc.ca/eng/1361456241366/1581293495454>.

29 For background on defensive versus positive protections, see World Intellectual Property Office, *Traditional Knowledge and Intellectual Property — Background Brief* (accessed 21 March 2019), online: <wipo.int/pressroom/en/briefs/tk_ip.html>.

30 *R v Pamajewon*, [1996] 2 SCR 821 at para 27, 138 DLR (4th) 204 [Pamajewon].

31 See Tom McFeat writing for *The Canadian Encyclopedia*, *sub verbo* “Wolastoqiyik (Maliseet)” (edited 10 October 2018), online: <www.thecanadianencyclopedia.ca/en/article/Maliseet>; Woodstock First Nation, “History” (accessed 10 July 2019), online: <www.woodstockfirstnation.com/history/>; Andrea Bear Nicholas, “History of the Maliseet First Nation at Kingsclear to 1950” (June 2013), online: <www.kingsclear.ca/about/history/>; Andrea Bear Nicholas, “A Summary History of St. Marys to 1950” (1 December 2005), online: <www.stmarysfirstnation.com/about.html>.

32 See the reference in Thomas Parkhill, *Weaving Ourselves into the Land* (Albany, NY: State University of New York Press) at 203.

33 See Laszlo Szabo, “Malecite Stories: Contents, Characters, Motifs” (1988) 13:2 *Studies in Can Lit* 157, online: <journals.lib.unb.ca/index.php/SCL/article/view/8083>. These works currently reside in the Canadian Museum of Civilization.

34 *Copyright Act*, RSC 1985, c C-42, s 18.

35 Andrea Bear Nicholas, testifying before Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, Evidence, 42nd Parl, 1st Sess, No 106 (7 May 2018) at 18, online: <www.ourcommons.ca/Content/Committee/421/INDU/Evidence/EV9842758/INDUEV106-E.PDF> [Bear Nicholas HOC].

In 2015, a decision was made to publish the stories notwithstanding the legal implications.³⁶ They contemplate that another 10 books may be produced.³⁷ In publishing *Glooskap*, the families not only accepted the risk of litigation, they in fact “look[ed] forward to being sued, so that the matter might be settled in court.”³⁸

The respective rights of the Maliseet community and Dr. Szabo’s estate have not been litigated. Notwithstanding how that may end, for our purpose, the circumstance is useful as an illustration of how claims may be framed and used.

2.1.2 Deciding on the Content of the Right

Some claims lend themselves to purely defensive uses. Claiming a right to publish books of one’s own stories is an example. It would permit a community to put out a book like *Glooskap*, but could do nothing to prevent others from reprinting them later, in the way a copyright would.

Claiming a right to publish one’s own stories also seems too broad to be successful in court. This is especially true if there is a commercial aspect involved. Substantiating this claim would require a community to adduce evidence that book publishing was integral to their culture prior to European contact. Succeeding on this point would seem difficult unless publishing was specifically provided for in a treaty.³⁹

What may succeed is a narrower claim — for example, that a community has a right to share among themselves traditional stories in their own language. That traditional stories are so integral to Indigenous culture as to warrant section 35 protection is beyond debate.⁴⁰ Records (such as tapes) showing that

community members had centuries-old stories in their minds can be used as evidence that the practice existed pre-contact. While written texts may not have been widespread, rights are not frozen in time — they are to be interpreted flexibly so as to permit their “evolution” rather than “affirmed ... in their primeval simplicity.”⁴¹ After all, many Indigenous languages took no written form until quite recently.⁴² The publishing of stories in one’s native language could easily be framed as an evolution of storytelling from one person to another, and would be fully in keeping with the theme of recognition expressed in section 35 cases.⁴³ Lastly, the fact that these books would be in an Indigenous language also gives the right an “inherent limit,” making the claim less contentious and therefore easier to recognize.⁴⁴

There does exist a near-precedent — albeit a heartbreaking one — for a defensive use of section 35 with respect to traditional knowledge rights. In August 2014, an 11-year-old girl from the Six Nations of the Grand River was diagnosed with leukemia. Scientific evidence indicated that she had a 90 percent chance of recovery with chemotherapy and no chance of survival without. The child’s mother opted to withdraw her daughter from treatment in favour of traditional longhouse medicine. The issue became one of child protection: could the hospital force the daughter’s return? The answer from the Ontario Court of Justice was no. The court recognized traditional medicine as a practice “rooted in [Six Nations] culture from its beginnings” and thereby protected by section 35, cautioning that “a right cannot be qualified as a right only if it is proven to work by employing the western medical paradigm.”⁴⁵

The case’s precedential scope is limited. It is merely a trial-level decision holding, at its most narrow, that Indigenous people cannot be coerced into using Western medicine. Even so, it is

36 Andrea Bear Nicholas, *Keloskapeyal naka Kansohseyal Atkohkakanol*, translated as *Glooskap and Other Old Stories* (Ottawa: Canadian Association of University Teachers, 2017).

37 Bear Nicholas HOC, *supra* note 35 at 22.

38 *Ibid* at 18. For more, see Andrea Bear Nicholas, “Who Owns Indigenous Cultural and Intellectual Property?” (27 June 2017), online: <policyoptions.irpp.org/magazines/june-2017/who-owns-indigenous-cultural-and-intellectual-property>; Canadian Association of University Teachers, “Copyright Act Review an Opportunity to Press Feds on Aboriginal Issues” (October 2016), online: <caut.ca/bulletin/2016/10/copyright-act-review-opportunity-press-feds-aboriginal-issues>; Shawn Goff, “Prof Upholds Maliseet Stories, Languages in New Book” (21 February 2017), *The Aquinian*, online: <theaquinian.net/prof-upholds-maliseet-stories-language-new-book/>.

39 The Maliseet are party to four Peace and Friendship treaties dating to 1713, 1725/26, 1749, and 1760: see Indigenous and Northern Affairs Canada, *Peace and Friendship Treaties* (10 December 2015), online: <www.rcaanc-cirnac.gc.ca/eng/1360937048903/1544619681681>; see also Maliseet Nation of New Brunswick, “Submission to the Expert Panel for the Review of Environmental Assessment Processes” (23 December 2016) at 2, online: <stmarysfirstnation.com/consult/nb-maliseet-submissions-to-the-ea-expert-panel.pdf>. The 1713 treaty is generally not included in Canadian lists because it was signed with the Colony of Massachusetts. Treaties on similar terms were signed with the Mi’kmaq of Atlantic Canada and were considered in *Marshall I*, *supra* note 27.

