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More Than Just A Trapline: A Torts Law Approach to Protecting Indigenous Trappers' Environmental Rights

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MORE THAN JUST A TRAPLINE: A TORTS LAW APPROACH TO PROTECTING INDIGENOUS TRAPPERS' ENVIRONMENTAL RIGHTS

Christina Maria Clemente

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As I sit to write this paper in April 2019, a community of trappers[1] *from the Hollow Water Traditional Territory located on the eastern shore of Lake Winnipeg are being forced to pack up early with a significantly diminished harvest of animals.*[2] *This is a result of preliminary clearcutting and trail disruption caused by Canadian Premium Sand, a silica sand mining company that has proposed to start operation adjacent to Hollow Water Traditional Territory.*[3] *This disruption to the trappers' ability to hunt and harvest was done without consent, and it is anticipated that the future activity of the mining company will further interfere with trappers' ability to use their traplines.*[4] *This same story continues to play out in numerous communities across Canada where industrial activity directly and indirectly harms wildlife and plants. Consequently, trappers are forced to take action to protect the use of their traplines. This paper explores the potential role that tort law may play in helping Indigenous trappers protect their traplines from future harm or receive compensation for past harms.*

I INTRODUCTION

Canadian courts and policymakers attempt to strike a balance between protecting industrial activity, which is said to benefit the majority of Canadians, with the individual rights of Canadians who live near the development sites. Yet the costs of industrial development are not necessarily evenly distributed throughout society. The ability of those who live near these sites to reasonably enjoy the use of the surrounding land is often negatively impacted.[5] Studies have shown that Indigenous communities are disproportionately affected by the negative consequences of pollution and chemical contamination in Canada.[6] Specifically, Indigenous trappers who rely on access to plants and animals and who have become involuntary neighbours to development projects face some of the most negative impacts of those development projects.

For example, near Sagamok Anishnawbek First Nation, a group called the Traditional Ecological Knowledge (TEK) Elders have been attempting to stop the aerial spraying of a

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1. The term "trapper" refers to a person who has a legal right to hunt, fish, or harvest within a particular area of land, usually referred to as a "trapline," by using different forms of hunting traps.

2. Camp Morning Star, "Powerful Interview with Young Trapper Whose Trapline Has Just Been Clear Cut without Consent," (20 April 2019), online: Facebook <https://www.facebook.com/399420164196317/videos/860683360949004>.

3. Ian Froese, "Unearthed Worries: Frack Sand Mine in Manitoba Draws Ire from Neighbours," *CBC Manitoba* (26 November 2018), online: <https://www.cbc.ca/news/canada/manitoba/frac-sand-mine-lake-winnipeg-canadian-premium-sand-1.4921611>.

4. Camp Morning Star, *supra* note 2.

5. See Natasha Bakht & Lynda Collins, "The Earth Is Our Mother: Freedom of Religion and the Preservation of Aboriginal Sacred Sites in Canada" (2016) University of Ottawa Working Paper No 2016-24 at 25–26.

6. Julien Agyeman et al, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: University of British Columbia Press, 2009); for general scholarship on environmental racism in Canada, see Kaitlyn Mitchell & Zachary D'Onofrio, "Environmental Injustice and Racism in Canada: The First Step Is Admitting We Have a Problem" (2016) 29 J Env L & Prac 305; Michael Mascarenhas, *Where the Waters Divide: Neoliberalism, White Privilege, and Environmental Racism in Canada* (Toronto: Lexington Books, 2012); Andil Gosine & Cheryl Teelucksingh, *Environmental Justice and Racism in Canada: An Introduction*, (Toronto: Emond Montgomery, 2008).

glyphosate-based herbicide, which is currently permitted as a provincially recognized forestry management practice[7] but is interfering with Indigenous trappers' rights.

