THE INDIGENOUS DOMAIN AND INTELLECTUAL PROPERTY RIGHTS

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CONTENTS

I INTRODUCTION

The development of the Indigenous renaissance in Canada and beyond has produced complicated quandaries of Indigenous peoples' knowledge systems intersecting with Eurocentric knowledge systems. As Justice Abella of the Supreme Court of Canada (SCC) insightfully noted: "As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous people, inequities are increasing revealed and remedies urgently sought."[2] As the cognitive curtains have been opened surrounding the holistic Indigenous peoples' knowledge systems, they reveal the injustices of the Eurocentric concepts of intellectual property law, which includes ownership and commercial privileges. These systemic injustices arise from the long, dark chronicle of the Eurocentric fictions of *terra nullius* (no one's territory),[3] *gnaritas nullius* (no one's knowledge),[4] and *lex nullius* (no laws) and the *demesne* (public domain) being applied to Indigenous peoples. The Eurocentric knowledge systems and laws generated these fictional concepts to explain the unknown continent and

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2. *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 1.

3. This convenient Eurocentric fabrication asserted that the newly discovered foreign lands were occupied by Indigenous inhabitants but were legally "unowned" and therefore "vacant." While the law of nations crystallized vested Indigenous sovereignty and territorial rights (see *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at para 145 [*Delgamuukw*] and *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 256 at paras 111–112 [*Tsilhqot'in Nation*]), the British legal fiction was disingenuously used in the colonial era to withhold genuine recognition of Indigenous sovereign and territorial rights. The SCC has rejected that fiction (see *Tsilhqot'in Nation* at para 69).

4. Néhinaw scholar Greg Younging, "Traditional Knowledge Exists; Intellectual Property Is Invented or Created" (2015) 36(4) U Pa J of Intl L 1077 at 1083–1085.

peoples not mentioned in the Bible.[5] They were used to justified unauthorized access, taking, using, and uncompensated appropriation by Europeans of existing Indigenous territories and knowledge systems. They operated to deny any legal protection to the Indigenous inhabitants' knowledge.[6]

These systemic and cognitive injustices toward Indigenous knowledge systems were crafted by the tendentious constructs of Eurocentric diffusionism,[7] colonialism,[8] racism,[9] and cognitive imperialism.[10] Together they formed the core of Eurocentrism[11] and its intellectual property regime.[12] Eurocentrism is a constructed knowledge system created in Europe to establish its invidious universality and superiority of European thought. Its universalism assumed and validated cultural and cognitive imperialism and incorporated the belief in the inequality of race and the subordination of non-European knowledge systems, languages, and cultures. Eurocentrism's hegemonic universalism excludes rather than includes. It was designed to replace and acquire other knowledge systems through a process of epistemicide,[13] which generated the concept of the vast public domain.

Under the horrific legacy of the European epistemicide, Europeans and European settlers have historically constructed Indigenous peoples as less than human—as "primitives,"

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5. Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Philadelphia: University of Pennsylvania, 1949); Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge: Cambridge University Press, 1986).

6. Angela R Riley & Kristen A Carpenter, "Owning *Red*: A Theory of Indian (Cultural) Appropriation" (2016) 94 Texas L Rev 859; Bruce Ziff & Pratima V Rao, eds, *Borrowed Power: Essays On Cultural Appropriation* (New Brunswick: Rutgers University Press, 1997).

7. JM Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (New York: Guilford Press, 1993).

8. W Mignolo, *The Darker Side of Renaissance: Literacy, Territorially and Colonization* (Ann Arbor: University of Michigan Press, 1995); Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003).

9. James (Sa'ke' j) Youngblood Henderson, "Postcolonial Ghost Dancing: Diagnosing European Colonialism" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) at 57.

10. Marie Battiste, *Decolonizing Education: Nourishing the Learning Spirit* (Vancouver: UBC Press, 2013) at 158–166.

11. S Amin, *Eurocentrism*: *Modernity, Religion, and Democracy: A Critique of Eurocentrism and Culturalism*, Russell Moore & James Membrez (trans.) (New York: Monthly Review Press 1988); Vassilis Lambropoulos, *The Rise of Eurocentrism: Anatomy of Interpretation* (Princeton: Princeton University Press 1993).

12. Jane Anderson, *Law Knowledge, Culture: The Protection of Indigenous Knowledge in Intellectual Property Law* (Cheltenham: Edward Elgar Publishers, 2009); William Fisher, "Toward Global Protection for Traditional Knowledge" (2018) CIGI Papers No 198.

13. Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Boulder: Paradigm Publishers, 2014) [Santos, *Epistemicide*].

"savages," "backward," and "non-persons."[14] Later they became objects of curiosity for study, collection, and research in order to affirm the superiority of Eurocentric knowledge. The Eurocentric constructed hierarchical typologies classified these inhabitants alongside flora and fauna.[15] When Eurocentrism acknowledged Indigenous inhabitants' knowledge, it was considered a deficient knowledge system. It labelled the Indigenous inhabitants' knowledge as folklore, folk ecology, women knowledge, ethnoecology, traditional environmental or ecological knowledge, customary law, traditional knowledge, traditional cultural expression, or genetic resources, or by using the enigmatic initials GRTKF (genetic resources, traditional knowledge, and folklore). These Eurocentric categories are a poor fit that destroy legal meanings.

These classifications establish the framework for Eurocentric colonialism and racism as well as their appropriation, control, and domination. These appropriations are endemic to Eurocentrism. This systemic injustice demands critical examination and reforms.

The Europeans assumed that whatever intergenerational Indigenous knowledges and intellectual property laws and rituals they "discovered" were not legally protected and were part of the audacious metaphor of "public domain" (*publici juris*) and could be freely accessed, used, or taken.[16] The Eurocentric public domain determined that these Indigenous peoples' knowledge and folklore were not new, original, or individual. Instead, the public domain characterized these knowledges as ancient natural traditions. The irony of this rejection of protecting these ancient knowledges is the source of the Eurocentric idea of the public domain, and intellectual property laws are based on nature.[17] Only what the Europeans extract from nature is legally protected—the Indigenous peoples' extraction from nature is not legally

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14. *An Act to Amend and Consolidate the Laws Respecting Indians*, SC 1876, c 18 s 3 no 12 ("The term 'person' means an individual other than an Indian, unless the context clearly requires another construction"); Edward W Said, *Culture and Imperialism* (New York: Alfred A. Knopf, 1993); JY Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining a Just Society* (Saskatoon: Native Law Centre, 2006) at 8–16 [Henderson, *First Nations Jurisprudence*]; Stephanie B Martens, *The Americas in Early Modern Political Theory: States of Nature and Aboriginality* (London: Palgrave Macmillan, 2006); Robert A Williams Jr, *Savage Anxieties: The Invention of Western Civilization* (New York: Palgrave Macmillan, 2012).

15. Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 1999) at 59.

16. Ruth L Okediji, "Traditional Knowledge and the Public Domain" (2018) CIGI Papers No 176 at 1–4 [Okediji].

17. AC Renouard, *Traité des droits d'auteurs dans la littérature, les sciences et les beaux-arts* (Paris: Jules Renouard et Cie, 1838) Tome I, AR 441. The Lockean principle of private property is rooted in the natural law principle that any natural resource is free for every man to appropriate through labour and is a foundation of Anglo intellectual property. In contrast, the Kant-Hegelian vision of European intellectual property is premised on a public domain that is ready to be owned by any "willing" individual to enhance their identity, development, and flourishing.

protected. Their knowledges are assigned to the public domain, which is open to exploitation and appropriation by anyone.[18]

These Eurocentric fictions in Canada and beyond have become obstacles to the legal protection of Indigenous peoples' knowledge and creative manifestations. In intellectual property laws, these fictions continue to serve as an implicit assumption in the Eurocentric metaphor of the public domain[19] or the common heritage of humanity.[20] Intellectual property law seeks to protect the selected products of original thought and the physical manifestations or expressions of Eurocentric knowledge and ideas by assigning and enforcing them as legal rights. These Eurocentric concepts and categories continue to raise difficult questions about protecting Indigenous knowledge at the intersection with European innovation policy and knowledge governance.

