

Indigenous Knowledge and Canadian Intellectual Property Law—A Working Paper

"Just as Indigenous territories were declared as Terra Nullius in the colonization process, so too has TK been treated as Gnarritas Nullius (Nobody's Knowledge) by the IPR system and consequently flowed into the public domain along with Western knowledge."

Dr. Gregory Younging,
"Traditional Knowledge Exists; Intellectual Property Is Invented or Created" (2015)

By the IPIC Indigenous IP Committee¹

Introduction

This working paper aims to educate Canadian intellectual property ("IP") practitioners about Indigenous knowledge ("IK") and Indigenous cultural expressions ("ICEs"), with the goal of assisting them in their work with Indigenous parties. This paper also aims to assess how, and to what extent, Canadian IP law protects IK and ICEs, and to what extent it may allow Indigenous communities to use Canadian IP rights to enhance their autonomy and control their IK and ICEs.

The terms "property" and "intellectual property" have economic and transactional connotations that may not align well with how many Indigenous legal orders and community protocols frame IK. Nonetheless, this paper uses the expression "Indigenous IP" because it is useful to frame IK in a manner consistent with Canadian law, with which IP lawyers and other practitioners are familiar.

Part I of this paper situates Indigenous IP in its historical context and suggests that commonly held views about IK and ICEs are shaped by Canada's colonial history. Part II, which forms the bulk of this paper, describes how Canada's laws protect Indigenous IP, noting how Canadian law is often ill-suited to protect certain IK and ICEs, but also how Canadian law may be used to protect Indigenous rights.

Part III concludes with an overview of potential next steps in Canada's journey towards reconciliation with Indigenous peoples as it relates to Indigenous IP. We suggest that Canadians should strive not only to understand and address the consequences of colonization on Indigenous peoples, but also to consider how the institutions and legal orders of Indigenous peoples may be reconciled with Canada's IP system.

Part I: Indigenous IP in Context

A. Indigenous Knowledge and Indigenous Cultural Expressions—Working Terminology

There is a vast diversity among and within First Nations, Inuit, and Métis people across Canada. As a result, Indigenous peoples, communities, and groups have different knowledge systems and

different laws, protocols, and practices. It also follows that any definition or discussion of IK or ICEs must be understood as mere starting points for those interested in working with Indigenous peoples in the field of IP.

Following the framework developed by the World Intellectual Property Organization ("WIPO"), the terms "IK" and "ICEs" are often used in Canada. For example, Innovation, Science and Economic Development Canada's ("ISED") "Introduction to Intellectual Property Rights and the Protection of Indigenous Knowledge and Cultural Expressions in Canada" refers to "IK" and "ICE," but also to WIPO's working definitions for traditional knowledge ("TK") and traditional cultural expressions ("TCE"):²

TK generally refers to the know-how, skills, innovations and practices developed by Indigenous peoples related to biodiversity, agriculture, health and craftsmanship. TCEs generally refer to tangible and intangible forms in which TK and culture are expressed and may include oral stories, artwork, handicrafts, dances, fabric, songs or ceremonies. It is also recognized that TK and TCEs can be collectively held and may evolve and change over time as they are passed down from generation to generation.

In this perspective, IK/TK is the integration of the intangible features listed above into a cultural system, whether it is secular, religious, useful, or aesthetic. Further, IK/TK may be widely known within a community, but it may also be restricted, for example, as a secret ritual. IK is not static; it evolves with the communities of which it forms part.³

The word "traditional" in TK refers to phenomena whose "creation and use are part of the cultural traditions of communities and for which the communities may have prescribed protocols, for use, protection, and preservation."⁴ This paper refers to IK, rather than TK, to dispel the misconception that all knowledge held by Indigenous peoples is old. However, the terms IK and TK are used interchangeably below to refer to both old and new Indigenous knowledge, on the assumption that IK is rooted in community-linked transmission and governance.

In contrast to IK, TCEs/ICEs are the expressions by which traditional culture and IK are embodied or expressed. TCEs may be tangible or intangible, such as music, stories, art, handicrafts, musical instruments, words, names, performances, textiles, carpet and jewellery designs, and forms of architecture, to name only a few examples.⁵ The distinction between IK/TK and ICEs/TCEs is often explained on the grounds that IK and ICEs may call for different types of legal protection and may raise different policy issues.⁶

It is important to note that the distinction between IK and ICEs is grounded in Canadian and international law, rather than in Indigenous laws. Situating Indigenous IP as a primarily Indigenous issue would no doubt result in a different legal framework.⁷ Given the objective of this working paper, however, we refer to IK and ICEs, also using the terms TK and TCEs from time to time when referring to (primarily international) sources that rely on this terminology.

B. Public Domain in Context

Indigenous IP is often wrongly considered to be in the public domain and, therefore, free for all to use. This misconception stems from the historical reality that non-Indigenous peoples have long exploited IK/TK, without regard to Indigenous laws or protocols governing consent, access, and use. In Western IP law, the public domain refers to material not protected by state-recognized exclusionary rights. Concluding that Indigenous IP falls into the public domain wrongly assumes that Indigenous songs, stories, or motifs found in museum collections or archives, for instance, are free to use simply because they are accessible.⁸ These materials remain governed by Indigenous laws and protocols regarding consent, access, and use. Indigenous laws have always been—and continue to be—vital sources of law for Indigenous peoples. They are also important sources of Canadian law in light of the Aboriginal and treaty rights recognized in the Canadian constitution and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which has been incorporated into Canadian law.⁹

In addition, an overview of the history of Indigenous peoples in Canada casts the "public domain" view of IK in a dramatically different light: just as colonization deprived Indigenous peoples of their freedom and their rights, Indigenous peoples were also dispossessed of the means to control their knowledge.