40 *Hamilton Health Sciences Corp v DH*, 2014 ONCJ 603 at para 78 [*Hamilton Health Sciences Corp*]; see also Leitch, *supra* note 11; Lorena Lafontaine et al, “What Canada’s New Indigenous Languages Law Needs to Say and Say Urgently” (15 September 2017) *Observatoire international des droites linguistiques* (blog), online: <www.droitslinguistiques.ca/blogue/6-blogue/458-what-canadas-new-indigenous-languages-law-needs-to-say-and-say-urgently?lang=en>.

41 Sparrow, *supra* note 12 at para 27; see also Van der Peet, *supra* note 19 at para 64; *McLeod Lake Indian Band v Chingee*, [1998] FCJ No 1185 at para 10, 165 DLR (4th) 358 (TD).

42 The Maliseet language did not take written form until 1899: Montague Chamberlin, *Maliseet Vocabulary* (Cambridge, MA: Harvard Cooperative Society, 1899), online courtesy of UNB: <web.archive.org/web/20051025053605/http://www.lib.unb.ca/Texts/Maliseet/vocabulary/>.

43 See, for example, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 14.

44 *R v Gladstone*, [1996] 2 SCR 723 at para 57 [*Gladstone*].

45 *Hamilton Health Sciences Corp*, *supra* note 40 at paras 80, 81.

a valuable authority to have. Should the next claim concern the right to use a traditional medicine under patent, as has been known to happen,⁴⁶ the case supports the proposition that traditional knowledge is the sort of historic practice that can override statutory law.

Claims can also be framed positively to ground enforceable IP rights. The assertion that communities hold *sui generis* rights over their traditional knowledge is essentially an Aboriginal title claim to intellectual property. Section 35 has been used to protect property rights before, notably to land. From this jurisprudence we can predict the analytic framework that the court will likely develop to consider a traditional knowledge rights claim.

First, we know the source of Aboriginal title to land is pre-contact occupation. It arises out of the recognition that “when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.”⁴⁷ One should assume that the court will recognize the same origin for IP rights.

If so, an IP right claim should be within reach. Indigenous communities have the same historic relationship with their traditional knowledge as they do with their historic territories. At times, they are inseparable. As put by the Dene of Treaty 11, “The Land is the boss of culture.”⁴⁸ Catherine Bell argues this is the case for totem poles in British Columbia.⁴⁹ Although totem poles at common law fall somewhere between fixtures and chattels, the customary law of the Gitksan views them firmly as part of the land. As one Gitksan chief describes:

When a chief is planning to raise the pole, it is very important because he thinks back on his territory where he would put all ... the power and authority that he has and he will put all the crests in his adawx [verbal record of lineage’s history] on this pole. ... The pole represents ... the power and ownership of the territory. The ... totem poles that you see standing have these — and they’re not just standing there for nothing.⁵⁰

This is helpful at a practical level because it means that certain manifestations of traditional knowledge may see rights run with the land. Australian scholar Stephen Gray, after examining a custom analogous to that of the Gitksan whereby an Indigenous community records its history and relationship to the land using paintings, concludes, “a relationship of this type between art and land ... is arguably sufficient to establish that the relevant laws are a nature or incident of aboriginal native title to land.”⁵¹ Other, less tangible mediums — like Maliseet stories — may not be so neatly wrapped up, though arguably they too tie a people to their territory. Such connections may also be helpful for groups claiming traditional rights from modern treaties, because they ensure that the phrase “land claims agreements” is not interpreted so as to suggest that section 35(3) protects only rocks and trees.⁵²

Second, we can expect the court will want to identify the bundle of *sui generis* rights by “precise” reference to the community’s laws and traditional way of life.⁵³ The court in *Delgamuukw* rejected the notion that Aboriginal title to land encompasses only the practice of those rights “integral” to a culture, as in *Van der Peet*. Rather, as is appropriate to property, rights are wider, allowing uses for “a variety of purposes.”⁵⁴ The only limit to these uses is that they not be “irreconcilable” with the group’s attachment to the land — or, in an IP context, the traditional knowledge itself.⁵⁵

What might that resulting bundle of rights look like? We should expect at least two features from land rights to carry over. The first is communality. One aspect of Aboriginal title to land is that it cannot be held by an individual; it is a communal right.⁵⁶ Another feature is that the title is inalienable to all except the Crown. Both of these features extend from the irreconcilability principle. Because Aboriginal title finds its source in a “relationship” with the land, a sale would end that relationship, and their rights along with it.⁵⁷ We expect that Aboriginal IP rights would also find their source in a community’s relationship with its traditional knowledge, so it should be expected that the same logic will apply to these rights as well. An exploration of a community’s own laws would be informative on this point in articulating what uses would be “irreconcilable” with their traditional form.

46 Heather A Sapp, “Monopolizing Medicinal Methods: The Debate over Patent Rights for Indigenous Peoples” (2006) 25:2 Temp J of Sci Tech & Envtl L 191.

47 *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313 at para 26, 34 DLR (3d) 145 [Calder].

48 As recorded in *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 114, online: <data2.archives.ca/e/e448/e011188230-02.pdf> [Royal Commission].

49 Catherine Bell, “Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform” in Bell & Paterson, eds, *Protection of First Nations Cultural Heritage: Laws, Policy and Reform*, supra note 1, 15 at 26.

50 *Ibid.*

51 Stephen Gray, “Peeking into Pandora’s Box — Common Law Recognition of Native Title to Aboriginal Art” (2000) 9 Griffith L Rev 227 at 237.

52 See also Leitch, supra note 11 at 114.

53 *Delgamuukw*, supra note 13 at para 194.

54 *Ibid* at para 117.

55 *Ibid.*

56 *Ibid* at para 115.

57 *Ibid* at para 129..

