STOPPING THE DESTRUCTION OF INDIGENOUS LANGUAGES: A CALL FOR REVISED INDIGENOUS LANGUAGES LEGISLATION AND AMENDMENTS TO THE *COPYRIGHT ACT*

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CONTENTS

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I INTRODUCTION

A. Indigenous Languages and "Intellectual Property"

This article argues that Canada has an ethical and a legal duty to protect Indigenous languages because those languages are vehicles for and integral to Indigenous cultures. Since Indigenous languages are intrinsically tied to Indigenous Traditional Knowledge (TK) and Traditional Cultural Expression (TCE), the federal and provincial governments should ensure that legislation affecting Indigenous languages, including the *Copyright Act* and the *Indigenous Languages Act*, protect rather than harm Indigenous languages. This is especially important given the rapid pace at which Indigenous languages are disappearing[1] and the destruction that the *Copyright Act*[2] and the *Indigenous Languages Act*[3] enable today. Put differently, this article argues that the duty of the state to protect Indigenous languages requires amendments to the *Copyright Act* and the *Indigenous Languages Act* and that, for those amendments to be effective, they must be guided by the voices of Indigenous scholars, governments, and traditions. This is because amendments to the *Copyright Act* and *Indigenous Languages Act* that are rooted in Indigenous cultures are more likely to reflect extant methods of Indigenous knowledge governance, to be responsive to the needs of those cultures, and, conversely, to avoid causing express or unintentional harm to Indigenous languages, cultures, and peoples.

B. Indigenous Languages

Languages are vehicles for ideas. Particular languages contain terms that do not exist in any other, and differences in vocabulary, syntax, and grammar shape the way speakers think.[4] This makes the protection of Indigenous languages essential to the protection of the ideas that they encompass; the loss of distinct languages means the loss of the unique ideas and worldviews that those languages contain or, put differently, the loss of *culture*.

Prior to contact with Europeans, what is now Canada was home to a plethora of unique Indigenous languages. But while many Indigenous peoples still speak these languages, "the precarious state of Canada's original languages is well documented."[5] The problem is

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1. Lera Boroditsky, "How Does Language Shape the Way We Think?" (11 June 2009), online: *Edge* <www.edge.org/conversation/lera_boroditsky-how-does-our-language-shape-the-way-we-think> at para 2.

2. Andrea Bear Nicholas, "Who Owns Indigenous Cultural and Intellectual Property?" (27 June 2017), online: *Policy Options Politiques* <policyoptions.irpp.org/magazines/june-2017/who-owns-indigenous-cultural-and-intellectual-property/>. ("Canada's laws . . . have worked not only to ignore and/or specifically deny the rights of Indigenous peoples to practice and maintain their cultural and intellectual property but also to legalize the theft of Indigenous cultural and intellectual property through the *Copyright Act*" [at para 4].)

3. Donna Lee, "New Indigenous Languages Law Does Not Protect Inuit Languages, Leaders Say" (27 June 2019), online: *CBC News* <https://www.cbc.ca/news/canada/north/inuit-languages-bill-c91-nunavut-1.5191796>. (While the government claims that the *Indigenous Languages Act* was developed in collaboration with Indigenous peoples, "Nunavut Tunngavik Inc., the land-claim organization representing Inuit in Nunavut, says the legislation was not co-developed with Inuit" [at para 4]; this article argues that the ILA conceals the ongoing plight of Indigenous languages, perpetuating the government's complacency in the face of the destruction of Indigenous languages.)

4. Boroditsky, *supra* note 1 at paras 2, 3, 14.

5. Nick Walker, "Mapping Indigenous Languages in Canada" (15 December 2017), online: *Canadian Geographic* <canadiangeographic.ca/article/mapping-indigenous-languages-canada> at paras 1, 3.

widespread, affecting many (if not all) Indigenous languages. Even Inninimowin, which "is considered the best-preserved Indigenous language in Canada, is at risk of disappearing."[6]

The destruction of Indigenous languages is intrinsically linked to the destruction of the cultures they are tied to, which find expression in Indigenous TK and TCE. As this article will demonstrate, any characterization of Indigenous TK and TCE as intellectual property is flawed and inaccurate. However, the impact of intellectual property legislation, in particular the *Copyright Act*, on Indigenous languages illustrates a legal problem related to the language and culture loss that threaten Indigenous ways of life in Canada. In enacting statutes such as the *Copyright Act* and, more recently, the *Indigenous Languages Act*, the state has not only failed to meet its duty to protect Indigenous languages, TK, and TCE, but has created legislation that actually does violence to Indigenous languages. This article argues that the exclusion of Indigenous voices and perspectives from legislative processes, with the continued and exacerbated destruction of Indigenous languages as the sad result, is the cause of that damage.

C. Traditional Knowledge and Traditional Cultural Expression

Knowing that languages contain unique, untranslatable ideas, it is perhaps unsurprising that what members of Canada's dominant culture might conceptualize as Indigenous versions of "intellectual property" defy such categorization. Differences between Indigenous and non-Indigenous legal concepts have long characterized the acrimonious relationship between Indigenous peoples and the Canadian government, and they problematize the application of Canadian laws to Indigenous peoples. Most often, Indigenous peoples have been forced to adapt to non-Indigenous laws. But sometimes the law has adapted in response to Indigenous legal traditions. This article argues that, just as the existence of Aboriginal title required the common law to adapt,[7] the unique characteristics of TK and TCE require the evolution of the *Indigenous Languages Act* and of at least one component of the Canadian intellectual property regime, the *Copyright Act*. It further argues that the necessary evolution should be guided by the voices of Indigenous legal traditions, scholars, and peoples.

For clarity, in this article TK "generally refers to the know-how, skills, innovations and practices developed by Indigenous peoples related to biodiversity, agriculture, health, and craftsmanship. TCEs generally refer to tangible and intangible forms in which TK and culture are expressed and may include oral stories, artwork, handicrafts, dances, fabric, songs or ceremonies."[8] While these are "creations of the mind,"[9] and therefore (arguably) should be protected by intellectual property (IP) law, in reality it provides only limited protection to TK and TCE. And the IP regime sometimes actively threatens Indigenous knowledge. The Canadian government has already recognized this harm:

> Indigenous knowledge and the IP system are based on different worldviews and approaches . . . Such differences result in potential gaps where the protections

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6. Jules Koostachin, "Remembering Inninimowin: The Language of the Human Beings" (2012) 27:1 Can JL & Soc'y 75 at para 3.

7. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 73–75.

8. Government of Canada, "Introduction to Intellectual Property Rights and the Protection of Indigenous Knowledge and Cultural Expression in Canada" (26 August 2019), online: *Government of Canada* <https://www.ic.gc.ca/eic/site/108.nsf/eng/00007.html> at para 2.

9. *Ibid* at para 3.

> under the formal IP system do not extend to some types of Indigenous knowledge and cultural expressions. Indigenous peoples may also find that barriers hinder their use of the formal IP system.[10]

Why are IP protections unavailable to many forms of TK and TCE? Their inherent characteristics (or *sui generis* nature) help to explain. They are described in Part V below.

D. A Roadmap

This article argues that the Canadian state can best fulfil its ethical and legal duty to protect Indigenous languages by amending legislation that currently harms Indigenous languages and that such amendments should be guided by Indigenous voices. That is because the protection of Canada's original cultures is vital and requires ongoing legislative action by the Canadian government. But, for such legislation to not only stop the damage that is being done to Indigenous languages but also preserve Indigenous TK and TCE,[11] any legislative amendments must be guided by Indigenous scholars, peoples, and traditions to ensure they reflect extant modes of Indigenous knowledge governance, which will help ensure that the legislation does not contribute to the continued destruction of Indigenous languages.

This article begins by exploring the harm that the *Copyright Act* has done to a particular Indigenous language, Maliseet.[12] Next, it describes the roots of Canada's ethical and legal obligation to protect Indigenous languages, TK, and TCE; critiques the recently enacted *Indigenous Languages Act*; and argues that the federal government bears the majority of the responsibility for taking such protective action. It then describes certain characteristics of TK and TCE that place them at odds with the existing *Copyright Act*. Finally, it identifies specific failures of the *Indigenous Languages Act* and of the *Copyright Act* in protecting Indigenous languages, TK, and TCE. The article stops short of providing specific recommendations for the necessary amendments because the author is non-Indigenous; providing specific recommendations would undercut the article's message: Such amendments should be guided by *Indigenous voices* to avoid unintentional neocolonial impacts.[13]

E. Where I Find Myself

I pause here to introduce myself: I am a second-year law student whose home is in northwestern Ontario. I am non-Indigenous but live on Indigenous land: My hometown and law school are located on the traditional land of the Fort William First Nation, a signatory to the Robinson-Superior Treaty of 1850. I share this to pay my respect to the original custodians of the land and to assert that I do not speak for Indigenous peoples. I also share it to begin to highlight the linguistic and epistemological differences between my culture and Indigenous cultures. "Indigenous authors often begin a text by situating themselves with respect to their subject matter [while non-Indigenous authors make] a conscious effort to *remove* any

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10. *Ibid* at para 8.

11. *Ibid* at para 2.

12. Nicholas, *supra* note 2 at 2.

13. Lee, *supra* note 3. (Obscuring the continued destruction of Indigenous languages permits the government and non-Indigenous public to remain complacent, which permits the destruction to continue.)

indication of the speaker's identity from his or her text."[14] This is a significant difference. It speaks to divergent cultural conceptions of relationality, reality, and scholarship that are not only expressed by but contained within each speaker's language, and it shows the importance of protecting Indigenous languages such as Maliseet.[15]

II THE MALISEET TAPES

The story of the Maliseet Tapes is a particularly odious example of cultural appropriation that was enabled by the *Copyright Act*[16] and the absence of effective Indigenous languages and knowledge governance legislation. A more detailed analysis of the *Copyright Act* is provided in Part V of this article; for the purposes of understanding the story of the Maliseet Tapes, it is sufficient that readers understand that copyright protects the fixation of ideas, not ideas themselves,[17] and that copyright is vested in the individual who fixes the ideas (the author).[18] For example, under the *Copyright Act*, an individual who records or transcribes a story owns the copyright in that story.

In the 1970s and 1980s, a Canadian university professor began to collect (by recording) traditional Maliseet stories.[19] These stories were collectively held and orally transmitted: They did not have particular, identifiable authors and were not fixed until the professor recorded the stories and transcribed the elders' translations of them. This meant that the professor, not the families that held and transmitted the stories, owned the copyright in their fixed expression.

The professor had undertaken the project after agreeing to convey copyright to the families of the storytellers once the project was complete.[20] Pursuant to the agreement, members of the Maliseet community eventually paid for the reel-to-reel tapes on which the stories were recorded, after the professor agreed to convey copyright along with the tapes. However, in the end, the professor "delayed conveying copyright to the families until 2004, when he refused to honour the agreement."[21]

Notably, like other Indigenous languages, Maliseet is endangered. "In the decade since negotiations with the copyright holder, the Maliseet language has dropped two categories in UNESCO's scale of language endangerment—from 'definitely endangered' to 'severely endangered,' and now to 'critically endangered.'"[22] The tapes and transcriptions could be vital tools in achieving a goal ostensibly shared by Indigenous peoples and the Canadian

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14. Wapshkaa Ma'iingan (Aaron Mills), "Aki Anishinaabek, Kaye Tahsh Crown" (2010) 9:1 Indigenous LJ 107 at 110.

15. Tom McFeat, "Wolastoqiyik (Maliseet)" (10 October, 2018), online: *Canadian Encyclopedia* <https://www.thecanadianencyclopedia.ca/en/article/maliseet>. (The word "Maliseet" is a Mi'kmaq word commonly used to refer to the Wolastoqiyik people; it is used throughout this article because that term was used in all of the articles relied on by the author.)

16. Nicholas, *supra* note 2 at 2.

17. *Copyright Act*, RSC 1985, c C-42, s 3(1).

18. *Ibid* at s 13(1).

19. Nicholas, *supra* note 2 at 2.

20. *Ibid*.

21. *Ibid*.

22. *Ibid* at 3.

government: the rekindling of the Maliseet language through the education of the group's youth. But such use has been hindered by Canadian copyright law. The families of the storytellers must choose between publishing the works with acknowledgement of the author's copyright, which would "constitute consent to what was effectively the theft of their stories,"[23] refrain from any publication, or publish without such acknowledgement and risk being the subject of litigation.