A trapline refers to an area of land registered to one or more individuals to use for the trapping of fur-bearing animals.[8] The term "trapper" refers to a person who has a legal right to hunt, fish, or harvest within a particular area of land, usually referred to as a "trapline," by using different forms of hunting traps. Provinces and territories regulate the registration and use of traplines. In Ontario, the *Fish and Wildlife Conservation Act* defines a "trap" as a "body gripping trap, box trap, cage trap or net used to capture an animal or invertebrate."[9] This narrow definition, however, does not do justice to the broader meaning that a trapline has for so many people, especially Indigenous peoples in Canada. Some Indigenous trappers have stated that from an Indigenous legal perspective,[10] the word "trapline" may refer to territories that have been traditionally passed down through hereditary lines, that come with a variety of rights and responsibilities related to stewardship of land, that include rights such as primary hunting and gathering rights, that are used to share important teachings with children, or that are used to collect medicinal plants.[11]

This paper argues that Indigenous trappers have many rights and obligations related to their traplines that Canada's current environmental laws do not recognize. Indigenous trappers may look to enforce their Aboriginal rights related to traplines by bringing constitutional law claims. Yet, to bring a constitutional Aboriginal claim, claimants must receive authorization from their First Nation's or Band's authorized representatives.[12] This poses problems for individual Indigenous trappers, whose concerns and issues vary within the collective First Nation or band. As a result, in this paper I will consider alternative legal avenues for protecting Indigenous environmental rights, such as tort law, by building on the idea of developing an Aboriginal tort law[13] and applying it specifically to Indigenous trappers' legal issues. I will explore whether tort law is a workable mechanism for Indigenous trappers to ensure adequate environmental governance and stewardship. It will also be necessary to consider recent developments in Aboriginal and tort law, and consider the state of the law regarding Indigenous trappers' rights to protect property interests through tort law after the 2015 decision in *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*.[14] This

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7. Christopher Read, "Trappers in Robinson Huron Treaty Area Want Aerial Herbicide Spraying to End," *APTN National News* (22 March 2019), online <https://www.aptnnews.ca/national-news/trappers-in-robinson-huron-treaty-area-want-aerial-herbicide-spraying-to-end> [Read].

8. See definition of "trapline" in British Columbia's *Wildlife Act*, RSBC 1996, c 488, s 1.

9. *Fish and Wildlife Conservation Act, 1997* SO 1997, c 41, s 1.

10. Here the term "Indigenous" refers generally to the plethora of Indigenous legal traditions that exist throughout Canada. Although some principles are similar across different Indigenous legal traditions, it should be noted that each one is unique and may change over time. For a fuller discussion of the different sources of Indigenous law and how they are not static, see John Borrows, "Indigenous Law Examples" in John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 59.

11. Bud Napoleon & Hannah Askew, "Caretakers of the Land and Its People: Why Indigenous Trapline Holders' Legal Rights and Responsibilities Matter for Everyone" (August 2018) West Coast Environmental Law at 15 [Napoleon & Askew].

12. *Behn v Moulton Contracting Ltd,* 2013 SCC 26 at para 33.

13. Lynda Collins & Sarah Morales, "Aboriginal Environmental Rights in Tort" (2014) 27:1 J Envtl L & Prac 1 at 15 [Collins & Morales].

14. 2015 BCCA 154 [*Saik'uz First Nation*].

decision affirms that *sui generis* Aboriginal property interests constitute a possessory interest in land. The fact that Aboriginal rights may constitute a proprietary interest in land is significant to Indigenous trapper claimants, because it is often required to ground a tort law cause of action. Finally, I will examine the potential role of tort law in addressing issues of Indigenous trappers by focusing specifically on the growing issue of forestry industry spraying herbicides over trapline territories to the detriment of the land, animals, and trappers. Indigenous trapline holders from all across Canada are organizing to actively resist the harms caused by the forestry industry, the mining industry, oil extraction, and so on, all of which diminish their ability to access and govern their traplines.[15] This paper focuses primarily on the TEK Elders from Sagamok Anishnawbek[16] First Nation who are fighting to end the practice of aerial herbicide spraying over forests in northern Ontario.

