

# Report of the Workshop on Indigenous Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property



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This report aims to bring together the words spoken at the event as faithfully as possible and, in this sense, we consider all the participants as co-authors. Any errors or omissions remain the responsibility of the reporters-editors.

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# **Report of the Workshop on Indigenous Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property**

## **Main abbreviations**

**ISED** – Innovation, Science and Economic Development Canada

**CIPO** – Canadian Intellectual Property Office

**CIPP** – Centre for Intellectual Property Policy

**IP** – Intellectual property

**TK** – Traditional knowledge

**TCE** – Traditional cultural expressions

## **I. Introduction**

On January 30, 2020, Innovation Science and Economic Development Canada (ISED) and the Centre for Intellectual Property Policy of the Faculty of Law of McGill University (CIPP), under the leadership of its Director Pierre-Emmanuel Moyse and in collaboration with several institutional partners, welcomed more than 60 participants to the Montreal Museum of Fine Arts for a multidisciplinary working session on traditional knowledge (TK), traditional cultural expressions (TCE) and intellectual property (IP). This workshop fits more broadly into the federal government's IP strategy and had as its main objective to better understand the needs and issues of indigenous communities regarding the protection of TK and TCE. It was also intended to share information both on the current IP legislative framework in Canada and on the research and enforcement experiences of indigenous communities.

Special attention was paid to the language of communication between participants. The workshop was held in both languages, English and French, to give Francophone communities the opportunity to be better represented and, to accommodate unilingual participants, a translation service was provided on site. The speakers therefore spoke in both French and English.

In carrying out its mandate from ISED, the CIPP had full discretion to create the space for discussion among representatives of indigenous communities, researchers, companies, government officials and civil society. To encourage free expression, the workshop was held under Chatham House rules. Therefore, it was agreed that the views expressed by each person and collated in this report are anonymous.

Blake Desjarlais of the Métis Nation was our moderator throughout the day. The discussions opened with a welcome and a prayer by Elder Joe Jacobs of Kahnawake (Mohawk) - who also closed the workshop -, and short remarks by Martin Simard, Director of Copyright and

Trademark Policy at ISED, with Pierre-Emmanuel Moysé who read the McGill statement on the recognition of Indigenous traditional territories on which the meeting was to be held. The day was then divided into a sequence of two conferences by academics (Conferences I and II), each followed by a roundtable of equal length (Roundtables I and II) allowing participants to exchange their views and discuss practices and difficulties encountered in the protection and enhancement of TK and TCE, particularly under the IP regime.

Once again we would like to acknowledge the support and professionalism of our ISED colleagues, Martin Simard (Director), Shelley Rowe and Laura Woodward. Our acknowledgements also go to Robyn Rugenius of CPPI, coordinator of the event, and to the McGill's Faculty of Law's students, all research assistants at the CIPP, who were responsible for designing the event's format and took care of contacting each participant beforehand to inform them of the objectives pursued, acting both as McGill's ambassadors and as interlocutors for our guests. Their names are Mitchel Fleming, Maya Gunnarsson, François Le Moine, Sejeong Park, Sayre Potter, Angèle Poupard and Pierre-Luc Racine. They helped organize and take notes during the workshop and contributed to this report. Some of them also authored a discussion paper on IP and TK that was distributed to prospective participants in the fall of 2019. We would also like to thank the Montreal Museum of Fine Arts and its Director, Nathalie Bondil, for welcoming us to its premises.

Finally, special acknowledgement is expressed to each participant for their invaluable and essential contribution to the workshop and the report, which could not have taken place without them. |

The work prior to the event and the involvement of many networks were precious. Our anthropologist colleagues Professor Jérôme Laurent (UQAM) and researcher Solen Roth (Université de Montréal) guided us throughout the preparation. We were in constant conversation with numerous colleagues and specialists, including Prof. Aaron Mills (McGill), Prof. Geneviève Motard (Laval), Kerry Sloan (McGill) and Prof. Kirsten Anker (McGill). Their advice in the preparation of the workshop was very helpful. Professor Anker, a specialist in Indigenous law, in a short address, shared her views on the teaching of Indigenous law at McGill's Faculty of Law and more broadly on the place of Indigenous law in Canada in the context of the environmental crisis.

This report recounts the content of the debates that took place on that day. We have tried to reproduce the comments exchanged without distortion, so that the ideas and opinions expressed can not only be preserved but also and most importantly, we hope, so that they can constitute avenues of reflection for future collaborations between the participants, while respecting the reality and interests of the indigenous communities.

## **II. The Conferences**

## **A - Part One: Intellectual Property, Traditional Knowledge and Traditional Cultural Expression: The State of Play**

L'atelier a débuté par une prière de l'aîné Joe Jacobs, de la Première nation mohawk de Kahnawake, qui a parlé de l'importance de l'écoute, de l'empathie et du dialogue dans le travail avec les autres. Professeur Pierre-Emmanuel Moyse, de McGill, et Martin Simard, d'Innovation, Science et Développement économique Canada, ont ensuite prononcé un discours de bienvenue.

The first presentation dealt with information regarding the national and international context of IP and TK and TCE. It focused first on the current legal landscape, both domestically and internationally, taking into account legal and practical realities. The first presentation was given by a representative of the Canadian Intellectual Property Office (CIPO), Xavier Genest from ISED who provided an introduction to the IP system. The presentation, entitled “An Overview of Canadian Intellectual Property Tools and Traditional Knowledge”, focused on the fundamental precepts of domestic regime of IP, on the Western conceptions of TK and TCE. The first portion of the presentation focused on the basic notions and elements of IP as spelled out in Canadian federal statutes, including:

- Patents grant time-limited monopolies (20 years) to inventors, enabling them to maximize returns on their invention for the period of the patent, after which it falls into the public domain. The three principal requirements to obtain a patent are novelty, utility and inventiveness.
- Copyright is a legal term used to describe economic and moral rights that creators have over their original literary, dramatic, musical and artistic works during their lifetime. After the creator’s death, copyright passes on to their heirs for 50 years following the end of the calendar year in which the creator died. Copyright, contrarily to others IP rights, exists without formalities as soon as the work is created. No registration is required.
- Industrial designs seek to protect new, visually appealing, aesthetic designs applied to useful articles. They can last for up to 15 years after the filing date at CIPO.
- Trademarks are signs that can be represented graphically to distinguish goods or services of one producer from those of other producers. They can last for 10 years from the date of registration at the CIPO and may be subsequently renewed multiple times for a fee. The key requirement for protection is distinctiveness of the sign.
- Geographical indications (GI) are used to distinguish a product that has a specific geographical origin and possesses qualities, a reputation or another characteristic related to that origin. GIs exist following approval of the GI from CIPO. The GI is then entered into a list of protected GIs in Canada, all of which pertain to wines, spirits, agricultural products or food of a category set out in the schedule (non-exhaustive).
- Certification Marks are used to distinguish goods and services based on:
  - The character or quality;
  - The working conditions under which the goods or services are produced or performed;
  - The class of persons producing or performing the goods or services;
  - The area where the goods are produced, or the services performed.

Registration can only be done by an entity not engaged in the manufacture, sale, leasing or hiring of services. The registered owner controls the licensing and “use” of the mark.

- Trade secrets help protect undisclosed knowledge indefinitely through secrecy and access agreements. Three main elements are required: such knowledge must have commercial value; it must not be in the public domain and it must be subject to reasonable efforts to maintain secrecy.
- Plant Breeders' Rights protect propagating materials of new plant varieties. Protection lasts up to 25 years for trees and vines, and up to 20 years for other plant varieties after the filing date with the Canadian Food Inspection Agency.

The presentation then highlighted the interrelationship between IP rights and the governance of TK and TCE. It was noted that TK and TCE represent integral aspects of the cultural heritage of Indigenous peoples, often forming part of their cultural and spiritual identity. TK is a living body of knowledge passed on from generation to generation within a community. TCE are used to explain the forms in which traditional culture is represented. These may include songs, music, dance, art, designs, names, signs, symbols, performances, handicrafts, narratives and other types of artistic or cultural expressions. TCE are integral to the cultural and social identities of Indigenous communities, as they embody know-how and skills and transmit core values and beliefs. In addition to explaining the scope and limitations of IP forms, the presentation noted some core justifications for protecting TK and TCE, as well as the major challenges of using the IP system to protect TK and TCE. IP may be used to preserve TK and TCE by creating safeguards against the risks of cultural misrepresentation or misuse. Furthermore, it may help in preserving the TK and TCE itself by creating a comprehensive public catalogue of the works. The presentation highlighted that IP may be used to commercialize TK and TCEs, as well as provide for additional incentives in their creation, preservation and exploitation. It was noted that the increased demand for more natural and authentic products could be a benefit for Indigenous peoples provided the source of the TK and TCE is properly protected. This applies equally to the increasing popularity of Indigenous art and artisan works. Indigenous organizations could leverage the IP regime to license TK and TCE to other parties in order to reap an ongoing benefit from the creation of new products.