Before European contact, Indigenous peoples and communities had their own knowledge systems.¹⁰ As Europeans colonized the land that became Canada, they imposed their legal structures relating, for example, to individual land ownership, jurisdictional borders, and resources harvesting and management. In so doing, they also started to suppress Indigenous laws, practices, and ways of life, eroding protections of IK and ICEs in the process. Over time, Canada forced First Nations onto reserves, displaced Inuit people, and limited resources accessible to Indigenous peoples, both on and off reserves.¹¹ With the opening of the first church-run Indian Residential School in 1831, Canada adopted the practice of taking generations of Indigenous children away from their families and into "schools" aimed at eliminating Indigenous languages, cultures, and ways of life.¹² The use of Indigenous language and various cultural practices were prohibited and harshly punished in residential schools. The *Indian Act*, adopted in 1876, further suppressed traditional Indigenous systems of governance and law.¹³ For example, the 1885 and 1886 amendments to the *Indian Act* banned potlatch and the sun dance, criminalizing practices that had played key roles in Indigenous culture, law, and governance.¹⁴ The Sixties Scoop further eroded Indigenous control over IK by removing Indigenous infants and children from their communities.¹⁵ This history challenges the commonly held belief that some or all IK is in the public domain, free for all to use.

In summary, the "public domain" ignores Indigenous governance, laws, and protocols over IK. Given that Canadian governments engaged in a centuries-long campaign to eradicate Indigenous institutions and knowledge systems, and to deprive Indigenous peoples of control over IK,¹⁶ it is problematic to rely on any perceived lack of Indigenous control over IK and ICEs to support the assumption that such knowledge falls into the public domain. Moreover, the fact that IK appears accessible, and therefore free to use, does not imply an absence of governing laws or protocols.¹⁷ Indigenous jurisdictional frameworks continue to govern its use.

Part II: Indigenous Knowledge and Canadian Law

IP practitioners appreciate that Canadian IP legislation, such as the *Trademarks Act* or *Copyright Act*, may protect Indigenous peoples' IP. However, IP legislation must be situated in the context of other relevant sources of law, including constitutionally protected Aboriginal and treaty rights, federal framework legislation implementing the UNDRIP, and modern treaties and self-government agreements. All these sources of law may impact the protection and promotion of IK.

By IP "protection," we mean the legal protection of human intellectual creativity and innovation against unauthorized use, in this case, by non-Indigenous parties.¹⁸ By IP "promotion," we mean whether and how Canadian law may be used to advance Indigenous autonomy and control over their IK and ICEs.¹⁹

While it is important to look at Indigenous IP issues with a lens to what is available and occurring globally, that discussion goes beyond the intended scope of this paper. However, we do refer to international tools to protect Indigenous IP in Canada when discussing the UNDRIP in section II.B as well as WIPO treaties in sections II.F and II.G, below.

A. Aboriginal and Treaty Rights—Section 35, *Constitution Act, 1982*

Section 35(1) of the *Constitution Act, 1982* states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed," while section 35(2) defines "aboriginal peoples of Canada" to include "the Indian, Inuit and Métis peoples of Canada."²⁰ Accordingly, under Canadian law, Aboriginal peoples (used interchangeably with "Indigenous peoples") have unique constitutionally protected rights—namely, Aboriginal and treaty rights. Such rights place limits on federal and provincial governmental powers and authority over the territories as well as the activities of First Nation, Inuit, and Métis peoples in Canada, and may impose obligations on private parties in certain circumstances.²¹

Aboriginal rights include rights to land and/or rights to engage in activities that are central to distinctive Indigenous cultures. For example, Canadian courts have recognized Aboriginal rights to hunt,²² to fish,²³ and to engage in diverse practices, such as using traditional medicines.²⁴ Aboriginal rights may extend to ownership, stewardship, and control over certain lands and resources within a traditional territory through Aboriginal title.²⁵

To date, Aboriginal and treaty rights have been applied primarily in respect of lands and resources and a diverse range of activities. In these cases, IK has played a role in informing the Crown's duty to consult and accommodate Indigenous peoples. The Supreme Court of Canada has also recognized that Aboriginal harvesting rights "will normally include the incidental right to teach such a practice, custom and tradition to a younger generation," giving some recognition to the importance of activity rights for transmission of Indigenous knowledge.²⁶ Furthermore, Aboriginal title grounds a right to not only decide how title lands are used, but also to proactively plan for future use. This right therefore entails additional, indirect protection for IK directed to the managing of Aboriginal title lands.

Although Canadian courts have acknowledged the importance of IK,²⁷ the full extent to which Aboriginal and treaty rights apply to IK remains unsettled. Some uncertainties include whether Aboriginal and treaty could ground (1) negative control claims, such as preventing the publication or translation of stories, oral histories, or other cultural knowledge without consent; (2) remedial claims, such as claims for damages or an accounting of profits arising from the unauthorized use or disclosure of IK; and (3) institutional or governance claims, such as the recognition of Indigenous jurisdiction over IK so as to require governments to consult before using IK, or the recognition that certain Indigenous governance structures in fact regulate use and access to IK or ICEs.²⁸ Consistent with section 35 jurisprudence, it is likely that the existence and content of such constitutional right would depend on the precise claim being made by an Indigenous community before a Canadian court, and on evidence adduced to prove why the practice at issue is integral to the culture of the Indigenous community.²⁹

B. United Nations Declaration on the Rights of Indigenous Peoples, SC 2021, c 14 (Federal)

Article 31(1) of the UNDRIP, adopted by the General Assembly in 2007 states in part:³⁰

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

On June 21, 2021, the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent and came into force in Canada.³¹ The *Act* requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to take all measures necessary to ensure that the laws of Canada are consistent with the UNDRIP, and to prepare and implement an action plan to achieve the UNDRIP's objectives.³² Importantly, Article 31 focuses on the rights of Indigenous communities to maintain, control, protect, and develop their IK, rather than only on recognizing exclusive rights over discrete elements like works, trademarks, or patentable inventions.

Under the authority of the *Act*, the Canadian government prepared the *2023-2028 Action Plan*, which includes measure 101:³³

Work in consultation and cooperation with First Nations, Inuit, and Métis to ensure appropriate measures are in place for Indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, including working in partnership with responsible government departments to ensure that Canada's intellectual property legislative and regulatory frameworks (e.g., *Copyright Act*, *Trademarks Act*, *Patent Act*) are consistent with the UN Declaration.