Ultimately, by disincentivizing members of the Maliseet community from reproducing the tapes, copyright law has impeded the dissemination of these important works, contributing to the continued decline of the Maliseet language and, consequently, culture.[24] "This is a result not simply of copyright laws but also of the failure to treat Indigenous linguistic rights in Canada as equal to those of the French and English. . . . Clearly copyright laws have not only reflected that inequality but also aided and abetted it."[25] This commentary echoes critiques of the *Indigenous Languages Act*, discussed further in Part V below.

The story of the Maliseet Tapes demonstrates that the *Copyright Act* fails to address the needs of Indigenous peoples. This is unsurprising: Protecting Indigenous languages and cultures by protecting TK and TCE was not the purpose for which the *Copyright Act* was enacted.[26] However, neglecting Canada's original cultures in this way is a serious legislative failure. This article argues that developing legislation tailored to the goal of respecting the diversity of Indigenous cultures, languages, and TK and TCEs may be an important means of addressing that neglect and, therefore, stopping the destruction of Indigenous languages in Canada.

Developing an entirely new framework that addresses the unique and divergent needs of the various Indigenous peoples, cultures, and languages located in Canada is, admittedly, a daunting task. And it is made more complicated by the impact that legislative attempts to protect Indigenous TK and TCE will have on other interests: Because of this complexity, "it has been nearly impossible for Canadian policymakers in different government departments and at different levels of government to coordinate coherent traditional knowledge policies or governance regimes [and] acknowledging and respecting the self-governance arrangements of indigenous communities adds a further layer of complexity to the issues."[27] Fortunately, Indigenous legal traditions exist that could be applied or integrated into Canada's IP regime or from which inspiration could be drawn for the development of new legislation.[28]

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23. *Ibid*.

24. *Ibid*.

25. *Ibid* at 4.

26. *Théberge v Galerie d'Art du Petit Champlain Inc,* 2002 SCC 34, [2002] 3 SCR 336. (Binnie J explained that the *Copyright Act*'s purpose is to protect the economic interests of copyright holders: "Canadian copyright law has traditionally been more concerned with economic than moral rights . . . The economic rights [protected by the *Copyright Act*] are based on a conception of artistic and literary works essentially as articles of commerce" [at para 12].)

27. Jeremy de Beer & Daniel Dylan, "Traditional Knowledge Governance Challenges in Canada" in M. Rimmer, ed, *Research Handbook on Indigenous Intellectual Property* (Northampton: Edward Elgar, 2015), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336679> at 3.

28. Deborah Mcgregor, "Traditional Knowledge and Water Governance: The Ethics of Responsibility" (2014) 10:5 *AlterNative* 493. (The author suggests that "traditional knowledge-based responses to the water crisis offer an alternative narrative to the dominant discourse" [at 1]; similarly, this article suggests that traditional knowledge governance models offer an alternative to the dominant narrative regarding the protection of Indigenous languages, TK, and TCE.)

Reconciling Indigenous and non-Indigenous legal traditions poses challenges. However, calls for such reconciliation are numerous and growing louder,[29] and precedent exists for the integration of various legal systems in Canada and for the enforcement by Canadian courts of Indigenous laws.[30]

Further, the Canadian government has ethical and legal obligations to stop the destruction of Indigenous languages. And while Indigenous peoples' attainment of self-governance will hopefully permit individual Indigenous peoples to govern their TK and TCE in a manner of their choosing, the urgency of the problem requires prompt and ongoing legislative responses, including the development of more powerful Indigenous languages legislation and of changes to the *Copyright Act* that will enable it to properly protect Indigenous languages and, therefore, TK and TCE while still accomplishing its other valid purposes.

III LOSING LANGUAGES: AN ETHICAL DILEMMA AND A LEGAL PROBLEM

A. The Ethical Arguments

1. Repairing the Damage and Righting Historical Wrongs

The treatment of Indigenous peoples in Canada constitutes genocide, according to the Truth and Reconciliation Commission's (TRC) final report.[31] That report states that the Canadian government "pursued [a] policy of cultural genocide" that begun when Sir John A. Macdonald was prime minister.[32] It goes on to identify residential schooling as a "central element in the federal government's Aboriginal policy"[33] and to describe how, within residential schools, "Aboriginal languages and cultures were denigrated and suppressed."[34] Indigenous children were commonly forbidden from speaking their languages, which was part of the government's "historical policies of assimilation aimed at the destruction of Indigenous languages and culture . . . based on a brute lack of respect for Indigenous law and sovereignty."[35] Abuse was common,[36] and some methods of control and punishment were extremely violent. Anker relates, for example, an account of sewing needles being

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29. Doug Beazley, "Reconciling Ourselves to Indigenous Law" (12 June 2019), online: *CBA/ABC National* <https://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2019/reconciling-indigenous-and-crown-law> at para 7.

30. *Campbell v British Columbia (Attorney General),* [2004] BCJ No 1524, 189 DLR (4th) 333 (BCSC). ("Since 1867 courts in Canada have enforced laws made by aboriginal societies" [at para 86].)

31. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission* (Montreal: McGill-Queen's University Press, 2015) [TRC Summary] at 1–3.

32. *Ibid* at 2.

33. *Ibid* at 3.

34. *Ibid.*

35. Kirsten Anker, "Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" (2016) 33:2 Windsor YB Access Just at 16.

36. TRC Summary, *supra* note 31. (The commonality of physical and sexual abuse must be emphasized: The word "abuse" appears 233 times in this summary [at 20]).

pushed through children's tongues, what the storyteller refers to as "a routine punishment for language offenders."[37]

Language destruction has also been perpetuated in less overt ways, outside of the residential school system. For example, Sheila Watt-Cloutier, celebrated Inuit climate change activist, describes in her memoir the loss of her language and a subsequent disconnect from her culture after being chosen as a "promising" Inuit child to attend school in "the South" (Nova Scotia).[38] Parallels exist between the experiences she describes and those that have been recounted by residential school survivors. These include the government-initiated separation of Indigenous children from their home, family, culture, and language; the state's paternalistic attitude toward Indigenous peoples; and impacts on children who the state removed from their communities that persist into adulthood.

The state's complicity in the cultural and physical genocide of Indigenous peoples provides powerful support for its obligation to repair the damage done to Indigenous languages. But it is important to note that taking protective action through implementing stronger Indigenous languages legislation and creating IP legislation tailored to the unique characteristics of TK and TCEs has the potential to produce a variety of additional positive impacts.