The second presentation of the day was undertaken by Martin Simard from ISED. He introduced the attendees to the Government of Canada's initiatives relevant to IP, TK and TCE. Drawing on the previous presentation, it updated participants on Canada's recent IP Strategy, with a focus on opportunities for Indigenous peoples, notably through data collection, educational and awareness initiatives as well as a monetary grant program. Mr. Simard provided an update on the recent Parliamentary Review of the *Copyright Act*, which recommended that the Government consult, among others, on a register of Indigenous art, the establishment of an organization dedicated to advocating for the interests of Indigenous creators and the insertion of a non-derogatory clause in legislation. As noted, the objective of the current IP strategy is to contribute to a more inclusive IP system by supporting IP awareness and capacity building for Indigenous communities, as well as supporting the participation of Indigenous peoples in the development and implementation of IP law, policy and programs as they relate to the protection of TK and TCEs both domestically and internationally. This strategy is aligned with the government-wide commitment to reconciliation and inclusive economic growth. ISED also highlighted the public awareness function of the government with respect to IP education for Indigenous peoples and noted that CIPO was available to provide basic IP awareness upon request.

The next two presentations touched upon the emergence of Indigenous rights and its intersection with international IP law and how Indigenous rights are being left out of the domestic discourse at the theoretical and practical level. It raised the problem of misalignment between national or international borders of states or provinces and that of communities. The first presentation, delivered by professor Ysolde Gendreau (University of Montreal), showed how Indigenous rights in IP is not a new phenomenon but was rather present in the last revision of the Berne Convention. Professor Gendreau engaged with the theoretical friction between works falling into the public domain and the collective ownership of TK. In addition, she highlighted the fact that geographical boundaries of communities do not necessarily align with national borders and may conflict with the national nature of IP. Next, professor Konstantia Koutouki (University of Montreal), discussed how practices and knowledge traditionally held by Indigenous peoples are now being brought into the formal IP regime without a benefit to Indigenous practitioners, using the rise in complex food growth systems and the legalization of cannabis as illustrative examples. She finished her presentation by emphasizing that while it is important to consult with indigenous peoples at the theoretical/policy level, it would be preferable to empower the indigenous people to protect TK in the terms and under the frameworks they deem appropriate. Prof. Koutouki opined that while TK has traditionally been presented as a challenge to the Western model of property, it is the latter and not the former that is problematic. In her opinion, the IP system needs to reconcile with the Indigenous reality; one has to give. Thinking in terms of “property” makes it difficult to create a dialog and reproduces colonial precedents.

Finally, a panel presented the practical issues of establishing a uniform approach to protecting TK and TCE through IP law. The first presenter, professor Thomas Burelli (University of Ottawa), posited the following three questions:

- What should the field actors do?
- Do the existing legal frameworks already constitute relevant management levers?
- What strategies are available today for framing access and use of TK?

Prof. Burelli highlighted that the current approach is an assortment of efforts and techniques developed on a case-by-case basis. However, any real change requires a clear framework anchored in the realities of indigenous worldview. He noted that despite there being various international meetings and resultant treaties dealing with the preservation of TK and TCEs through IP law, there is no consensus on a universal approach. This, he noted, leaves Canada in need of developing a singular protective framework around which it may design its national TK and TCE policy. Prof. Burelli discussed several feasible avenues to develop a Canadian approach to TK, one of which being greater local engagement with communities deciding how their TK is circulated outside of the community. It emphasized that Indigenous law is in many ways the most legitimate source for regulating the circulation of TK. Moreover, he proposed that all researchers engaging in research that might affect Indigenous peoples be under specific ethical obligations to respect the cultural context within which they are operating. In addition, researchers and subsequent benefitting parties may be required to obtain consent from the Indigenous community to exploit the TK or TCE and enter into access and benefits-sharing agreements with the Indigenous community. Prof. Burelli provided a list of some existing initiatives to further develop a uniform protocol for protecting TK and TCE:

- [Guidelines for Ethical Aboriginal Research](#)
- [Maliseet Nation \(Wolastoqwik\) Traditional Knowledge Protocol \(MTK Protocol\)](#)

- [Considerations and Templates for Ethical Research Practices](#) - First Nations Centre des Premières Nations (FNCPN)
- Ethics Tool Kit (FNCPN)
- [Guidelines for Research Involving Indigenous Women](#)<sup>1</sup>
- [Mi'kmaq Ecological Knowledge Study Protocol](#)
- [OCAP Ownership, Control, Access and Possession – Sanctioned by the First Nations Information Governance Committee](#)
- [Negotiating Research Relationships with Inuit Communities – A Guide for Researchers](#)
- [First Nations of Quebec and Labrador Research Protocol](#)<sup>2</sup>

Following, Me Simon Picard (Huron-Wendat Nation Council and lecturer, Laval University) shared his views as representative of a Nation and expert in indigenous law. He conceded that all of these solutions present their own unique issues, including :

- Consensus-based decision making;
- Participation;
- Defining obligations;
- Proving the source of TK and TCE;
- Access to resources in enforcing third-party obligations;
- Combatting bad faith and superfluous arguments from third parties seeking to benefit from the TK and TCE;
- Flexibility to take into account the preferences of each community in the protection of TK and TCE (not every community wants the commercialisation of their “knowledge”).

However, each of these options would likely result in more advantages than disadvantages, including:

- Exerting media and political pressure on any actors involved in acts of biopiracy;
- Obtaining success and productive solutions with competent authorities;
- Obtaining concessions / reparations;
- Demonstrating the true sources of TK and the relevant TK holders.

To this day, Canada has already recognized ancestors’ rights that can be enforced by courts, but it is not sufficient to protect the interests of Indigenous communities for TK and TCE. The presentations concluded with highlighting the importance of first understanding Indigenous law and the Indigenous context before offering any right-centered or statutory solutions.

## **B – Part two: Natural Sciences, Arts and Culture and Science and Innovation**

The second conference consisted of a series of presentations held in the afternoon focusing on experience and partnerships between communities and research units as regards to plants and natural science. It aimed at initiating the discussion on collaborative research, opportunities and innovative practices involving potential claims on IP rights, including confidential information held by communities.

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<sup>1</sup> In French.

<sup>2</sup> In French.



The first presentation of the afternoon was conducted by professor Alain Cuerrier (University of Montreal) and a representative of the Pekuakamiulnuatsh First Nations, Ms. H  l  ne Boivin, who spoke about their shared experiences in conducting research on and with First Nations Peoples. They highlighted the difficulty of having scholarship production being accepted for publication without revealing any confidential information or names. This demonstrated the conflict between scientific journals' demand for empirical research and requirement of disclosure and the oftentimes necessary confidentiality that accompanies researching First nations' communities in the first place. Prof. Cuerrier noted that the risk of disclosure and related issues of confidentiality are important concerns for First nation peoples and fuel both the sentiment of mistrust vis-a-vis the scientific community and fear of knowledge misappropriation. The presenters then spoke about their experience conducting research funded by a first nation lead research grant. They detailed the realities of budget management and how the budget was, in an innovative way, operated directly by the community. In addition, the community played a vital role in matching other young researchers or students with particular aspects of the research project to allow for greater exposure to Indigenous youth and foster educational opportunities within the community. The presentation concluded with an acknowledgment that research efforts undertaken outside and within the community must work to establish mutual priorities and coordinate research efforts with each other.

Afterwards, Me Julie Gauvreau, an IP lawyer in Montr  al, demonstrated the use of IP law to protect TK and TCE concerning plants and plant breeding. She highlighted three distinct avenues by TK and TCE concerning plants and plant breeding may be protected:

- Patents;
- Trademarks; and
- Plant Breeders' Rights.

The presentation focused on plant breeders rights and its potential for protecting unique species of plant used for traditional purposes. However, Me Gauvreau conceded that the inherent limitation on plant breeders rights is that it only applies to the discovery of plants that are new, clearly distinguishable from all other varieties, sufficiently homogeneous regarding particular features of sexual reproduction and stable enough to retain its essential characteristics after repeated reproduction. In addition, protection of plant breeders' rights is not absolute insofar as it is limited to a fixed number of years and there exist exceptions to the protection conferred on the plant breeder. In conclusion, plant breeders' rights were held to be a useful tool to be used in conjunction with other forms of IP to protect TK and TCE that concern plants and the uses thereof.

Finally, Richard Gold, professor at McGill University, presented on the prospects and promises of an Open Science regime and how it relates to the indigenous worldview, interests and claims. Open Science can be understood as an approach to conducting science and accessing knowledge. In contemporary terms, Open Science includes open access publications, open data, tools and materials, and the absence of restrictive IP which compete with proprietary models of science. Prof. Gold presented the promises of an Open Science model:

- Reduces cost of creating teams;
- Reduces duplication;
- Facilitates reuse of data and materials collected for one purpose for novel purposes;

- Engages communities in priority setting, data and material collection; and
- Democratizes science.