While Indigenous knowledge is one of the constitutionally protected manifestations of Aboriginal and treaty rights in the constitution of Canada,[21] the concept of Canadian public domains still classifies Indigenous peoples' knowledge as a body of information available for anyone to access and use freely.[22] The Canadian public domains reconstruct and extend a historically prejudicial Eurocentric view of Indigenous peoples' knowledge. It ignores that their knowledge systems are protected by the constitutionalized Indigenous domain and Indigenous laws that are distinct from but equal to the Eurocentric public domains.

This article will briefly address the concept of the Canadian public domains and then introduce the Indigenous domain concept. I will then discuss the need to establish the Indigenous domain's constitutional supremacy that requires Canadian intellectual property law to be reformed to be made consistent—without any domain being dominant. I conclude with some modest suggestions.

II CANADIAN PUBLIC DOMAINS

The concept of the Canadian public domains is a haunting legal metaphor. It is imported from Eurocentrism and has a rich history of refinements through the centuries. It is said to have existed since time immemorial. Indigenous law, Greek laws, Roman civil law, Florentine

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18. T Cottier & M Panizzon, "Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection" in K Maskus & J Reichman, eds, *International Public Goods and the Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005) at 570; R Coombe, "Protecting Cultural Industries to Promote Cultural Diversity: Dilemmas for International Policymaking Posed by the Recognition of Traditional Knowledge" in *International Public Goods*, *ibid* at 602–604; Carlos M Correa, *Traditional Knowledge and Intellectual Property: Issues and Options Surrounding the Protection of Traditional Knowledge* (Geneva: Quaker United Nations, 2001).

19. Okediji, *supra* note 16. The Eurocentric notion of the public domain may connect the two concepts in Roman property law of *res communes* (non-excludable and incapable of appropriation and hence ownership altogether) and *res publicae* (owned by the public as such).

20. The contested Roman law notion of *res communis humanitatis*, or common heritage of humanity, entails a conception of international collective ownership that is distinct from the stricter *res nullius*.

21. Section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]. See also section 25 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

22. Carys J Craig, "The Canadian Public Domain: What, Where, and to What End?" (2010) 7 CJLT 221.

law, and the British common law all reflect this domain[23] before legislation even codified intellectual property law. The public domain can best be conceptualized as the immanent order: a latent normative order that is an intelligible and defensible vision of a human's social and creative life. The immanent order is revealed and refined through the halting and flawed work of the votaries of religious communities, legal thought, and art. It is often conceptualized as an assumptive or logical pre-existing realm of a people's life—a product of the collective minds undertaken in historical time from a particular community and legal traditions. These realms revealed and developed the idea of intellectual property rights in certain peoples as a notable exception to the communities' shared discourses.

The public domain as a latent normative order of nature is both the birthplace and the resting place of intellectual property rights. It is the raw material for human creativity and inspiration. It signifies that all the creative materials not protected by the private intellectual property law are "owned" by the peoples. The public domain exists as the air we breathe, sunlight, rain, life, and perhaps the environment.

The public domain concept is the source of intellectual property law.[24] Since the latter part of the nineteenth century, the French legal construct of "falling into the public domain (*demesne*)" described the end of a copyright term. The common law concept appeared as an affirmative discourse at the end of intellectual property rights, such as copyright, patents, trademarks, and so on.[25] The codified intellectual property laws are systems of copyright, patents, trade secrets, trademarks, and moral rights granted to authors and inventors. But these categories do not reveal all the existing intellectual property. A judicial law of ideas exists that allows individuals to protect novel or original ideas as personal property and compensation.[26] When these statutory rights expired, were forfeited, were expressly or carelessly waived, or became inapplicable, they regenerated the public domain.

However, the public domain remains the unprotected foundation of intellectual property law. It is not a subject of intellectual property law—it is the inverse of intellectual property laws. It is broadly defined as encompassing intellectual and creative materials not protected by law. It is conceptualized as owned by an abstract public, but no community or person can own the materials. It is non-rivalrous, meaning that it does not prevent others from using it when one person uses the knowledge. It is also non-excludable, meaning that it is costly or impossible for one user to exclude others. The idea/expression dichotomy guides it: Ideas, facts, styles, methods, intrigue, mere information, and concepts are unprotected, while individual creative expressions are legally protected. Ironically, intellectual property laws can protect "expressions" of the ideas and collections of material from the public domain.

Over the past thirty years, Anglo-Eurocentric academics have used the broad metaphor of the "public domain" as a normative and rhetorical force that fosters future creativity and

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23. See generally B Bugbee, *Genesis of American Patent and Copyright Law* (Washington DC: Public Affairs Press, 1967).

24. Jane C Ginsburg, "'Une Chose Publique'? The Author's Domain and the Public Domain in Early British, French and US Copyright Law" (2006) 65:3 Cambridge LJ 636 at 668.

25. Mark Rose, "Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain" (2003) 66:1/2 Law & Contemp Probs 75 at 76, 87.

26. Michael A. Epstein, *Epstein on Intellectual Property*, 5th ed (New York: Aspen Publishers, 1992).

innovation.[27] It is viewed as the background to the intellectual property laws. It mysteriously determines which materials are not eligible for legal protection. It has generated the concepts of the "commons," "intellectual commons," or "open content" to characterize the shared and free use of public domain materials.

Canada is a federated and multicultural nation. The concept of a single public domain in Canada appears to be a contradiction. No monolithic or uniform definition of the public domain exists in Canadian. Canada's constitution is silent about the existence of a single, presumptuous definite article to "the" public domain. The Canadian confederation establishes many and diverse domains: the foundational Indigenous domain of Aboriginal and treaty rights[28] and the constitutional domain, which is divided into federal and territorial and provincial powers. [29] Moreover, the *Charter of Rights and Freedoms* requires governments and courts to interpret rights in a manner consistent with the preservation and enhancement of Canadians' multicultural heritage.[30] The complex relationships between these domains are poorly comprehended.

Behind the statutory intellectual property laws, these distinct but interrelated residual domains illuminate the multifaceted character and modes of the immanent metaphor. Canadian jurisprudence does not have a positive account of either the Indigenous or public domains. Under the influence of parliamentary supremacy, law professor Teresa Scassa articulated that Canada's public domains are conceived of as the "leftovers" of statutory intellectual property rights—the melancholic and fragile crumbs that remain once its statutory appetite is satisfied. Its scope is elastic and indeterminate; it can be expanded or shrunk by either legislative enactment or judicial interpretation.[31]

Canadian jurisprudence on intellectual property rights has focused on statutory laws. Judicial references to the public domain have been rare and insipid. The courts have recently affirmed the view of the public domain as a pre-existing source of Canadian intellectual property laws, which are constructed from the Eurocentric traditions[32] and appropriated Indigenous traditions.[33]

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27. David Lange, "Recognizing the Public Domain" (1981) 44 Law & Contemp Probs 147; see also James Boyle, "The Second Enclosure Movement and the Constitution of the Public Domain" (2003) 66 Law & Contemp Probs 33 at 59.