The *Act* is not self-implementing³⁴ and requires Parliament to make Canada's laws, including IP legislation, consistent with the UNDRIP, in consultation with Indigenous peoples. As of the release of the Action Plan, the federal government had not published specific proposals addressing measure 101.³⁵

C. Modern Treaties and Self-Government Agreements

The 1973 Supreme Court decision in *Calder*³⁶ ushered a new era of land claims negotiation. Modern treaties and self-government agreements set out complex regulatory frameworks that govern various subject matters within an Indigenous nation's territory, including the preservation, promotion, and safeguarding of culture, language, and education.³⁷

Modern treaties and self-government agreements typically exclude IP from their scope and therefore do not address the protection of Indigenous IP.³⁸ Nonetheless, these treaties and self-government agreements may enable Indigenous peoples to adopt measures directed to the preservation and promotion of their language and culture. These measures could include IP- and copyright-adjacent provisions relating to the creation, performance, or assignment of artistic or cultural works, or intellectual property in such works.³⁹

D. Trademarks Act

Under the *Trademarks Act*, trademarks serve to distinguish the goods or services manufactured, sold, leased, hired, or performed by a person from those of others.⁴⁰ Use in the ordinary course of trade is an essential requirement for all trademarks.⁴¹ Trademarks in Canada can take the form of a sign,⁴² certification mark,⁴³ or official mark.⁴⁴

The *Trademarks Act* is maladapted to protect certain forms of IK and ICE. For example, the use and ordinary course of trade requirements often clash with how Indigenous communities use various symbols or distinctive marks. Some IK and ICE may not be exchanged (or be allowed to be exchanged) in an ordinary course of trade. For example, inukshuks are a sacred symbol used by the Innu as a direction indicator in barren lands of the North, or as an indicator of hunting or fishing spots, among other functions.⁴⁵ Inukshuks are not "used" within the definition of the *Act*, and therefore could not benefit from trademark protection, although they could theoretically be the subject of an action for passing off (which only requires proof of goodwill, misrepresentation, and damage).⁴⁶ For the Innu peoples, inukshuks have long been misused by businesses and Canadians without regard to their sacred meaning and purpose.⁴⁷ This example illustrates a further difficulty with protecting ICEs with trademarks or passing off actions: identifying what entity or community owns the goodwill associated with a particular TCE.

The *Trademarks Act* does not expressly address the potentially offensive or deceptive use of Indigenous names, signs, and symbols. The *Act* does prevent the registration of confusing or misleading marks; however, the Canadian Intellectual Property Office (CIPO) likely lacks resources necessary to apply these general prohibitions to applications that engage IK and ICEs (including databases and Indigenous examiners). Further, misappropriation of Indigenous symbols can make it difficult for the rightful Indigenous community to assert its rights.⁴⁸ For example, the imitation of West Coast First Nation designs used in trademarked logos, such as those of the

Vancouver Canucks hockey team, may make it difficult for the Haida or other B.C. First Nations to develop trademarks to distinguish their goods and services in the future.⁴⁹

Subject to cost considerations, trademark law may be used to support Indigenous communities. For example, community symbols/designs of band councils and Indigenous governments created under self-government agreements may be protected as official marks, as the Nisga'a Nation has done with NISGA'A.⁵⁰ Another example is the bear mark owned by the Economic Development Commission (CDEPNQL, also known as FNQLEDC) of the First Nations Quebec and Labrador, which the CDEPNQL licenses to Indigenous craftsmen and entrepreneurs to identify their products as Indigenous-made.⁵¹ Official marks have several benefits over traditional trademarks, including that they "are non-commercial, have different rights and are subject to different criteria."⁵² Official marks can protect the sacred symbols from culturally inappropriate use.⁵³

Similarly, Indigenous communities may file for and obtain certification marks as a means to recognize goods that are made consistent with an Indigenous community's traditional practices. This was done, for example, by the Cowichan Band Council, which obtained a design certification mark for use in association with clothing.⁵⁴

Geographical indications, another form of protection outlined in the *Trademarks Act*,⁵⁵ may also be used to extend Indigenous communities' autonomy over their IK.⁵⁶

E. Copyright Act

Copyright protects the original expression of human authors in a fixed form, without the need for registration.⁵⁷ Copyright grants the author the sole right to reproduce, perform in public, communicate to the public by telecommunication, publish, translate, and adapt their creative works. Moral rights also attach to copyright protected works, which include the right to the integrity of the work and the right of attribution or non-attribution.⁵⁸ Copyright can be assigned in full or in part. Valid assignments of copyrights must be in writing.⁵⁹ Moral rights can be waived in whole or in part, but cannot be assigned.⁶⁰

With certain exceptions, copyright and moral rights expire 70 years after the author's death.⁶¹ Once copyright expires, the work becomes public domain, available for anyone to use in any manner.

In addition to copyright protection in original creative works, Canadian law grants a limited form of copyright to (i) performers in their fixed performances and (ii) the makers of sound recordings. A performer's copyright includes the right to communicate their performance to the public by telecommunication and to fix their performance.⁶² Performers also have moral rights in certain of their performances.⁶³ The copyright granted to makers of sound recordings includes the right to publish the sound recording for the first time, reproduce it and rent it out.⁶⁴

Where a work fits the criteria for protection, copyright may be useful to Indigenous communities because it arises automatically and does not require registration.⁶⁵ Original, creative works by contemporary Indigenous artists, authors, and composers are protected under Canadian copyright law. As well, Indigenous performers own copyright in their performances of literary, dramatic, or musical works and sound recordings that they make, whether or not the subject matter of the performance or recording is protected by copyright.⁶⁶