2. Moving Forward Together

My hope is that readers of this article will recognize the inherent value of Indigenous languages and will agree that they deserve protection in and of themselves. Indigenous languages, after all, are vessels containing Indigenous cultures and ways of life. Koostachin, a member of the Inninuwak people, explains: "Inninimowin carries the traditional knowledge, customary laws, identity, spirituality, and everything that is sacred to the Inninuwak; it embraces our ancient stories, our ceremonial practices, and the ancestral teachings originating from the Mushkegowuk area."[39] It is also important to note, however, that *all* Canadians, Indigenous and non-Indigenous alike, stand to benefit from legislative efforts to protect Indigenous languages, TK, and TCE.

a. Improving Relations between Indigenous Peoples and the State

John Borrows has critiqued Canadian legislative action regarding Indigenous peoples as measures that obscure the truth rather than improve the lived experience of Indigenous peoples.[40] While using similar techniques to address similar problems may produce similar results, properly constructed legislation enacted with the aims of protecting Indigenous languages (and thus TK and TCE) could not only achieve those goals but could also improve the relationships between Indigenous peoples and the Canadian government.

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37. Anker, *supra* note 35 at 19.

38. Sheila Watt-Cloutier, *The Right to Be Cold: One Woman's Fight to Protect the Arctic and Save the Planet from Climate Change* (Minneapolis: University of Minnesota Press, 2018) at 33: "[O]ur achievements at school came at the cost of our Inuit knowledge and skills. . . . I did not speak Inuktitut all the months that [I spent away from home], and during those two years, [I] lost a remarkable amount of [my] mother tongue."

39. Koostachin, *supra* note 6 at para 3.

40. John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 54.

For any such legislation to be effective, its development must, first, be guided by Indigenous peoples, scholars, and legal traditions. Some Indigenous groups are currently working on articulating or have already recorded their own strategies for the protection of their languages and cultures,[41] which could serve as templates for statutes designed to protect Indigenous languages, TK, and TCEs. Importantly, the primary role of legislators must be to listen and lend support to those voices that the state has, until now, worked to silence.

Second, it requires strength. It needs substance. It needs *teeth*.[42] While the *Indigenous Languages Act* has laudable goals that include a governmental commitment to providing "adequate, sustainable and long-term funding for the reclamation, revitalization, maintenance and strengthening of Indigenous languages,"[43] this piece of legislation is far from perfect and is arguably ill-equipped to achieve its stated goals. The *Indigenous Languages Act*'s failures are discussed further in Part V.

b. Enriching Our Collective Culture

Indigenous leadership in the protection of Indigenous languages and the resulting cultural enrichment are personified in the story of Jeremy Dutcher, "performer, composer, activist, musicologist"[44] and "member of Tobique First Nation in New Brunswick."[45] Mr. Dutcher worked "in the archives at the Canadian Museum of History, painstakingly transcribing Wolastoq songs from 1907 wax cylinders."[46] He then created "collaborative" compositions, compiled on his first album, *Wolastoqiyik Lintuwakonawa*. The album was awarded the 2018 Polaris Music Prize.[47]

Mr. Dutcher explains the importance of his work in this way: "It's crucial for us to make sure that we're using our language and passing it on to the next generation. If you lose the language, you're not just losing words; you're losing an entire way of seeing and experiencing the world from a distinctly Indigenous perspective."[48] The juxtaposition of Mr. Dutcher's story with that of the Maliseet Tapes suggests that following the leadership of Indigenous peoples in the protection of TK and TCE is more likely to foster reconciliation than similar efforts directed by non-Indigenous individuals. The contrast between the events that unfolded is even more striking because both stories centre on the same Indigenous group and language. And the music collaboratively produced by Mr. Dutcher and his ancestors recorded on wax cylinders over a hundred years ago benefits all of those who listen to it, Indigenous and non-Indigenous alike.

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41. Maliseet Nation Conservation Council Traditional Knowledge Working Group, *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol* (September 2009), online: <https://achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf> (pdf).

42. Betty Harnum, "Justin Trudeau's Proposed Indigenous Languages Act Will Need Teeth to Succeed," *CBC News* (16 December 2016), online: <www.cbc.ca/news/canada/north/betty-harnum-indigenous-languages-act-1.3897121>.

43. *Indigenous Languages Act,* SC 2019, c 23, preamble.

44. Jeremy Dutcher, "About" (n.d.), online: *Jeremy Dutcher* <https://jeremydutcher.com/about/>.

45. *Ibid.*

46. *Ibid.*

47. CBC, "2018 Winner" (2018), online: *CBC Music Presents: Polaris Music Prize* <https://polarismusicprize.ca/album/wolastoqiyik-lintuwakonawa/>.

48. Dutcher, *supra* note 44.

As stated in the preceding section, amending legislation that currently facilitates the destruction of Indigenous languages represents an opportunity for reconciliation that Canada's political leaders can only fully take up if they follow the guidance of Indigenous scholars, legal traditions, and peoples. And, simultaneously, the protection of Indigenous languages, TK, and TCE provides an opportunity to enrich our collective culture by strengthening particular strands of which it is comprised. This is an opportunity that, once lost, can never be regained, underscoring the importance of timely legislative intervention designed to stop the destruction of Indigenous languages, guided by Indigenous voices.

c. Responding to Climate Change

A further incentive to protect Indigenous languages, TK, and TCE (by developing stronger Indigenous languages laws and developing a statutory framework that protects TK and TCE) is that they are repositories of ecological information. "We are slowly learning how crucial traditional knowledge and language diversity is in areas such as biological diversity, especially with the rapid decline of rare plant and animal life in unique ecosystems around the world."[49] This rapid decline is markedly apparent in the Arctic, where researchers have embarked on an ambitious project: the chronicling of Inuit elders' observations of climate change.[50] The observations of these elders provide important information and observations about climate change, including changes in weather patterns, vegetation, and mammal abundance.[51]

Yet even this process is fraught. The observations and ideas themselves do not attract copyright or other forms of IP protection. The project necessarily relies on translation and transcription,[52] which poses at least two distinct problems: the potential for lost meaning and nuance, and the fact that copyright becomes vested in the transcriber rather than the source of the idea, as occurred in the case of the Maliseet Tapes.

Legislation that properly protects Indigenous languages, TK, and TCE will consequently protect a store of wisdom and knowledge that is currently disappearing at alarming rates. These ethical arguments are important; they highlight and strengthen the legal basis for the Canadian government's responsibility to protect Indigenous languages, TK, and TCE.