28. *Constitution Act, 1982*, *supra* note 21, s 35(1).

29. The *Constitution Act*, (UK) 30 & 31 Vic c 3 [*Constitution Act, 1867*] empowers the federal government explicitly to make laws regarding patents of inventions and discovery (s 91(22)) and copyrights (s 91(23)). The courts also have some residual authority over trademarks and industrial designs and other intellectual property rights. The federal statutes enacted under these constitutional sections impact provincial jurisdiction under sections 92 and 93.

30. *Charter*, *supra* note 21, s 27.

31. Teresa Scassa, "Table Scraps or a Full Course Meal? The Public Domain in Canadian Copyright Law" in McGill University Faculty of Law, ed, *Intellectual Property at the Edge: New Approaches to IP in a Transsystemic World—Meredith Lectures* (Cowansville: Yvon Blais, 2007) 347 at 348.

32. See Robert Merges, *Justifying Intellectual Property* (Cambridge: Harvard University Press, 2011).

33. See political philosopher John Raul Saul's insights in *A Fair Country: Telling Truths about Canada* (Toronto: Viking Canada, 2008). In the first part of the book, he argues that Canadian political thought is heavily influenced and shaped by Indigenous ideas.

Generally, in Canada's complex knowledge governance law, the implicate domains and intangible intellectual property laws are viewed as intrinsically linked. Still, their trajectories pull in opposite or contradictory directions in their view of what law is and how it can and should be developed. The intellectual property laws give time-limited, monopoly rights to private corporations and individuals. The laws reflect the belief that human progress can best be provided by distributing economic activity to private innovators. These exclusive private rights are justified by natural law or common law arguments for an inherent entitlement to proprietary rights rooted in intrinsic justice and equity. Alternatively, the positivist law argument for protecting intellectual property rights as either a manifest the sovereign's will or the clear legislative choice embodied in statutes that command obedience respects the personal or corporate labour needed to generate specific public welfare gains and progress. These justifications of protecting and encouraging the new creations and innovations are often intertwined.[34] Regardless of the justification, these private rights have to be balanced or reconciled to maintain an implicit public domain.

The intellectual property law requires calibration with its regulatory framework's various domains. Justice Binnie, writing for the majority of the SCC in the context of balancing copyright laws with the public domain, stated:

> Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to property utilization.[35]

The unanimous SCC expressly acknowledged "society's interest in maintaining a robust public domain that could help foster future creative innovation" to set a standard of originality that goes beyond "a mere copy or [simply showing] industriousness" and the need for "room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others."[36] The robust public domain's judicial vision is a pre-existing concept that generates intellectual property rights. It envisions vibrant cultural and multicultural domains interacting to facilitate exchange and transformation, inspiration and innovation, and thereby serves the public interest. It is integral to the concept of human progress. However, the calibration requires that the legal protection provided by intellectual property law has to be consistent with Canada's constitution.

A. The Dark Side of the Public Domain

At first glance, the SCC's public domain concept seems harmless. However, it has a dark side. Because of Eurocentrism, the colonists have always considered Indigenous knowledge to be free to be appropriated. Canadian intellectual property rights have not statutorily protected Indigenous knowledge or meaningfully addressed the legal, ethical, and moral problems associated with the appropriation or the collection and study of Indigenous knowledge

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34. *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 23 [*CCH Canadian*]. Here the SCC cites the fundamental balance as between a (utilitarian) "public interest in the encouragement and dissemination of works" of copyright and the idea of "a just reward for the creator."

35. *Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para 32.

36. *CCH Canadian, supra* note 34 at 23.

and cultural material.[37] Through these assumptions, Indigenous peoples and their laws lost control over how and what knowledge could be circulated or used.[38] An ongoing concern of Indigenous peoples is that the public domain is a discriminatory framework of Eurocentrism that reinforces the invisibility of Indigenous peoples' laws and practices in regard to knowledge governance and innovations. But certain kinds of Indigenous knowledge and expressions have precise rules governing access and circulation.

To adequately deal with these discriminatory frameworks, Indigenous peoples assert that the relationship between the Indigenous and public domains is primarily about power relations. These power relations are inherent in Eurocentric conceptions of "the public," "common heritage," "sharing," and "freedom." The current intellectual property legislation does not recognize nor affirm the Indigenous domain. Instead, Indigenous knowledge is construed as source material for appropriation by others. The abstract concept has been used to justify historical and contemporary wrongs against Indigenous knowledge systems.[39] The potential tendentiousness arises from the presumption that Indigenous knowledge and genetic resources are the raw material in a public domain of *scientia nullius*.[40] This view undervalues Indigenous labour that established Indigenous science conservation of biodiversity. These wrongs reveal that pitfalls exist that have to be remedied. I think Canadian jurisprudence needs to generate a positive account of the Indigenous domain and account for its distinctiveness from the Canadian public domains.

III THE INDIGENOUS DOMAIN

In Canada, the Indigenous domain continues to be part of the supreme law of the land.[41] Canada's constitution recognizes and affirms Aboriginal and treaty rights.[42] The SCC has affirmed that Aboriginal peoples' constitutional rights are collective, communal, or group

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37. Russel Lawrence Barsh, "Who Steals Indigenous Knowledge?" (2001) 95 Am Soc'y Int'l L Proc 153.

38. Kathy Bowrey & Jane Anderson, "The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?" (2009) 18:4 Soc & Leg Stud 479.

39. Marie Battiste & James Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000); Kristen A Carpenter, Sonia Katyal, & Angela Riley, "In Defense of Property" (2009) 118:6 Yale LJ 1022; Darrel A Posey & Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996).

40. William Van Caenegem, "The Public Domain: Scientia Nullius" (2002) 24:6 Eur IP Rev 324.

41. *Constitution Act*, *1982*, *supra* note 21, s 52(1): "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." It imposes an obligation on government and courts empowered to determine questions of law to do so in a manner consistent with the constitution and to invalidate or treat as invalid any law to the extent of its inconsistency with the constitution. See *Schachter v Canada*, [1992] 2 SCR 679.

42. *Constitution Act, 1982*, *supra* note 21, s 35(1): "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 35(2) defines "aboriginal peoples of Canada" as including the "Indian, Inuit and Metis peoples of Canada." The Aboriginal peoples of Canada have "inherent sovereignty," inherent rights, and treaty rights that exist now and for the future. The Aboriginal treaties with the British sovereign were transferred to the Crown in right of Canada by the Crown's novation. Section 35 expands the federal obligations to Indians under the *Constitution Act, 1867, supra* note 29, s 91(24).

rights.[43] The constitutional rights generate the Indigenous domain, a metaphor for a holistic source of these rights. The Indigenous domain reveals the interrelated manifestations of the spiritual realm that generates diverse Indigenous lifeworlds.[44] These spiritual forces of nature have inspired and guided Indigenous peoples' knowledge.[45] The Indigenous domain's creativity and expressive modes have generated Aboriginal sovereignty, inherent powers, rooted constitutionalism, persuasive laws, and consensual treaties.[46] The Indigenous domain, which in Latin is called *ex proprio vigore* or *sui generis*, was vested in the Indigenous nations by the law of nations at the critical date when the British sovereign asserted jurisdiction over Indigenous territories.[47]

The Indigenous domain has always been grounded in the ecologies that operate as the Indigenous peoples' education system, just as nature is the Eurocentric public domain's source. Their experiences with biotic and abiotic forces shaped their knowledge systems. The Indigenous domains have many Indigenous keepers and generators of knowledge, so that families continually generate distinctive heritages, identities, and landscapes.[48] The oral traditions and symbolic literacy of Indigenous peoples reveal the continent's embodied and teaching ecologies, investing their ancestors' knowledge, imagination, and experiences. This enduring spiritual process of generating knowledge, stories, and artistic media that makes people live right has never ceased; they have been a method of "survivance."[49] It has survived the linguistic violence of colonialism and forced assimilation.