Copyright law, however, is often ineffective to protect Indigenous folklore, stories, songs, dances, and handicrafts, even if they are original works. Indigenous works are often passed down through generations and belong to an Indigenous community rather than to an identified individual. Copyright law therefore deems them to be public domain, free to be used without consent.⁶⁷ IK and ICE are thus subject to continued misappropriation and misuse in Canada. For example, a Canadian company called Dsquared2 created an "Indigenous inspired" clothing line clothing called ".dsquaw" (presumably a play on a historically offensive term to demean Indigenous women), which Indigenous communities found inappropriate.⁶⁸ Craft works, like Anishinaabe dream catchers, are regularly sold by non-Indigenous retailers, threatening the work of Indigenous artisans and devaluing the cultural teachings that accompany dream catchers.⁶⁹

Copyright law can also be ineffective in protecting the rights of Indigenous persons and communities in their performances and sound recordings. For example, Indigenous communities have authorized non-Indigenous persons to record the telling of their histories only to later become unable to control the use of these recordings. One such incident occurred in the 1970s when elders from the Maliseet First Nation recounted Maliseet stories to Laszlo Szabo, a professor at the University of New Brunswick, who claimed ownership of the stories as the maker of the sound recording.⁷⁰

In addition, copyrights protect expression, not underlying facts.⁷¹ For this reason, copyright law offers at best an imperfect means for Indigenous communities to achieve greater data sovereignty, and to enhance their control over Indigenous health statistics, data about Indigenous residential school survivors, or use of Indigenous languages.⁷² Nonetheless, copyright may be asserted over data-rich works, provided that the selection or arrangement of the data demonstrates a sufficient level of originality.

The communal nature of much IK and ICE, passed down through generations in an unfixed form and without identifiable authors, poses insurmountable obstacles to copyright protection.⁷³ Such challenges should be examined in light of Article 31 of the UNDRIP, which provides Indigenous peoples the right to maintain, control, and protect their IK and ICE.

F. Patent Act

The *Patent Act* grants inventors a 20-year exclusivity over their invention if they are new, useful, unobvious, and adequately disclosed.⁷⁴ An invention that was publicly disclosed in the prior art is not eligible for a patent.⁷⁵

New IK may be and has been protected by patents, when appropriate.⁷⁶ However, the *Act* requires full disclosure of the claimed invention and limits the term of protection to 20 years. The scheme of the *Act*, which places knowledge in the public domain after 20 years, may be inappropriate to safeguard knowledge that is required to be used in a specific manner, or by only certain members of a community under Indigenous laws and protocols. Placing Indigenous knowledge in the public domain jeopardizes the integrity and sacredness of this IK.⁷⁷

Indigenous commentary about patent law seems to have focused on two issues. First, Indigenous communities have voiced concerns that patents over IK may issue because patent offices fail to identify or locate prior art IK, perhaps because this IK is not catalogued in searchable databases, or because it is only practised within certain communities, or only by certain knowledge keepers or individual stewards identified by the community's laws and protocols.⁷⁸ Second, Indigenous communities have pointed out that patents may issue, and have historically issued, over inventions *derived from* IK, but that Indigenous communities have not shared in the benefits of patents that derive from their knowledge.

In May 2024, a diplomatic conference convened by WIPO agreed on a new treaty related to IP, genetic resources, and associated traditional knowledge.⁷⁹ The treaty's provisions include a requirement that contracting states require patent applicants to disclose the country of origin and source of any genetic resources upon which any claimed invention is based. The Government of Canada has initiated a consultation process relating to the implementation of the Treaty into law, but there is no indication yet of when or how this treaty may be adopted into Canadian law.

G. Industrial Design Act

Design owners must secure rights to their industrial design through registration with CIPO in accordance with the *Industrial Design Act*. Canadian law does not protect unregistered industrial designs.

Industrial design protects the aesthetic feature of a product, not what it is made of, how it is made, or how it works.⁸⁰ An industrial design is registrable if the design is novel⁸¹ and the design does not consist only of features that are dictated solely by a "utilitarian function"⁸² of the finished article. As such, a design must possess an aesthetic or visual element distinct from its functional purpose.

The registration of a design gives its proprietor an exclusive right in relation to the design for the later of 10 years after the date of registration or 15 years after the filing date of the application.⁸³

IK and ICEs that are generations old are incapable of being protected by industrial design law because they are not novel. Like patents, new IK can be protected by the industrial design regime where appropriate. However, the statutory-enforced term may be a barrier to Indigenous communities using a legal regime that places knowledge into the public domain after 10 years. Placing certain knowledge in the public domain may jeopardize its integrity and sacredness.

On November 22, 2024, WIPO adopted the Riyadh Design Law Treaty (RDLT) to establish a streamlined framework for industrial design protection procedures.⁸⁴ RDLT article 4 provides that a contracting party may require that an industrial design application contain information on ICEs and IK of which the applicant is aware and that is relevant to the eligibility for registration of the industrial design.⁸⁵ Canada has not signed the RDLT, and implementation into Canadian law does not seem to be a matter of current discussions.

H. *Plant Breeder's Rights Act*

A plant, tree, or vine that grows in the wild (i.e., without direct human intervention) cannot be protected under the *Plant Breeders' Rights Act*.⁸⁶ However, a newly cultivated variety of such a plant, tree, or vine, namely one with distinct and stable characteristics⁸⁷ typically developed through breeding and selection, can be registered and protected by its developer to prevent anyone else from commercially producing, propagating, selling, importing, or exporting that new variety⁸⁸ for a limited period. Under the *Act*, the period of exclusivity for most crops and ornamental plants is 20 years. For trees and vines, it is 25 years.⁸⁹

Indigenous cultivators have been active in North America for millennia.⁹⁰ IK and ICEs around harvesting and cultivation practices can in theory lead to new plant, tree, or vine varieties that may be the subject of a claim of Plant Breeders' Rights (PBRs). Likely varieties in the North American context include maize, beans, squash, sunflowers, tobacco, hemp and fibres of all types, rice, roots and tubers, berries, tomatoes, and other fruits. Indigenous varieties and practices are currently being documented by elders from many communities with ethnobotanists,⁹¹ but to date no study of such Indigenously created varieties has ever been compiled with a view to PBRs.

