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**WIPO PANEL ON, “INDIGENOUS AND LOCAL COMMUNITIES’  
CONCERNS AND EXPERIENCES IN PROMOTING, SUSTAINING  
AND SAFEGUARDING THEIR TRADITIONAL KNOWLEDGE,  
TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC  
RESOURCES”**

*COMPETING JURISDICTIONS OVER TRADITIONAL KNOWLEDGE  
IN THE NORTHERN AMERICAS*

*NOVEMBER 30, 2006*

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## INTRODUCTION

### **Indigenous Knowledge Systems**

Prior to contact with Europeans between 300-600 years ago, Indigenous knowledge systems had developed and flourished over several thousands of years in various parts of the world. These knowledges are rich and varied, ranging from soil and plant taxonomy, cultural and genetic information, animal husbandry, medicine and pharmacology, ecology, zoology, music, arts, architecture, social welfare, governance, conflict management, and many others.<sup>1</sup> The following section will briefly outline a very small sampling of the manifestations of Indigenous knowledge systems in the Northern Americas that existed prior to European contact and colonization, most of which continue to exist and evolve.

### **Significant Contributions to Humanity: Devalued and Diminished**

In the northern part of the continent of South America, Indigenous nations had charted the constellations, developed astrological charts and constructed elaborate pyramids that parallel the pyramids in Egypt. In the mountains near the mid-west coast of the Continent were complex city structures containing shaped stone buildings, stairs, walkways and irrigation systems that still stand today. The ruins show precision-crafted buildings with neat regular lines, beveled edges, and mortarless seams that characterize the best of Inca architecture.<sup>2</sup> In the interior of North America, Indigenous nations constructed gigantic mounds, some in the shape of animal and human figures that can only be identified from an aerial view. Entombed bodies and metal tools have been found inside these mounds indicating, “a complex and advanced civilization at work.”<sup>3</sup> Along the Northwest coast of the Continent intricate wood longhouses were constructed comprising village structures that continue to intrigue architects. The three hundred or so tribal groups who lived in North America when Christopher Columbus arrived built their homes and arranged their settlements according to similar patterns and principles passed from generation to generation.<sup>4</sup>

Far beyond architecture Indigenous design in North America had produced products including a variety of canoe designs, the kayak, snow shoes, sunglasses and a multitude of various farming and hunting implements. Gardening using hydroponics and advanced farming techniques were developed and practiced in continents of the Americas by Indigenous peoples producing a range of crops including corn, squash, beans, tomatoes, wheat, potatoes and varieties of fruits. Throughout the Amazon basin Indigenous farmers had overcome problems with termites and other insects by utilizing extracts from trees that act as natural repellent – which some Western scientists now struggle to understand and reproduce. Throughout North America and South America, Indigenous farmers had a profound understanding of genetics enabling them to experiment with new strains of potatoes. In the Andean region Indigenous

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<sup>1</sup> Hoppers, Catherine, (2002). In Indigenous Knowledge and the Integration of Knowledge Systems: Towards a Philosophy of Articulation (pp. 11). Claremont, South Africa: New Africa Books.

<sup>2</sup> Weatherford, Jack, (1988). In Indian Givers: How Native Americans Transformed the World (pp. 59). New York, New York: Crown Publishers.

<sup>3</sup> Francis, Daniel (1992). In The Imaginary Indian: The Image of the Indian in Canadian Culture (pp.193). Vancouver, British Columbia: Arsenal Pulp Press.

<sup>4</sup> Nabokov, Peter, & Easton, Robert, O.B. (1989). In Native American Architecture (pp. 12). Oxford, New York: Oxford University Press.

farmers knew that by taking pollen from one variety of corn and fertilizing the silk of another variety, they could create a corn with combined characteristics of the two parent crops.<sup>5</sup>

Major advances in the realm of health and herbal medicines had been developed throughout the continents of the Americas. Shamans and traditional healers practiced spiritual, herbal, and psychological techniques, including the placebo effect. Indigenous herbal specialists around the world gathered plants and studied and developed natural medicines that continue to surpass by far advances in herbology by non-Indigenous peoples.

Indigenous knowledge systems have also made many significant contributions to the arts and humanities of the world. The technique of acid etching of designs of Hohokam peoples in what is now southwestern Arizona (dating back to 500 b.c.) predates the technique in Europe by three hundred years.<sup>6</sup> Stories of ancient times before human beings, stories of the Creation of Indigenous peoples and other stories of spiritual, mythological and legendary figures are rooted in the Oral Tradition of Indigenous nations and have been passed down through generations and continue to fascinate many of the peoples of the world. Elaborate Indigenous artistic techniques and designs in sculpture, painting, music, drama, dance, continue to thrive in traditional and evolved forms, and have intrigued art historians and the art world for centuries.

In the area of governance, complex political systems exist among Indigenous nations and include chieftainships, monarchies, and evidence of universal rights and democracy prior to any such concepts in Europe. The Haudenosaunee People of the Longhouse practice a democratic form of government and formed the League of the Six Nations Confederacy that would later influence the development of American and European democracy. Oral history among the People of the Longhouse place the origin of the league at about 900 b.c.<sup>7</sup> Other united nations structures along the northwest coast, eastern seaboard and southern and northeast plains of North America developed between 2500 and 1500 years ago and far predate any such structures in Europe.

Indigenous knowledge systems represent the accumulated experience, wisdom and know-how unique to nations, societies, and or communities of people, living in specific environments of America, Africa, Asia and Oceania. It represents the accumulated knowledge of seventy per cent of the earth's people—some ten thousand distinct peoples and cultures. In the past, Eurocentric knowledge has condescendingly associated Indigenous knowledge with the primitive, the wild, and the natural.<sup>8</sup> This is the prevailing negative Eurocentric perception of Traditional Knowledge (TK) that forms the basis for the *status quo*. Despite the advances made by knowledge systems throughout the Indigenous world, the Western world's general response throughout the colonial and most of the post-colonial periods was to dismiss the value of TK. Since only European people could progress, all Indigenous knowledge was viewed as static and historical.<sup>9</sup>

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<sup>5</sup> Weatherford, Jack, (1988). In Indian Givers: How Native Americans Transformed the World (pp.85). New York, New York: Crown Publishers

<sup>6</sup> Francis, Lee, (1996). In Native Time: A Historical Time Line of Native America (pp. 14). New York, New York: St, Martin's Griffin.

<sup>7</sup> Ibid.

<sup>8</sup> Henderson, Sakej, (2004). Traditional Indigenous Knowledge (pp.1). Unpublished.

<sup>9</sup> Henderson, Sakej, (2004). Traditional Indigenous Knowledge (pp.6). Unpublished

From the initial contact periods, the interface between European and Indigenous Nations was characterized by ethnocentric and racist attitudes on the part of Europeans. Until the early 1980s, dominant Western perspectives tended to view TK as relatively insignificant for the industrialized world and commonly referred to it using the derogatory term “folklore.” In the 1980s, ownership of knowledge and artistic creations traceable to the world’s Indigenous societies emerged, seemingly out of nowhere, as a major social, economic and trade issue (Posey-1996). Throughout the 1990s and into the 21<sup>st</sup> century it has become increasingly apparent that TK not only has immense economic value but also salient intrinsic value that contains: cures to diseases and ailments; sustainable management of resources and ecosystems; means to spiritual, healing and health and lifestyle alternatives; and aesthetics, forms and techniques that produce some of the world’s greatest artworks.