These intergenerational dialogues creatively reconstruct the central aspects of the Indigenous domain through oral tradition and written literature and genres such as film and

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43. *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*]; *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]; *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672; *R v Gladstone*, [1996] 2 SCR 723; *R v Nikal*, [1996] 1 SCR 1013 [*Nikal*]; *R v Pamajewon* [*R v Jones; R v Gardner*], [1996] 2 SCR 821; *R v Adams*, [1996] 3 SCR 101 [*Adams*]; *R v Côté*, [1996] 3 SCR 139 [*Côté*]; *Mitchell v MNR*, [2001] 1 SCR 911 [*Mitchell*]; *R v Powley*, [2003] 2 SCR 207; *R v Marshall; R v Bernard*, [2005] 2 SCR 220 [*Marshall-Bernard*]; *R v Sappier; R v Gray*, [2006] 2 SCR 686 [*Sappier-Gray*].

44. See Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38:2 SCLR 595; Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 [Mills]. By "lifeworld," Professor Mills means the Eurocentric concepts of an ontological, epistemological, and cosmological framework that is storied in the Indigenous domain through which the world appears to a people; at 850, note 6.

45. Angela R. Riley, "Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities" (2000) 18 Cardozo Arts & Ent LJ 175.

46. See Wallace Coffey & Rebecca Tsosie, "Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations" 12 Stan L & Pol'y Rev 191 (2001); Mills, *supra* note 44.

47. J L'Heureux-Dubé, dissenting other grounds, in *Van der Peet*, *supra* note 43 at paras 106–112; *Mitchell, supra* note 43 at paras 9–10; *Delgamuuku, supra* note 3 at paras 114, 145, 153, 155; *Tsilhqot'in, supra* note 3 at paras 111–112, 115.

48. Mvskoke (Creek) Poet Joy Harjo, *Secrets from the Center of the World* (Tucson: University of Arizona Press, 1989), wrote that all landscapes have a history, much the same as people exist within cultures, even tribes. There are distinct voices and languages that belong to particular areas. See Russel L Barsh, "Grounded Visions: Native American Conceptions of Landscapes and Ceremony" (2000) 13:1 St Thomas L Rev 127.

49. Anishinaabe Gerald Vizenor, *Literary Chance: Essays on Native American Survivance* (Valencia: Universitat de Valencia Press, 2007). Vizenor wrote: "Native survivance is an active sense of presence over absence, deracination, and oblivion; survivance is the continuance of native stories, not just a reaction, however pertinent, or the mere right of a survivable name" (at 12–13).

photography. The intertribal pow-wow seasonal circuit in North America is the most beautiful and creative manifestation of the contemporary Indigenous domain.

The inherent Indigenous domain is an immanent legal order—a legal order that existed before European presence and the imperial treaties. These inherent rights and benefits of the Indigenous domain are not dependent on explicit grants from the British sovereign or the imperial or Canadian legislature.[50] They are based on collective and inherent sovereignty that pre-existed at the critical date and survived.[51] They are the inherited collective arrangements and routines of Indigenous civilizations—the language, routines, and ceremonies of the structure of these nations, societies, tribes, and peoples. Since the critical date, most of the vested Aboriginal rights have not been surrendered or transferred by treaties from Indigenous peoples to the British sovereign or extinguish by clear legislative acts.[52] Indigenous peoples have the inherent right to reserve and regulate the transmission of their holistic heritages, knowledge systems, and languages. [53] These manifestations have never been transferred to the British or Canadian legal domains.

Canada and the provinces are obligated to implement these inherent and treaty rights. The imperial constitutional law, the reception of the common law, and now constitutional affirmation have all protected the Indigenous descendants' existing rights.[54] Supreme Court Chief Justice Lamer states that "although the doctrine of Aboriginal rights is a common law doctrine, Aboriginal rights are truly *sui generis*."[55] These *sui generis* rights cannot be unilaterally extinguished or abrogated by the federal or provincial governments.[56] Also, the constitutionalized Indigenous domain and its rights are separate and safeguarded from other individual rights in Canada.[57] Nonetheless, in an exceptional case for substantial and compelling public objections and justification, governments can infringe these constitutional rights, and Indigenous peoples can be compensated for the infringement.[58]

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50. *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of ManiUtenam)*, 2020 SCC 4 at para 49, citing *Delgamuukw, supra* note 3 at paras 114, 153, 153. In *Delgamuukw*, the SCC recognized that section 35(1) of the *Constitution Act, 1982* (*supra* note 21) did not create Aboriginal rights; instead, it accorded constitutional status to those inherent rights that were already "existing" in 1982 (at para 133).

51. *Mitchell, supra* note 43 at paras 9–11.

52. Siku Allooloo, Michael Asch, Aimée Craft, Rob Hancock, Marc Pinkoski, Neil Vallance, Allyshia West, and Kelsey Wrightson, "Treaty Relations as a Method of Resolving IP and Cultural Heritage Issues (An Intellectual Property Issues in Cultural Heritage CommunityBased Initiative)" (2 October 2014), online: University of Victoria and IPinCH (Intellectual Property Issues in Cultural Heritage) <www.sfu.ca/ipinch/sites/default/files/resources/reports/treatyrelations_finalreport_2014.pdf> [Allooloo et al].

53. Erica-Irene Daes, *Protection of the Heritage of Indigenous People: Final Report of the Special Rapporteur of the Commission on Human Rights*, 12, UN Doc E/CN.4/Sub.2/26, June 1995.

54. *Marshall-Bernard*, *supra* note 43 at paras 38–39; *R v Marshall*, [1999] 3 SCR 456 at paras 45–48, [*Marshall*].

55. *Delgamuukw, supra* note 3 at para 82.

56. *Mitchell*, *supra* note 43 at para 11.

57. *Charter*, *supra* note 21. Section 25 provides "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of 7 October 1763; and (*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired."

58. *Sparrow*, *supra* note 43 at 1109–1120.

Often the governments claim that they do not comprehend the existence or the meaning of the inherent Aboriginal rights.[59] While it might not always be clear to Canadian governments and courts what is contained in the Indigenous domain, the United Nations *Declaration on the Rights of Indigenous Peoples* and studies are helpful. The *Declaration* has established corroborating constitutive principles that affirm and explain Aboriginal peoples' constitutional rights.[60] Its seventh preambular paragraph affirms that the rights and standards are "inherent" or pre-existing; they are not new rights.[61] It reflects the existing global consensus that Indigenous peoples are the bearers of inherent and inalienable human rights.[62] The *Declaration* directly incorporates the international treaties on human rights law to Indigenous peoples and is crucial to interpreting the other articles.[63] It affirms the inherent human rights of Indigenous peoples to "practice and revitalize . . . cultural traditions and customs";[64] to "manifest, practice, develop and teach their spiritual and religious traditions customs, and ceremonies";[65] to "revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures";[66] and to "maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions."[67] These rights affirm the distinct Indigenous domain, eliminating the epistemicide of Indigenous knowledge systems and ensuring cognitive justice.[68]

Moreover, the UN Expert Mechanism on the Rights of Indigenous Peoples clarified the scope of the Indigenous domain:

> Indigenous peoples' cultures include tangible and intangible manifestations of their ways of life, achievements and creativity, and are an expression of their self-determination and of their spiritual and physical relationships with their lands, territories and resources. Indigenous culture is a holistic concept based on common material and spiritual values and includes distinctive

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59. *Sparrow*, *supra* note 43; *Van der Peet*, *supra* note 43.