IV CANADA'S LEGAL OBLIGATIONS

It is important to note that Canada adopted the policy of assimilation described above "*because* it wished to divest itself of its legal and financial obligations to Aboriginal people and gain control over their land and resources. If every Aboriginal person had been 'absorbed into the body politic,' there would be no reserves, no Treaties . . . no Aboriginal rights"[53] and, quite possibly, no Indigenous languages. In addition to its ethical duty outlined in the previous

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49. Chi Luu, "What We Lose When We Lose Indigenous Knowledge" (16 October 2019), online: *JSTOR Daily* <daily.jstor.org/what-we-lose-when-we-lose-indigenous-knowledge/?fbclid=IwAR0BhmnYvxHyT04maKTaT7A3fph3j6cu9pIAykqbWkETQs6-Olb4dZR6woo> at para 9.

50. José Gérin-Lajoie, Alain Cuerrier & Laura Siegwart Collier, *The Caribou Taste Different Now: Inuit Elders Observe Climate Change* (Nunavut: Nunavut Arctic College Media, 2016).

51. *Ibid* at 3, 4.

52. *Ibid* at 8.

53. *TRC Summary, supra* note 31 at 3 [emphasis added].

section, Canada has a legal duty to protect Indigenous languages, TK, and TCE, which stems from a variety of sources. That legal duty would be best met by enacting legislation designed to protect Indigenous TK, TCE, and languages.

A. Domestic Law and the Jurisdictional Problem

To begin, the protection of Aboriginal rights and treaty rights is enshrined in the *Constitution*, section 35(1).[54] The inclusion of rights related to Indigenous languages and their protection and revitalization has been affirmed by Parliament[55] and echoes calls for federal government action to protect Indigenous languages from the TRC.[56] Further, the Canadian government's fiduciary duty to Indigenous peoples is well-established.[57] In *Sparrow*, the Supreme Court noted that "t]e government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[58]

Perhaps the strongest argument for Canada's duty to protect Indigenous languages is its own commitment to such protection. As noted above, the *Indigenous Languages Act,* "which is intended to support the reclamation, revitalization, maintaining and strengthening of Indigenous languages in Canada,"[59] recently received royal assent. The *Act*'s preamble states that "the recognition and implementation of rights related to Indigenous languages are at the core of reconciliation with Indigenous peoples and are fundamental to shaping the country, particularly in light of the Truth and Reconciliation Commission of Canada's Calls to Action."[60] It also specifically refers to the fact that language rights are among those rights protected by the *Constitution*, section 35,[61] and to UNDRIP's call for the protection of languages (discussed further below).[62]

The TRC's Calls to Action and the enactment of the *Indigenous Languages Act*[63] lend support for the notion that the protection of Indigenous languages, TK, and TCE fall within the jurisdiction of the federal government. The federal government's jurisdiction over intellectual property[64] provides similar support, notwithstanding the fact that categorizing Indigenous languages, TK, and TCE as "intellectual property" is inaccurate and problematic.

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54. *Constitution Act, 1982*, s 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982 [*Constitution*].

55. *Indigenous Languages Act, supra* note 43, s 8.

56. Truth and Reconciliation Commission, *Calls to Action*, 2012 (Winnipeg: Truth and Reconciliation Commission of Canada) at 2.

57. *R v Sparrow*, [1990] 1 SCR 1075, SCJ No 49 at para 59.

58. *Ibid*.

59. Government of Canada, *supra* note 8 at para 1.

60. *Indigenous Languages Act, supra* note 43, preamble.

61. *Ibid*, s 6. ("The Government of Canada recognizes that the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982* include rights related to Indigenous languages.")

62. *Ibid*, s 5(g). (One of the *Act*'s stated purposes is to "contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples as it relates to Indigenous languages.")

63. *Ibid*, s 5(g).

64. *Constitution*, s 91 (23). (This section specifically states that copyright is within the federal government's jurisdiction.)

However, while the federal government is primarily responsible for the protection of Indigenous languages, TK, and TCE, effective protection will require collaboration not only with diverse Indigenous groups, but also that the federal and provincial governments engage in cooperative federalism.[65] By that I mean that the scale and scope of the problem presented by the destruction of Indigenous languages—along with the practical realities of a country as geographically expansive as Canada, the division of powers between the federal and provincial governments, and finally the uniqueness and diversity of Indigenous peoples residing in Canada—*requires* that the provincial and federal governments engage in collaborative processes to effectively protect Indigenous languages. What precisely this process can or should look like is a matter that warrants further discussion that is beyond the scope of this article.

B. The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)

UNDRIP, to which Canada is a signatory, states that "Indigenous peoples have the right to revitalize, use, develop and transmit to further generations their histories, languages, oral traditions, philosophies, writing systems and literatures."[66] Canada's failure to legislate and adhere to UNDRIP can only continue to harm relations between Indigenous and non-Indigenous peoples in Canada. It also exposes the federal government to valid criticisms that its treatment of Indigenous peoples consists of measures that conceal rather than address the damage that it has done to those peoples.[67]

British Columbia recently committed to passing legislation that will put its laws "in line with the UN Declaration on the Rights of Indigenous Peoples . . . a historic moment for everyone in B.C.."[68] Full implementation of UNDRIP as law will require the cooperative federalism mentioned above, due to the jurisdictional issues described by de Beer and Dylan.[69]

V FAILURES

A. The *Copyright Act*

The federal government has acknowledged that the Canadian intellectual property regime in general is ill suited to protecting Indigenous TK and TCE.[70] That unsuitability is especially

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65. de Beer & Dylan, *supra* note 27 at 26.

66. United Nations, "United Nations Declaration on the Rights of Indigenous Peoples" (13 September 2007), online (pdf): *United Nations* <www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>, at 12–13.

67. Borrows, *supra* note 40 at 54. (In this story, the papers raining down from the sky can be understood to represent colonial legislation that conceals rather than addresses the harms caused by colonialism.)

68. British Columbia, "It's about a Brighter Future. Indigenous Human Rights Set in B.C. Law," *British Columbia: A New Path Forward* (2019), online: <declaration.gov.bc.ca/>.

69. de Beer & Dylan, *supra* note 27. ("Because of the novel nature of traditional knowledge . . . it is unclear . . . whether this subject matter falls exclusively within one sphere of jurisdiction or the other or is even properly within any division of power. The key then is for both the federal and provincial governments . . . to be collaborative in establishing coherent traditional governance" at 26.)