This outside interest has also led to wide spread misappropriations and otherwise unauthorized and inappropriate use of TK. As a result, TK has now given rise to important Indigenous community, national and international issues that are under discussion in many countries and in The World Trade Organization (WTO), The World Intellectual Property Organization (WIPO), The Convention on Biological Diversity (CBD) and various other United Nations (UN) forums.

Indigenous knowledge is not only "technical" or empirical in nature, but also its recipients integrative insights, wisdom, ideas, perceptions and innovative capabilities that pertain to ecological, biological, geographical, and other physical phenomena. It has the capacity for total systems understanding and management.<sup>10</sup> Yet these high capacity, time-tested Indigenous systems’ have been devalued and diminished by having Eurocentric perceptions and institutions imposed upon them. In the process, many of the systems have been de-based through misrepresentation, misappropriation, unauthorized use and the separating of the content from its accompanying regulatory regime (i.e., Customary Laws).

### **Customary Laws: Developed Legal Regimes Devalued and Diminished**

Indigenous Peoples have numerous internal Customary Laws associated with the use of TK. These Customary Laws have also been called “cultural protocols” and are part of the laws that Indigenous Nations have been governed by for millennia and are primarily contained in the Oral Tradition. Although, in lieu of the increased outside interest in TK and problems with interaction between TK and (Intellectual Property Rights) IPR systems, there is a current movement among Indigenous Nations to document their protocols in written and/or digital format. Customary Laws are intimately intertwined and connected with TK to form what are whole and complete, integrated and complex Indigenous knowledge systems that have existed throughout the world for thousands of years. Indigenous Nations are also considering how Customary Laws can evolve and be adapted and applied in the present and future. However, throughout the colonization process, and in the post-colonial period, the IPR system has been imposed on Indigenous peoples and their knowledge systems including their Customary Laws.

Customary Laws around the use of TK vary greatly between Indigenous Nations, but include such regulations as:

Certain plant harvesting, songs, dances, stories and dramatic performances can only be performed/recited and are owned by certain individuals, families or clan

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<sup>10</sup> Henderson, Sakej, (2004). Traditional Indigenous Knowledge (pp. 2). Unpublished.

members in certain settings and/or certain seasons and/or for certain Indigenous internal cultural reasons;

Crests, motifs, designs and symbols, and herbal and medicinal techniques are owned by certain individuals, families or clan members;

Artistic aspects of TK, 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, and herbal and medicinal techniques, can not be practiced, and/or certain motifs can not be used, until the emerging trainee has apprenticed under a master of the technique;

Certain ceremonial art and herbal and medicinal techniques can only be shared for specific internal Indigenous cultural and/or spiritual reasons and within specific Indigenous cultural contexts.

These are but a few general examples of Customary Laws that Indigenous Nations around the world have developed over thousands years to regulate the use of TK. Indigenous Customary Laws are intimately intertwined and connected with TK and form what can be viewed as whole and complete integrated complex Indigenous knowledge systems throughout the world. For example, speaking about clan ownership in Nlakapamux Customary Law, Shirley Sterling states: “This concept of ownership by clans, nations and family groups and individuals of stories and other knowledge must be respected. The protocols for the use of collective knowledge from each cultural area and each First Nation would have to be identified and followed.”<sup>11</sup>

Indigenous Customary Law, like other sources of law, is dynamic by its very nature. Like its subject matter – culture, practices and traditions – it is not frozen in time, it has evolved with the social development of Indigenous peoples. Indigenous Customary Law also has an inextricable communal nature. The social structures that recreate, exercise and transmit this law through generations, and the protocols that govern these processes, are deeply rooted in the traditional territories of Indigenous peoples, and, understandably are inalienable from the land and environment itself.<sup>12</sup> Indigenous Customary Law is inseparable from Indigenous knowledge. In some Indigenous Nations, the abstract subtlety of Indigenous customary law is indivisible from cultural expressions such as stories, designs and songs. That is, a story may have an underlying principle of environmental law or natural resource planning.<sup>13</sup> A song may explain the custodial relationship that a certain community has with a particular animal species. A design may be a symbol that expresses sovereignty over a territory as well as the

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<sup>11</sup> Sterling, Shirley, (1997). In The Grandmother Stories: Oral Tradition and the Transmission of Culture (pp. 39). Unpublished Doctoral thesis. University of British Columbia Press.

<sup>12</sup> Alexander, Merle, (2003). In Customary Laws: Applying Sharing within Communities to International Instruments (pp.9). Unpublished.

<sup>13</sup> See Borrows, *supra* 1, at 17–20 for an interpretation of an Anishinabek resource law regarding *Nanabush v. Deer, Wolf et al.*

social hierarchy of a nation's clan system. A watchman's pole may be considered an assertion of Aboriginal title, tell a story of a historical figure and have a sacred significance.<sup>14</sup>

Neither the common law nor international treaties place Indigenous Customary Law on equal footing with *other* sources of law. As a result, TK is particularly vulnerable to continued destruction without substantive legal protection. Indigenous jurisprudence and law should protect Indigenous knowledge. In relation to Eurocentric law, Indigenous jurisprudence of each heritage should be seen as an issue of conflict of laws and comparative jurisprudence. With regard to its authority over Indigenous knowledge, Indigenous law and protocols should prevail over Eurocentric patent, trademark or copyrights law.<sup>15</sup> However, due to a series of historical realities, the *status quo* is that Indigenous knowledge has become subjugated under European legal regimes.

### **Customary Law Pre-dates Intellectual Property Rights System**

One of the greatest ironies of the *status quo* in the interface between European and Indigenous knowledge management systems is that Indigenous systems predate European systems by thousands of years. This point can be highlighted by the historical reality that when Christopher Columbus landed in the Americas hundreds of integrated knowledge systems complete with regulatory regimes had been functioning on the Continent for generations, while no such regulatory regimes were in existence in Europe. What would now be termed "piracy," "unauthorized use" and "copyright infringement" was common practice in 16<sup>th</sup> century Europe. In the period of time leading up to mid-16<sup>th</sup> century, European authors' works were produced and sold without permission (Crean-1993), and inventors began to boycott the trade fair circuit based around Frankfurt because they would commonly have their ideas misappropriated (McDougal-2001).

## **CASE STUDIES IN IPR/TK INTERFACE**

This section will detail examples of TK that has been misappropriated and otherwise protected or unprotected under copyright, patents and trademarks in North America. The case studies will be analyzed in terms of the insights they provide about the functionality of the IPR system and its ability to incorporate TK and the interests of the Indigenous peoples where the TK originates from. It will highlight concerns that existing regimes of protection are not able to protect certain forms of TK; and, therefore, supporting the argument that new systems of protection need to be developed and implemented. The three main mechanisms of the IPR system, copyright, patent and trademark, will be examined through specific cases to show how they have impacted TK. Through the examination of the case studies some brief analysis of how each mechanism interacted with TK will also be provided.

### **Interaction Between TK and IPR Systems**

As eluded to earlier, in the process of transporting European institutions into various parts of the world occupied by Indigenous people, the IPR system has now been imposed upon the TK system. Many issues have arisen in the past ten years regarding problems resulting from the existing IPR system's apparent inability to protect TK. The main problems with TK protection in the IPR system are:

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<sup>14</sup> Alexander, Merle, (2003). In Customary Laws: Applying Sharing within Communities to International Instruments (pp.11). Unpublished.