60. *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), art 37(1) [*UNDRIP*]. In July 2017, the Government of Canada promised to fulfil its commitment to implementing UNDRIP by reviewing laws, policies, and other collaborative initiatives and actions. "Principles Respecting the Government of Canada's Relations with Indigenous Peoples" (14 February 2018), online: Department of Justice <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

61. *Ibid*, Preamble.

62. Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Harvard University Press, 2012). For the link between human rights and intellectual property rights, see Laurence R Helfer, "Toward a Human Rights Framework for Intellectual Property" (2007) 40 UC Davis L Rev 971 at 975.

63. *UNDRIP, supra* note 60, art 1.

64. *Ibid*, art 11.

65. *Ibid*, art 12.

66. *Ibid*, art 13.

67. *Ibid*, art 31.

68. Catherine A Odora Hoppers, "Indigenous Knowledge and the Integration of Knowledge Systems" in Catherine A Odora Hoppers, ed, *Indigenous Knowledge and the Integration of Knowledge System*s (Claremont: New Africa Books, 2002) 2; Boaventura de Sousa Santos, ed, *Cognitive Justice in a Global World: Prudent Knowledges for a Decent Life* (Lanham: Lexington, 2007) refers to the epistemic dominance of Eurocentrism as "abyssal thinking" and the need for recognition of epistemic diversity and cognitive justice. Also see Santos, *Epistemicide*, *supra* note 13 at 12, 240.

> manifestations in language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behaviour, habits, tools, shelter, clothing, economic activities, morals, value systems, cosmovisions, laws, and activities such as hunting, fishing, trapping and gathering.[69]

The Indigenous domain is neither intrinsically pure nor absolute; it is dynamic and resilient. It remains responsive to a continuous process of regenerating heritages, strategies, and innovations that encompass the entire spectrum of life. It is not primitive, an artifact of the past, or static. The countless generations that have been the diligent innovators of the holistic and dynamic Indigenous peoples' knowledge systems and languages can be intelligibly referenced in the languages. These knowledge systems have laws and rituals about transmission and use of knowledge, creativity, and innovation built into their languages. The Indigenous domain has always been generated from and maintained by knowledge keepers who act as custodians of the developed knowledge system, including its transmission, use, and redevelopment. These relationships are mediated and reflected in creation stories, songs, ceremonies, and expressions integral to the Indigenous domain's distinctive features. In many nuanced and complex ways, over the generations the Indigenous domain has developed the complex laws and customs by which knowledge and its cultural expressions are generated, curated, protected, applied, shared, and flourish. This tangible and intangible domain continues to develop creatively in response to and in interaction with visions, spiritual and external forces, and knowledge systems.

The SCC has stated that the Indigenous peoples' modern practices, traditions, or customs that have a reasonable degree of continuity with the vested law, traditions or customs, and practices that existed before contact with Europeans or at the critical date of the British sovereign assertion of protective jurisdiction over Indigenous peoples' territory are constitutionally protected. While the SCC has implicitly acknowledged the manifestation of the Indigenous domain, it has failed to understand how the core of Indigenous peoples' knowledge is interrelated and maintains the Indigenous domain that regulates the relationship in harmony.[70] The Indigenous domain stresses the "origin" in the concept of originality, rather than the Canadian focus on newness. Eurocentric and Canadian literature artificially separated the *sui generis* Indigenous domain into Eurocentric categories. However, these categories are a poor fit as it destroys Indigenous legal meanings.[71] The Indigenous domain and its manifestation cannot be divorced from the interpretive communities that give it meaning. Indigenous peoples in their diverse languages usually refer to the holistic domain as Indigenous knowledge.

These dynamic and defining features of the Indigenous peoples' laws, traditions, customs, and practices that have been "integral to the distinctive culture" inform the contemporary Indigenous domain.[72] These features distinguish or characterize the Indigenous domain and the

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69. *Promotion and Protection of the Rights of Indigenous Peoples with Respect to the Cultural Heritage,* 19 August 2015, A/HRC/30/53 at para 7.

70. Leroy Little Bear, "Jagged Worldviews Colliding" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77 at 81.

71. Shubha Ghosh, "Traditional Knowledge, Patents, and the New Mercantilism (Part II)" (2003) 85 J Pat & Trademark Off Soc'y 885.

72. *Van der Peet*, *supra* note 43 at paras 54–59.

core of the peoples' identity.[73] The SCC has stated that Indigenous peoples' culture is "really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, legal systems, and potentially, their trading habits."[74]

Indigenous peoples consider the Indigenous domain vital to their life, culture, and identity. The Indigenous domain is not frozen in its pre-contact form: Ancestral visions and creativity reveal many modern expressions. Moreover, the Indigenous peoples' right to a way of life generally encompasses other rights necessary to its meaningful exercise.[75] Any attempt to restrict Indigenous peoples' constitutional rights requires the government to justify infringement.[76] The SCC has suggested that the laws, traditions, customs, and practices that Indigenous peoples consider marginal or incidental to the modern exercises of ancestral laws to the cultural identity of Indigenous peoples can be limited or excluded from constitutional protection but may be protected by treaties or legislation.

The Indigenous peoples of Canada's constitutional rights are intimately linked to the Indigenous domain's multiple and diverse versions. These versions protect the ancestral creative ideas, arts, and trade as well as modern expressions. They are connected in the same way as the statutory intellectual property rights are integrally linked to the various public domains. However, they establish a distinct constitutional domain, with no transference to the Canadian public domains. These relationships can be characterized as a harmonious and eternal synergy of human imagination and creativity.

The Indigenous domain contains customary, interactive, or performance law.[77] The SCC has required that Indigenous peoples' laws be read as equal to Canadian laws.[78] Its decisions affirm the constitutionalized Indigenous domain's separate existence from Euro-Canadian public domains. Through Indigenous peoples' laws and traditions, the constitutionalized Indigenous domain can protect Indigenous heritage, knowledge, and creativity.[79] Indigenous law consists of oral and ceremonial practices regulating communication, exchange, and conduct. It is made up of implicit standards of conduct rather than formulated rules. These standards are tacit, though often exact, guidelines for how people ought to act toward another in particular situations. These performance-based laws determine what one should

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73. Identity is a subjective matter and not easily discerned. See R. L. Barsh and J. Y. Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993 at 1000; *Sparrow*, *supra* note 43 at 1103; *Delgamuukw, supra* note 3 at paras 82–87; John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:1 Const Forum Const 27; Rosemary J Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6:2 Can JL & Jur 249.

74. *Sappier-Gray*, *supra* note 43 at para 45.

75. *Côté*, *supra* note 43; the SCC found that trading rights also confirmed mobility rights.

76. *Sparrow*, *supra* note 43; *Adams*, *supra* note 43; *Côté*, *ibid*; *Nikal*, *supra* note 43.

77. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Henderson, *First Nations Jurisprudence, supra* note 14 at 166–177.

78. *Van der Peet*, *supra* note 43 at paras 18–20, 38, 42; *Delgamuukw, supra* note 3 at paras 45–47, 147, 153; *Tsilhqot'in Nation, supra* note 3 at paras 14, 42.