He also highlighted the significant cost necessary for lay people to access the tools necessary to interact with scientific material in any meaningful fashion and that Open Science works to remove such barriers. TK may be implicated in many innovative practices and that it would be necessarily affected by an Open Science regime. For instance, indigenous communities and individuals may be the subjects of biomedical research (specific genetic or social features). Prof. Gold noted that TK and Open Science may be reconcilable provided an Open Science regime is implemented wisely. He highlighted the following features to ensure that Indigenous control over TK is not eroded by the adoption of Open Science:

- If a veto is exercised at the beginning of a project that allows all future uses of data, tools and materials then there would be no incompatibility.
- If secrecy is traded for data protection (ex: in pharma), then third parties may draw on data in future without losing control.
- If benefit sharing agreements are imposed and the collection of data and materials is restricted to a singular, first encounter with all subsequent dealings being accommodated through the prior agreements.

Prof. Gold concluded that a recognition of TK as belonging to indigenous communities can further Open Science aspirations to better engage communities, particularly where a power imbalance exists and that by recognizing TK, researchers can help build trust, set priorities and develop better ways to share knowledge with communities. As Open Science hinges on the free flow of information, it is necessary to acknowledge the source of that knowledge, thereby vesting Indigenous communities with greater control and recognition over their TK.

The conferences concluded with a blessing by the Mohawk Elder, Joe Jacobs, reinforcing the same principles of empathy, respect and cooperation.

### **III. The roundtables**

The morning roundtables followed directly on from the presentations on the national and international IP framework and TK. Three (3) tables of approximately ten (10) participants were planned for those who wished to speak in French and two (2) for those who wished to speak in English. The purpose of these tables was to allow participants to introduce themselves and share their initial reactions. Each table was orchestrated by a university professor who was responsible for ensuring that each of the participants in the round table had the opportunity to express themselves. A list of questions had been circulated to all participants in advance and included in the day's program.

The afternoon roundtables were reduced to two (2) for each language and were organized according to the same format while inviting participants to alternate and change tables, so that they could have the opportunity to share with others whom they would not have had the chance to meet otherwise. Each table had a rapporteur. This report is not intended to be a transcript or summary of the discussions. Some of the key messages and reflections arising from the various

roundtables could be loosely grouped under the following themes : « **power** », « **IP system** », « **funding** », « **acknowledgement** », « **protection** », « **trust** », « **awareness and education** », « **sharing** », « **abuse** », « **research and community** », « **certification** ».

A few preliminary disclaimers. It was made clear to participants that the workshop was not a consultation but rather an observatory to learn about each other's positions and a place to listen. There was complete freedom of speech, but no format being perfect, the presence of different communities and participants from a wide variety of backgrounds and professions (such as professors, civil servants and institutional representatives, including some representatives of First Nations advocacy organizations) the announcement that a report would be prepared may have naturally guided the conversations so that they instrumentalized themselves. Indeed, Professor Moysé warned in his opening remarks that while the focus of the event was IP and TK, it is impossible to ignore the many issues involved in the reconciliation process. Any issue that links governments with civil society and Indigenous Nations is, quite understandably, political. However, this did not prevent the participants from engaging generously, respectfully and intelligently in the proposed exercise.

### **Pouvoir/Power/Self-Determination/Economic Development**

Consultations are flawed. Decision-makers are disconnected from the realities of the artists that they are trying to help.

There is no awareness among First Nations of the importance, for good or ill, of intellectual property issues. There is a lack of awareness of intellectual property issues in several areas that are not limited to the protection of culture (e.g. patent, industrial design, etc.). But awareness is difficult because politically, this issue is not of interest to indigenous politicians. The band council cannot raise awareness in the community if it is indifferent to the issue itself. Furthermore, because the councils' mandates are so short, this type of issue never has the opportunity to become a priority. Another problem is the involvement of citizens who are struggling with their daily lives and do not have time for these issues. In addition, they are over-solicited.<sup>3</sup>

The Chiefs' Assembly does not always address themes that are unifying or that concern the well-being of the entire community. They should address more global issues. From the point of view of economic development: the State must also agree to give economic power to Native people.<sup>4</sup>

We must not forget that the Registrar also plays an important role in determining what is indigenous and what is not.<sup>5</sup>

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<sup>3</sup> Translated from French.

<sup>4</sup> Translated from French.

<sup>5</sup> Translated from French.

There is a role for allies to create space for Indigenous peoples within the intellectual property regime.

Working within the system (colonial-state) can make things more malleable. “I know where my pay cheque comes from, but I know where my heart is.”

Governments and Indigenous peoples have different goals when it comes to bridging arts and culture with economic development. Indigenous art has an impact on the overall economy, as well as on the socio-economic status of Indigenous peoples. But Indigenous peoples are more concerned with authenticity and the use of and traditional forms of cultural expression. The Inuit are always used as an example of how the commercialization of Indigenous art can lead to economic development, but this narrative only tells part of the story. What about art that has a community setting? This doesn't fit into the overarching narrative, nor does it fit within copyright or other current IP structures. The big question then, is how do we reconcile these two things? Indigenous peoples want to become financially independent through their art, but they also have community obligations.

Western and Indigenous perceptions of “works” differ as many Indigenous communities understand their works as “cultural works” versus the Western idea of “art” which is a colonial term. This changes the inherent significance of the work.

In addition, it is prudent not only to look at how the Canadian intellectual property system may protect traditional knowledge and cultural expressions but also how Indigenous communities might protect their traditional knowledge and cultural expressions. Different Indigenous communities may have a different approach to protection. There may arise significant difficulty once we realize that a lot of traditional knowledge has become secret and not even community members necessarily know who are the traditional knowledge holders and what belongs to specific communities

I'm not comfortable with the idea of commercializing aspects of my culture because commercialization is not really part of native culture. For indigenous artisans, income is necessary for their livelihood. However, making a lot of money from culture is not in our values. Rather, the purpose of circulating goods is to cover basic needs.<sup>6</sup>

We also can't forget that there is diversity within Canada amongst Indigenous peoples--each nation needs to do their own thing and create their own rules. We can compare this to the process of ethics board approvals--when people want to work in communities, they need to get

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<sup>6</sup> Translated from French.

community-specific approvals. The same should exist for IP regimes. However, across the board, there is a need/desire for autonomy. The government just needs to let go and let Indigenous peoples govern themselves. The current processes are designed to reinforce current power relations.

The data collected must remain in the communities and the results are presented to community members so that the results are known and shared. Research results do not necessarily mean the same thing to community members as they do to outside researchers.<sup>7</sup>

We have our own protocols, but there are differences within each community (e.g. tensions between band councils and traditional leadership). The Confederacy already has policies for things like masks (which are medicine, not art). It's the business of people to deal with it themselves, within communities. Also, when Canada is consulting with us, depending on whether they talk to the band council or traditional leaders, they are going to get different answers. We don't know how to solve this, but it is something to be aware of.

Systems have been imposed on us. We need a policy based on an Indigenous framework that opens the door to having discussions based on each of the nation's own needs. We must have recognition of indigenous legal systems which give rights to legislate on certain topics.

The important thing about protecting and commercializing traditional knowledge and cultural expressions is not to wait for the goodwill or "recognition" of the State. Indigenous communities must exercise their right to self-determination by immediately adopting their own standards, standards that their members will consider legitimate. With time and political pressure, these norms may find their way into State normativity.<sup>8</sup>

We are trying to put this universe of understanding into a tiny box (Canada), which has another tiny box (common law), which is in another tiny box (IP). We will never fit in there. This is why we need to figure this out on a nation-to-nation basis. Indigenous people need to develop our own policies.

In order for the State to take indigenous standards into consideration, it is necessary to have such standards in place. By doing so, we will be able to give the State a concrete and understandable dimension of what we mean by the collective dimension of our rights.<sup>9</sup>

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<sup>7</sup> Translated from French.

<sup>8</sup> Translated from French.

<sup>9</sup> Translated from French.

There is a need to create credible interlocutors who could interact with the state.<sup>10</sup>

We need to deal with the question of jurisdiction. Indigenous intellectual property laws need to exist, not just Canadian intellectual property law. The big question then, is how can Canada reconcile its concept of power vis-a-vis jurisdictional issues? How do we keep Canada's hands off to create the space for us to rebuild these knowledge protection systems? There is a need for legislation that limits Canada's role and recognizes our laws.

The number one question is whether Indigenous peoples have jurisdiction over themselves. This needs to be answered before asking about their laws on intellectual property protection.

With the diversity that exists, can we find some common values or pathways for protection if indigenous knowledge amongst Indigenous nations? Is there common ground? We need to have an Indigenous legal framework to protect indigenous knowledge, not just Canadian law.

The *Cree Culture Act* has been passed within the last year, a policy on intellectual property could follow in the same lines. But the Cree Nation Government is very different from other Indigenous communities in Canada—it has self-governance (guaranteed through the *James Bay and Northern Quebec Agreement*).

There is a website, [localcontexts.org](http://localcontexts.org), which is an initiative to support Indigenous communities in the management of their intellectual property and cultural heritage specifically within the digital environment.