<sup>15</sup> Henderson, Sakej, (2004). In Indigenous Traditional Knowledge (pp.9). Unpublished.

- 1) that expressions of TK often cannot qualify for protection because they are too old and are, therefore, supposedly in the Public Domain;
- 2) that the “author” of the material is often not identifiable and there is thus no “rights holder” in the usual sense of the term; and,
- 3) that TK is owned “collectively” by Indigenous groups for cultural claims and not by individuals or corporations for economic claims.

### **The Public Domain Problem**

Under the IPR system, knowledge and creative ideas that are not “protected” or whose period of protection has expired are in the Public Domain. Generally, Indigenous peoples have not used IPRs to protect their knowledge; and so TK is often treated as if it is in the Public Domain – without regard for Customary Laws. Another key problem for TK is that the IPR system’s concept of the Public Domain is based on the premise that *the author/creator deserves recognition and compensation for his/her work because it is the product of his/her genius; but, because the author/creator is a member/ product of society, that society must eventually be able to benefit from that genius*. Therefore, according to this aspect of IPR theory, all knowledge and creative ideas must eventually enter the Public Domain. Under IPR theory, this is part of the reasoning behind the time period limitations associated with copyright, patents and trademarks.

The precept that all Intellectual Property, including TK, is intended to eventually enter the Public Domain is a problem for Indigenous peoples because Customary Law dictates that certain aspects of TK are not intended for external access and use in any form. Examples of this include, sacred ceremonial masks, songs and dances, various forms of shamanic art, sacred stories, prayers, songs, ceremonies, art objects with strong spiritual significance such as scrolls, petroglyphs, and decorated staffs, rattles, blankets, medicine bundles and clothing adornments, and various sacred symbols, designs, crests, medicines and motifs. However, the present reality is that TK is, or will be, in the Public Domain (i.e., the IPR system overrides Customary Law.)

### **Case Studies**

After providing some background as to the key reasons behind the IPR systems deficiencies in protecting TK, the remainder of this section will discuss some specific examples. Indeed, there are hundreds of such case studies many of which are referred to in the literature and discourse. However, for the purposes of illustration, the number of case studies will be limited to two or three under the categories of copyright, trademark and patent. The cases will attempt to show that an intellectual/legal analysis of reasons for IRR deficiencies can be made simpler by looking at some concrete examples. An effort has also been made to provide a balance between positive and negative examples in terms of IPR/TK interaction in the selection of the cases.

### **Copyright Cases**

This section will first contrast two cases where Indigenous stories have been published in children’s books. The first case is one in which a non-Indigenous author overtly appropriated and copyrighted stories, and the second in one in which an Indigenous publisher attempted to adopt aspects of Customary Law into the publishing process. A third example of a case of music copyright is also included.

### **The Cameron Case**

In 1985 the Euro-Canadian author Anne Cameron began publishing a series of children's books through Harbour Publications based on Westcoast Indigenous traditional stories. These books include: *The Raven*, *Raven and Snipe*, *Keeper of the River*, *How the Loon Lost Her Voice*, *Orca's Song*, *Raven Returns the Water*, *Spider Woman*, *Lazy Boy* and *Raven Goes Berry-picking*. Cameron had been told the traditional stories by Indigenous storytellers and/or had been present at occasions where the stories were recited. The original printing of the books granted Anne Cameron sole authorship, copyright and royalty beneficiary, and gave no credit to the Indigenous origins of the stories. As the discourse around Indigenous cultural appropriation emerged in the 1990s, Cameron's books came under severe Indigenous criticism; not only on the grounds of cultural appropriation, but the Indigenous TK holders asserted that some of the stories and aspects of the stories were incorrect.

This led to a major confrontation with Indigenous women authors at a women writer's conference in Montreal in 1990. At the end of the confrontation Cameron expressed her regret in publishing Indigenous stories in the series: however, the books continued to be reprinted and new books in the series continued to be published (Armstrong and Maracle-1992). Some minor concessions have been made in subsequent reprints of books in the series and new additions. Reprints of the books that were produced after around 1993/94 contained the disclaimer: "When I was growing up on Vancouver Island I met a woman who was a storyteller. She shared many stories with me and later gave me permission to share them with others... the woman's name was Klopimum." However, Cameron continued to maintain sole author credit, copyright and royalties payments. In a further concession, the 1998 new addition to the series *T'aal: the One Who Takes Bad Children* is co-authored by Anne Cameron and the Indigenous Elder/storyteller Sue Pielle who also shares copyright and royalties.

### **The Kou-skelowh Case**

The Kou-skelowh Series, published by Theytus Books, could be viewed as proper and ethical process within Indigenous cultural confines. The Series are traditional Okanagan stories that have been translated into English, illustrated and made into children's books. The original Kou-skelowh Series was published by Theytus Books in 1984. The redesigned second versions of the series were published by Theytus in 1991. One of the most valuable aspects of the Series is how its development attempted to incorporate Indigenous cultural protocols into the publishing process. Firstly, in the early 1980s, on behalf of Theytus, Okanagan author Jeannette Armstrong approached the Okanagan Elders Council and asked if some traditional legends could be used in the project. When the Elders gave permission for three legends to be used, Armstrong then condensed the legends and translated them into English. The English versions were then taken back to the Elders Council for examination and edited until they were approved.

The Elders Council was then asked if Theytus Books could have permission to publish the stories for the book trade. After lengthy discussions, Theytus was granted permission on the grounds that several conditions were met, including that no individual would claim ownership of the legends or benefit from the sales. The Elders Council was also then asked to name the series: Kou-skelowh, meaning "we are the people." The series is authorless and instead each book contains the caption "An Okanagan Legend." The series is also copyrighted to the Okanagan Tribal Council – as the Okanagan Elders Council is not an incorporated entity.



The methodology implemented in the Kou-skelowh Series could stand as a model in which concerns with Indigenous cultural protocols were considered, as well as a good example of the uniqueness of Indigenous editorial practice. The methodology that was used in the Kou-skelowh Series could also stand as an example of the uniqueness of Indigenous editorial practice.

### **The Mbube Case**

In its original Indigenous version the “Mbube Song” is traditionally sung with a Zulu refrain that sounds, to English-speaking people, like “wimoweh.” Mbube was a big hit throughout Southern Africa selling nearly 100,000 copies in the 1940s in the recorded version by the South African Solomon Linda who was regarded as the master singer of the song. Linda recorded the tune in 1939 with his group the Evening Birds, and it was so popular that a style of Zulu choral music became known as “Mbube Music.” Decca Records in the U.S accessed a copy of the recording in the 1950s and passed it on to the singer Pete Seeger, who was apparently enchanted by Mbube, especially the “wimoweh” refrain. Seeger then recorded it with the American folk group The Weavers. American musicologists claim the song really gained notoriety with The Weavers' live version at Carnegie Hall in 1957. Linda was not credited as the writer; it was credited to “Paul Campbell”, a member of the group. The Kingston Trio released their version in 1959 with the writer credit listed as “traditional; adapted and arranged by Campbell-Linda.”