79. Siegfried Wiessner & Marie Battiste, "The 2000 Revision of the United Nations Draft Principles and Guidelines on the Protection of the Heritage of Indigenous People" (2000) 13:1 St Thomas L Rev 383; Catherine Bell & Robert Patterson, eds, *Protection of First Nations' Cultural Heritage: Laws, Policy and Reform* (Vancouver: University of British Columbia Press, 2009).

expect from one's family and tribe in various circumstances, and what they, in turn, can and will demand of you.

Every Indigenous person is an heir of the ancestral intellectual heritage, creators in their life, and messengers to future generations. They apply to categories of relationships rather than to general classes. They exist in every form of ecological and cultural life, but there are situations where the laws are exclusive. Canadian law of intellectual property needs to uplift Indigenous knowledge to a place of prominence in the tapestry of learning, research, scholarship, creativity, and community engagement. Indigenous peoples' knowledge and their ways of being, knowing, and doing—philosophies, languages, methodologies, pedagogies—are sources of inspiration that enrich Canadian society.

A. Constitutional Supremacy of the Indigenous Domain

A significant part of the decolonizing and Indigenization of Canada's knowledge governance and intellectual property law is respecting the constitutionalized Indigenous domain. The constitutional affirmation of Aboriginal peoples' rights unsettles the existing Canadian constitution and legislation. It provides Indigenous peoples with an innovative and evolving base for challenging laws inconsistent with their constitutional rights. Government and courts have a constitutional obligation to make intellectual property law consistent with the Indigenous domain.

The constitutional supremacy requires governmental laws, regulations, and policies consistent with Aboriginal peoples' constitutional rights to be valid law.[80] The SCC has stated that it is an error of law for any government or courts to rely on a "presumption" that any federal or provincial law is constitutional.[81] Moreover, Canadian courts have an obligation to strike down federal and provincial law as of no force or effect to the extent that it is inconsistent with Aboriginal peoples' constitutional rights. The SCC has held that courts can issue declarations of failures to fulfil constitutional obligations toward Indigenous peoples and that the "principles of legality, constitutionality and the rule of law demand no less."[82] Consistent with the communal nature of Aboriginal peoples' constitutional rights, the SCC has said it is appropriate to read down inconsistent legislation to exempt Aboriginal peoples from it rather than to strike the legislation down in its entirety.

The public domain and the federal and provincial intellectual property laws have to be consistent with the Aboriginal peoples' constitutional rights to be valid. But they are not. The Canadian intellectual property laws are not neutral. They discriminate against and freely take from various manifestations of the Indigenous domain. The distinction between the Indigenous and Canadian public domains has not been clarified.

Indigenous peoples of Canada need to affirm an Indigenous domain that reflects and protects their Indigenous knowledge system in the face of Canada's indifferent intellectual property laws. Canada needs to remedy its discriminatory, divisive, and demeaning intellectual property law toward the Indigenous domain. These discriminatory laws have to be replaced with an honourable, respectful, consistent, meaningful, ethical approach to the Indigenous

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80. *Constitution Act, 1982*, *supra* note 21, s 52(1).

81. *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 at paras 12–26.

82. *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 140 [*Manitoba Metis*].

domain. This approach requires the governments to explore with Indigenous peoples how to accommodate and nourish their constitutional rights to protect their creative rights.

Little in the text of Canada's constitution informs us how to give meaning to the context or text of the constitutional acts, much less how to reconcile it with the Aboriginal peoples' constitutional rights with other constitutional rights. Justice McLachlin for the SCC has articulated the controlling doctrine of constitutional convergence among its parts: "It is a basic rule . . . that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution."[83] This horizontal constitutionalism requires the governments and courts to generate a "symbiosis" of the constitution's different parts that compose the supreme law of patriated Canada, but none is absolute over the other.[84]

More importantly, nothing in the constitution's text reveals how to read Indigenous knowledge, laws, treaties, and acts together to comprehend the Indigenous domain's scope and nature. The constitution of Canada does not include an express grant of power with respect to "knowledge" or "culture" in its division of power to either the federal or provincial government. Courts have stressed the need to constitutionally reconcile and balance Aboriginal peoples' rights with the Crown's assertion of sovereignty. From the long colonial era, they have acknowledged a particular danger that the interests of governments and the majority will dominate and overshadow Aboriginal peoples' constitutional rights. They have at times recognized this danger; unfortunately, they have not always resisted it.

The rights and materials of the various Indigenous domains have always existed outside the public domains of Eurocentric colonialism and the imposed categories or characteristics of the intellectual property rights carried over or developed by the immigrant-settlors to Indigenous territories. These constitutional protections of the Indigenous domain limit any transference to the federal intellectual property rights and its residual public domains. Where any legislation or common law rule is inconsistent with the constitution, the SCC has stated that the legislation or common law should be modified, if possible, to comply with constitutional rights.[85] The Indigenous domain cannot be based on Eurocentric or Canadian facile assumptions, traditions, or laws. They reflect the distinctive and creative practices, perspectives, and cultures of the Indigenous nations from which they originate and are maintained by the Indigenous domain, and they should not be discounted because they do not conform to Eurocentric perspectives and laws. Thus, the SCC has cautioned against facilely rejecting Indigenous laws because they convey or contain elements classified in Eurocentric law as mythology, lack precise detail, embody material viewed as tangential, or are confined to a particular Indigenous people.[86]

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83. *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 373, 390; see also *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 52 [*Quebec Secession Reference*].

84. *Quebec Secession Reference*, *ibid* at paras 49–50, 93; *Sparrow*, *supra* note 43 at 1109; *Van der Peet*, *supra* note 43 at paras 42, 49–50; *Delgamuukw, supra* note 3 at paras 82, 148. See the partial attempts in *R v Badger* [1996] 1 SCR 771 [*Badger*] reading together Treaty No 8 (1899) with the Natural Resources Transfer Agreement in *Constitution Act*, 1930 and s 35 of *Constitution Act*, *1982*.

85. See *Charter* cases, *R v Swain*, [1991] 1 SCR 933 at 978–79; *R v Salituro*, [1991] 3 SCR 654 at 675; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 878; *Hill v Church of Scientology*, [1995] 2 SCR 1130 at para 91; *R v Golden*, [2001] 3 SCR 679 at para 86.

86. *Mitchell*, *supra* note 43 at para 34.

The SCC has affirmed that governments and courts will enforce Aboriginal peoples' constitutional rights equal to any other constitutional rights.[87] It has held that Aboriginal peoples' constitutional rights are "unalterable by the normal legislative process and unsuffering of laws inconsistent with it."[88] The Canadian judiciary has a duty "to ensure that the constitutional law prevails" in all cases.[89] Although Aboriginal peoples' rights have distinct origins and purposes from other constitutional rights, their distinctiveness should not excuse governments or the courts from giving Aboriginal peoples' constitutional rights the same generous treatment as other constitutional rights.[90] Aboriginal peoples' constitutional rights are not second-class constitutional rights that can be discriminated against by governments or courts.