Lastly, if opting to leap rather than step forward, one might assert that Indigenous laws on traditional knowledge supersede those applied by Parliament. This is an assertion of self-government. If successful, it entails both a defensive and positive impact, because the substance of those laws would almost certainly grant the community *sui generis* rights over their traditional knowledge and the jurisdiction to govern their use.

Indigenous communities have a wide array of laws that both determine the content or “bundle” of rights subsisting in their traditional knowledge and govern how those rights can be used. For example:

- Crests, motifs, designs and symbols, and herbal and medicinal techniques are owned by certain individuals, families, or clan members.
- Artistic aspects of traditional knowledge, such as songs, dances, stories, dramatic performances, and herbal and medicinal techniques, can only be shared in certain settings or spiritual ceremonies with individuals who have earned, inherited, and/or gone through a cultural and/or educational process.
- Art forms and techniques as well as herbal and medicinal techniques cannot be practised, and/or certain motifs cannot be used, until the emerging trainee has apprenticed under a master of the technique.
- Certain ceremonial art and herbal and medicinal techniques can be shared only for specific internal Indigenous cultural and/or spiritual reasons and within specific Indigenous cultural contexts.⁵⁸

The specific right or claim asserted under section 35 will depend on the traditions of the local community. As the Truth and Reconciliation Commission (TRC) notes, “Indigenous law is

diverse; each Indigenous nation across the country has its own laws and legal traditions.”⁵⁹

Those developed by the Maliseet present as one case study. In 2009, the Maliseet Nation Conservation Council developed a “Traditional Knowledge Protocol.”⁶⁰ While its pith and substance is not the specific delineation of IP rights (as is the case with Canadian statutes), it does apply to — and potentially conflict with — much of what would be the purview of IP legislation. In scope, the protocol applies broadly, including to artistic works, stories, songs, tools, and primary research materials gathered from Maliseet people. Like Canadian statutes, it establishes an agency for its implementation, the Maliseet Research Review Board (MRRB). Again, while not in pith and substance about establishing the content and assignment of IP rights, it does assert that all forms of traditional knowledge “are and must remain the collective property and responsibility of our people.”⁶¹ It implies protections of unlimited term, both by (1) allowing the MRRB to identify and establish “claims” to cultural materials in the public domain and (2) requiring that the Maliseet be credited as rights owners even after statutory copyright periods expire. It also controls what can be done with Maliseet cultural property, allowing the MRRB to prohibit the display or publication of such property and to sanction those who defy their orders. It is, in sum, a sophisticated and multi-faceted law, and one that operates in much the same space as laws of Parliament.⁶²

There are several authorities that one might cite in support of a self-government claim. On matters pertaining to social and civil rights, courts have long recognized Indigenous customs as a source of law that survived the assertion of Crown sovereignty. The leading case is *Connolly v Woolrich*, a decision handed down a mere nine days after Confederation.⁶³ The Quebec Superior Court was asked to decide the legitimacy of a marriage between a Quebec man and a Cree woman solemnized according to the customs of her tribe. The court found the marriage valid, holding that European settlement did not accompany a wholesale displacement of Indigenous laws. Monk J stated:

58 Gregory Younging, “Gnaritas Nullius (No One’s Knowledge): The Public Domain and Colonization of Traditional Knowledge” (Paper delivered at the Seventeenth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore concerning experiences from Canada, 6 December 2010) at 4.

59 Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: Reconciliation—The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (Winnipeg: TRC, 2015) at 45, online: <nctr.ca/assets/reports/Final%20Reports/Vol-ume_6_Reconciliation_English_Web.pdf> [TRC Final].

60 Maliseet Nation Conservation Council, *Traditional Knowledge Protocol* (St Mary’s First Nation, NB: Maliseet Nation Conservation Council: 2009), online: <achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf>.

61 *Ibid* at appendix B, part I, section F.

62 Note that it is not necessary that a community codify its IP laws in order to be given effect. See Lord Denning in *R v Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All ER 118 at 123, [1982] 2 WLR 641 (EWCA) (“In early societies custom is the basis of law. Once a custom is established it gives rise to rights and obligations. ... These customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community”); quoted with approval in *Harpe v Massie and the Ta’an Kwäch’än Council*, 2005 YKSC 54 at para 46; and *Campbell et al v AG BC/AG Cda & Nisga’a Nation et al*, 2000 BCSC 1123 at para 85.

63 *Connolly v Woolrich* (1867), 11 LCJ 197, 17 RJRQ 75, aff’d (1869), 1 RL 253 (QCCA) [*Connolly*]; also cited with approval in *Yew v BC (Attorney General)* (1923), [1924] 1 WWR 753 at para 43 [WL], [1924] 1 DLR 1166 (CA) (“the learned Judge came, I think, to the right conclusion, and a judgment given nearly sixty years ago which is peculiarly adapted to the social requirements of the development of our great country, vast portions of which are still in a wild state, should not be lightly disturbed”).

Will it be contended that the territorial rights, political organization ... or the laws and usages of the Indian tribes were abrogated; that they ceased to exist when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and where not even modified in the slightest degree in regard to the civil rights of the natives.⁶⁴

It was but the first in a series of judgments predating the *Constitution Act, 1982* that recognized the legitimacy of marriages performed under Indigenous customs.⁶⁵

The applicability of *Connolly* is not restricted to marriage.⁶⁶ In a landmark case concerning adoption, the BC Court of Appeal cited *Connolly* — “a most remarkable authority in this field” — in holding that customs of the Stellaquo Band were sufficient to ground a parentage claim. At issue in the case of *Casimel* was whether the biological grandparents of a deceased motorist, who had raised the deceased from birth and were regarded by the community as his parents, were entitled to be treated as such for the purposes of recovering under British Columbia’s insurance statute.⁶⁷ The court held that they were, readily accepting that adoptions effected by local custom could be given legal recognition. In doing so, the court adopted a legal test from the High Court of Australia in *Mabo v Queensland*. That court held:

The incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the Indigenous inhabitants, provided those laws and customs are not so repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld.⁶⁸

This test has since been cited in Canadian jurisprudence.⁶⁹ It has also spread in popularity, with Saskatchewan lawyer Norman Zlotkin expressly recommending the *Connolly/Casimel* line of authority as the means for Indigenous communities to acquire rights over their traditional knowledge.⁷⁰

One must be mindful, however, of the fate of the claimants in *Pamajewon*. In that case, leaders in the Shawanaga and Eagle Lake First Nations attempted to avoid conviction for illegal gaming by asserting that their nations retained a self-government right to regulate gaming. Their claim failed for want of evidence that gambling on the reserve lands was an integral part of their distinctive cultures.⁷¹ A generalized right of self-government was not enough. The *Maliseet* case, though, seems convincingly distinguishable. Not only was storytelling an integral cultural practice, successive generations actively regulated their treatment. *Pamajewon* left a small door open for practices that were “the subject matter of aboriginal regulation,”⁷² and *Maliseet* storytelling fits the bill.