A subsequent version by The Tokens was performed in an audition with the top RCA production team of Hugo (Peretti) and Luigi (Creatore) in 1960. Hugo and Luigi decided the song needed new lyrics. With George Weiss, they keyed in on what they saw as the songs “jungle origins” and wrote *The Lion Sleeps Tonight* including the “wimoweh” refrain that was just Seeger’s mistranslation of Linda's original. The Tokens recorded the quintessential pop version in May 1961 at RCA Studios. The song became a huge international hit and was give another round of popularity and financial benefit when featured as the theme song in the Disney epic *The Lion King*. Linda or his heirs have not received any substantial royalties from a song that is perhaps one of the most well-known worldwide hits.<sup>16</sup>

### **Analysis**

While the Kou-skelowh case shows that publishers and editors can make moral decisions to respect TK, the Cameron case shows that the copyright system does not protect traditional stories from appropriation should the “author” choose to continue to maintain copyright. The Indigenous TK holders of the original stories could find no recourse within copyright law. As such they could only make their grievances known and together with the Indigenous women authors make a moral appeal to the copyright holder. This appeal was only moderately effective in that it only lead to some minor concessions. Although the Kou-skelowh case is a more optimistic model for TK within copyright, it fundamentally only represents an innovative use of the system based on the good will of the publisher to respect TK protocols. In the Mbube case, Soloman Linda also had no recourse within copyright law. According to music copyright, a person(s) who does fresh work on an existing work may, however, claim to be the author of the resulting product. (Vader-1997).

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<sup>16</sup> Brent, Bill & Glenman, Fred. Translated Hits. Available <http://www.bobshanon.com/stories/hesofine.html>

### **Patent Cases**

Misappropriation of TK through patents is the area in which the greatest number of misappropriations exists, as thousands of patents on TK have been licensed to corporations and individuals worldwide. At the 7<sup>th</sup> meeting of the WIPO IGC in March 2005, a representative from the Indian delegation quoted a recent study in which “a random selection of 300 patents in India revealed that over 200 contained TK” (intervention by Indian Delegation at WIPO IGC7 - 2005). The extent of the problem has become a major concern for WIPO, as the body who grants international patents. The organization has conducted several major research studies on the topic in recent years, some of which refer to such cases “erroneous patents” and propose mechanisms to revoke such patent licenses. Many of these controversial patent licenses pit small Indigenous communities against large national and multinational corporations. Noting that there are a wealth of test cases that could be selected, this section will examine two cases: one involving an Inuit corporations unsuccessful attempt to patent Inuit TK in Canada, and the case of the patenting of a plant from Southern Africa by U.S. corporations.

#### **The Igloodik Case**

An example of the failure of the Patent Act to respond to Inuit designs is the Igloodik Floe Edge Boat Case.<sup>17</sup> A floe edge boat is a traditional Inuit boat used to retrieve seals shot at the floe edge (the edge of the ice floe), to set fishing nets in summer, to protect possessions on sled when travelling by snowmobile or wet spring ice, and to store hunting or fishing equipment.

In the late 1980's the Canadian government sponsored the Eastern Arctic Scientific Research Centre to initiate a project to develop a floe edge boat that combined the traditional design with modern materials and technologies. In 1988 the Igloodik Business Association (IBA) sought to obtain a patent for the boats. The IBA thought that manufactured boats using the floe edge design would have great potential in the outdoor recreation market. To assist the IBA with its patent application the agency, the Canadian Patents and Developments Limited (CPDL) initiated a pre-project patent search that found patents were already held by a non-Inuit company for boats with similar structures. The CPDL letter to the IBA concluded that it was difficult for the CPDL to inventively distinguish the design from previous patents and, therefore, the IBA patent would not be granted. The option of challenging the pre-existing patent was considered by the IBA, however, it was decided that it would not likely be successful due to the high financial cost and risk involved in litigation.

#### **The Taumatin Case**

Taumatin is a natural sweetener made from berries of a katemfe shrub that is traditionally used by Indigenous peoples in Central Africa. The protein is about 2,000 times sweeter than sucrose without any of the health risks. In 1993, researchers from the Lucky Biotech Corporation and the University of California acquired a US patent on all transgenic fruits, seeds, and vegetables containing the gene responsible to producing taumatin (Shand-1993). Although taumatin has still not reached the US and other markets, with the high cost and low production scale of growing taumatin on plantations in Africa, and a \$900 million per year low-calories sweetener market in the US, it is highly likely that African katemfe plantations

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<sup>17</sup> Ford, Violet. The Protection of Inuit Cultural Property (pp. 20). Paper presented at the meeting of the Creator's Rights Alliance National Conference on Traditional Knowledge, June 4, 2004, Montreal.

will not be used; if so, the countries where katemfe is grown will not be able to benefit from exporting the berries.<sup>18</sup>

### **Analysis**

The Igloodik and Tautimatin cases show that TK can be patented by non-Indigenous corporations, leaving the Indigenous originators with no financial benefits and no recourse other than litigation. Typically in patent challenge litigation, corporations have their own lawyers and financial resources to provide effective legal support, whereas local (Indigenous) communities rarely have such resources or advocates (Posey-1996). Even if a case goes to court, the company may well succeed in convincing the court that its product, use or process is sufficiently different from the original to constitute an invention.<sup>19</sup>

### **Trademark Cases**

As most Indigenous communities are far behind in terms of establishing businesses most trade-marking of TK involves a non-Indigenous corporation trade-marking an Indigenous symbol, design or name. This practice has been curtailed by laws in the Philippines, the U.S. and other countries; however it remains rampant in most countries around the globe (i.e., the 2010 Vancouver Olympic Logo). Again, many cases could have been examined in this section but only two have been chosen: one case involving the Snuneymux Band trade marking petroglyphs through the Canadian Patent Office, and one involving an international corporation's patent licence being the subject of an intense international Indigenous lobbying effort.

### **The Snuneymux Case**

The Snuneymux people have several ancient petroglyphs located off their reserve lands near False Narrows on Gabriola Island, BC. In the early 1990s non-Indigenous residents of Gabriola Island began using some of the petroglyph images in coffee shops and various other business logos. In the mid-1990s the Island's music festival named itself after what had become the local name of the most well known petroglyph image, the dancing man. The Dancing Man Music Festival then adopted the image of the dancing man as the festival logo and used it on brochures, posters, advertisements and T-shirts.

The Snuneymux Band first made unsuccessful appeals to the festival, businesses and the Gabriola community to stop using the petroglyph symbols. In 1998 the Snuneymux Band hired Murry Brown as legal counsel to seek protection of the petroglyphs (Manson-2003). At a 1998 meeting with Brown, Snuneymux Elders and community members on the matter, The Dancing Man Festival and Gabriola business' and community representatives were still defiant that they had a right to use the images from the petroglyphs (Brown-2003).

On the advice of Murry Brown, The Snuneymux Band filed for a Section 91(n) Public Authority Trademark for eight petroglyphs and was awarded the trademark in October of 1998 (Brown-2003). The trademark protects the petroglyphs from "all uses" by non-Snuneymux people and, therefore the Dancing Man Festival and Gabriola Island business and community representatives were forced to stop using images derived from the petroglyphs.

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<sup>18</sup> Posey, Darrell & Dutfleid, Graham, (1996). Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities (pp. 82). Ottawa, Ontario: International Development Research Centre.