The gap between the PBR IP Regime and the protection of IK and ICEs is vast. Like other statutory IP rights, PBRs are time limited, designed for commercial exploitation rather than cultural value, and allow for no collective ownership. Remedies for breach do not aim to sustain or reinforce IK or ICEs. Further, PBRs do not protect IK or ICEs relating to agricultural practices such as seed distribution, fertilization, intentional burning, or environmental remediation.

I. Contract Law and Legislation Directed to Contracts with Indigenous Parties

The law of contracts, as it currently exists or could be varied by legislation, provides a means by which Indigenous peoples may protect and promote their knowledge.

Indigenous artists, creators, businesses, and communities can use licensing terms to impose conditions on the prospective use of IK by third parties. All contracts are subject to review based on legal doctrines such as illegality, unconscionability, and restraint of trade, but intellectual property right owners have considerable freedom to impose conditions on their licensees to whom confidential information is disclosed, a protected right is licensed, or a service is provided. Contractual terms can be imposed to limit the licensee's right to use the information in a particular field, for a particular use, for a certain time, or in a certain geographical area. Commercial template clauses and agreements, to be included by Indigenous parties in their agreement with third parties, could go a long way to prevent the relinquishment of rights. Of course, contracts only bind parties to a licence, or their successors in interest, and not the public at large.

The contractual arrangements made to ensure to the permanence of the Witness Blanket⁹² illustrate the ability of contracts to promote Indigenous peoples' agency over their knowledge.

Part III: Conclusion

Canadian law provides some measure of protection and support to Indigenous communities, businesses, and creators seeking to protect and promote IK and ICEs, but the law also suffers from many gaps. Over the short run, pragmatic Indigenous clients and their lawyers may use Canadian law and IP statutes as instruments to further their control over IK and enhance Indigenous communities' autonomy over their knowledge. While imperfect and often inconsistent with Indigenous values, current Canadian law provides many useful tools for Indigenous communities, businesses, and creators to protect their IK.

In practice, creative legal thinking and non-legal approaches are helpful to assist Indigenous clients effectively. Licensing,⁹³ online user agreements,⁹⁴ image tagging,⁹⁵ and working with Indigenous communities to establish IK databases all may help to close current gaps in Canadian law when it comes to IK, at least until Canadian law evolves to recognize and enforce Indigenous governance over IK/ICEs.

Recent WIPO treaties offer opportunities to begin reconciling IK governance with Canada's IP system. This path to reconciliation would build upon recognition of Indigenous rights over IK and ICE per UNDRIP's Article 31. Next steps could include integrating fundamental principles and rights as set out in the UNDRIP, including respect for Indigenous laws; free, prior, and informed consent; and self-determination. In this context, Canadian IP professionals should become more familiar with how Indigenous communities themselves view and manage their IK: Indigenous laws—that is, legal practices, protocols, and traditions—vary by community and exist independently of Canadian law.⁹⁶

Canadian IP professionals, and members of the Intellectual Property Institute of Canada, have an essential role to play in protecting and promoting Indigenous IP. This involves a responsibility to learn about the challenges facing Indigenous communities, businesses, and clients; to consider how Canadian IP legislation may leave gaps in the protection and promotion of IK; and, consistent with reconciliation, to bring about legal changes to accommodate Indigenous legal norms and systems governing IK and ICEs.

End Notes

- ¹ This working paper was edited by Vincent de Grandpré, Meika Ellis, and Shoshanna Paul, with contributions from Tom Digby, Vincent de Grandpré, Meika Ellis, Richard Levy, Richard Okimaw, Shoshanna Paul, and Colleen Stanley.
- ² Canada, “Introduction to IP Rights and the Protection of Indigenous Knowledge and Cultural Expressions in Canada” (Ottawa: ISED, modified 20 July 2020), online: <https://ised-isde.canada.ca/site/intellectual-property-strategy/en/introduction-intellectual-property-rights-and-protection-indigenous-knowledge-and-cultural>.
- ³ Robert G 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 225.
- ⁴ *Ibid.*
- ⁵ WIPO, (2025) *Intellectual Property, Traditional Knowledge and Traditional Cultural Expression* [Module 1 Overview and Key Concepts notes at page 8].
- ⁶ Canadian copyright law protects the expressive works but not their underlying idea or the knowledge they embody. Similarly, patent protection is granted for a limited period of time in exchange for the disclosure of knowledge. The underlying ideas in copyright-protected works and the inventions disclosed in expired patents enrich the public domain, to the benefit of all. These features of Canadian IP law (and of Western law, more generally) illustrate one reason why the protection of IK versus ICEs raise different policy considerations.
- ⁷ See generally Val Napoleon et al, *Indigenous Intellectual Property: An Interrupted Intergenerational Conversation* (Toronto: University of Toronto Press, 2024).
- ⁸ For example, in “The Appropriation and Incarceration of Indigenous Songs,” Dylan Robinson explores how a Nisga’a lament song, recorded and archived in 1927 without regard for the Nisga’a laws or protocols, was later used in the opera *Louis Riel* as though it was freely available material. The author situates this example within the broader historical context of the mid-20th century, when Canada encouraged composers to draw from Indigenous songs held in archives or museum collections while Indigenous peoples were legally prohibited from practising their culture. See Robinson, Dylan, “The Appropriation and Incarceration of Indigenous Songs” 2022, online: <https://ppia-ppaa.ca/article/the-appropriation-and-incarceration-of-indigenous-songs/>.
- ⁹ Articles 11(1) and 31(1), [Schedule](#), *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#).
- ¹⁰ Gregory Younging, “Traditional Knowledge Exists; Intellectual Property Is Invented or Created” (2015) 36:4 U Pa J of Intl L 1077 at 1080.
- ¹¹ There are hundreds of relevant resources and books by Indigenous authors who lived through the relevant period in history. As a quick resource, see: Canada, “First Nations, Inuit and Métis historical terminology” (modified 30 July 2025), online: <https://www.canada.ca/en/library-archives/collection/research-help/indigenous-history/indigenous-terminology.html>.
- ¹² National Centre for Truth and Reconciliation, “Residential School History” online: <https://nctr.ca/education/teaching-resources/residential-school-history/>.
- ¹³ Zach Parrott, “Indian Act” in *The Canadian Encyclopedia* (published 7 February 2006, updated 23 September 2022), online: <https://www.thecanadianencyclopedia.ca/en/article/indian-act>.