II "WHY IS NO ONE TALKING ABOUT THE HERBICIDE THE FORESTRY COMPANIES ARE SPRAYING ON OUR TRAPLINES?"[17]

In the case of Indigenous trappers, interference with the ability to reasonably enjoy use of land typically manifests in the form of environmental contamination or pollution. Industrial activity often involves using a wide range of chemicals, many of which are not well understood,[18] and allowing for their release into the environment, which can spread to nearby areas. Lack of research and understanding about the effects of many chemicals allows industry to use them widely without restriction from Canada's environmental regulations. These chemicals cause harm to plants, animals, and even humans who rely on the land for varying purposes. For example, herbicide spray used by the forestry industry is particularly harmful to large mammals, as the toxins accumulate at the top of the food chain: This is demonstrated in livers of animals like caribou, which have higher levels of toxicity in areas where spraying occurs.[19] Of particular concern is the use of glyphosate, a herbicide which is commonly sprayed in the air over forests to eliminate unwanted plants. In northern Ontario, the agent is deployed by air over portions of forests to eliminate unwanted plants, such as under bush, from stifling the early growth of coniferous trees, which are harvested for commercial use.[20]

Near Sagamok Anishnawbek First Nation, the TEK Elders have been attempting to stop the aerial spraying of the glyphosate-based herbicide, which is currently permitted as a provincially

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15. For example, Treaty 8 Trappers Association based in Alberta, see "MOU Transfers Management of Indigenous Traplines in Treaty 8 Territory" (1 May 2018), *Windspeaker,* online: <windspeaker.com>.

16. Please note that this paper includes a number of variations of the spelling for Anishnawbek, including Anishinaabe and Anishinabeg, to reflect the spelling used by each source.

17. Napoleon & Askew, *supra* note 11 at 59.

18. See generally Lynda Collins, *The Canadian Law of Toxic Torts* (Toronto: Canada Law Book, 2014) at 56 [Collins, *Toxic Torts*]; Carl F Cranor, *Toxic Torts: Science, Law, and the Possibility of Justice* 2nd ed (New York: Cambridge University Press, 2016) ch 1 at 1.

19. Napoleon & Askew, *supra* note 11 at 17.

20. DG Thompson & DG Pitt, "Frequently Asked Questions (FAQs) on the Use of Herbicides in Canadian Forestry: Technical Note No 112" (2011) online: *Canadian Forest Service Publications* <https://cfs.nrcan.gc.ca/publications?id=32344> [Thompson & Pitt].

recognized forestry management practice.[21] Ontario's Ministry of Natural Resource and Forestry (MNRF) maintains that the use of glyphosate is a necessary and harmless practice to ensure the success of tree-planting operations that follow major clearcutting.[22] However, TEK Elders insist that the use of the herbicide has interfered with trappers' ability to use the trapline for hunting and harvesting medicinal plants. They also explain that the practice of spraying a herbicide as potent as glyphosate interferes with the trappers' ability to steward the plants, animals, and land according to their own laws and worldview: "Herbicides destroy the interdependent balance of all life, which is the core philosophy of the Anishinabek."[23] Not only do the Anishinabek trappers suffer diminished ability to use the trapline to hunt and collect plants, but the forestry practice has also interfered with their ability to interact with the land in a way that is in line with their Anishinabek worldview.

A. Indigenous Trappers are Uniquely Vulnerable to Environmental Harm

Canadian environmental statutory law and regulation are often based on standards of allowable contaminants that do not take into account the particular cumulative effects and injury to Indigenous trappers. For example, a certain amount of toxicity and wildlife damage may be allowable under Canadian environmental standards yet may conflict with Indigenous trapline governance practices/protocols. Many experienced trappers and elders, drawing on first-hand experience out on their traplines as well as Traditional Ecological Knowledge, have warned about the need to consider the cumulative effects of contamination and pollution. For trappers, the harm arises not only from the significant reduction in their ability to hunt larger mammals, but also from a disruption to the entire system.