The government should be asserting complementary regulatory vehicles (such as with environmental regulations). The government wants to get a better handle of what is going on and be more aware of all the initiatives that are taking place. There is a question as to whether law or para-regulatory regimes are the best way in which to protect traditional knowledge.

We have a legal system that is inherently built on systemic racism. We do not want to simply be subjected to yet another policy.

## **Intellectual Property System**

Existing power relations are coming out of intellectual property. The whole has to be protected, not just the individuals. Intellectual property law compartmentalizes and ignores the holistic view, thereby privileging western frameworks over Indigenous ones.

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<sup>10</sup> Translated from French.

Intellectual property as used implies that knowledge expires in the public domain. This is problematic because it runs counter to the idea that the community is the perpetual custodian of knowledge.<sup>11</sup>

Intellectual property is important both for issues of protection and of economic development. This requires the State to accept the idea that indigenous economies should not be confined to subsistence.<sup>12</sup>

Intellectual property laws can assist the economic development of Indigenous Nations. They can also be useful for indigenous artists who wish to make their work known.<sup>13</sup>

### **Funding**

Why is only \$1 million over 5 years out of a \$50 million<sup>14</sup> budget being committed to this? This is offensive. The government has money to protect western knowledge, so why not Indigenous knowledge? For example, the Canadian health research institute alone is getting \$108 million.

We need more dedicated funds for research. Research drives policy, which leads to more money. We need more research on Indigenous knowledge systems to ensure proper resources are being put towards protecting Indigenous knowledge.

We currently have lots of members of our communities studying at university. In order to keep them as knowledge resources in the community, there needs to be economic development and opportunities. We need to diversify our economy outside of just mining and forestry.

Does the Canada Intellectual Property Office have a resource person for Indigenous peoples? This position should exist to help guide Indigenous proposals.

There needs to be more funding for indigenous cultural activities.<sup>15</sup>

### **Recognition of Indigenous Knowledge**

The world does not understand the importance of really listening to First Nation peoples.

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<sup>11</sup> Translated from French.

<sup>12</sup> Translated from French.

<sup>13</sup> Translated from French.

<sup>14</sup> The Government committed \$85.3 million over five years under the IP Strategy (source: ISED).

<sup>15</sup> Translated from French.

From the western perspective, traditional knowledge can be categorized into two streams: scientific knowledge and Indigenous knowledge. After this categorization, the scientific knowledge becomes the dominant knowledge that is relied on by states, and Indigenous knowledge becomes unknown. Traditional knowledge needs more inclusive engagement that does not try to break it down into two streams. It requires a lot of work on the part of the dominant culture to be more open and reflective.

We are also seeing the phenomenon of traditional knowledge being taken as though it is new and now belonging to the dominant culture--this needs to be addressed.

There is work to be done outside of the communities. The authenticity of guest artists at events is important. One thing that is shocking: some indigenous youth want to rediscover traditional techniques but they have to pay organizations to "learn their culture".<sup>16</sup>

We also need to recognize who holds heritage knowledge. There are still knowledge holders within our communities--we don't need outsiders to teach us our own culture. For example, there are still women who know how to make *amautis* or other important inventions. We can recognize these knowledge holders through policy/legislation. We must create a category to recognize these special heritage innovations.

Relationships with community members are important to classify and contextualize these [cultural] objects in order to better present them to the public and also to preserve this knowledge. It is mainly through personal testimonies that information about their place of origin and purpose can be obtained, as well as more personal stories in the form of memories related to the object. However, it can be difficult to use First Nations personal stories to put cultural objects into context. These stories could enhance the sharing of their culture in (non-native) museums. I understand that there is this tension between sharing and usurpation of culture, which explains the mistrust.<sup>17</sup>

When a settler sees a piece of Indigenous artwork, it may be that only their physical self is invoked. When an Indigenous person comes into contact with that same piece of artwork, however, all four quantum may be invoked.

It's important to make sure History is remembered. Losing your history means running the risk of losing your culture. This culture includes traditional knowledge and cultural expressions, but also

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<sup>16</sup> Translated from French.

<sup>17</sup> Translated from French.



customary rights. Customary rights are the guarantees and protectors of knowledge and learning. These rights, which are mostly oral, have been weakened.<sup>18</sup>

Intent is important with traditional knowledge. You can't just imitate a ceremony you saw--in performing it there needs to be the correct intent in order for it to have any meaning.

### **Importance of Protecting Indigenous Knowledge**

We have to protect the data. The difficulty is that the transmission of knowledge cannot always be recorded. Moreover, some subjects cannot be - or should not be - studied (e.g. sacred).<sup>19</sup>

The use of traditional knowledge is important so that it is not lost. Culture must be practiced to avoid its extinction with the technology used by indigenous communities to carry out their activities. For example, watching television to know the weather. Traditional knowledge, such as predicting the weather with the "language of the forest", is at risk. On the other hand, this type of knowledge is oral, so an extra effort is needed to preserve it. It is urgent to make this effort knowing that otherwise the tradition will die out.<sup>20</sup>

There is a tension between the written and the spoken word among indigenous communities. The Innu community of Mashteuiatsh has kept its written tradition for a long time, but some other communities consider it to be a form of acculturation and a deterioration of traditions.<sup>21</sup>

The [oral] tradition is malleable. Oral transmission evolves and adapts over generations, while the written word is fixed. For example, if the rule: "You don't kill the pregnant animal" is written down, it will be more difficult to shape it and create exceptions in times of famine.<sup>22</sup>

In his opening remarks, Elder Jacobs said "Let your heart be your best GPS." We need to think about the importance of the words he spoke. We cannot talk about intellectual property without talking about the land, the water, and stewardship. We need to take better care of Mother Nature in order for our grandchildren to benefit from her. As Indigenous peoples, we inherently understand the words spoken by Elder Jacobs. We need to include Indigenous researchers in any Indigenous research. They have the inherent understanding of Indigenous ways of knowing and doing. Only then will we be able to protect traditional knowledge.

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<sup>18</sup> Translated from French.

<sup>19</sup> Translated from French.

<sup>20</sup> Translated from French.

<sup>21</sup> Translated from French.

<sup>22</sup> Translated from French.

“It’s not the pipe that needs protecting; it’s the story behind it--it’s the universe.”

## **Trust**

Treaties are always broken. Many communities do not see any interest Canada may have in helping them to protect their traditional knowledge. Canada won’t even help them to get clean water. Why would this be any different?

Indigenous peoples often have a complicated relationship with scientific communities. Few scientists relinquish intellectual property for the benefit of indigenous peoples. This is a problem because researchers and students retain intellectual property rights in this manner. Moreover, many indigenous communities have a negative view of the intellectual property system because they have seen how some researchers or companies have used intellectual property rights in order to appropriate traditional knowledge.<sup>23</sup>

The exclusion of Indigenous communities from these projects creates a marked lack of trust within Indigenous communities. This lack of trust can have important consequences for the preservation of traditional knowledge. It makes future partnerships difficult. In particular, negative precedents in the relationship between Indigenous peoples and scientists lead to Elders refusing requests for interviews with indigenous youth or for projects that will serve to preserve traditional knowledge.<sup>24</sup>

The sad thing is that old relationships with scientists have set negative precedents. So some Elders have been asked so much in the past that they have turned down requests for interviews with indigenous youth. They died without interviews and the tradition was lost to the younger generations.<sup>25</sup>

## **Sensibilisation and education**

How do we get the message out about intellectual property protections to people on the streets/the lay people who may be interested in this? It is our responsibility to spread this.

There is a need to educate Indigenous communities and then engage in consultation. Education must happen using the language and through advertising on the radio, posters, facebook. Each

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<sup>23</sup> Translated from French.

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<sup>25</sup> Translated from French.

community has their own cultural department; they can also be used to disseminate information to the community.

There needs to be a reflection on the problem of access to authentic culture for urban indigenous youth. Urban youth do not have the money or the time to return to the territory. This reflection must take place both inside and outside First Nations. There must be communication between communities and organizations in urban settings.<sup>26</sup>

There should be mini courses for artisans in communities to learn how to protect their intellectual property. Artists are very disconnected from the complexity of intellectual property law--we need to be having discussions to help artists understand and be aware of their vulnerability.

It would be good for "good practices" to be known and disseminated.<sup>27</sup>

The creation of an indigenous institute is an excellent idea because the federal government does not respect natural ways of doing things when it comes to information management. An indigenous institute, managed by indigenous people, would also facilitate governance at the local level by emphasizing the importance of putting in place concrete projects for communities. Indigenous people must have control over research, which an institute would allow.<sup>28</sup>

The presence of an indigenous institute could also facilitate exchanges with other Nations. Internal researchers would be in the best position to distribute information and traditional knowledge among the communities. It would be a comeback to the exchange of best practices between Nations, as it has been done for hundreds of years.<sup>29</sup>

*Are dictionaries of indigenous languages written by French missionaries used by the communities?*

- Yes, it is a tool used sparingly.
- It has recently been used in legal proceedings as proof of community continuity in the territory.
- Some Canadian institutes have digitized books in indigenous languages (1767-1900). They were written by white missionaries, but the content may still be of interest to indigenous communities. These institutes will invite indigenous people to read these texts

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<sup>26</sup> Translated from French.