With all this in mind, communities have a few routes open to them. Claiming an integral historic practice is likely the simplest, but it means that the right can only be used defensively. The problem of appropriation is left unaddressed. Another route is to follow a title claim framework and assert *sui generis* IP rights in traditional knowledge. The most ambitious route is to assert the applicability, and supremacy, of Indigenous laws. Choosing among these options depends on the remedy sought as well as the factual matrix underlying a community’s claim.

2.2 Step Two: Extinguishment

In step two of a claim, we grapple with the fact that the text of section 35 protects only those rights still “existing” when the new constitution came into force.⁷³ It would fall to an opposing party to prove that, prior to 1982, the Crown expressed a “clear and plain intention” to extinguish the right being claimed.⁷⁴

Parliament’s regulation of the IP space is likely not enough to amount to extinguishment. The argument arises because statutes like the *Copyright Act* and *Patent Act*, which

64 *Connolly*, *supra* note 63 at para 23.

65 See *R v Bear’s Shin Bone* (1899), 4 Terr LR 17, 3 CCC 329 (NWTSC); *R v Nan-e-quis-a Ka* (1889), 1 Terr LR 211, 2 CNLC 368 (NWTSC); *R v Williams* (1921), 20 BCR 303 (SC); *Re Noah Estate* (1961), 36 WWR 577, 32 DLR (2d) 185 (NWT Terr Ct).

66 See *Re Katie* (1961), 32 DLR (2d) 686, 38 WWR (NS) 100 (NWT Terr Ct); *Re Beaulieu* (1969), 3 DLR (3d) 479, 67 WWR 669 (NWT Terr Ct); *Re Deborah E4-789* (1972), 28 DLR (3d) 483, [1972] 5 WWR 203 (NWTCA); *Re Wah-Shee* (1975), 57 DLR (3d) 743 (NWTSC).

67 *Casimel v Insurance Corp of BC*, [1993] BCWLD 2373, 82 BCLR (2d) 387 (CA). *Casimel* was heard by the BC Court of Appeal just a few weeks after its decision in *Delgamuukw*, and before the latter had been affirmed at the Supreme Court of Canada.

68 *Mabo v Queensland (No 2)* (1992), BC9202681 at 51, 107 ALR 1 (HCA) [emphasis added].

69 *Manychief v Poffenroth* (1994), [1995] 3 WWR 210 at para 25, 164 AR 161 (QB); *Klahoose First Nation v Cortes Ecoforestry Society*, 2003 BCSC 430 at para 35.

70 Norman Zlotkin, “From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada” in Bell & Paterson, eds, *Protection of First Nations Cultural Heritage: Laws, Policy and Reform*, *supra* note 1, 343 at 362.

71 *Pamajewon*, *supra* note 30 at para 28.

72 *Ibid* at para 29.

73 *Sparrow*, *supra* note 12 at para 23.

74 *Ibid* at para 37.

predate 1982, are sometimes seen as “complete codes.”⁷⁵ In assigning and omitting rights, one might infer from Parliament an intention to govern the entire IP space such that no rights are to exist outside the four corners of the legislation. There also exist provisions like section 5(1.2) of the *Copyright Act*, which states, “Copyright shall not subsist in Canada otherwise than as provided” by the statute. This line of argument is bolstered thematically by the theory of users’ rights, which holds that knowledge is by default “as free as the air.”⁷⁶ Rights given by statute are to be seen as limited exceptions to that rule, with Parliament intending that all else be left to the public.

On a comparative note, this is effectively the position taken by the Federal Court of Australia in *Bulun Bulun*.⁷⁷ In that case, the Indigenous Ganalbingu sought a declaration that they were the equitable owners of a copyright subsisting in a painting. Because the painting was of a sacred site, and Ganalbingu customs placed restrictions on the “corpus of ritual knowledge” associated with their lands and culture, equitable title was said to arise as an incident of their Aboriginal title to the land. The court held that while Aboriginal customary laws over artistic works had survived the introduction of the common law, they were extinguished with the introduction of copyright legislation. In doing so, the court rejected the possibility of “Aboriginal copyrights” as an extension of Aboriginal title.

Courts have not adopted *Bulun Bulun* into Canadian law, nor is there reason to expect it to be forthcoming. Most notably, Australia does not have an equivalent to section 35 to entrench Aboriginal rights against Parliamentary power. The threshold for extinguishment is therefore lower in Australia, though aspects of the “clear and plain” intention test still remain.⁷⁸ One might also expect greater thought to go into the differences between copyrights and traditional knowledge rights. Gray questions the intellectual soundness of the *Bulun Bulun* decision, noting that traditional knowledge rights would be “*sui generis* right[s] which cannot be equated exactly with ... copyright law” and thus might be accommodated alongside existing statutes.⁷⁹ Canadian scholar Robert Paterson agrees, speculating that the Canadian *Copyright Act* would not extinguish customary law because “copyright and Indigenous traditional knowledge ... are different things” entailing a different bundle of rights.⁸⁰ It is, however, a reminder that section 35

claimants should not use the language of “equitable copyrights” lest the lines be blurred.