One of the reasons for the cognitive dissonance between what is actually needed to protect Indigenous trappers and what is permitted in the areas where traplines exist is that colonial Canadian environmental protection and conservation regimes have been superimposed onto Indigenous systems of environmental governance and stewardship.[24] Various Indigenous systems of environmental governance and stewardship continue to flourish but often do so separately or in conflict with Canadian federal and provincial laws.[25] Whereas Canadian environmental protection is maintained through a regulatory and assessment regime that industry must navigate through to obtain permits and be allowed to continue operations, many Indigenous environmental legal obligations automatically accompany land ownership or land use. Cree legal scholar Darcy Lindberg explains that the legal protocols that oblige

21. Read, *supra* note 7.

22. Julien Gignac, "In Northern Ontario, Herbicides Have Indigenous People Treading Carefully and Taking Action," *The Globe and Mail* (12 November 2017) online: <https://www.theglobeandmail.com> [Gignac].

23. A quote from a letter written by TEK Elders to provincial and federal departments, as printed in *ibid*.

24. Napoleon & Askew, *supra* note 11 at 25–26.

25. Jessica Clogg et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 J Envtl L & Prac 227; Benjamin J Richardson, "The Ties That Bind: Indigenous Peoples and Environmental Governance" in Benjamin J Richardson, Shin Imai, & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009).

trapline holders to protect land and animals are rooted in principles of deep reciprocity.[26] In this way, trappers who have obtained a right or ability to hunt, fish, or harvest on the land simultaneously have an obligation to protect the land and the accompanying plants and animals.

Whereas Western ideas of conservation centre on the need to conserve resources for the purposes of human consumption and profit, some Indigenous trappers' obligations go beyond human-centred conservation and seek to protect the environment on behalf of the animals' best interests rather than on behalf of their own best interests.[27] To address this problem, scholars Collins and Morales have called for the development of an Aboriginal tort law through which the court will incorporate Indigenous perspectives into the tort law analysis.[28] Collins and Morales argue that tort jurisprudence in the area of Aboriginal environmental claims should reflect the insights of Aboriginal law and scholarship, and should be utilized as a crucial part of protecting property interests in Canada.[29] This approach is particularly significant for Indigenous trappers, who have their own varied systems of governance, protocol, and legal obligations that coincide with being a trapper and using their trapline. The unique perspective of trappers should be used in both civil litigation and consultation with government to raise the collective understanding of the environmental cost of industrial activity. On an individual basis, trapline holders should use this knowledge to remedy against industrial activity, such as aerial spraying of herbicides, that impedes their ability to enjoy the use of their trapline. Successful tort claims may allow Indigenous claimants to protect against environmental degradation to their trapline territory in a more direct way than environmental regulation alone could provide. It is more direct, in that protecting property interests of Indigenous trapline holders sometimes coincides with allowing Indigenous trapline holders to fulfil their own environmental protocols and legal obligations to the land under their own legal systems.

III CAN TORT LAW BE USED AS AN EFFECTIVE MECHANISM OF ENVIRONMENTAL GOVERNANCE FOR INDIGENOUS TRAPPERS?

One of the central questions of this paper is whether current tort law is a suitable avenue through which Indigenous trappers can enforce their Aboriginal rights to use their traplines. Beyond providing Indigenous trappers a legal avenue to protect their traplines, this paper also considers tort law's potential to reconcile Indigenous environmental laws upheld by Indigenous trappers with Canadian environmental law. Although there are fundamental differences between the common law's approach and various Indigenous laws' approach to remedying or preventing wrongdoings, there may be some common ground between the two. For example, tort law's historical purpose of balancing the right of autonomy with the obligations to not

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26. Darcy Lindberg, *kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming Gendered Protocols in Cree Ceremonies through Cree Law* (LLM Thesis, University of Victoria Faculty of Law, 2017) [unpublished] at 95, 110.