When enforcing the Indigenous domain aligned with these constitutional rights, courts take a purposive approach, as they do with other constitutional rights.[91] Under a purposive approach, governments and courts must be sensitive to and advance Aboriginal peoples' constitutional rights and distinct purposes in examining federal or provincial laws. They have to be aware that Aboriginal peoples' constitutional rights are based on their laws and perspectives, rather than Eurocentric or Canadian laws and perspectives.[92] These laws and perspectives are derived from the fact that when Europeans arrived in North America, Indigenous peoples "*were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[93] Moreover, Aboriginal peoples' rights are distinct from the Eurocentric liberal enlightenment rights but are still based on each person's "inherent dignity."[94] Nonetheless, Aboriginal peoples' rights are more significant protection than the *Charter* rights, since the *Charter* rights cannot abrogate or derogate from Aboriginal peoples' rights.[95] In the constitution, the SCC has stated that Aboriginal peoples' constitutional rights are equal in importance and significance to the *Charter* rights, although governments and courts must view Aboriginal peoples' rights differently from *Charter* rights.[96]

Indigenous peoples' inherent powers and distinct laws, traditions, and customs make the constitutional purposive analysis challenging. At times, the courts have imposed fiduciary duties on the Crown in recognition of the colonial-type power that governments have had and in some cases continue to exercise over Indigenous peoples.[97] After recognizing and affirming Aboriginal peoples' constitutional rights, the SCC recognized the need for a distinctive approach to enforcing Aboriginal peoples' rights, including the Crown's fiduciary obligations and honourable governance.[98] This approach to Crown conduct is stricter than

87. *Van der Peet*, *supra* note 43 at para 19.

88. *Sparrow, supra* note 43 at 1006 citing *Reference re Manitoba Language Rights,* [1985] 1 SCR 721 at 745.

89. *Sparrow*, *ibid* at 1106.

90. John Borrows, "(Ab)Originalism and Canada's Constitution" [2012] 58 SCLR (2d) 351.

91. *Van der Peet*, *supra* note 43 at paras 17–22, 26–43.

92. *Ibid* at para 20.

93. *Van der Peet*, *ibid* at para 30.

94. *Van der Peet*, *ibid* at paras 18–19.

95. *Charter*, *supra* notes 21, 57, s 25.

96. *Van der Peet*, *supra* note 43 at para 19.

97. *Van der Peet*, *ibid* at paras 24–25; *Sparrow*, *supra* note 43 at 1108–1109.

98. *Sparrow*, *ibid* at 1107–1109; *Adams*, *supra* note 43 at para 54.

the constitutional standard of good government.[99] In situations where courts have found that pre-1982 governmental actions have not breached the *sui generis* fiduciary duty, they may issue declarations that the government has not discharged its constitutional obligations in a manner consistent with the honour of the Crown.[100]

In the imperial Treaties, Indigenous nations and tribes retained their jurisdiction and laws over their knowledge and cultures. The SCC has commented that "[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982."[101] The treaties are not a systemic view of either legal system; they are partial agreements or reconciliations of each sovereign's distinct legal traditions. The common law courts have affirmed that in the terms of most of the treaties the British sovereign did not give Indians "rights"— the nations gave the British sovereign specific rights or responsibilities in their territory.[102] Neither the oral nor written negotiations nor promises in the reconciled treaties illustrate that the Indigenous nations or tribes clearly or specifically delegated or transferred any jurisdiction of their law regulating knowledge, language, or way of life to the Queen, Canada, or the provinces.[103] Most of the Indigenous nations have retained their knowledge systems, languages, and ways of life within their inherent jurisdiction and laws.[104] As Professor Micheal Asch has stated, Canada needs to constrain its actions to conform with the treaty, understanding that nothing could be more reasonable than a desire to ensure that Indigenous peoples are the custodians of their cultural heritage.[105] The treaty protection of Indigenous peoples' knowledge is part of the constitutional fiduciary obligation and the Crown's honour and integrity.[106]

The SCC has rejected the remedial option of reading down any parliamentary "broad, unstructured administrative discretion" to a minister:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance.[107]

Additionally, the SCC has recognized that the Crown has a unique duty to consult with Indigenous peoples before undertaking actions that may affect their inherent rights.[108] The Crown's duty to consult is based on the constitutional doctrine of the honour of the Crown

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99. *Constitution Act, 1867*, *supra* note 29, s 91.

100. *Manitoba Métis Federation, supra* note 82 at paras 9, 65–110.

101. *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 20 [*Haida Nation*].

102. *United States v Winans*, 198 US 371 at 381, 25 S Ct 662 (1905) (A treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted"). See generally "Indian Canon Originalism" (2013) 216 Harv L Rev 1100.

103. *Badger*, *supra* note 84 at para 41; *Marshall*, *supra* note 54 at para 78.

104. Even where a treaty is silent on an issue, the nations and tribes reserve the right to maintain their way of life: *Menominee Tribe v United States*, 391 US 404 at 406, 88 S Ct 1705 (1968).

105. Allooloo et al, *supra* note 52.

106. *Sparrow*, *supra* note 43 at 1107–1108 and 1114; *Badger*, *supra* note 84 at para 41; *Marshall*, *supra* note 54 at para 4.

107. *Adams*, *supra* note 43 at para 54.

108. *Haida Nation, supra* note 101 at paras 10, 16–25.

in its dealings with Indigenous peoples.[109] The governmental obligation to consult applies to Indigenous peoples' claims whether they have been confirmed or not. This responsibility is part of the reconciliation and negotiation process with countervailing constitutional rights and law. However, many times this results in epistemic exploitation. This concept applies to consultations about the Indigenous and Canadian intellectual property laws.

The SCC has held that the duty to consult with holders of Aboriginal and treaty rights to protect and promote their constitutional rights is required by the constitutional supremacy clause, the Crown's honour, and the goal of constitutional reconciliation of powers and rights. It has stated that the constitutional duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal peoples' constitutional rights and contemplates conduct that might adversely affect it.[110]

The way that the Crown has discharged its duty to consult and accommodated the Indigenous domain is relevant to determinations of whether the Crown has breached a fiduciary duty or justified a limit on section 35(1) rights. Negotiation is a flexible and participatory process well suited for recognizing the Indigenous domain's evolving and dynamic nature and reconciling Aboriginal rights with other constitutional rights or interests. However, the desire to achieve constitutional reconciliation should not be a governmental excuse to avoid recognizing the Indigenous domain and justify limiting these inherent constitutional rights or remedies.

The SCC has stated that the constitutional reconciliation with Indigenous peoples' rights does not mandate any particular content. A fair and honourable reconciliation will respect Aboriginal peoples' constitutional supremacy over federal and provincial law.[111] The SCC observed:

> reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people.[112]

These constitutional principles apply to the existing intellectual property laws that either deny or neglect the Indigenous domain's existence. Canadian intellectual property laws are not consistent with the Indigenous domain. They are distinct legal regimes. They need to be constitutionally reconciled and made consistent with the Indigenous domain.

Effective reconciliation and meaningful protection for the Indigenous domain with Canadian intellectual property laws are required and needed. The purpose of reconciling Aboriginal peoples' rights with the Canadian intellectual property laws is similar to the purposes of the seminal English *Statute of Monopolies* that defined patents of inventions as exceptions to the rule that would otherwise render commercial monopolies "utterly void and

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109. *Haida Nation*, *ibid* at paras 16–20.

110. *Haida Nation, supra* note 101 at paras 19 and 35.

111. *Constitution Act*, *1982*, *supra* note 21, s 51(2).

112. *Haida Nation*, *supra* note 101 at para 32.

of no effect."[113] The English statute's purpose was to remedy the grievance of inconvenience caused to the public by monopolies of commercially useful technology and trade.