70. Government of Canada, *supra* note 8.

apparent when the effects of the *Copyright Act* on Indigenous TK and TCE are examined, as demonstrated by the story of the Maliseet Tapes.[71] Before discussing the *Copyright Act* itself, some characteristics that tend to be shared by the TK and TCE of various Indigenous groups need to be described.

Note, however, that, to avoid causing neocolonial harm by perpetuating the idea that Indigenous peoples are homogenous, the diversity of Indigenous peoples and the languages, TK, and TCE that they create should be recognized by any legislation whose purpose is to protect them. This article does not mean to suggest that Indigenous groups, cultures, languages, TK, or TCE are uniform or homogenous. That said, many forms of TK and TCE share certain characteristics: TK and TCEs are collectively held, have ancient roots and evolve over time, and are place-based.

1. TK and TCE Are Collectively Held, Ancient and Evolving, and Place-based

Unlike IP generally, Indigenous knowledge is "held collectively for the benefit of all."[72] Particular authors or creators tend to be difficult, if not impossible, to identify. Indigenous "stories, songs, practices, and customs"[73] provide vessels for the transmission of laws and other important cultural ideas. The value and reliability of collectively held, orally communicated "works" (to use the language of the IP regime) has been acknowledged by Canadian courts. In *R v Delgamuukw,* evidence laws were adapted to permit the admission of some forms of TK to establish a claim to Aboriginal title.[74] Although the existence of collectively held TK and TCE demonstrate their worth and value, this precedence provides a preemptive response to dismissive reactions to the assertion that the expansion of the IP regime is simultaneously necessary and possible. It is important to remember that, currently, the nature of TK and TCE as collectively held prevents their protection by the IP regime, and particularly by copyright law, as is discussed further below.

Again unlike many forms of IP, TK and TCE have roots deep in history and have evolved and changed over time. Just as "Indigenous cultures in North America have evolved symbiotically with the land, its animals, its geology, and its climate, which provide metaphors for knowing,"[75] Indigenous knowledge is not static. The fact that it is transmitted orally permits fluidity and flexibility that fits poorly with IP legislation, which presumes that the expression of ideas necessarily requires written systems for dissemination and transmission to new generations. Unfortunately, the IP regime's preoccupation with fixation[76] problematizes the fluidity of Indigenous knowledge.

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71. Nicholas, *supra* note 2.

72. Chidi Oguamanam, "Rethinking Copyright for Indigenous Creative Works" (29 June 2017), online: *ABA Canada* <www.abs-canada.org/news/rethinking-copyright-for-indigenous-creative-works/> at para 4.

73. Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ at para 11.

74. *Delgamuukw v British Columbia,* [1997] SCJ No 108 at para 87.

75. Anker, *supra* note 35 at 36.

76. *Copyright Act*, *supra* note 17. (While the *Copyright Act* does not explicitly state that fixation is required for the protection of the expression of ideas, such protection is vested only in "works"—in expression that has been fixed.)

TK and TCE, by virtue of the deep connection between Indigenous peoples and the lands they inhabit, are also intimately connected to the land. Indeed, "we are slowly learning how crucial traditional knowledge and language diversity is in areas such as biological diversity . . . [The] unique properties [of rare plant and animal life] have long been recorded by indigenous groups through their language."[77] Non-Indigenous individuals' and governments' failure to listen is explained by Eurocentric, racist notions of the superiority of non-Indigenous ways of thinking and recording knowledge.[78] This close connection to place is a further reason to protect TK and TCE, however, and not an excuse to ignore or devalue it. The problematic relationship between IP and TK and TCE is articulated by Wapshkaa Ma'iingan: "Anishinaabe concepts of relation to land and its natural resources cannot be articulated through or validated within a legal framework that practices colonialism: contemporary Anishinaabe and Canadian legal traditions remain largely irreconcilable."[79]

Given the ethical and legal duty that the Canadian government has to protect Indigenous languages, TK, and TCE, it is vital that such reconciliation take place. Indigenous cultures and peoples have been forced to adapt and literally make room for non-Indigenous cultures far too frequently, to their detriment. Our government has committed itself to a process of reconciliation; that process should be guided by various Indigenous understandings of the term. As Anker states, "it is not enough for the TRC . . . to strive simply for 'relational,' rather than 'cheap,' reconciliation, without also opening up the idea of reconciliation itself to engagement with Indigenous languages and traditions."[80] This means that the IP regime must expand to adequately protect TK and TCE, rather than requiring Indigenous peoples to bend their ancient methods of knowledge governance to fit the Canadian legal framework.

2. Copyright Protection and Indigenous Knowledge Governance

Like other elements of the Canadian intellectual property regime, the *Copyright Act* has an overarching preoccupation with protecting economic interests.[81] Economic protection is one important consideration that should be addressed by legislation that aims to protect Indigenous TK and TCE. However, such legislation will need to recognize that TK and TCE provide benefits beyond economic ones and thus provide protection for those non-fungible elements as well.

Copyright protects various forms of intellectual property and attracts automatically to original literary, dramatic, musical, and artistic works that meet certain requirements (i.e., there is no requirement that a work be registered before it is protected).[82] Copyright protects *works*, though, not ideas. And, unfortunately, some of the characteristics that are prerequisite to copyright protection are at odds with the fundamental characteristics of Indigenous TK

77. Luu, *supra* note 49 at para 9.

78. *Ibid*, at para 8.

79. Wapshkaa Ma'iingan (Mills), *supra* note 14 at 108.

80. Anker, *supra* note 35 at 17.

81. *Théberge v Galerie d'Art du Petit Champlain Inc,* 2002 SCC 34, [2002] 2 SCR 336. (Binnie J explained that the *Copyright Act*'s purpose is to protect the economic interests of copyright holders: "Canadian copyright law has traditionally been more concerned with economic than moral rights . . . The economic rights [protected by the *Copyright Act*] are based on a conception of artistic and literary works essentially as articles of commerce" at para 12.)

82. *Copyright Act*, *supra* note 17, s 5.

and TCEs. To attract copyright protection, works must be original[83] and fixed,[84] while TK and TCEs tend to change over time and are passed down orally.