<sup>27</sup> Translated from French.

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<sup>29</sup> Translated from French.

in the near future in order to reduce the discomfort of certain communities and to reassure them that the content of these documents belongs to the indigenous communities.<sup>30</sup>

## **Knowledge Sharing**

The use of Mangan indigenous traditional knowledge is limited to community members. The knowledge is shared, internally, from generation to generation in the community. There is a pharmacy open to the public for the purchase of medicinal plants, but the origin of the plants, the recipes, the method, are not shared.<sup>31</sup>

The use of the artworks in the community is often accepted. For example, throat singing is considered to be collective works that belong to the community. Inuit can use it without the permission of their community. On the other hand, throat singing by a Cree (Indigenous, but non-Inuit) artist constitutes cultural appropriation. Such a situation has already occurred and has provoked an uprising among Inuit women. They considered it an appropriation of part of their identity. Worse still, according to them, the Cree artist took advantage of their culture to make money.<sup>32</sup>

In the example of the Iroquois confederacy, there is a question of who (within the community) has rights to certain knowledge.

There is currently research on traditional medicines being done in Cree territory. It stems from relationships built with elders that have been maintained for over fifteen years. The Ethics Board of the Cree Health Board and the Cree knowledge holders must approve all research prior to publication. They are cautious about who the research is shared with.

Traditional knowledge keepers are necessary for preservation. But some traditional knowledge has become too secret--preservation and protection are being privileged at the expense of dissemination and education. Our own people don't even know the traditional knowledge. Not even community members necessarily know who the traditional knowledge holders are and what belongs to specific communities.

How do you maintain integrity though with widespread use and dissemination? This can bleed into the commodification of culture. Many people fear that sharing traditional knowledge will lead to exploitation.

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<sup>30</sup> Translated from French.

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Western knowledge has had a proprietary framework that monetized knowledge; Open Science models open this framework up so that information is accessible to everyone. But trying to fit Indigenous traditional knowledge into this model would undervalue it. When developing western systems, there was a component where western philosophers and scientists would monetize their knowledge. Now that they're running out of ideas, they just want to go to Indigenous communities and open up knowledge sharing. Would knowledge sharing be reciprocal?

Open science runs contrary to the preservation and protection of culture. Indigenous peoples should not be told that they must bow to modernity and accept open science. Identity and modernity are not mutually exclusive. There is a need to rebuild the cultures before opening up all the knowledge. Open source does not allow Indigenous communities to fight for the right of recognition.

### **(Mis)appropriation**

We refuse to let non-indigenous people take advantage of our techniques by making reproductions of our cultural objects for commercial purposes, to make money by appropriating our culture.<sup>33</sup>

The use of Indigenous works in popular culture is good for dissemination and money, but bad for protecting the cultural significance.

Cultural appropriation can occur when a band member decides to monetize the culture of the community, but also of other bands (artifacts from some communities can be found in the museums of other communities that claim cultural practices that are not their own).<sup>34</sup>

Some (white) foreigners come to our communities to seek knowledge. For example, for \$12 a white person left with traditional knowledge to make profit. It is a nobody who appropriates my culture to become somebody. Some foreigners also come to the community to explain how we, Abenakis, should exploit our culture.<sup>35</sup>

Several people show up, under the guise of being tourists, take pictures, record the songs and stories, and then trade them.<sup>36</sup>

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<sup>33</sup> Translated from French.

<sup>34</sup> Translated from French.

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<sup>36</sup> Translated from French.

Concerns over the appropriation or misuse of traditional knowledge has led to it becoming even more secret.

Traditional knowledge comes from oral histories--since it is not written down, it is difficult to take it as truth. Whereas oral historians preserve the history in the art itself, the mass production of traditional goods takes away from the history/bastardizes the history by altering the history intrinsic to the good.

There is a difference between appropriation and misappropriation. Appropriation means taking something with permission, whereas misappropriation is without consent. Elders want the knowledge out there; they want appropriation and evolution, they just don't want misappropriation. A problem though, is that once something has been appropriated enough and people believe it is in the public domain, they may begin to misappropriate it/believe they don't need permission anymore. It is hard to put the genie back in the bottle.

Indigenous artists are both appropriating and misappropriating from their own culture and other Indigenous cultures by, for example, using western art vocabulary. This is also evident in the widespread use of dreamcatchers. This is relevant also to commercial versus personal use. For example, it may be okay for someone to misappropriate a dream catcher for personal use, but not to profit off of it.

It is important to understand the difference between cultural works and artworks for the settler market. For example, some artists specifically make pieces with no ceremonial aspect to them for the settler market. Haida pipes are very sacred, but many non-Indigenous people wanted them because they are so beautiful. The solution was to make some without the hole going all the way through--this meant that they did not hold the same ceremonial importance, but the art was just as beautiful. Another example can be seen with Tanya Tagaq. She uses the practice of throat singing to create artwork for mainstream society. This is distinct from the cultural tradition of Inuit throat singing.

The first danger comes from people in our own community. There are also nation-to-nation issues. For example, the Atikamekw are good bark craftsmen and a museum of another nation has a canoe but its origin is not marked even if it is Atikamekw.<sup>37</sup>

The exploitation of artists and their work is a problem for all artists around the world, especially with social media. However, it has a more significant impact on Indigenous artists, because their culture and worldview are instilled in their art. The replication and commercialization of that art

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<sup>37</sup> Translated from French.

is stealing a piece of the artist as an Indigenous person. For example, where a song or image is used incorrectly, it can be going against an entire peoples' worldview.

### **Researchers in the Community**

Research must be adapted to local realities. The indigenous reality in urban areas is not the same as the one on reserves.<sup>38</sup>

Any research within and outside of communities should have Indigenous researchers be a part of the project. Different knowledge bases are important, and Indigenous perspectives are becoming relevant to current issues (such as land preservation, water, ecological management, etc.). We are the experts. We should not have outsiders dictating things to us.

How does a community deal with the influx of researchers? One participant is working on a proposed cultural policy to be submitted to Cree Nation Government (CNG) that will include protocols for: research happening in community; procedures for outside researchers in each community; what happens to research after they leave community; creation of database/repository of all studies done on Cree communities at Cree cultural institute so that Cree communities can actually use the research for themselves; and there will be one policy for all of CNG, not broken down by community.

Is there any follow-up with communities after research is done?

There is also a need for better communication between communities and outside researchers. For example, community members who have participated in the research need to be informed, at the outset, that once the research is disseminated, they will be recognized as **co-authors**.<sup>39</sup>

There is a need for resources for communities to be able to manage the influx of researchers. Also, there is a need for resources for more people to do follow-up in order to protect traditional knowledge from researchers. If you're going to control Indigenous traditional knowledge, you need to control who is going in and taking what. If providing access to the community has a cost, then those costs should be borne by those benefiting from accessing the community--could impose community fees to study them. Ultimately, resources need to stay in the community, not with the researchers. Maybe this could be integrated into grant applications? As it currently stands, a limited amount of money from universities is going to fund the position of a research coordinator in Cree communities, but the vast majority of the funding is coming from the CNG.

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<sup>38</sup> Translated from French.

<sup>39</sup> Translated from French.

There is a lack of structures in the communities. For some, the problem is not so much the intellectual property regime as the lack of research capacity in the communities (cultural centres, research organizations, etc.). In addition, there are few budgets at the moment and there is not enough reliance on local governance mechanisms.<sup>40</sup>

There should be a mechanism in place for any university that wants to do research in the community to follow a certain process. What would communities want to include in those protocols?

There is a need to improve the way in which research projects involving indigenous communities are carried out. Communities need to be able to define their research agenda. Community members must be involved in research. The involvement of indigenous people must be at all stages of the research process, particularly in the management of research and budgets. It is also essential to obtain the approval of the indigenous community before funding is obtained or results are disseminated.<sup>41</sup>

With universities, it is possible (but difficult) to get researchers to relinquish their copyright to communities. Universities use three arguments to justify their refusal to take indigenous intellectual property interests into account: the universality of knowledge requires the dissemination of data, collective agreements grant copyright to professors, and indigenous peoples are only "collaborators". However, it is possible to "contract out" a waiver by professors of their intellectual property.<sup>42</sup>

Materials collected in the communities (e.g. blood samples) should be returned to the communities. And the communities must ensure its protection.<sup>43</sup>

Researchers must understand that some subjects are simply not suitable for research (because of their sacredness).<sup>44</sup>

The problem stems from the fact that universities do not consider indigenous communities as autonomous political entities, but as "subjects of interest" to be analysed.<sup>45</sup>

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<sup>40</sup> Translated from French.