27. Raymond Williams, "Ideas of Nature" in *Problems in Materialism and Culture: Selected Essays* (London: NLB, 1980) at 67–85.

28. Collins & Morales, *supra* note 13 at 20.

29. Collins & Morales, *supra* note 13 at 21.

do harm to one's neighbour[30] shares some similarities to the normative principles within Anishinaabe law that each person owes a duty of care to each other and the environment.[31]

A. Historical Development of Tort Law

The overarching purpose of tort law is to address the injury and losses that one person experiences because of the conduct of another person, and to compensate them for that loss.[32] Property torts specifically address injury and harms related to an interest in property. For example, private nuisance protects the right of those with a possessory interest in land to enjoy a reasonable level of environmental quality.[33]

Tort causes of action such as nuisance and trespass were developed to protect an individual's property interests.[34] Within the common law tradition, the protection of a proprietary interest in land is rooted in the idea that with ownership comes the right to do whatever you please with the land.[35] Of course, this is limited to restrict behaviour that would interfere with a neighbouring property owner's ability to reasonably enjoy their land. Within the common law concept of property, control of property is manifested through possession. Other legal traditions frame the relationship between humans and land differently. For example, within Anishinabek law the relationship to land or property is manifested in capacity, not possession. This means that a person's control of a piece of land flows from their capacity and ability to help others and maintain a reciprocal relationship with the land.[36] These fundamental differences in the way that ownership and property rights are conceived will impact the ways in which Indigenous trappers might wish to protect their property rights vis-á-vis access to a trapline that has been harmed by industrial pollution or contamination.

If tort law is "the institution that determines what our legal rights and obligations are to one another . . . and, as such, affects our expectations of ourselves and of others,"[37] then perhaps tort law is an appropriate mechanism for trappers to use to protect their ability to govern their environment in a reciprocal manner. Furthermore, in *Tsilhqot'in Nation v British Columbia*, the Supreme Court of Canada stated that the *sui generis* nature of Aboriginal title means that it creates a beneficial interest in land that gives the First Nation the right to possess it, manage it, use it, enjoy it, and profit from its economic development.[38] If tort law is open to protecting this type of *sui generis* property interest, there is potential for a deeper level of

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30. Michael Lobban, "The Development of Tort Law" in William Cornish et al, eds, *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law* (Oxford: Oxford University Press, 2010) at 891 [Lobban].

31. Larry Chartrand, ed, *The Inter-Societal Imperative of Understanding Indigenous Concepts of "Property"* (2006) [Chartrand].

32. Allen M Linden, Lewis N Klar, & Bruce Feldthusen, *Canadian Tort Law: Cases, Notes & Materials*, 14th ed (Markham: LexisNexis, 2014).

33. Collins, *Toxic Torts*, *supra* note 18 at 56.

34. Lobban at 887.

35. *Ibid*.

36. Chartrand, *supra* note 31.

37. Leon Trakman & Sean Gatien, *Rights and Responsibilities* (Toronto: University of Toronto Press, 1999) at 3, cited in Collins & Morales, *supra* note 13 at 4.

38. 2014 SCC 44 at paras 70, 73 [*Tsilhqot'in*].

environmental rights protection open to trappers who wish to protect their own ability to steward the trapline.