¹⁴ *Infra.*

¹⁵ Niigaanwewidam James Sinclair & Sharon Dainard (updated by David Gallant), “Sixties Scoop” in *The Canadian Encyclopedia* (published 22 June 2016, updated 10 January 2024), online: <https://www.thecanadianencyclopedia.ca/en/article/sixties-scoop>.

¹⁶ Consider Indigenous peoples' loss of jurisdiction as Europeans colonized the lands, the many examples of non-voluntary disclosures of IK to ethnographers and museums, Western legal controls over the mobility of Indigenous peoples and their ceremonies, and pure acts of dispossession and market extraction without consent.

¹⁷ WIPO, *The Public Domain*, [WIPO/GRTKF/IC/17/INF/8](#) (24 November 2010).

¹⁸ WIPO, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*, WIPO/GRTKF/IC/37/7 (6 July 2018), para 22. To be sure, this definition reflects a Western understanding of IP. For at least some Indigenous communities, a better definition might reflect the notions of authority, consent and governance over the dissemination or use of IK, including over sacred or restricted materials.

¹⁹ An example may illustrate the point. The United States’ *Indian Arts and Crafts Act of 1990* is a truth-in-advertising law that prohibits misrepresentation in the marketing of American Indian or Alaska Native arts and crafts products within the US, and imposes criminal penalties on manufacturers, importers, and resellers of allegedly Indigenous crafts, when these crafts are not in fact made by Indigenous people. See <https://www.doi.gov/iacb/act>. By preventing third parties from marketing fake Indigenous crafts, the *Act* protects Indigenous IP. By reserving certain areas of economic activities to Indigenous peoples, the *Act* may also enhance Indigenous autonomy and promote Indigenous IP. No similar legislation exists in Canada, although equivalent provisions (akin to section 74.01) could possibly be added to the *Competition Act*.

²⁰ [Constitution Act, 1982](#), s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

²¹ See, e.g., *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#) at para [56](#); *Thomas and Saik’uz First Nation v Rio Tinto Alcan Inc*, [2022 BCSC 15](#) at paras [354–55](#), [359](#), and [367](#); varied [2024 BCCA 62](#), leave to appeal denied (SCC).

²² *R v Powley*, [2003 SCC 43](#), [2003] 2 SCR 207.

²³ *R v Van der Peet*, [\[1996\] 2 SCR 507](#) at para [46](#).

²⁴ *Hamilton Health Sciences Corp v DH*, [2015 ONCJ 229](#).

²⁵ *Tsilhqot’in Nation v British Columbia*, [2014 SCC 44](#) at para [32](#) [*Tsilhqot’in*].

²⁶ *R v Côté*, [\[1996\] 3 SCR 139](#) at para [56](#).

²⁷ Canadian courts acknowledge Indigenous peoples’ pre-existing customs, practices, traditions, and laws and ‘translate’ these into equivalent modern legal rights within the Canadian legal system. *Ibid.* See generally, Reagan Siedler, “Constitutionalized Rights to Indigenous Intellectual Property” (2020) 35 CIPR 51 at 54.

²⁸ See, e.g., *Thomas v Rio Tinto Alcan Inc*, [2024 BCCA 62](#), where the British Columbia Court of Appeal recognized a positive fiduciary obligation on the federal and provincial governments to protect an Aboriginal right to fish once it had been proven.

²⁹ See generally *Tsilhqot’in*; *R v Van der Peet*, [\[1996\] 2 SCR 507](#) at para [46](#).

³⁰ [Schedule](#), *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#).

³¹ *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#).

³² See Canada, “Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act” (Ottawa: Department of Justice Canada, 2024, modified 21 August 2025) online: <https://www.justice.gc.ca/eng/declaration/index.html>.

³³ See Canada, “Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act” (Ottawa: Department of Justice Canada, 2024, modified 21 August 2025) online: <https://www.justice.gc.ca/eng/declaration/index.html>.

³⁴ See, e.g., *Gitxaala v British Columbia (Chief Gold Commissioner)*, [2023 BCSC 1680](#) at para [14](#).

³⁵ For a broader discussion about how UNDRIP could be used as a tool for reconciliation with Indigenous peoples in Canada, see Chidi Oguamanam & Roger Hunka, “Aboriginal Partnership, Capacity Building and Capacity Development on ABS: The Maritime Aboriginal Peoples Council (MAPC) and ABS Canada Experience,” in Chidi Oguamanam, ed, *Genetic Resources, Justice and Reconciliation: Canada and Global Access and Benefit Sharing* (Cambridge: Cambridge University Press, 2018): 40.

³⁶ *Calder et al v Attorney General of British Columbia*, [\[1973\] SCR 313](#).

³⁷ See Canada, *Final Agreements and Related Implementation Matters* (Gatineau: CIRNAC, 2024, modified 17 February 2026) online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100030583/1529420498350>.

³⁸ See Canada, *The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government: Part I – Policy Framework, Scope of Negotiations* (Gatineau: CIRNAC, 01 March 2023) online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>. See, e.g., *A Self-Government Treaty Recognizing the Whitecap Dakota Nation / Wapaha Ska Dakota Oyate*, [section 5.19d](#); and *Tsawwassen First Nation Final Agreement*, [section 22](#).

³⁹ By analogy, see Québec legislation directed to protecting artists, such as the *Act respecting the Professional Status of Artists in the Visual Arts, Film, the Recording Arts, Literature, Arts and Crafts and the Performing Arts*, [CQLR c S-32.1](#), and the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*, [CQLR c S-32.01](#).

⁴⁰ *Trademarks Act*, RSC 1985, c T-13 at s [2 \(trademark\)](#). See also Teresa Scassa, *Canadian Trademark Law*, 2nd edition (Toronto: LexisNexis, 2015).