Bulun Bulun notwithstanding, a deeper look reveals exactly why the proposition of extinguishment by IP statute must fail. First, there is some doubt as to whether IP statutes form complete codes. Courts commonly apply laws from other sources in the resolution of IP disputes. In a recent decision, the Ontario Superior Court of Justice recognized that causes of action are not limited to those found in statute:

The Defendants say, in effect, that the *Copyright Act* is a complete code and that Mr. John cannot seek a remedy in negligence when he has no remedy under the *Copyright Act*. They cite in support of this proposition [*Blue Crest*, supra note 75]. ... I disagree. Estey, J. does not say that the *Copyright Act* creates a complete code. Indeed, he declines to make such a broad statement.⁸¹

Nor are heads of damages so restrained. In this regard, too, courts see the statutes as one source of law within a larger context:

It was argued on behalf of the defendant that ss 20 to 24 of the Act are a complete code of the remedies available in copyright actions and as there is no provision for exemplary damages, the Court has no authority to award any. ... There is certainly no prohibition in the Act to an award of exemplary damages and if the plaintiff is entitled to all such remedies by way of damages and otherwise as are or may be conferred by law for the infringement of a right, it is my view that it was not the intention to exclude exemplary damages. Exemplary damages are well recognized at common law.⁸²

Note that while section 22 of the *Copyright Act* opens the door to damages “otherwise ... conferred by law,” punitive damages are also available in patent suits though no provision of the *Patent Act* invites them in.⁸³ While damages and causes of action are but examples,

75 *Compo Co Ltd v Blue Crest Music et al*, [1980] 1 SCR 357 at paras 10 and 23, 105 DLR (3d) 249 [*Blue Crest*]; *DBC Marine Safety Systems Ltd v Canada (Commissioner of Patents)*, 2008 FCA 256 at para 2.

76 *International News Service v Associated Press*, 248 US 215 at 250, 39 S Ct 68 (1918); see also *Moreau v St Vincent*, [1950] Ex CR 198 at 203, [1950] 3 DLR 713; Yochai Benkler, “From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access” (1999) 52 Fed Comm LJ 561.

77 *Bulun Bulun and Milpurrru v R & T Textiles Pty Ltd* (1998), 41 IPR 513, 86 FCR 193 (FCA) [*Bulun Bulun*].

78 For more in the Australian context, see Gray, supra note 51 at 241.

79 *Ibid* at 244.

80 Paterson, supra note 5 at 222.

81 *John v Richards*, 2017 ONSC 6307 at para 46.

82 *Pro Arts Inc v Campus Crafts Holdings Ltd* (1980), 110 DLR (3d) 366 at paras 72–73, 28 OR (2d) 422 (H Ct J).

83 *Lubrizol Corp v Imperial Oil Ltd*, [1996] 3 FC 40 at para 33, [1996] FCJ No 454 (CA) (“We can see no reason why, in appropriate circumstances, punitive or exemplary damages could not be available in a copyright or patent infringement case”), cited with approval in *Whiten v Pilot Insurance Co*, 2002 SCC 18 at 125.

it appears that existing statutes, though comprehensive in some respects, are not an exhaustive testament on the governance of the IP space.

Nor would it be appropriate to attribute users' rights to all Indigenous knowledge that currently wants for protection. This is a distributive justice concern, but must be the formalist's position as well. IP regimes are often characterized in terms of a quid pro quo. In return for enriching society with their knowledge or creativity, those responsible are granted exclusive rights to benefit from their work for a period of time.⁸⁴ Authors have conceptualized this bargain as a social contract between creators and users.⁸⁵ Applying this contractarian framework to traditional knowledge would be misguided. Society appears to pass no "consideration" to Indigenous communities in return for the benefits that users receive. Rather than granting any rights of exclusivity, IP laws relegate much of traditional knowledge to the public domain.⁸⁶ Nor did traditional knowledge develop in response to monopoly incentives; it was brought about in accordance with Aboriginal laws. Harvard's Ruth Okediji notes this creative maladjustment, writing:

To the extent traditional knowledge fails to satisfy standard property justifications, it is because those justifications are imbued with assumptions that are misaligned with the conditions that inform the productive and creative processes of Indigenous groups and local communities.⁸⁷

To suggest that traditional knowledge fits the character of the public domain is to "dehistoricize" both concepts.⁸⁸ That bargain has not been struck. For the purposes of legal analysis, then, the fiction of the quid pro quo cannot be invoked; one cannot suggest on that basis that Parliament intended to assign rights over Indigenous traditional knowledge to users or the public domain.

Lastly, and most fatally, even if the statutes are complete codes that intended for traditional knowledge to be in the public domain, the jurisprudence makes clear that regulation does not entail extinguishment. A complete code is not enough.⁸⁹ A clear and plain intention must demonstrate more than the fact that Aboriginal rights have been subject to a regulatory scheme.⁹⁰ This is so even if Parliament has legislated in a manner "necessarily inconsistent" with the exercise of an Aboriginal right.⁹¹ Because existing statutes do not expressly state such an intention, the most likely remaining source of extinguishment would be by treaty.⁹² That said, in reading those treaties whose texts are publicly available,⁹³ and being mindful of the principles of interpretation that apply,⁹⁴ one finds no indication that the Crown turned its mind to issues of traditional knowledge, much less had a clear and plain intention to override customary law in this regard. Though not heavy on detail, this is where Ottawa professor Daniel Gervais lands on the issue as well:

Intellectual property statutes in Canada generally do not deal with aboriginal customs and practices. Certain treaties only reserve the subject matter, but that seems far from a clear and plain intention to extinguish an aboriginal right.⁹⁵

2.3 Step Three: Infringement of the Right

Step three requires the Indigenous claimant to demonstrate that application of the government regulation would be unreasonable, cause undue hardship, and/or deny their preferred means of exercising their right.⁹⁶ In many circumstances, the social context of reconciliation will weigh heavily toward such a finding.

Consider again the *Glooskap* book. Its primary purpose is to preserve the Maliseet language — which is why the stories remain untranslated.⁹⁷ It is a language in dire need of aid. More than 100 years ago when the language first became alphabetized, the

84 See in the patent context *Teva Canada Ltd v Pfizer Canada Inc*, 2012 SCC 60 at para 32.

85 See Alina Ng, "The Social Contract and Authorship: Allocating Entitlements in the Copyright System" (2009) 19:2 Fordham IP Media & Ent LJ 413.