<sup>19</sup> Ibid., 94

### **The Aveda Case**

In 2000, The Aveda Corporation, headquartered in Minneapolis and New York City, introduced a cosmetic product line called “Indigenous” which included an aroma candle, essential oil and hair and body shampoo. The products in the line were infused with cedar, sage and sweetgrass and the symbol of the line featured on all labeling and promotional material is the Medicine Wheel. The trademark application No. 75/76,418 under the word “Indigenous” was filed with the US PO on September 9, 1999 and was granted November 15, 1999. The “Indigenous” trademark application was submitted to the Canadian PO on September 15, 1999 and granted on July, 16, 2003.

Indigenous lobbying against the “Indigenous” line began to grow throughout the 2000-2002 in the US, Australia and New Zealand. The lobbying efforts attempted to disseminate the message that the line was offensive to Indigenous peoples mainly because: the word “Indigenous” was trademarked by a non-Indigenous corporation; and, the Medicine Wheel symbol was being used in a culturally inappropriate manner. The cross-cultural issues were somewhat clouded by the fact that the cedar, sage and sweetgrass were obtained from Native Americans and other Native Americans endorsed the products, such as the following statement by Robby Romero (President of the Native Children’s Survival) on one of the brochures: “Indigenous™ express a reverence to Mother Earth, devotion to the environment, and an alliance with Wisdom Keepers of the World.”

Eventually Indigenous lobbyists from the US and Australia began working together and managed to get a meeting with Dominique Conseil, president of Aveda, in September 2003. In the meeting Conseil was persuaded to drop the line and the trademark and the following was stated by Aveda in a press release dated November 4, 2003:

Aveda Corporation today announced the discontinuation of its Indigenous product line as well as its intention to abandon the ‘Indigenous’ trademark. The Indigenous collection... will cease production immediately.... The decision was reached following a meeting among representatives of several indigenous nations of the Americas and Australia and representatives of Aveda... ‘We are discontinuing the Indigenous product line to demonstrate our ongoing support and respect for indigenous peoples in their efforts to protect their traditional knowledge and resources,’ explained Dominique Conseil, president of Aveda. ‘Aveda will discontinue marketing any products under the ‘Indigenous’ trademark and, to emphasize its respect, will begin the formalities necessary to abandon any rights it may have in this trademark,’ Mr. Conseil added... ‘By its action, Aveda also hopes to stand in solidarity with indigenous peoples in their quest for recognition of intellectual property rights in their traditional wisdom.’

### **Analysis**

While the outcomes of the Snuneymux and Aveda cases appear to shed an optimistic light on trademark protection of TK, a closer examination of the cases still reveals problems with TK and IPR interaction. The Snuneymux trademark did “work” to protect the petroglyphs; however not as the trademark system is intended. According to trademark theory the system is intended to be “offensive” allowing the rights holder to freely use the mark for the promotion and advancement of the product into the marketplace. In the Snuneymux case the petroglyphs were trademarked for “defensive” purposes; i.e., so they would not be used. Like the Kou-

skelownh case, the Snuneymux case represents an innovative use of the IPR system that negotiated within the systems limitations and found a way to make it work to protect TK.

The Aveda case may be a great Indigenous lobbying victory; but it is not such a great victory for TK protection within the IPR system. In the case, the extenuating circumstances of a strong and organized lobby, a company eager to protect its naturalist, purest, earthy image, and an open minded President, lead to the canceling of the line and the trademark. However, like Cameron's minor concessions, the canceling was the result of a willing concession on the part of the rights holder based on a moral appeal. There is nothing within the IPR system that would have compelled Aveda to abandon the mark if it, for example, the company chooses to make an economic decision based on investment in developing and manufacturing the line, and ignore the moral issue presented before it.

### **Summary**

The case studies have shown that serious conflicts exist between the IPR and TK systems and lead to the conclusion that it constitutes a major problem which Indigenous peoples must work out with the modern states they are within and the international community. In contrast to Eurocentric thought, almost all Indigenous thought asserts that property is a sacred ecological order and manifestations of that order should not be treated as commodities.<sup>20</sup>

It is clear that there are pressing problems in the regulation of TK. It is also clear that IPR system and other Eurocentric concepts do not offer a solution to some of the problems. There have been cases of Indigenous people using the IPR system to protect their TK. However, the reality is that there are many more cases of non-Indigenous people using the IPR system to take ownership over TK using copyright, trademark and especially patents. In some such cases this had created a ridiculous situation whereby Indigenous peoples cannot legally access their own knowledge.

One recent study undertaken on behalf of the Intellectual Property Policy Directorate (IPPD) of Industry Canada and the Canadian Working Group on Article 8(j) concluded: "There is little in the cases found to suggest that the IP system has adapted very much to the unique aspects of Indigenous knowledge or heritage. Rather, Indigenous peoples have been required to conform to the legislation that was designed for other contexts and purposes, namely western practices and circumstances. At the same time, there is little evidence that these changes have been promoted within the system, i.e., from failed efforts to use it that have been challenged" (IPPD-2002). Such conclusions, along with other conclusions being drawn in other countries and international forums, and the case study examples discussed in this chapter, appear to support the argument that new systems of protection need to be developed. *Sui Generis* models have been proposed and developed in many countries.

### **The U.S. Indian Arts and Crafts Act**

In the United States of America Indian Arts and Crafts Act of 1990 and Other Relevant Measures, two mechanisms have been established in the US to work in conjunction:

1. The Indian Arts and Crafts Board was established in 1935. It operates as an agency within the Department of the Interior and administers the Indian Arts and Crafts Act (IACA). The Board interprets potentially unlawful conduct for

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<sup>20</sup> Battiste, Marie, & Youngblood Henderson James, (2001). Protecting Indigenous Knowledge and Heritage: A Global Challenge (pp.145). Saskatoon, Saskatchewan: Purich Publishing.

enforcement purposes. It can, for example, refer complaints of criminal violations to the Federal Bureau of Investigation and recommend to U.S. Attorney General that criminal proceedings be instituted.

2. The Database of Official Insignia of Native American Tribes is maintained by the United States Trademark and Patent Office (USPTO). USPTO Database of Official Insignia of Native American Tribes was established as a result of the Trademark Law Treaty Implementation Act (1998).

The 1990 Native American Graves Protection and Repatriation Act (NAGPRA) also protects certain aspects of TK. NAGPRA mainly has to do with the protection material culture but it does protect American Indian and Native Hawaiian culture in many respects through its concern with sacred objects, the illicit sale of religious artifacts and the protection of sacred sites. American law does not generally recognize moral rights but the federal Visual Artists Protection Act also gives artists (including Native American artists) moral rights-type protection in certain instances (Patterson-2006). Meanwhile, Indigenous peoples in the U.S. continue to repatriate some of their cultural materials and assert jurisdiction over their knowledge systems through limited tribal sovereignty and law making powers.

The stated objectives of the mechanisms are as follows:

(1) IACA:

To promote the development of Indian arts and crafts and to create a board to assist therein, and for other purposes;

(2) Database of Official Insignia:

To address issues surrounding the protection of the official insignia of federally and State recognized Native American tribes (Section 302(a), Trademark Law Treaty Implementation Act).