This explains why, while it is true that "protections under the *Copyright Act* are used by Indigenous artists, performers, composers and writers for tradition-based creations,"[85] it is also true that "mechanisms for the protection of IP are based on protecting the rights of identified individual creators and innovators over their creations and innovations that exist in physical format; this is not easily adapted to protecting collectively-owned TK or TCEs of significance to communities, dating back generations."[86]

A recent report by the Standing Committee on Industry, Science and Technology explained that "even if . . . cultural expression originates in fact from Indigenous peoples, the law can deprive them from owning copyright on these expressions. Witnesses urged the Committee to review copyright legislation to address the misappropriation of traditional Indigenous art forms" particularly in light of the fact that Indigenous artists "face more difficulties in obtaining fair remuneration for their work than non-Indigenous artists."[87] Further, the committee's fifth recommendation is that "the Government of Canada consult with Indigenous groups, experts, and other stakeholders on the protection of traditional arts and cultural expressions in the context of Reconciliation,"[88] and specifically calls for "the participation of Indigenous groups in the development of national and international intellectual property law."[89]

Not only does copyright law fail to protect important repositories of Indigenous knowledge, it has been weaponized to destroy such knowledge.[90] This means that it has functioned as a tool of colonialism, as illustrated above.[91] In addition to the damage described in the story of the Maliseet Tapes, the process of enacting the *Copyright Modernization Act*[92] has been implicated in harming Indigenous cultures in that "despite extensive public consultations leading up to the statutory revisions . . . only one invitation [was made by]

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83. *CCH Canadian Ltd v Law Society of Upper Canada,* 2004 SCC 13, [2004] 1 SCR 399 at para 31. (Mere copying does not satisfy the requirement of originality.)

84. *Gould Estate v Stoddart Publishing Co.* (1996), 30 OR (3d) 520, 74 CPR (3d) 206) at para 22. (The contents of interviews conducted casually, in informal settings, failed to meet the common law fixation requirement and, therefore, did not attract copyright protection.)

85. Government of Canada, *supra* note 8 at para 5.

86. *Ibid* at para 7.

87. House of Commons, Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act* (June 3, 2019), online: *Parliament Canada* <www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/page-87#15> at 26.

88. *Ibid* at 3.

89. *Ibid* at 4.

90. Francesca Fionda, "Canada's Copyright Act Failing Indigenous People, Committee Finds" (11 June 2019), online: *The Discourse* <thediscourse.ca/urban-nation/copyright-act-failing>. ("In its report, the committee acknowledges that the *Copyright Act* fails to recognize Indigenous forms of ownership, and may even facilitate misappropriation, noting, 'Indigenous artists appear especially vulnerable to economic exploitation'" at para 6.)

91. [91] Nicholas, *supra* note 2 at 2.

92. *Copyright Modernization Act,* SC 2012, c 20.

government to hear specifically about Aboriginal Peoples' perspective on the matter."[93] Yet despite the testimony of Violet Ford, who spoke as vice president of the Inuit Circumpolar Council and who described harm being done to Inuit peoples through "the misuse of Inuit innovations, cultural expressions and symbols such as the kayak, the inukshuk and more,"[94] "there is nothing in the *Copyright Modernization Act* that responds specifically to any of the dominant concerns of Aboriginal Peoples."[95]

In this way, while the *Copyright Act* exemplifies the colonial harm that can occur when legislation is enacted with no thought to Indigenous perspectives and interests, the *Copyright Modernization Act* exemplifies the neocolonial harm that ensues when legislation is enacted that ostensibly addresses those perspectives and interests while, in reality, provides mere lip service or procedural safeguards. That is, when the protection of substantive rights (to the protection of Indigenous languages, TK, and TCE) is deemed to be satisfied by procedure (inviting *a single* Indigenous individual to express their concerns) or lip service (enacting legislation that has commendable goals but no practical means by which to achieve them), the extant harm is obscured and thereby permitted to persist. Avoiding this pitfall requires that legislative attempts to stop the destruction of Indigenous languages be guided by Indigenous scholars, traditions, and peoples.[96]

B. The *Indigenous Languages Act*

The *Indigenous Languages Act* (ILA) was subject to criticism even while it was being drafted, at least in part because other, similar legislation had failed.[97] Harnum points out that legislative action intended to protect Indigenous languages in the Northwest Territories (which has 11 official languages) has largely failed to protect those languages.[98] And while the ILA admirably calls for consultation with Indigenous peoples and for "adequate, sustainable and long-term funding,"[99] it predictably falls short of providing effective, concrete protections for the Indigenous languages that it is ostensibly designed to preserve.

A particular problem is that, while some provisions clearly impose positive obligations on the federal government and its agents,[100] many others are merely permissive. An example is section 8, which permits (but does not require) the federal government to "cooperate with provincial or territorial governments, Indigenous governments or other Indigenous governing bodies, Indigenous organizations or other entities . . . to coordinate efforts to efficiently and effectively support Indigenous languages in Canada in a manner consistent with the rights

93. de Beer & Dylan, *supra* note 27 at 7.

94. *Ibid* at 7.

95. *Ibid* at 8.

96. Denis Brunsdon, "Recognizing Indigenous Legal Values in Modern Copyright Law" (2016) 6:3 UWO J Leg Stud 2. (Adapting the *Copyright Act* in ways guided by Indigenous legal traditions is possible and would help work towards reconciliation, at 2.)

97. Harnum, *supra* note 42 at para 6.

98. *Ibid* at para 7.

99. *Indigenous Languages Act, supra* note 43, s 7.

100. *Ibid*. ("The Minister must consult with a variety of Indigenous governments and other Indigenous governing bodies and a variety of Indigenous organizations. . .", s 7.)

of Indigenous peoples recognized and affirmed by section 35 of the *Constitution.*"[101] Given the number of Indigenous children attending provincially governed public elementary and secondary schools, and the historic impact that government-mandated public education has had on Indigenous cultures and languages, this permissive language is troubling. It, like the statute's unproclaimed provisions, calls into question the federal government's commitment to achieving the legislation's stated goals. Harnum's fear that the legislation lacks "teeth" is thus supported.[102]

This does not mean, however, that the ILA should be set aside, as it has the potential to serve as the basis for better, stronger legislation. And it is the position of this article that effective legislative action aimed at protecting Indigenous languages, TK, and TCE must be ongoing. It is not enough for the federal government to rest on its laurels now that it has passed the ILA, particularly given the criticisms that the legislation has received and the short length of time that has passed since its inception. But the *Act* will only remain problematic if it remains as ineffective as it is today.