86 Chidi Ogumanam, "Wandering Footloose: Traditional Knowledge and the Public Domain Revisited" (2018) 21 J World IP 306.

87 Ruth L Okediji, "Traditional Knowledge and the Public Domain" (2018) Centre for International Governance Innovation Paper No 176 at 4, online: <cigionline.org/sites/default/files/documents/Paper%20no.176.pdf>.

88 See Kimberly Christen, "Does Information Really Want to Be Free? Indigenous Knowledge Systems and the Question of Openness" (2012) 6 Int J Comm 2870 at 2880.

89 See consideration of the *Customs Act*, RSC 1970, c C-40 in *Mitchell v MNR*, [1997] FCJ No 882 at para 289, [1997] 4 CNLR 103 (TD), *aff'd* [1998] 1 FC 375, 167 DLR (4th) 702 (CA)..

90 *Gladstone*, *supra* note 44 at para 34.

91 *Sparrow*, *supra* note 12 at para 35.

92 On sources of extinguishment, see Jacqueline F Pruner, "Aboriginal Title and Extinguishment Not So Clear and Plain: A Comparison of the Current Maori and Haida Experiences" (2005) 14 Pac Rim L & Pol'y J 253 at 273.

93 See Indigenous and Northern Affairs Canada, *Treaty Texts* (last modified 29 August 2013), with texts dating from the 1700s to early 1900s, online: <www.rcaanc-cirnac.gc.ca/eng/1370373165583/1581292088522>.

94 *Badger*, *supra* note 26 at para 41.

95 Daniel J Gervais, "Spiritual But Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge" (2003) 11 Cardozo J Int'l & Comp L 467.

96 *Sparrow*, *supra* note 12 at para 70.

97 See Goff, *supra* note 38.

visiting scribes noted intergenerational losses already occurring:

They still use their own language, though it is becoming corrupted by white influence. ... The younger people among them care nothing for such things, and when the present generation of older Indians shall have passed away, it is doubtful if anything of value to Ethnology or Philology can be obtained from them.⁹⁸

The impact of residential schools surely worsened this impact. Among the most troubling findings of the TRC were those concerning the “cultural genocide” against Indigenous languages, such that restoration efforts form the basis of six calls to action.⁹⁹ Today, there is “almost no one under 70” who speaks Maliseet,¹⁰⁰ an observation in keeping with UNESCO’s categorization of the Maliseet language as “severely endangered.”¹⁰¹ The ability to teach and disseminate Indigenous languages is critical in reversing these effects.¹⁰²

In a situation like this, where cultural revitalization is the goal, an inability to access one’s traditional knowledge because of statutory barriers seems an obvious example of undue hardship. In a theoretical case involving use of patented traditional medicine, the inability to use healing techniques developed within one’s own community seems another easy example. Any statute that puts obstacles between a community and its traditional knowledge is likely to meet the requirements of this third step.

2.4 Step Four: Justification

Being outside the *Charter*, section 35 is not subject to a standard section 1 justification. Courts have nonetheless held that the state can infringe section 35 rights by proving (1) a compelling and substantial legislative objective and (2) that the means being taken are consistent with the government’s fiduciary duty to Indigenous peoples.¹⁰³ Where there is competition over finite resources, the government must prove that it has accommodated and given priority to the exercise of the Aboriginal right.¹⁰⁴ Concerns that meet these criteria are typically

linked to conservation, because this form of regulation furthers the interests of Aboriginal rights holders and accords with the Crown’s fiduciary responsibility.¹⁰⁵ Economic fairness was given as a legitimate ground for reallocating some Aboriginal fishing rights to non-Indigenous people in *Gladstone*, because it was seen as necessary for the attainment of reconciliation.¹⁰⁶

This framework puts the Crown in a difficult position should it try to justify an existing IP statute. Canadian IP laws are not meant to cure mischiefs relating to public safety, conservation, or market failures that stand in the way of Indigenous peoples’ well-being. The primary justifications for our copyright and patent regimes are to provide economic incentives for creation and to respect the personality embodied in the creative or inventive act.¹⁰⁷ Trademarks serve a purely commercial purpose.¹⁰⁸ While of doubtless importance generally, these acts do not evidence a consideration of IP’s impact on Indigenous peoples, or an attempt by the Crown to regulate traditional knowledge as would a fiduciary.

Were Parliament to get serious about traditional knowledge and amend the legislation in response, this may well change. But at present, Canada’s IP statutes contain nothing akin to conservation a federal government could rely upon to suggest that it is mindful of its fiduciary duty.

2.5 Conclusion

In summary, Indigenous communities seem well positioned to take advantage of section 35 to protect their traditional knowledge. Although a great deal of historical evidence will be required, the path to such recognition appears to have already been established in the case law. Section 35 appears to be a flexible tool, presumably ready for use to provide defensive protections against appropriation and positive rights in works themselves.

3.0 Discussion

It seems that a section 35 solution is within reach — but is it desirable? What would this mean in practice? Even one successful

98 William F Ganong, “Introduction” (1893) in Chamberlin, *supra* note 42.

99 Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: TRC, 2012) at calls 10(iv), 14, 15, 16, 84, 85, online: <nctr.ca/assets/reports/Calls_to_Action_English2.pdf> [TRC Calls to Action].

100 CBC, “Truth and Reconciliation Report Unlikely to Deal with Language: Prof” (2 June 2015), online: <cbc.ca/news/canada/new-brunswick/truth-and-reconciliation-report-unlikely-to-deal-with-language-prof-1.3096714>.

101 Christopher Moseley, *Atlas of the World’s Languages in Danger*, 3rd ed (Paris: UNESCO Publishing, 2010) at “Maliseet,” online: <unesco.org/new/en/culture/themes/endangered-languages/atlas-of-languages-in-danger>.

102 Andrea Bear Nicholas, “Linguicide: Submersion Education and the Killing of Languages in Canada” (March/April 2011) *Briarpatch Magazine*, online: <briarpatchmagazine.com/articles/view/linguicide>; Lafontaine, *supra* note 40; Tove Skhuthabb-Kangas & Robert Dunbar, “Indigenous Children’s Education as Linguistic Genocide and a Crime Against Humanity? A Global View” (Finnmark County, Norway: Gáldu ála, 2010), online: <www.afn.ca/uploads/files/education2/indigenousschildrenseducation.pdf>.