⁴¹ *Ibid* at ss [4\(1\)](#) and [4\(2\)](#).

⁴² *Ibid* at s [2 \(sign\)](#): word, a personal name, a design, a letter, a numeral, a colour, a figurative element, a three-dimensional shape, a hologram, a moving image, a mode of packaging goods, a sound, a scent, a taste, a texture and the positioning of a sign.

⁴³ *Ibid* at s [2 \(certification mark\)](#): means a sign or combination of signs that is used or proposed to be used for the purpose of distinguishing or so as to distinguish goods or services that are of a defined standard from those that are not of that defined standard, with respect to (a) the character or quality of the goods or services, (b) the working conditions under which the goods are produced or the services performed, (c) the class of persons by whom the goods are produced or the services performed, or (d) the area within which the goods are produced or the services performed. See also *Ibid* at s. [23\(1\)](#): A certification mark may be adopted and registered only by a person who is not engaged in the manufacture, sale, leasing or hiring of goods or the performance of services such as those in association with which the certification mark is used or proposed to be used.

⁴⁴ *Ibid* at s [9\(1\)\(n\)\(iii\)](#): any badge, crest, emblem or mark adopted and used by any public authority, in Canada as an official mark for goods or services in respect of which the Registrar has, at the request of Her Majesty or of the university or public authority, as the case may be, given public notice of its adoption and use.

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- ⁴⁵ Norman Hallendy, “Inuksuk (Inukshuk)” in *The Canadian Encyclopedia* (published 4 July 2013, updated 8 December 2020), online: <https://www.thecanadianencyclopedia.ca/en/article/inuksuk-inukshuk?utm>.
- ⁴⁶ Catherine W Ng, “Some cultural narrative themes and variations in the common law” (2009) 99:3 *Trademark Rep* 837 at 857-61.
- ⁴⁷ Jeff Pelletier, “Home Depot pulls Inuksuk garden statue over cultural appropriation concerns” *Nunatsiaq News* (5 June 2023), online: <https://nunatsiaq.com/stories/article/home-depot-pulls-inuksuk-garden-statue-over-cultural-appropriation-concerns/>.
- ⁴⁸ Simon Brascoupé and Karin Endemann, “[Intellectual property and Aboriginal people: a working paper](#)” (1999) *Indian and Northern Affairs Canada* at 22-23. See, e.g. Pro-Football Inc., owners of the Washington Redskins[®], opposed an Indian head design filed by a private company in Canada.
- ⁴⁹ In contrast, in New Zealand, certain statutory provisions prevent or discourage the registration of intellectual property where its use or registration is likely to offend Māori, or for other reasons that take Māori cultural considerations into account. See *Trade Marks Act 2002*, s [17\(1\)\(c\)](#).
- ⁵⁰ Ng, *supra* at 858; Brascoupé, *supra* at 20; and Lindsay Paquette, “Bill C-15 and the United Nations Declaration on the Rights of Indigenous Peoples: A Proposal for Intellectual Property Law Reform in Canada for the Protection, Preservation and Prosperity of Indigenous Traditional Knowledge and Cultural Expression” (2022) 34:2 *IPJ* 181 at 187. Indigenous governments or councils can protect a community crest or symbol as an official mark under section 9(1)(n)(iii) of the *Trademarks Act*.
- ⁵¹ See Identification Premières Nations First Nations, online: <https://id1n.org/en/>. See also the conditions of use: “CDEPNQL Policy on the Use of the Official Trademark,” online: <https://id1n.org/tos/politique-utilisation-fr.html>.
- ⁵² Brascoupé *supra* at pages 20-21. See also Robert K Paterson, “Canadian and International Traditional Knowledge and Cultural Expression Systems” (2017) 29:2 *IPJ* 191 at page 857-61.
- ⁵³ Vanessa Udy, “The Appropriation of Aboriginal Cultural Heritage: Examining the Uses and Pitfalls of the Canadian Intellectual Property Regime” (19 November 2015), online (blog): <https://www.sfu.ca/ipinch/outputs/blog/canadian-intellectual-property-regime/>: The Snuneymuxw First Nation in B.C. registered the symbols depicted in ancient petroglyphs found in the Nanaimo River Estuary as official marks under 9(1)(n)(iii) of the *Trademarks Act*.
- ⁵⁴ See GENUINE COWICHAN & DESIGN, Certification Mark Registration No. 0792174.
- ⁵⁵ See *Trademarks Act*, ss [11.11–11.24](#).
- ⁵⁶ See Donna Appavoo and Monika Korzun, “The potential role of geographical indication in supporting Indigenous communities in Canada” in Alessandro Bonanno, Kae Sekine & Hart N Feuer, eds, *Geographical Indication and Global Agri-Food* (London: Routledge, 2019), online: <https://doi.org/10.4324/9780429470905>.
- ⁵⁷ See *Copyright Act*, [RSC, 1985, c C-42](#), ss [3\(1\)](#), [15](#), and [18](#).
- ⁵⁸ *Ibid*, s [14.1\(1\)](#).
- ⁵⁹ *Ibid*, s [13\(4\)](#).
- ⁶⁰ *Ibid*, s [14.1\(2\)](#).
- ⁶¹ *Ibid*, s [6](#). For exceptions to the standard term of life of the author plus 70 years, see ss [6.1–11.1](#) regarding anonymous and pseudonymous works, posthumously published works, works of joint authorship and cinematographic works. See also s [14.2](#): Upon the death of the author the copyright and moral rights pass to the author’s designated heirs.

⁶² *Ibid*, s 15.

⁶³ *Ibid*. s 17.1.

⁶⁴ *Ibid*, s 18.

⁶⁵ *Ibid*. For an example of the benefits of registration, see s [53\(2\)](#) regarding evidential presumption.