The legal protection provided in the United States is, in summary, intended:  
to protect and preserve cultural heritage;  
to prevent commercial interests from falsely associating their goods or services with indigenous peoples.

Within the United States, the IACA empowers the IACB to refer violations to the Federal Bureau of Investigation. The IACB may independently recommend to the Attorney General of the United States that criminal proceedings be instituted. The IACB may also recommend that the Secretary of the Interior refer a matter to the Attorney General for civil enforcement action. The criminal and civil penalties for violating the IACA are as follows: first time individual offenders are subject to fines of up to \$250,000 or five years' imprisonment; businesses are subject to fines of up to \$1,000,000; subsequent violations expose individual offenders to fines of up to \$1,000,000 or fifteen years' imprisonment, while business offenders face up to \$5,000,000 in fines. (U.S. Indian Arts and Crafts Act of 1990 and other relevant measures)

In response to concerns raised by the Assistant Secretary of Policy, Management and Budget and the commissioners of the Indian Arts and Crafts Board (IACB), the Office of Inspector General (OIG) conducted a review of counterfeit Indian arts and crafts completed in June 2005. OIG evaluators and investigators studied the application of the law and obtained Indian artists' perspectives on the issue of misrepresentation and counterfeiting in the Indian arts and crafts industry. The review found that,

“current laws, while well-intended, do little to protect Indian artisans from the unfair competition created by low-priced, mass-produced imitations of their work. The primary law, the Indian Arts and Crafts Act, is practically unenforceable and does not provide adequate authority to the IACB. As a result, enforcement largely depends upon the cooperation of agencies outside the Department of the Interior’s control, such as the FBI and U.S. Customs and Border Patrol. Further, there are conflicts between the Indian Arts and Crafts Act and current trademark law, which prevent the IACB from facilitating the registration of trademarks for Indian artisans.”

It was further noted,

“ that the IACB has spent most of its effort focusing on the highest, and most difficult, level of counterfeit enforcement: criminal prosecution. However, as we have documented in this report, this level has produced no identifiable results, by way of either criminal convictions or a measurable decrease in counterfeit activity.”

The review’s suggested actions were that the US PTO, in cooperation with the IACB, should:

1. Encourage the re-introduction of the Indian Arts and Crafts Act Amendments in Section 3 of Senate Bill 2843. These amendments would give the IACB the authority to (a) investigate violations of the Act; (b) enforce the Act through the imposition of fines for violations; (c) enforce the Act through injunctive relief; and (d) enter into a reimbursable support agreement with federal, state, tribal, regional, and local law enforcement entities.
2. Collaborate with the CBP to revise the country of origin marking regulations to remove exceptions and require that Indian-style jewellery items (and other applicable items) be indelibly marked, not just their containers.
3. Work with the Congress to amend the Act to clarify that the IACB is authorized to facilitate the registration of trademarks that are owned directly by Indian individuals, tribes, and arts and crafts organizations and/or enter into a Memorandum of Understanding with the Department of Commerce to allow the IACB to register and assign trademarks on behalf of Indian individuals, tribes, and arts and crafts organizations.
4. Consider seeking civil penalties for misrepresentation before resorting to criminal penalties. If the amendments in Section 3 of Bill S. 2843 pass, the IACB should also focus on administrative actions.

(Indian Arts and Crafts a report on Misrepresentation No. E-EV-OSS-0003-2005)

### **The Indigenous Artist’s Research Project in Canada**

In the late 1980s and early 1990s, the Indigenous arts community in Canada was instrumental in bringing the issues of cultural appropriation and repatriation to the forefront of the national consciousness. The mobilization of Indigenous artists at the 1987 “Telling Our Own Story” Conference in Vancouver, protests by Indigenous artists against *The Spirit Sings* exhibit at the

Glenbow Museum and the National Gallery of Canada in 1986-1987, and the lobbying effort of Indigenous members in the Writers Union of Canada in 1988, all contributed to an increased awareness among progressive elements in Canada. These efforts have led to increased recognition of the importance of TK in upholding the integrity of Indigenous peoples.

The Creator's Rights Alliance (CRA) was formed in 2002 to represent the Intellectual Property interests of artists in Canada at a national and international level, and, therefore also, has an interest in TK issues and Indigenous artists. There have been presentations on the subject of TK each year at the annual meetings of the CRA. The Indigenous Peoples Caucus (IPC) of the CRA has maintained an effort to hold ongoing discussions with on TK related issues within the Indigenous artists community and government departments and agencies in Canada, and lobby for TK rights at WIPO, CBD and other UN forums. The Intellectual Property Policy Directorate (IPPD) of Industry Canada also has a domestic policy development work program on TK issues. The focus of their work to date has been on identifying long-term objectives at the national level by gathering information from a variety of sources, including from Indigenous communities and individuals at the grassroots level. The picture is not yet complete. IPPD's work is still at the fact-finding stage and further work is needed to obtain a more representative view of the diversity of stakeholders and concerns surrounding the issues.

The CRA approached representatives of the IPPD in 2004 for funding assistance to conduct three regional symposia dealing with TK related issues, as well as a national conference coinciding with the CRA annual meetings in Montreal in June 2005. The entire project, including the results of the two previous meetings held in Saskatchewan and Manitoba, was named the Indigenous Artist Research Project (IARP).

Throughout the symposia conducted for the IARP participants pointed out that TK raises serious challenges for the Intellectual Property system. Many argued that the current IPRs do not respond to the concerns of TK holders. One overarching problem identified is that the IPR system is designed to eventually release all Intellectual Property into the Public Domain after time periods of protection expire. Many participants insisted that Indigenous protocols dictate that certain aspects of TK are not intended for external access in any form, at any time. The IARP also highlighted how these potential conflicts between the TK and IP systems have given rise to numerous discussions at the local, national level and international level. In each region artists and others indicated the need for support from the federal government for organization around these issues at the local level in order to allow them to better contribute to these discussions. Additional views provided by participants through the follow-up telephone interviews largely complement the findings outlined. The IARP managed to bring together a wide range of individuals, federal government departments and organizations interested in finding answers to the complex and sensitive issues related to TK, in a positive and productive manner. It is the hope that the information gathered will be a useful contribution to current work on TK underway within federal government and Indigenous communities and that collaboration will continue to take place in the future (IARP Final Report-2004). More recently, perhaps due to staff changes, shifting priorities and/or a change in government, IPPD has not been active on its TK file.

### **The National Gatherings on Indigenous Knowledge**

*Traditions: National Gatherings on Indigenous Knowledge* (NGIK) was the third in a series of national gatherings organized by the Department of Canadian Heritage (DCH) with the goal of continuing engagement with Aboriginal communities across Canada on areas of



mutual interest.” DCH proposes that ‘the findings of *Traditions* will help to build and enhance policies, programs and services that are supportive of Indigenous peoples in Canada and are relevant to their needs.’ DCH has stated, “*Traditions* acknowledges and celebrates the fact that an underlying strength of Canada is founded on the rich heritage of Indigenous societies and the extensive contributions they have made to our national identity. Dialogues with First Nations, Inuit and Métis identified the need for all Canadians to recognize these contributions and acknowledge the unique challenges faced by communities in the three areas of Indigenous knowledge targeted for discussion: languages and cultures; intellectual and cultural property; and artistic expression.”