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Funding agencies must ensure that communities are in agreement with research projects before awarding grants to avoid conflicts or unauthorized actions.<sup>46</sup>

It is important to hold training sessions for external researchers before they arrive in indigenous communities. This is especially important for researchers who are young because, in many cases, these researchers arrive in the communities with little knowledge of the realities and do not know how to behave and interact with them.<sup>47</sup>

To facilitate research, including the preservation of traditional knowledge, an indigenous research institute should be established, with representatives from all Nations. Despite their differences, all Nations share certain important issues, including the management of intellectual property. This would give more autonomy to the indigenous people in the financing of projects in addition to facilitating collaboration with the communities. It would be necessary to ensure that local needs are taken into consideration while working together to make the issues evolve.<sup>48</sup>

## **Certification**

The use of trademarks and certification could avoid appropriation whether on a large or small scale. Handicraft products could be certified by the community or a third party. Promotion is needed to make the public aware of the label.<sup>49</sup>

If a seal of authentication is created for the marketing of indigenous art, the brand should not be managed by indigenous communities, but the federal government can invest in its promotion so that the logo is known.<sup>50</sup>

In general, there was some resistance within indigenous communities to the use of certifications and trademarks. Many communities are afraid of fraud and the non-efficiency of intellectual property systems.<sup>51</sup>

Anyone can make moccasins--it is important to have certification to show that moccasins were made authentically start to finish, and not just in some factory.

Cases of misappropriation under current legal regimes cost too much (access to the justice system). Why doesn't Canada have an office just for Indigenous peoples to use resources to

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<sup>46</sup> Translated from French.

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pursue counterfeit Indigenous goods? There should be an Office of Enforcement/government service to do this.

It would be essential to establish an Indigenous Arts Council.<sup>52</sup>

It would be a good idea to think about setting up a certification mechanism, as the Inuit do and as some Nations did a long time ago.<sup>53</sup>

There is an Inuit organization that has an entire department in charge of managing and controlling the use of their symbols--it is a lot of work. It is expensive to enforce protection of cultural symbols, especially in the age of the internet. Further, artists license their symbols, but often they receive no compensation for this, and they do not have the capacity to monitor for infringement and appropriation.

There is no infrastructure for protection. The communities are the ones who have had to create them, sometimes very far away from their communities in Toronto or other big cities. And the protection infrastructure that does exist is usually just for one small community. You can imagine the risk of exploitation in other communities across the territory.

Potential solutions to the challenges of enforcement include: having a dedicated employee to police usage; licensing regimes, with the understanding that artists alone are not capable of enforcing them; creative commons designations for the specific use of community objects/work (e.g. "This can only be read by a woman," Jane Anderson, NYU); partnerships with collective societies to manage copyright, and collective marks as a means of preserving the narrative and the authenticity.

Certain organizations, such as Canada Council for the Arts have decided to move all their operations online and only accept online applications. This excludes so many small communities who may have a rich artistic heritage but are shut out because they do not have access to the internet. Any organizations that have a goal of helping artists protect their work should allow oral applications in any language.

## **IV. Conclusion**

After more formal scholar presentations on some IP subjects, the roundtable discussions explored many issues concerning the protection of TK and TCE. Through the diverse views, some recurring themes emerged.

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<sup>52</sup> Translated from French.

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## **Foundations of Intellectual Property Law**

The current IP system is based on Western conceptions that does not take into account Indigenous conceptions or the unequal power relationships between the government and Indigenous communities. These past breaches of trust make future partnerships difficult. Some participants also underlined that law needs to undergo not only a gender-based analysis but also a “race-based” one. The first concern is that the current IP law compartmentalizes and ignores the holistic view of TK and TCE.

- Some participants proposed that the government should leave space for Indigenous to develop their own legal framework to protect TK and TCE, keeping in mind the differences between communities. IP could be seen as a useful tool to help a community's economic development and for the artists to make their work known.
- Other participants proposed that TK and TCE should be altogether excluded from the IP system to prevent any cultural appropriation. Another argument raised is that some TK and TCE should not be monetized, as this would go against traditional use.

The fact that Indigenous IP is neither on the priority list of politicians nor of the Canadian government was also noted.

## **Complexity of the Intellectual Property system**

Participants have underlined the lack of awareness about IP in the communities due to the lack of available information, as well as how difficult it was to enforce some IP norms due to the heavy burdens laying on communities and artists. Artists are very disconnected from the complexity of the IP laws, and Indigenous communities are encumbered with administrative procedures that demand financial resources and time. The need to have discussions to help artists understand and be aware of their vulnerability was also discussed.

## **Importance of Traditional Knowledge and Cultural Expressions**

Among the main reasons for preserving TK and TCE were to:

- Preserve the distinct identities of the diverse indigenous communities;
- Enhance their economic development through trade;
- Help achieve not only economic but socio-economic parity; and
- Enhance scientific development through research.

## **Commercialization of Traditional Knowledge and Cultural Expressions**

Nonetheless, the main division on this subject was whether to monetize TK and TCE or not – and if so, how. On the one hand, current exploitation and misappropriation of Indigenous culture are reasons why many Indigenous people fear sharing TK and TCE. Moreover, some argued that

sacred artefacts should not be commercialized. On the other hand, differences between personal or community use and commercial use were highlighted. An example illustrated that some artworks are made for a settler market without their ceremonial aspect.

### **Cultural Appropriation**

If the promotion of Indigenous cultures to the general public to raise awareness was generally desired, misappropriation was condemned. An underlined issue was that once some sacred ceremonial objects are perceived to be in the public domain (e.g. dream catchers, Cowichan sweaters and Haida pipes) it is hard to put the genie back in the bottle. Moreover, examples of misappropriation were given not only in situations between non-Indigenous and Indigenous people but also within and between different Indigenous communities. The main worry was the use of an Indigenous community's traditions by someone or an organization which is not a member of that community, without proper credits to the community of origin or for profit or both. A possible solution would be to create certificates specific to each community. However, issues regarding funding and current fake certification have to be taken into consideration.

### **Research**

Historically, in most cases Indigenous communities have not been credited for their participation in scientific research concerning TK and TCE and have not benefited from it. This fostered distrust and anger regarding researchers. Nonetheless, the importance of research was often acknowledged with a desire to build new methods. Examples of best practices raised by participants to follow include:

- Consent from Indigenous communities should always be required;
- Indigenous communities must be able to define their research;
- Community members must be involved in the research;
- Indigenous communities must be given credit in the publication;
- Data collected must remain in the communities and/or be accessible to the communities;
- Researchers must understand that some subjects should not be researched (e.g. because the subject is sacred).

### **Other Future Projects**

Finally, our participants had many ideas on further projects. A few examples are:

- Put into place an Indigenous Arts Councils;
- Create an indigenous research institute;
- Provide funding for indigenous cultural activities and tourism;
- Have a dedicated fund for proceedings in case of IP breach concerning TK and TCE;
- Introduce Indigenous norms and the notion of collective rights in the Charter;

- Use the notion of intangible heritage to protect TK.

### **Governmental Support**

Many concerns about funding arose during the roundtables since Indigenous communities do not have appropriate resources to support such projects. In addition, since Indigenous communities already face problems of over-solicitation, the challenges of governmental support in establishing the necessary infrastructure was debated. Still, the Canadian government should, according to most participants, be ready to make the appropriate resources available as requested by the community.

## Annexe A - Liste des participants<sup>54</sup>

1. Anker, Kirsten – Associate Professor in the Faculty of law, McGill University.
2. Awad, Amy – Director, Trade Negotiations and Investment, Canadian Heritage.
3. Blanchet, Edgar – Anthropological Research Officer, Ndakina Office of the Grand Council of the Waban-aki Nation.
4. Boivin, Helene – Member of the Pekuakamiunuatsh Nation.
5. Burelli, Thomas – Associate Professor in the Faculty of Civil Law, University of Ottawa.
6. Clancy, Paula – Chair of Indigenous Intellectual Property Committee, IPIC.
7. Coocoo, Charles – Elder, Atikamewk Nation.
8. Coocoo, Christian – Cultural Services Coordinator, Atikamewk Nation Council.
9. Coonishish, Minnie – Executive Director, Aanischaaukamikw, Cree Cultural Institute.
10. Coulombe, Gérard – Interim administrator, Alliance Autochtone de Québec.
11. Cuerrier, Alain – Researcher, University of Montréal and Botanist at the Montreal Botanical Garden.
12. Cyr, Julie – Negotiations and Consultation Directorate, Indigenous Affairs Secretariat
13. Dejarlais, Blake – Director of Public & National Affairs, Metis Settlements General Council.
14. Deschênes, Michel - Program and Policy Analyst, CSSSPNQL.
15. Fleming, Mitchel – Organizer and student in the Faculty of law, McGill University.
16. Gadoua, Marie-Pierre – Social Mediation Project Manager, Bibliothèque et Archives nationales du Québec (BANQ).
17. Gariépy, Stéphane – Technical Manager, Agriculture and Agri-Food Canada.
18. Garneau, David – Professor in the Faculty of Media, Art and Performance, University of Regina.
19. Gaucher, Karine – Director of Programming and Communications, La Guilde.
20. Gauvreau, Julie – Partner and Lawyer in intellectual property, Lavery.
21. Gendreau, Ysolde – Professor in the Faculty of law, University of Montréal.
22. Genest, Xavier – Advisor Business Services Directorate, Canadian Intellectual Property Office.
23. Godbout, Sabryna – Languages and Cultures Project Officer, First Nations of Quebec and Labrador Sustainable Development Institute (FNQLSDI).
24. Gold, Richard – Professor in the Faculty of law, McGill University.
25. Gunnarsson, Maya – Organizer and student in the Faculty of law, McGill University.
26. Hamel, Nathalie – Counsellor for First Nations and Inuit Relations, Ministère de la Culture et des Communications du Québec.
27. Huffman, William – Marketing and Special Projects Manager, West Baffin Eskimo Cooperative.
28. Jérôme, Laurent – Professor in the Religious Studies Department, Université du Québec à Montréal.
29. Koutouki, Konstantia – Professor in the Faculty of law, University of Montréal.
30. Kusy, Claire – Executive Director, Centre des métiers du cuir de Montréal.
31. Lainey, Jonathan – Curator Indigenous Cultures, McCord Museum.
32. Landry, Miriam – Cultural agent, Jardin des Premières Nations, Jardin Botanique de Montréal.
33. Landry, Yves – Member, Abenaki Affirmation Committee.
34. Lajeunesse, Roland – Senior Partner, GID Design-Retirement Group.
35. Leclair, Jean – Professor in the Faculty of law, University of Montréal.
36. Lemoine, François – Organizer and student in the Faculty of law, McGill University.