In 2002, Industry Canada and Canadian Heritage acknowledged in its report to Parliament on the *Copyright Act* the predicament of traditional knowledge and traditional cultural expressions. They noted that these issues need consultation on the most appropriate way to protect the traditional knowledge and traditional cultural expressions.[114] Much governmental uncertainty remains about protecting Indigenous peoples' knowledge. The law may protect some creations or innovations related to Indigenous peoples' knowledge; however, the distinction between Indigenous peoples' creative works inspired by their knowledge system or other sources often remains vague and tenuous. Indigenous peoples' knowledge is intergenerational; it continually develops and is re-created.

No easy trans-systemic transferability or compatibility exists between Aboriginal peoples' rights and Canadian intellectual property rights. The perceived incommensurability arises in the intersection of Euro-Canadian and Indigenous knowledge systems. Euro-Canadian assumptions, categories, and justifications are not commensurable with Indigenous peoples' knowledge systems. European Enlightenment created these assumptions to classify humanity's stages, racism, and colonial identification of non-Europeans. The purpose of Canadian intellectual property laws is to secure economic returns for an individual creative, productive, and innovative process that is not always compatible with most Indigenous peoples' objectives. When the Canadian intellectual property laws and its categories extended to Indigenous peoples' knowledge, it often regenerated cultural appropriation issues.

A pretense of benign translation has mediated the contemporary concern of Indigenous peoples' knowledge with Canadian knowledge. Eurocentric disciplinary knowledges have attempted to translate Indigenous knowledge into their frameworks. Such adaptations or incorporations are often not compatible, as the translation requires foundational transformations in how knowledge is understood and how it is shared. The superiority of Eurocentric knowledge is presumed in most translations. That questionable presumption sheers off the complexity, interconnection, and intelligibility of Indigenous peoples' knowledge systems to render them legible. The Canadian knowledge systems' historical construction has generated many negative stereotypes. Thus, Indigenous peoples have rejected these past translations and transformations.

Canadian public domains or the intellectual property laws cannot limit the constitutionalized Indigenous domain. These laws have to be consistent with the Indigenous domain, but the Indigenous domain does not have to be consistent with these domains and laws. Without Indigenous peoples' consent, the Canadian intellectual property laws cannot commercialize or individualize the Indigenous domain.

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113. *Statute of Monopolies*, 1623, (Eng) 21 Jac 1, c 3.

114. Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act (Copyright Act—Section 92 Report)* (October 2002) at 29. Industry Canada administers the *Copyright Act*, while Canadian Heritage is responsible for the cultural aspects of copyright policy.

IV CONCLUSION

The endless story of being human means being both the inheritors of epistemic heritage and knowledge systems as well as the creators and innovators of the future. The significant source of conflict and tension in ongoing discussions about intellectual property in Canada and internationally has been the prevailing "public domain" doctrine. The public domain doctrine continues the Eurocentric construct of colonialism, imperialism, and empire. It extends a historically prejudicial view of Indigenous peoples' knowledge as part of an unprotected commons. Without the Indigenous peoples' consent, the imposed public domain doctrine represents the Indigenous knowledge and its creative expression as available to the public to access and use freely. It is a discriminatory and rhetorical tool of avoidance used by transnational corporations and nations to restrain or exclude their free access to Indigenous knowledge, inspiration, and resources. Still, the public domain doctrine lacks any uniform definition; no single public domain exists nationally or internationally. Instead, every type of intellectual property has constituted different public domains.[115] Nevertheless, the Indigenous domain is denied intellectual property law protections. This exception denies Indigenous knowledge holders the ability to protect and maintain their creative processes' distinctiveness to retain their vibrant, diverse creative expressions and arts. The Eurocentric conception of knowledge and intellectual property rights has dismissed and undermined the Indigenous domain. It reveals discrimination and unfair trade practices.

Although Eurocentric and Canadian intellectual property laws have not protected Indigenous knowledge and creative processes, Indigenous laws always have. The Eurocentric laws' lack of protection does not suggest that Indigenous knowledge is freely accessible in the public domain. Indigenous laws have always structured the Indigenous domain. The appropriation, misappropriation, and misuse of Indigenous knowledge within the European and Canadian legal system have caused Indigenous peoples many harms.[116] Canada has addressed the harms by the constitutional protection of inherent and treaty rights. These harms should not extend to the future. In Canada, these harms are a violation of constitutional rights.

Canada needs to decolonize and indigenize its intellectual property system as a matter of constitutionalism and the rule of law. It needs to create a fair and balanced intellectual property system that works for everyone, including the Indigenous peoples of Canada. The existing intellectual property laws are required to be consistent with Aboriginal peoples' constitutional rights.[117] In 2019, Canada promised to renew the existing intellectual property

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115. Okediji, "Traditional Knowledge", *supra* note 16 at 6–8.

116. Rebecca E Tsosie, "Indigenous Identity, Cultural Harm, and the Politics of Cultural Production: A Commentary on Riley and Carpenter's 'Owing Red'" (2016) 94 Texas L Rev 250.

117. Romeo Saganash led a multi-year effort for Indigenous peoples of Canada to integrate UNDRIP into federal law. His private member bill, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on Rights of Indigenous Peoples*, passed in the House of Commons and Senate but languished when Parliament ended; "Bill C-262" (June 2019), online: *Open Parliament* <https://openparliament.ca/bills/42-1/C-262>. In 2019, the BC legislature enacted the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, which integrates the UN Declaration into provincial law; (November 2019), online: *CanLII* <https://canlii.ca/t/544c3>. In 2021, the Government of Canada enacted Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*. This act would ensure that the Government of Canada takes all measures necessary to make the laws of Canada consistent with the UNDRIP, and it required Canada to prepare and implement an action plan to achieve the objectives of UNDRIP.

law as part of its program to support economic development and innovations.[118] Canada's intellectual property law needs to acknowledge the Indigenous domain as a constitutionally protected living system to provide for the integrity, continuity, and security of Indigenous peoples' inherent intellectual property rights, such as Indigenous knowledge, cultural expression, and art, both tangible and intangible.

The Government of Canada can recognize Indigenous peoples' laws as part of the constitutional Indigenous domain or cooperate with Indigenous rightsholders and artists to establish protective legislation that gives intellectual property-style protection to Indigenous heritage, knowledge systems, and cultural expressions. As a minimum first step, the Canadian intellectual property laws should be amended to explicitly protect and promote Indigenous peoples' knowledge and cultural and artistic expressions with a non-derogation clause.[119] The non-derogation clause should state the following:

> For greater certainty, nothing in this Act shall be construed to abrogate, derogate, or infringe from any existing aboriginal or treaty rights of the Aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*, but it shall be construed to protect and promote these constitutional rights.

The non-derogation clause is a "shield" that protects and affirms Aboriginal peoples' constitutional rights from other guaranteed rights or freedoms of Canadians and safeguards their collective rights. As a second step in implementing Aboriginal peoples' constitutional rights, Canada needs a strategy to establishing protective legislation that gives intellectual property-style protection to Indigenous peoples' heritage and knowledge systems. Canada must develop this strategy in cooperation with Indigenous artists and keepers of the law through additional consultations. The Indigenous artists and keepers of the law may choose to protect them by Indigenous law under their constitutional rights or work with the government to establish protective federal legislation.

The Canadian public domains should not continue to be used as a universal excuse that justifies the appropriation or denial of Indigenous peoples' knowledge. The Canadian intellectual property law has to respect the Indigenous domain and Indigenous peoples' law concerning knowledge and creativity.

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118. House of Commons, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology* (June 2019) (Chair: Dan Ruimy) at 26–31, recommendation 5.

119. *Charter*, *supra* 21, s 25.