The Gatherings provided a forum in which DCH came together with Indigenous communities and representatives from other government sectors to discuss a framework for the recognition, respect, protection and celebration of Indigenous knowledge in all the ways it is used and expressed. The NGIK also provided opportunities for delegates to meet others who share their perspectives and concerns. They allowed delegates to share information about best practices and support available from federal departments and agencies, and they encouraged open and relevant discussions of key issues and brainstorming on opportunities and strategies for change.

During the months of May and June 2005, national Gatherings on Indigenous knowledge were held in eight communities across Canada: Rankin Inlet, Edmonton, Penticton, Wanuskewin, Yellowknife, Wendake, Eskasoni and Six Nations. They brought together over 400 representatives of Indigenous communities with DCH and other government representatives. Each Gathering took place over three days and involved approximately fifty invited delegates. Gatherings consisted of small break-out circles and plenary discussions focused on the following themes:

Indigenous Knowledge and Languages and Cultures

Indigenous Knowledge and Intellectual and Cultural Property

Indigenous Knowledge and Artistic Expression

Within each of the three themes, delegates were asked to consider: what issues should be considered priorities and what were the main vulnerabilities; the possibilities for action; and the roles and responsibilities for addressing the issues in diverse communities. The process of engagement used by the National Gatherings Secretariat is founded on key principles that have guided the DCH in coming together with federal departments, provincial and territorial governments, Aboriginal governments and leaders, and communities alike. According to the Draft Report, “these principles were not just for the national Gatherings, but will continue to guide the Department of Canadian Heritage in future processes of engagement.”

A common theme heard throughout the Gatherings was that communities would like to see the creation of, and financial support for, Elders’ Councils to advise both communities and government departments at various levels. Although each Gathering, and indeed each circle discussion, had its own unique conception of Elders’ Councils, the underlying message was that guidance and advice from Elders is essential because traditional laws and protocols govern virtually all aspects of community life, including finding solutions and strategies to address critical issues. The need to raise awareness about the urgency and importance of these critical issues was raised at each Gathering. Indeed, the report is a testament to the importance of promoting, protecting and valuing Indigenous knowledge, while acknowledging the

contributions that First Nation, Inuit and Métis peoples have made and continue to make to Canadian society and culture.

The NGIK process was an example of a National government inviting Indigenous communities to take part in a process and express their views. DCH also established an Advisory Committee of Indigenous representatives to guide and provide advice on the process. It remains to be seen if the NGIK will have any significant impact of DCH and Canadian Government policy on TK. (At the time of this writing of this paper the NGIK Final Report is being held up in the Prime Minister's Office awaiting approval.)

### **Summary**

There have been a number of Indigenous/National Government collaborations on TK issues in various countries: with various degrees of success and control by either of the two parties. It is clear that there have also been a variety of forces and circumstances leading to the initiatives. The conclusion could be drawn that in terms of producing tangible soft law approaches to the satisfaction of Indigenous peoples the outcomes of some of the key initiatives could be ranked in the following order: 1) South Africa, 2) Australia, 3) New Zealand, 4) Canada. Whereas hard law approaches have been enacted in various countries including India, Brazil, China, Costa Rica, Peru, Philippines, Portugal, Thailand, South Africa and the U.S. The Canadian experience has shown some recent movement and potential after decades of stagnation. To be sure Canada has the benefit of learning from the Australian and New Zealand examples and the opportunity of building on recent initiatives and the 2010 Olympics. Canada appears to be at a similar stage that Australia was at a decade ago in that, after about two decades of Indigenous peoples raising TK issues, the state has slowly begun to acknowledge the problem. Perhaps the IARP, the NGIK and the potential of a 2010 protective mark could lead to the beginning of a movement to act on TK issues more substantively in Canada.

While Canada has the examples of the United States, South African, New Zealand and Australian experiences to draw from, Indigenous peoples in Canada also have the Australian test case models to consider as a means of forcing the state to act. Indeed, some analysts believe that Indigenous peoples are in a unique position of having the potential to advance Moral Rights recognition to the benefit of all artists (Crean-2002).

### **The Case for New Regulation**

It is clear that there are pressing issues in the regulation and protection of TK. It is also clear that there are problems to which the IPR system other Eurocentric concepts do not offer a solution. Such discrepancies between TK and the IPR systems have led certain analysts and Indigenous peoples to reject the current system in its entirety. Some have argued that the protection of TK requires the establishment of an entirely new system that could incorporate Customary Law. In the developing literature and discourse, this proposed new system is usually referred to as *Sui Generis*. An "intellectual property-like" system could be adopted to suit TK needs. The TK/IPR interface forces us to re-evaluate Intellectual Property fundamentals. The central question in this debate is, can Intellectual Property be a truly universal system recognizing various forms of traditional creations and innovations and grant some protection to collective rights holders?

A perceived need to legislate a *Sui Generis* system, incorporating Customary Law to match identified needs of TK holders clearly does exist. However, others have argued that resorting to a *Sui Generis* system should be a solution of last resort, because it could mean that instead of finding out why the system does not work, a "tailored" system is legislatively put in place without necessarily thinking about its impact on the existing system. In order to avoid stretching the current Intellectual Property canvass beyond what is reasonable, a *Sui Generis*

regime could be established and extended through a new international instrument (Gervais-2002) that would likely be developed first in the WIPO IGC and perhaps later in the CBD. This could happen once countries most advanced in dealing with TK issues have adopted and tested certain forms of protection of TK and shown that these new forms of protection actually work in meeting the needs and expectations of TK holders.

While international efforts continue to discuss and develop regulations for TK protection, complementary efforts must be made on domestic fronts at the same time. Countries with wide spread abuse of TK, like Canada and Australia, New Zealand and the U.S., must move quickly to bring about domestic regimes of protection that will be in line with developing international regimes. The Carpet Case and the Bulan Bulan Case in Australia have begun the process by establishing Indigenous copyright (and affording it the same protective mechanism as European-based Intellectual Property); although the Court stopped short of recognizing Collective Copyright. In Bulan Bulan this was done on what could be seen as an erroneous attempt to apply the concept of Indigenous collective ownership to the concept of “joint authorship.” More such test cases on TK are now required in Australia since a new Moral Rights regime has been established after Bulan Bulan.

In Canada the judgments of the Snow and Th  berge cases leave all creative works relation to Moral Rights in question, let alone TK, and further test cases are required on Moral Rights. Meanwhile, the SCC (Supreme Court of Canada) has yet to consider the existence of a collective Aboriginal Right to ownership and control of Aboriginal cultural property.<sup>21</sup> Again, test cases on TK are required in Canada to begin the process in Common Law that is underway in Australia. Meanwhile Canada and Australia and many other countries need to begin the process of working with Indigenous groups on the development of new regimes of protection or face problems of conflicting national and international regimes when international standards are set. The time frame to do so seems to be getting shorter as the WIPO IGC appears to be heading towards an incremental approach starting with short-term soft law leading to long-term entrenched law. In the IGC work plan it appears that this will begin soon with a political declaration on TK rights leading to instruments such as a binding or non-binding treaty (or treaties). It is certainly the hope of many Indigenous peoples, and their lobbyists and supporters, that the IGC’s current program of work on Customary Law will lead to a binding treaty (or treaties) that also recognize and incorporate Customary Law. It has, in fact, emerged in Indigenous and other perspectives on the discourse that any consideration of *Sui Generis* mechanisms must incorporate Customary Law.