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<sup>54</sup> The final list is based as much as possible on the information form completed by the participants.

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37. Gros-Louis, Line – Cultural Chief, Artist, Potter, Council of the Huron-Wendat Nation.
38. Gros-Louis, Michel –Archives Directorate, Government of Canada.
39. Gros-Louis McHugh, Nancy – Manager, Research Sector, CSSSPNQL.
40. Lisa Phillips, Kawennanó:ron – Executive Director, Kanien'kehá:ka Onkwawén:na Raotitióhkwa Language and Cultural Center (KORLCC).
41. Matoush, Julie – Program Researcher, Cree Nation of Mistissini - Health and Social Development Department.
42. McGregor, Savanna – Student, Tulo Center of Indigenous Economics.
43. Mestokocho Paradis, Lydia – Cultural agent, Maison de la Culture Innue.
44. Moar, Patrick – Coordinator, Tourisme Manawan.
45. Mollen, Gaëlle – RBC Indigenous Internship Program Coordinator, Musée Canadien de l'histoire à Gatineau.
46. Motard, Geneviève – Professor in the Faculty of law, University of Laval.
47. Moyses, Pierre-Emmanuel – Professor in the Faculty of law and Supervisor and chief of students Organizers, University McGill.
48. Mullen, Faye – Artist and Support Worker at Indigenous Student Resource Centre, Concordia University.
49. Owisokon Lahache, Pauline – Mohawk Artist.
50. Park, Sejeong – Organizer and student in the Faculty of law, McGill University.
51. Patterson, Elizabeth – Partner, Dionne Schulze.
52. Paul, Hillary – Crown-Indigenous Relations and Northern Affairs Canada.
53. Phillips, Morgan – Research Associate, Ratikonhsatatie Network Environment for Indigenous Health Research.
54. Picard, Simon – Director of the Huron-Wendat Nation Legal Services.
55. Potter, Sayre – Organizer and student in the Faculty of law, McGill University.
56. Poupard, Angèle – Organizer and student in the Faculty of law, McGill University.
57. Pranteau (Daybi), Geoffrey – Hip Hop Artist.
58. Qiluqqi Koperqualuk , Lisa – Curator and Mediator in Inuit Art, Montreal Museum of Fine Arts.
59. Racine, Pierre-Luc – Organizer and student in the Faculty of law, McGill University.
60. Roth, Solen – Researcher, University of Montreal, Anthropologist and Lecturer, School of Design, Université de Montréal.
61. Rowe, Shelley – Senior Project Leader, Innovation, Science and Economic Development.
62. Rugenius, Robyn – Workshop Organizer, McGill Centre for Intellectual Property Policy
63. Simard, Martin – Director, Copyright and Trademark Policy and Workshop Organizer, Innovation, Science and Economic Development.
64. Smith, Pinock – Algonquin independent arts and crafts specialist.
65. Watso, Jacques – Councillor, Council of the Abenakis of Odanak.

## Annexe B - Agenda

### **ISED/CIPP Practical Workshop on Indigenous Knowledge and Cultural Expressions and Intellectual Property January 30, 2020**

**Organized by the Centre for Intellectual Property Policy (CIPP) and Innovation, Science and Economic Development Canada (ISED) in collaboration with Canadian Heritage and the Montreal Museum of Fine Arts (MMFA).**

**Location :** Museum of Fine Arts, Jean-Noël Desmarais Pavilion, 2<sup>nd</sup> Floor, Room “The Salon”  
1380 Sherbrooke St W, Montreal, Quebec H3G 1J5 (Main Entrance)

**Date :** January 30, 2020 (8:30-17:00)

**Expected results:**

- Production of a report & information documents/presentations on intellectual property (IP) in an Indigenous context circulated to all participants and published online
- Gathering of recommendations for the future and creation of networks to support the next engagement phase

#### **1. 8:30-9:00 REGISTRATION & BREAKFAST**

#### **2. 9:00-9:30 OPENING**

**Welcome Ceremony** (Joe Jacobs, Mohawk elder)

**Opening Remarks** (Martin Simard (ISED) & P.-E. Moysé (CIPP)). Participants will have the opportunity to meet each other in the more convivial setting provided by the roundtables.

#### **3. 9:30-10:45 – STATE OF PLAY**

**Xavier Genest** (Canadian Intellectual Property Office, Ottawa) and **Martin Simard** (ISED) –**Intellectual Property and Indigenous Knowledge and Cultural Expressions** – Introduction to Intellectual Property Rights (patents, trademarks, copyrights, industrial designs, geographical indications) and the protection of Indigenous knowledge and cultural expressions in Canada, followed by a short presentation of the most recent related initiatives of the federal government. More information available at: [www.canada.ca/indigenous-ip](http://www.canada.ca/indigenous-ip).

**Ysolde Gendreau** (Université de Montréal) – **International and Foreign Initiatives** – The structure of current Canadian copyright law, its usefulness, its limits, as well as its linkages with cultural appropriation and foreign initiatives (Australia, Brazil, etc.)

**Konstantia Koutouki** (Université de Montréal) – **Community-led Economic Development and Indigenous Traditional Knowledge** – For several decades, international and other legal frameworks



have attempted to align Indigenous traditional knowledge rights and intellectual property rights. What is clear now is that Indigenous Nations will not allow traditional knowledge to be fragmented so that it can be interpreted using arbitrary and culturally incompatible rules and procedures. At the same time Indigenous Peoples have made great strides in creating community-led opportunities for economic development using Indigenous legal frameworks for traditional knowledge protection. (Indigenous legal systems, Traditional Knowledge, regenerative communities, Cannabis, living soil)

**Thomas Burelli** (Université d'Ottawa) and **Me Simon Picard** (Nation Huronne-Wenda, Université Laval) – **The Unsuspected Powers of Indigenous Peoples to Protect their Traditional Knowledge** – The power of Indigenous people to control the circulation of their traditional knowledge is often underestimated. Indeed, despite the limits of international and state law, resources and strategies are available to Indigenous peoples to control access to, and use of, their traditional knowledge. In this presentation, we will discuss the options available to Indigenous peoples through several case studies. (ethics, research protocols, contracts, negotiation)

#### **4. 10:45-11:00 BREAK**

#### **5. 11:00-12:00 ROUND TABLES**

**Listening and discussions** in small groups<sup>55</sup> supported by facilitators

- Round table, presentation of participants
- Presentation of IP cases and stories illustrating both conflicts and successes

Sample questions: How can Indigenous IP be useful? What are the needs of communities, tensions and lived experiences? Can IP help strengthen the control communities have over their culture? But also: how can Indigenous approaches be better reflected in Canada's IP regime? For example, how can conflict resolution approaches help arbitrate conflicts between tradition and innovation? What can we learn of Indigenous worldview regarding the immaterial, the sacred, the spiritual? Can we imagine a conflict resolution systems based on terms set by the communities? IP and cultural appropriation, what is the link?

Rapporteurs to share highlights of each group's discussion.