103 Sparrow, *supra* note 12 at para 71.

104 Gladstone, *supra* note 44 at para 64.

105 Jack et al v *The Queen* (1979), [1980] 1 SCR 294 at para 42, [1979] 5 WWR 364.

106 Gladstone, *supra* note 44 at para 75.

107 Daniel J Gervais, “A Canadian Copyright Narrative” (2009) 21 IPJ 269; Daniel J Gervais, “The Purpose of Copyright Law in Canada” (2005) 2 U Ottawa L & Tech J 315; Dale Nance, “Owning Ideas” (1990) 13 Harv JL & Pub Pol’y 757..

108 *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 21.

claim through the courts would have “considerable symbolic significance.”¹⁰⁹ While it certainly opens the door for litigation, protracted court cases are a less than optimal way of determining Aboriginal rights.¹¹⁰ The time, cost, and adversarial nature of proceedings all make for an ill fit. In an ideal setting, parties might use this section 35 analysis as a basis for future negotiations, as recommended by experts and the courts.¹¹¹

From an Indigenous perspective, section 35 seems to be a promising solution. Deferring to the Assembly of First Nations on what criteria would make for a culturally appropriate IP regime, it seems that an ideal framework would

- originate in Indigenous rather than Western law;
- be based, epistemologically, in Indigenous conceptions of property and society;
- apply on the basis of criteria reflective of traditional knowledge, notwithstanding issues such as originality or fixation, and to all potential forms in which traditional knowledge may manifest itself;
- offer protections in duration and substance appropriate to traditional knowledge, which may include indefinite term protections where appropriate;
- allow the vesting of rights in the community as a whole; and
- be enforceable in Canadian courts.¹¹²

One notices a tension. A good solution must strike a balance between being authentically Indigenous yet still cognizable to the Canadian legal system. It appears that protecting traditional knowledge through section 35 would fit this balance well. One assumes that no set of laws could be more perfectly tailored to Indigenous traditional knowledge than those originating in their own local laws and customs.

At a philosophical level, it is also encouraging that the source of rights will likely be recognized as originating from a community’s historic relationship with its traditional knowledge rather than having rights assigned by virtue of being a traditional knowledge “creator.” The

latter is a fundamentally Western way of looking at IP; the relationships involved in Indigenous cultural creation are often seen to be much broader. As Christie explains, Indigenous peoples often see works as coming into existence by virtue of a more holistic process of mutual inspiration:

From [a traditional Aboriginal] perspective the “self” is ... a nexus in a web of being, capable of creation only because of its interconnections with all of reality. Nothing, on this model, is ever solely the creation of the atomistically defined individual artist or intellectual, for the inspiration comes from the world around, the skill is courtesy of gifts from various spiritual sources, and the resources to work on the project are made available by the community and the world around.¹¹³

Recognizing that rights stem from a community’s relationship with its traditional knowledge aligns the law with Indigenous cultural epistemology.

At the same time, section 35 protections utilize a constitutional mechanism well known to the Canadian legal system. Some jurisdictions, such as New Zealand, have achieved little by developing traditional knowledge solutions that are celebrated by Indigenous people but impossible to put into practice.¹¹⁴ While not downplaying the practical challenges associated with litigating Aboriginal rights, Canadian Indigenous groups would at least be relying on a provision already established within the legal system. From a practical point of view, this is undoubtedly beneficial.

3.1 On Reconciliation

A final word before concluding. Today’s discourse on Indigenous policy is centred on one concept: reconciliation. As put plainly by the TRC:

Reconciliation is in the best interests of all of Canada. It is necessary not only to resolve the ongoing conflicts between Aboriginal peoples and institutions of

¹⁰⁹ Gray, *supra* note 51 at 247.

¹¹⁰ *R v Marshall*; *R v Bernard*, 2005 SCC 43 at para 142.

¹¹¹ See Zlotkin, *supra* note 70 at 343; Gray, *supra* note 51 at 246; Sparrow, *supra* note 12 at para 53; see also Matthew Palmer, “Constitutional Realism About Constitutional Protection: Indigenous Rights Under a Judicialized and Politicized Constitution” (2006) 26:1 Dal LJ 1 at 23.

¹¹² AFN Discussion Paper, *supra* note 4 at 14–17. Note that these aims are consistent with the vast majority of literature that considers the flaws of current IP regimes: see Michael F Brown, *Who Owns Native Culture?* (Cambridge, MA: Harvard University Press, 2003) at 59–68.

¹¹³ Christie, *supra* note 1 at 450.

¹¹⁴ *Wai 262 Report*, cited as Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (2 July 2011), online: <wai262.weebly.com/>. Its most notable recommendation is to assign a Maori guardian to all products of Maori traditional knowledge, including those in the public domain, essentially mandating an Indigenous consent requirement on all further uses. This recommendation inflamed opposition and gave rise to complaints that the proposals did not fall within the bounds of the legal system: see “Editorial: Caution the Right Approach to Report”, *The Dominion Post* (7 July 2011), online: <stuff.co.nz/dominion-post/comment/5245734/Editorial-Caution-the-right-approach-to-report>; Tova O’Brien, “Iwi Shouldn’t Get Special Treatment with Wai 262 — Brash”, *3 News* (2 July 2011), online: <newshub.co.nz/nznews/iwi-shouldnt-get-special-treatment-with-wai-262--brash-2011070217>; Paterson, *supra* note 5 at 233.

the country, but also in order for Canada to remove a stain from its past and be able to maintain its claim to be a leader in the protection of human rights among the nations of the world.¹¹⁵

Regrettably, the literature to date shows little consideration for how traditional knowledge regulation can further reconciliation, and no extant framework by which to judge whether a solution would further reconciliation in the Canadian IP context. While the TRC and Royal Commission on Aboriginal Peoples make some recommendations that pertain to culture, neither address the IP space with enough specificity to use as an analytical framework. It is unfortunately beyond the scope of this article to develop such a framework, as helpful as such an assessment would be. That said, a few positive observations are warranted.