The Indigenous humanities and visual arts are integral to the renewal, revitalization of Indigenous knowledge (Henderson-2002) yet they are exploited unabated by appropriators who often can use the IPR system to protect themselves. Intellectual Property was conceived and developed independently of the TK system and later imposed upon the TK system through the colonization process. The IPR system never took into account Indigenous cultural protocols, or the intrinsic value of TK, yet it’s economic institutions now exploit TK while Indigenous peoples remain the most economically deprived population in the world. National and international *Sui Generis* regimes of protection for TK based on Customary Law and

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<sup>21</sup> Bell, Catherine & Paterson, Robert (2003). *Aboriginal Rights and Repatriation of Cultural Property*. In Box of Treasures or Empty Box: 20 Years of Section 35, (pp. 121). Penticton, British Columbia: Theytus Books.

current global economic realities are required to resolve the situation and must be created with the participation of Indigenous peoples.

Indigenous Customary Law is intended to protect Indigenous knowledge; therefore, any of the problems with TK in relation to Eurocentric law, should be seen as an issue of conflict of parallel legal regimes. Customary Law regarding TK should prevail over Eurocentric patent, trademark or copyright law: but, in the present situation, it clearly does not. It is possible, however, to imagine that a fusion of concepts from Customary Law and IPR Law could be developed to regulate the use of TK in contemporary contexts.

### **The Case for TK Regulation in Canada**

In Canada, Indigenous jurisprudence, knowledge and heritage is uniquely constitutionally protected as an Aboriginal and/or treaty right in Section 35 of the *Constitution Act, 1982* and Section 25 in the *Charter of Rights*. The *Charter* also recognizes the constitutional and legal rights to Aboriginal heritage, (s. 27) languages (s. 22) and education (s. 29).<sup>22</sup> The governments of Canada (federal, provincial or territorial) have not clearly claimed jurisdiction or ownership over Indigenous knowledge in any public statement, policy or legislation. Therefore, there appears to be an implied recognition that Indigenous peoples have control and management of their Indigenous knowledge, but a concise legal affirmation that Indigenous knowledge is an Aboriginal right under section 35(1) of the *Constitution Act, 1982* is required. Canada has approached Indigenous knowledge from both a self-government and conventional means perspective, willing to negotiate Indigenous knowledge as an implicit subject matter of self-government negotiations (Alexander-2005).

Canada also advocates protection and management of Indigenous knowledge by conventional contracts, other co-management agreements or existing legislation. The situation in Canada is that legal interpretation of TK rights is required by the introduction of test cases. This could work in conjunction with or separate from any legislative initiatives may be taken by Canada to protect and/or regulate TK. It could also work in conjunction with or separate from any further legal interpretation of Moral Rights in Canada. Canada has been apathetic with regard to taking any significant TK initiatives and, although there may be some recent potential for movement, it appears that test cases would be necessary to accelerate any progress – as has been done in Australia.

In the meantime ongoing discussions at the Indigenous community, national and international level will continue to lead the way forward to solutions that satisfy Indigenous peoples and others interested in TK. The National Gatherings on Indigenous Knowledge may be part of a beginning to address these issues in Canada. Previous national initiatives in countries such as Australia, New Zealand, Nigeria, India, Brazil, China, Costa Rica, Peru, Philippines, Portugal, Thailand, South Africa and the US that have been addressing TK issues for several years may one day be able to add the Canadian experience to the list of advanced national initiatives that can inform the international initiatives taking place in WIPO and CBD, and other forums of the UN, and lead to the development of viable solutions. Hopefully these solutions will be designed to strike a balance between protecting TK and allowing it to be shared for the benefit of all.

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<sup>22</sup> Bell, Catherine & Paterson, Robert (2003). *Aboriginal Rights and Repatriation of Cultural Property*. In *Box of Treasures or Empty Box: 20 Years of Section 35*, (pp. 121). Penticton, British Columbia: Theytus Books.

The CBD states that Traditional Knowledge provides “valuable information to the global community and a useful model for biodiversity policies ... as on-site communities with extensive knowledge of local environments, indigenous and local communities are most directly involved with conservation and sustainable use” (The Handbook of the Convention on Biological Diversity-2005). As a signatory to the Convention, Canada is obligated to do its part in protecting and preserving Indigenous knowledge. It is time for Canada to recognize, value and protect Indigenous knowledge in all its richness and complexity. There are two key points to be made in the Canadian legal context. First, Indigenous knowledge is an incidental right of each constitutionally protected Aboriginal and treaty right, and second, Aboriginal rights, and corresponding Aboriginal traditional knowledge-based rights, are collective not individual in nature. Canadian Aboriginal groups need to use their constitutional and legal leverage to take a rights-based approach to their ownership, management, control and continuation of their knowledge systems.

The Supreme Court of Canada (SCC) has affirmed this as follows: “to ensure the continuity of Aboriginal practices, customs and traditions, a substantive Aboriginal right will include an incidental right to teach such a practice, custom and tradition to a younger generation” (*Cote vs. The Queen*-1998). The SCC has also affirmed the Aboriginal legal perspective that Aboriginal rights, by their very nature, are collective rights held by members of the particular Aboriginal nation as follows: “Aboriginal and treaty rights cannot be defined in a manner which would accord with common law concepts... Rather, they are the right of Aboriginal people in common with other Aboriginal people to participate in certain practices traditionally engaged in by particular Aboriginal nations in particular territories”(*Cote vs. The Queen*-1998).

Indigenous peoples use the Oral Tradition to chronicle important information, which is stored and shared through a literacy that treasures memory and the spoken word.

The oral transmission allows for a constant re-creation of Indigenous systems of laws. The reinterpretation of tradition to meet contemporary needs is a strength of this methodology. Customary Law, like other sources of law, is dynamic by its very nature (Alexander-2003). Indigenous peoples had rights of self-government and self-regulation at the time of sovereignty. Those rights rest on the customs, traditions and practices of those peoples and formed an integral part of their distinctive cultures. The SCC has recognized that the assertion of Crown sovereignty does not prohibit a continuing co-existence with Aboriginal Customary Law. Courts have also held that Customary Law is neither abrogated nor derogated by provincial, territorial or federal law unless there is “clear and plain” intention of the sovereign power by act of Parliament or legislature.

Indigenous peoples in Canada must begin to take actions to increase public awareness on TK issues and initiate court actions to push the TK agenda. The fact that misappropriations of TK continue in Canada shows that the *status quo* is far out of line with the legal reality. Canada is also far behind the many countries mentioned previously who have taken steps to regulate and protect TK. Thus far, Canada has not expressed any policy on TK and has only made the following disjointed responses to the problem: a) the introduction of the Igloo Mark in the 1960s that has now fallen out of usage; b) certain government agencies and departments funding certain research projects related to TK; c) the National Gatherings on Indigenous Knowledge conducted in 2004-2005 (the Report of which is thus far unpublished and awaiting approval at the Prime Minister’s Office); d) the establishment of an inter-departmental committee including Department of Canadian Heritage, Industry Canada, Indian and Northern Affairs Canada Department of Foreign Affairs and International Trade, Environment Canada and Department of Justice. These ineffective or otherwise inactive

measures are not sufficient to address the complex, salient issues and problems that that need to be been addressed.

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