#### **6. 12:05-12:10 GROUP PICTURE** (optional)

**7. 12:10-13:30 LUNCH – IP in a Changing World** – Prof. Kirsten Anker will give us her first impression and will present on McGill's Indigenous law experience

#### **8. 13:30-14:20 NATURE, CULTURE AND SCIENCE**

**Alain Cuerrier** (Université de Montréal) [with the collaboration of **Julie Matoush** (Cree Nation of Mistissini) and **Hélène Boivin** (Pekuakamiulnuatsh Nation) – TBC] – **Naalurmiuq : between respect, humility and patience, listening to one another** – Work in Indigenous communities occurs in a particular ethical context. Researchers and students are called to navigate in little known territories. On the one hand are the rules established by granting organizations and ethics committees linked to universities, and, on the other hand, Indigenous communities that increasingly establish their own rules. This forces a return to openness towards the other, to a true engagement where respect and humility need

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<sup>55</sup> Groups will be finalized once all participants are confirmed.

to be front and centre (traditional knowledge, First Nations of Canada, Inuit, research agreement, consent letter, ethics).

**Me Julie Gauvreau (Lavery) – Protecting plant varieties** – One way to protect plant varieties in Canada is through Plant Breeders' Rights, a relatively unknown tool. It is useful to understand its advantages and its limits to determine who can use it and when. We'll briefly describe which criteria a plant should meet to qualify for this protection, the scope of the rights granted to the breeder, and the exceptions to the protection (Plant Breeders' Rights, Criteria, Scope, Exceptions).

**Richard Gold (CIPP, McGill) – Open Science and Traditional Knowledge** – Open science promises to democratize research by sharing knowledge globally while better engages user and patient communities. Concerns regarding the misuse of TK lead, however, to calls to carefully control data dissemination and use. As indigenous communities can benefit from open science – through agenda setting, direct participation in research, interpreting research results – it is important to seek ways to reconcile TK concerns with open science.

## **9. 14:20-15:15 ROUND TABLES**

**Listening and discussions** in small groups supported by facilitators

- Linkages between presentations made and the cases discussed during the first round tables
- Identification of gaps and priorities to better move forward

Sample questions: What can we do? What thoughts, ideas, wishes, projects, next steps can we propose? What are, among the things heard, issues that concern or interest you more? What aspects have been omitted, mishandled or misunderstood? And should this workshop lead to other meetings or forms of engagement, when, how and by whom should they be organized?

## **10. 15:15-15:30 BREAK**

## **11. 15h30-16:30 PLENARY**

Presentation from rapporteurs, first impressions, first results, key takeaways – Discussions & debates

## **12. 16:30 CLOSING**

**Final Remarks & thanks** (CIPP and ISED)

**Closing Ceremony** – Joe Jacobs, Mohawk Elder

## **ORGANIZING COMMITTEE**

McGill CIPP : (Pierre-Emmanuel Moyse) Sayre Potter, Maya Gunnarsson, Angèle Poupard, Sejeong Park, Mitchel Fleming et notre coordinatrice Robyn Rugenius.

ISED : (Martin Simard) Laura Woodward, Shelley Rowe

## **BIOGRAPHIES OF PRESENTERS**

**Xavier Genest** graduated from the School of Management of the Université du Québec à Montréal (ESG UQAM) with a bachelor's degree in business administration with a specialty in finance, and has worked at Canada Economic Development for Quebec Regions delivering innovation programs.

**Martin Simard** is the Director of Copyright and Trademark Policy at Innovation, Science and Economic Development Canada since 2017. He spent several years, first as a Senior Analyst and then as Manager, in the Copyright and International Trade Policy Branch at Canadian Heritage. Prior to his, he worked for a number of years in communications for the federal government and for not-for-profit organizations in Canada and abroad. Martin holds a master's degree from the Norman Paterson School of International Affairs at Carleton University.

**Ysolde Gendreau** – A graduate of McGill University (B.C.L., LL.B., LL.M.) and Université Paris II (Doctorate in Law) and member of the Barreau du Québec, Ysolde Gendreau has taught intellectual property law and competition law at the Faculty of Law since 1991. Her research focuses on copyright in a comparative and an international perspective. Ysolde Gendreau has acted as member of the Patented Medicine Price Review Board (the PMPRB) (1995-2000), President of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) (2003-2005) and President of the Canadian branch of the Association littéraire et artistique Internationale (ALAI) (2006-2011), on whose Executive Board she still serves. Professor Gendreau is also an associated member of the International Academy of Comparative Law and a member of the Intellectual Property Institute of Canada.

**Konstantia Koutouki** is a professor of law at the Université de Montréal, Executive Director of Nomomente Institute and Lead Counsel for Natural Resources with the Centre for International Sustainable Development Law. Her research examines the links between international trade, intellectual property, and environmental protection. She has extensive experience working on issues concerning regenerative practices and the law especially as they relates to the social, economic and cultural development of Indigenous and local communities. She is particularly interested in the preservation of natural spaces and traditional knowledge, especially traditional medicine and agriculture. She has first-hand experience with Indigenous and local communities around the world, where she has spent much time as a guest and researcher.

**Thomas Burelli** is an Assistant Professor at the Civil Law Faculty of the University of Ottawa. His fields of expertise are environmental law, intellectual property law, Indigenous law and ethics. His research focusses on decolonization of relations between scientists and Indigenous communities. He notably studies tools that these actors develop to organize their relations with regards to accessing traditional knowledge. He notably drafted the Code of Ethics of the Centre de Recherches Insulaires et Observatoire de l'Environnement (Criobe-CNRS) located in Moorea in French Polynesia. It is the first French instrument to specifically tackle the ethics of research involving Indigenous and local communities. Thomas Burelli also contributed to reveal many cases of biopiracy in French overseas. He participated in many field missions in new Caledonia, French Guiana and French Polynesia.

**Me Simon Picard** – Director of legal services at the Huron-Wendat Nation. Simon Picard works mainly in the field of Indigenous rights. He has a solid experience in Aboriginal and treaty rights, negotiating specific claims, taxation and management of reserve land pursuant to the Indian Act, particularly as they relate to the development of major economic development projects. He is also lecturer at Université Laval.

**Kirsten Anker** – Kirsten Anker is associate professor at McGill's Faculty of Law. She teaches property, legal theory and Aboriginal law and has been a leader in developing the curriculum to bring Indigenous

legal traditions into the Faculty's transsystemic approach to legal education. With research interests extending also to evidence, dispute resolution, and resource management, her current projects include work on non-static digital mapping in land claims, Indigenous consultation, and ecological jurisprudence.

**Richard Gold** is a James McGill Professor at McGill University's Faculty of Law where he was co-founder of the Centre for Intellectual Property Policy. He teaches in the area of intellectual property and innovation. His research centers on the nexus between innovation, development and commerce, particularly with respect to biotechnology. Prof. Gold co-edited a book on Traditional Knowledge with Tania Bubela entitled *Genetic resources and traditional knowledge: case studies and conflicting interests* published by Edward Elgar.

**Alain Cuerrier** is a botanist at the Jardin botanique de Montréal, member-researcher at the Institut de recherche en biologie végétale (IRBV) and adjunct professor in the Department of Biological Sciences at the Université de Montréal. His research deals with local and traditional nature-related knowledge. He's forged collaborations with the Québec Inuit, Cree, Innu and Naskapi as well as with the Squamish of British Columbia. Some of his students are working in French Guiana and Costa Rica. Beyond the field of ethnobotany, Alain Cuerrier studies the perception of nature and climate change among the First Nations of Canada. He's also interested in traditional Native American medicine, particularly Arctic plants, those of the boreal forest and more recently those of certain tropical countries. In addition, he's part of the Team in Aboriginal Antidiabetic Medicines of the Canadian Institutes of Health Research and is treasurer of the International Society of Ethnobiology. He's published over 60 articles and more than 12 books in the framework of his research. He is associate editor of the *Journal of Ethnobiology* and of *Ethnobotany Research and Applications*.

**Pierre-Emmanuel Moysé** is Associate Professor at the McGill Faculty of Law and the Director of the Center for Intellectual Property Policy. He is the founder and editor of the *Thémis* Competition and Innovation Series and Director of publications of the *Jurisclasser Propriété Intellectuelle* published in Québec by LexisNexis. He is the co-founder of the national competition in copyright policy organized every two years since 2015, in collaboration with Canadian Heritage and Innovation, Science and Economic Development Canada. In 2018, he was named expert by the European Parliament in his fields of expertise. As a member of the Law & Technology Consortium, he will welcome in Montreal in 2020 the most important research centres in technology to encourage international collaboration.

**Julie Gauvreau** is a partner, lawyer, patent agent and trade-mark agent in Lavery's intellectual property group. She holds a degree in microbiology from Université de Montréal and began her practice in 1998. She is a lawyer, a registered patent agent in Canada and in the United States, and a trade-mark agent. Julie Gauvreau has developed a successful patent practice with a full range of clients in the biotechnology and pharmaceutical fields. Her specialty resides in helping clients develop effective intellectual property protection strategies tailored to meet clear business objectives including the development and launch of new products. Her clients include universities, hospitals, government laboratories and research institutes, as well as small and medium sized businesses, and large pharmaceutical companies. She works closely with intellectual property practitioners in many other countries to obtain protection of Canadian inventions abroad, and represents many foreign clients seeking patent protection in Canada. She has given numerous seminars and courses on intellectual property matters.