Lessons may be gleaned from the successes and failures of a predecessor to the ILA, the *Inuit Languages Protection Act* (ILPA),[103] which was hailed as

> among Nunavut's most important pieces of legislation, setting out rights for Inuktut speakers and the duties of various government organizations and officials in ensuring that [those] rights are upheld . . . the Act makes clear that the future of Inuktut depends on positive action by the Government of Nunavut to advance the Inuit Language in government, education and the services that organizations, including businesses, provide to the public.[104]

The goals of the ILPA are comparable to those of the ILA, yet the two statutes differ significantly. While the ILA is characterized by permissive language, as described above, the ILPA imposes strict duties on organizations.[105] The status of Inuit language rights is protected by section 2(2), which holds that sections 3 to 13 of the ILPA prevail if they conflict with an Act other than the *Human Rights Act*.[106]

Importantly, an entire section is dedicated to education. Subsection 8(1) states that "Every parent whose child is enrolled in the education program in Nunavut . . . has the right to have his or her child receive Inuit Language instruction."[107] Subsection 8(2) requires the design and implementation of programs "to produce secondary school graduates fully proficient in

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101. *Indigenous Languages Act, supra* note 43, s 8.

102. Harnum, *supra* note 42 at para 20.

103. *Inuit Languages Protection Act,* SNu 2008, c 17.

104. Inuit Uqausinginnik Taiguusiliuqtiit, "The Inuit Language Protection Act" (2016), online: *Uqausinginnik Taiguusiliuqtiit* <www.taiguusiliuqtiit.ca/en/what-is-iut/the-inuit-language-protection-act> at paras 1, 2.

105. *Inuit Languages Protection Act, supra* note 103. (Organizations are required to display public signs and similar in Inuit language along with any other language used, s 3(1); s 3(2) requires that certain essential services be delivered in the Inuit language.)

106. *Ibid*, s 2(2).

107. *Ibid*, s 8(1).

the Inuit Language, in both its spoken and written forms."[108] These powerful provisions were enacted with the meaningful participation of Indigenous peoples and organizations.[109]

Yet even the ILPA has not achieved its goals. Nunavut Tunngavik, an organization that "ensures that promises made under the Nunavut Agreement are carried out,"[110] has criticized the Nunavut government's proposal "to push the deadline for bilingual Inuktitut-English education for Grade 12 students to 2039—20 years past the original deadline of this year set by the 2008 education act."[111] This has opened the ILPA to criticisms that it is merely symbolic "and does not include the legal measures needed to protected the languages,"[112] leading Inuit leaders to call on the federal government to "update its Official Languages Act to grant Inuktut equal standing with English and French within Nunavut."[113]

All of this predicts the probable inefficacy of the comparably insubstantial ILA and highlights the possibility that, if unamended, it will conceal the ongoing destruction of Indigenous languages and thereby permit that destruction to continue. It further emphasizes the vitality of listening to Indigenous voices when Indigenous scholars, groups, and individuals call for specific legislative action, such as the called-for amendment of the *Official Languages Act*. Such an amendment would cut against the state's continued prioritization of non-Indigenous interests and against its simultaneous, implicit devaluation of those interests and of Indigenous peoples.

Legislative attempts to protect Indigenous languages, TK, and TCE must acknowledge the fraught history that the Canadian government has created via colonial practices and address their practical impact. Relying on those problems as an excuse not to take action, or to engage in symbolic but half-hearted and therefore ineffective actions, will only perpetuate the status quo. While the ILA may represent a metaphorical step in the right direction, it is doubtful that this legislation, as currently enacted, will serve to adequately protect Indigenous languages, TK, and TCE. And, even if it were sufficiently robust to protect Indigenous languages, it alone is insufficient to protect Indigenous cultures and cultural transmissions in the forms of TK and TCE. That is because Indigenous cultures are also threatened by the failure of the *Trademarks Act* to protect Indigenous TK and TCE.

VI CONCLUSION

I conclude by reiterating my position in relation to this article's subject matter: I am a non-Indigenous law student and do not speak for Indigenous peoples. This article is my attempt to grapple with particular injustices imposed on Canada's original cultures by colonialism in

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108. *Ibid*, s 8(2).

109. Nunavut Tunngavik, "NTI Celebrates the Inuit Language Protection Act" (18 September 2008), online: *Tunngavik* <www.tunngavik.com/news/nti-celebrates-the-inuit-language-protection-act/>. ("NTI was heavily involved in the development of the language legislation through the Government of Nunavut led language legislation steering committee . . . the act is a good foundation to start reversing the trend of Inuit language loss in Nunavut" at paras 4, 5.)

110. Nunavut Tunngavik, "About NTI" (n.d.), online: *Tunngavik* <www.tunngavik.com/about/>.

111. Lee, *supra* note 3.

112. *Ibid*.

113. *Ibid*.

general and by the intellectual property regime, copyright law, and the passing of ineffective Indigenous languages legislation that amount to lip service, specifically.

Canada's government has ethical and legal obligations to address the damage its actions and inactions have done to Indigenous cultures, including the destruction of Indigenous languages, TK, and TCE. The protection of Indigenous TK and TCE demands the protection of Indigenous languages because languages are vehicles for concepts unique to the cultures that speak them—and because Indigenous languages are rapidly disappearing.

While legislation catered to the protection of Indigenous languages, TK, and TCE, properly conceived, has the potential to achieve the goal of protecting various Indigenous cultures, the success of such legislation is by no means a forgone conclusion. To reach that end, the legislation must be guided by Indigenous voices and backed by the power of the state.[114] It must reflect the unique characteristics of TK and TCE that make their protection by the *Copyright Act* virtually impossible. Finally, it must actually protect Indigenous cultures and peoples and not merely claim to do so if it is to constitute a departure from ongoing colonial and neocolonial practices.

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114. The author declines to provide specific suggestions for amendments to the *Copyright Act* and the *Indigenous Languages Act* because she is non-Indigenous; to do so would be to contradict the purpose of this article, which is to assert that any such amendments must be guided by Indigenous voices. For examples of specific suggestions, see the works of Andrea Bear Nicholas, Jeremy Dutcher, John Borrows, Jules Koostachin, Wapshkaa Ma'iingan (Aaron Mills), Sakej Youngblood Henderson, the Inuit Uqausinginnik Taiguusiliuqtiit, the TRC, and the *Statutory Review of the Copyright Act*.