⁶⁶ Examples of works containing IK and ICEs where copyright may arise: artistic works such as paintings by contemporary Cree artist Kent Monkman, whose works insert Indigenous perspectives into art history by challenging the representation of Indigenous peoples in 19th-century art (Kent Monkman, *Shame and Prejudice: A Story of Resilience* (Exhibition Catalogue, 2017), online: Kent Monkman Studio <https://www.kentmonkman.com/exhibitions/shame-and-prejudice>); graphic logos that appear on authentic Indigenous handicrafts, for example the illustration in the Genuine Cowichan and design trademark that identifies genuine Cowichan sweaters; literary works that could be adaptations of traditional stories, stories that blend fiction with Indigenous folklore such as Tanya Tagaq’s novel *Split Tooth*, and stories about Indigenous experiences such as *The Orange Shirt Story* by Phyllis Webstad; dramatic works such as choreography that blends traditional Indigenous forms with contemporary approaches to reclaim; and musical works including compositions featuring elements common in traditional Indigenous music.

⁶⁷ Richard Awopetu, “In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property” (2020) 69:4 *Emory LJ* 745 at 753.

⁶⁸ “Cultural Appropriation of Indigenous Peoples in Canada” in *The Canadian Encyclopedia* (published 18 April 2018, updated 20 July 2020), online: www.thecanadianencyclopedia.ca/en/article/cultural-appropriation-of-indigenous-peoples-in-canada.

⁶⁹ *Ibid*.

⁷⁰ “Copyright Act review an opportunity to press feds on Aboriginal issues” *Canadian Association of University Teachers Bulletin*, October 2016, <https://www.caut.ca/bulletin/copyright-act-review-an-opportunity-to-press-feds-on-aboriginal-issues>.

⁷¹ See, e.g., *Maltz v Witterick*, [2016 FC 524](#) at para [29](#).

⁷² The First Nations Information Governance Centre is focused on these issues, among others. See The First Nations Information Governance Centre, online: <https://fnigc.ca/>.

⁷³ That copyright assignments must be in writing adds a further complication: *Copyright Act*, RSC 1985, c C-42, s [13\(4\)](#).

⁷⁴ *Patent Act*, [RSC 1985, c P-4](#) at ss [2](#), [27](#), [28.2](#), and [28.3](#).

⁷⁵ Canada, “Filing Prior Art” (Gatineau: CIPO, modified 07 December 2021) online: <https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/patents/filing-prior-art>. See also *Ibid* at s [34.1\(1\)](#).

⁷⁶ See e.g. [Canadian Patent No. 2,869,600](#) (*Thermally Assisted Gravity Drainage (TAGD)*).

⁷⁷ See Ruth L. Okediji, “Traditional Knowledge and the Public Domain”, Centre for International Governance Innovation Paper No. 176, June 2018, at 14-15, online: <https://www.cigionline.org/publications/traditional-knowledge-and-public-domain/>.

⁷⁸ See Canada, “Patents based on genetic resources and associated traditional knowledge” (Gatineau: CIPO, modified 16 June 2025) online: <https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/patents-based-genetic-resources-and-associated-traditional-knowledge>. (“There are few publicly accessible databases that relate to the traditional knowledge of Indigenous peoples.”)

⁷⁹ See *WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, World Intellectual Property Organization (Geneva: WIPO), 24 May 2024, [GRATK/DC/7](#).

⁸⁰ *Industrial Design Act*, [RSC 1985, c I-9, s 2](#). The terms “industrial design” and “design” are interchangeably used to mean “features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye.” The term “article” is defined under the IDA to mean “any thing that is made by hand, tool or machine.”

⁸¹ *Ibid*, s [8.2\(1\)](#). For a design to be novel, an identical or substantially similar design must not have been disclosed to the public in Canada or elsewhere before the first filed application or 12 months before this date by the Applicant.

⁸² *Ibid*, s [2](#). “Utilitarian function” is defined in the IDA as “a function other than merely serving as a substrate or carrier for artistic or literary matter.”

⁸³ *Ibid*, s [10\(1\)](#). During the existence of an exclusive right, no person may make, import for the purpose of trade or business, sell, rent, or offer the registered design (or a design that does not differ substantially) without a licence from the proprietor.

⁸⁴ WIPO, “Summary of the Riyadh Design Law Treaty (2024)” online: https://www.wipo.int/en/web/treaties/ip/rdlt/summary_rdlt.

⁸⁵ *Riyadh Design Law Treaty*, World Intellectual Property Organization (WIPO), 22 November 2024, TRT/RDLT/001.

⁸⁶ *Plant Breeders’ Rights Act*, [SC 1990, c 20](#).

⁸⁷ *Ibid* s [4\(2\)](#).

⁸⁸ *Ibid* s [5\(1\)](#).

⁸⁹ *Ibid* s [6\(1\)](#).

⁹⁰ It is well known that North American agriculture arose spontaneously in meso-America and the Mississippi Valley and was widespread across the hemisphere at the time of European contact. Bruce D Smith “Origins of Agriculture in Eastern North America”. (1989) 246:4937 *Science* 1566.

⁹¹ See e.g. Nancy J Turner, *Ancient Pathways, Ancestral Knowledge* (Montreal: McGill-Queen’s University Press, 2014).

⁹² See Canadian Museum for Human Rights, “Witness Blanket” (2022), online: <https://witnessblanket.ca>.

⁹³ Eric C Kansa, “Indigenous Heritage and the Digital Commons” in Christoph Antons, ed, *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Alphen aan den Rijn: Kluwer Law International, 2009): 219 at 39 (e.g. Creative Commons licenses).

⁹⁴ *Ibid*.

⁹⁵ Knowledge-based tools may also help protect Indigenous IP. From a purely practical standpoint, disseminating information about the meaning of objects incorporating Indigenous knowledge (like museum artifacts), regardless of their current ownership or custody, serves to reconnect culturally significant object with the Indigenous people and communities from whom they originate. Systems like Local Contexts (see <https://localcontexts.org/>) can be used to provide this information and to restore Indigenous communities’ control over their historical knowledge, even as the law adapts only slowly to recognize and protect Indigenous knowledge.

⁹⁶ Indigenous laws are not to be confused with Aboriginal law, which is the protection of Indigenous people under Canada’s constitution.