It does appear that a section 35 solution adheres to many national and international articulations of best practices for reconciliation. For one, it accords with the TRC's recommendation on cultural revival, which states that "[t]he preservation, revitalization, and strengthening of Aboriginal languages and cultures are best managed by Aboriginal people and communities."¹¹⁶ It offers legal backing for the conclusion of the Royal Commission on Aboriginal Peoples that section 35 should include a substantive right to self-government, and that a community's "language, culture, values and traditions" must fall within the "core jurisdiction" for Indigenous governance.¹¹⁷ It also achieves the goals set out in international frameworks, most notably the *United Nations Declaration on the Rights of Indigenous Peoples*; its articles recognize Indigenous rights 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."¹¹⁸ Similar statements can be found in the *Convention of Biological Diversity*,¹¹⁹ in draft articles of the World Intellectual Property Office,¹²⁰ and conventions by UNESCO¹²¹ and the International Labour Organization,¹²² all of which seem consistent with the "recognition and affirmation" of traditional knowledge rights.

Admittedly, some commentators wish for more, noting that affirmed rights are still premised on the dominion of the Crown and the legitimacy of the constitution itself.¹²³ Yet, as Zlotkin notes, some degree of state involvement will always be necessary if rights are to be given effect beyond a group's own borders.¹²⁴ Even Christie, who can be skeptical about greater involvement from Ottawa, concedes this point.¹²⁵ Moreover, the TRC itself has endorsed the use of section 35 to advance the cause of reconciliation, writing:

The road to reconciliation ... includes a large, liberal, and generous application of the concepts underlying Section 35(1) of Canada's Constitution so that Aboriginal rights are implemented in a way that facilitates Aboriginal peoples' collective and individual aspirations.¹²⁶

These are all positive early indicators. Ultimately, a full assessment of the reconciliatory potential of constitutionalized traditional knowledge rights will require consideration of non-Indigenous perspectives as well. As the TRC defines it, reconciliation "is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country."¹²⁷ Whether constitutionalized traditional knowledge rights

- 115 Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission* (Winnipeg: TRC, 2015), at 183, online: <nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf> [TRC Summary].
- 116 TRC Calls to Action, *supra* note 99 at 14(iv); see also TRC Final, *supra* note 59 at 51, 74.
- 117 Royal Commission, *supra* note 48 at 206–213, recommendation 2.3.5. It also supports recommendation 2.3.29, which encourages Indigenous communities to implement their own strategies for cultural revitalization.
- 118 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UNGAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) 15 at art 31; see also arts 11, 24 [UNDRIP]. Note that the TRC has endorsed UNDRIP as a framework for reconciliation: see TRC Final, *supra* note 59 at 137.
- 119 *Convention on Biological Diversity* (entered into force 29 December 1993), Can TS 1993/24, online: <cbd.int/convention/text/>.
- 120 World Intellectual Property Office, "The Protection of Traditional Knowledge: Draft Articles" (28 September 2018) document code WIPO/GRtraditional knowledgeF/IC/38/4, online: <wipo.int/meetings/en/doc_details.jsp?doc_id=416956>.
- 121 *Convention for the Safeguarding of Intangible Cultural Heritage* (entered into force 2006, not ratified by Canada), online: <ich.unesco.org/en/convention>.
- 122 *International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (No 169), arts 7(1), 23 (entered into force 5 September 1991, not ratified by Canada), online: <ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:C169>.
- 123 See James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights* (Saskatoon: Native Law Centre, 2006); Naomi Sayers, "#Indigenous #Sovereignty and Contradictions in Section 35(1)" (21 December 2013), *kwetoday*, online: <kwetoday.com/2013/12/21/indigenous-sovereignty-contradictions-in-section-351/>.
- 124 Zlotkin, *supra* note 70 at 366.
- 125 Christie, *supra* note 1 at 453.
- 126 TRC Final, *supra* note 59 at 49.
- 127 *Ibid* at 3.

achieve this end is an issue yet to be determined, though its prima facie alignment with TRC recommendations is encouraging.

4.0 Conclusion

The primary contribution of this article is the assertion that even by conservative doctrinal principles, protecting traditional knowledge under section 35 of the *Constitution Act, 1982* seems quite possible. It appears to offer the first practical, in-depth analysis of how a claimant might make such a claim. It also observes that protecting traditional knowledge under section 35 seems to be a positive step forward toward reconciliation.

Because it covers so much ground, the article leaves much for subsequent scholars to develop. As referenced earlier, it would be beneficial to have experts develop a more specialized framework by which Canada might assess whether future traditional knowledge proposals serve the end of reconciliation. Further thoughts on cultural uses of section 35 would be beneficial, as would analyses on the economic and trade ramifications of such constitutionalized rights. Impacts on the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) and the *Canada-United States-Mexico Agreement* (CUSMA) may be important determinants of whether Canadians embrace this solution.

One lingering question in any section 35 matter concerns the duty to consult.¹²⁸ Given the complexity of this topic, I have purposely declined to answer how the work of administrative bodies might be affected by a section 35 claim. Although statutory and traditional knowledge rights are distinct and can coexist, they can also come into conflict. The implications for Aboriginal administrative law deserve exploration in their own piece.

An avenue of research that Canada sorely requires is a collection, compiled in culturally appropriate ways, of Indigenous traditional knowledge laws. This will give IP scholars, many of whom are not Indigenous, a better base on which to develop proposals. This exercise is also sure to benefit Indigenous communities.¹²⁹

Lastly, the article opens opportunities for further research in the core IP wheelhouse. Top of mind is the question of whether an Indigenous community's use of traditional knowledge would be considered a fair dealing.¹³⁰

Around the world, scholars have been searching for solutions to the misuse of traditional knowledge. Canada seems to have a solution knocking at the door. With any luck, Canada

will use its unique constitutional setting not only to protect traditional knowledge domestically, but to become a model of legal pluralism for the international community. My commendations go to the legal minds that make it happen.

128 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 29; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 47.

129 Napoleon, *supra* note 1 at 383.

130 See an early venture into this question in Denise Brunson, "Recognizing Indigenous Legal Values in Modern Copyright Law" (2015) 6:3 *Western J Leg Studies* 1.