Several scholars have already begun to analyze ways in which the law could adapt to better protect Aboriginal environmental rights. For example, scholar Lynda Collins' work has focused on the ways in which Aboriginal property interest may be relied on to ground tort law remedies to protect Aboriginal environmental rights outside of constitutional law.[39] As Collins explains, in the context of property tort law there are typically four categories of Aboriginal property interests: (1) interests in reserve lands, (2) interests in Aboriginal title lands, (3) interests in lands over which a claim of Aboriginal title has been asserted, and (4) interests involving lands subject to Aboriginal rights.[40] These four categories apply to Indigenous trapline holders as well. Where a trapline is within a First Nations reserve, then that trapper or trapper family will have sufficient possessory interest in the land to pursue a nuisance claim.[41] In cases where the trapline exists in territories over which treaties have been signed, this interest may stem from the constitutionally protected treaty rights.[42] In other cases, and most likely where traplines exist over untreatied territories, trappers' interest in the land may stem from constitutionally protected Aboriginal rights and/or title.[43]

B. Filling in the Gaps of Constitutional Aboriginal Law

Bringing a constitutional claim under section 35 may be a way for trappers facing interference with their trapline in the form of environmental harm to seek remedy. However, this legal avenue poses many barriers to trapper claimants. First, because Aboriginal rights are held collectively, an individual who wishes to make a claim asserting section 35 rights will require the support of the Nation's authorized representative.[44] In First Nation communities that are Aboriginal First Nations *and* "bands" within the meaning of the *Indian Act*,[45] the elected band council will act as the authorized representative. This may pose a problem to potential claimants in communities where the environmental harm comes as a result of an

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39. Lynda Collins, "Protecting Aboriginal Environments: A Tort Law Approach," in Sandra Rodgers, Rakhi Ruparelia, & Louise Bélanger-Hardy, eds, *Critical Torts* (Toronto: LexisNexis, 2008) [Collins, "Protecting Aboriginal Environments"].

40. *Ibid* at 74.

41. *Saik'uz First Nation*, *supra* note 14 at para 88.

42. The text of Treaty 8 states that "Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described," Treaty No 8 Made June 21, 1899, online: <http://www.aadnc-aandc.gc.ca/eng/1100100028805/1100100028807>; see also *Mikisew Cree First Nation v Canada*, 2005 SCC 69, where trapping rights of Indigenous people, protected in Treaty 8, were at issue.

43. In *R v Van der Peet,* [1996] 2 SCR 507 [*Van der Peet*], the Supreme Court of Canada laid out the "integral and distinctive" test for determining the existence of an Aboriginal right, and in *R v Sappier*, 2006 SCC 54, the court clarified that even practices such as food harvesting, which are essential to the survival of a group, may meet that test; the test for proving Aboriginal title was laid out in *Delgamuukw v British Columbia,* [1997] 3 SCR 2010 [*Delgamuukw*].

44. *Behn v Moulton Contracting Ltd,* 2013 SCC 26 at para 31.

45. *Indian Act,* RSC 1985, c I-5.

industrial activity that the band council has negotiated and approved of, because then they can act as the gatekeepers to any cause of action that would interfere with the industrial activity.[46]

There are also several other barriers that remain. Even if an Indigenous trapper is authorized to bring a section 35 claim, the infringement of an Aboriginal right may be justified when the interests of all Canadians are weighed against those of the Indigenous claimants. As a result, as Kent McNeil argues, Aboriginal title can provide less protection than other non-constitutional property interests.[47] In some cases, the only remedy potentially available to trappers is engaging the government's duty to consult, which does not mean their consent is required for a project or conduct to go ahead.[48]

For Indigenous trapline holders, consultation is often not enough to protect the nuanced environmental and Aboriginal right at risk: interference with a trapline holder's ability to use and steward the trapline. Consultation may succeed in bringing trappers to the table and giving them a voice. However, if statutory requirements of environmental assessment and scientific reporting do not accord with the trappers' level of knowledge and assessment of their trapline, decision making will substantially fail to give effect to trappers' roles as stewards of the trapline. Trappers should be able to protect and ensure conservation of their environment as *they* understand it and with their engagement. For example, the TEK Elders fundamentally do not believe that a chemical herbicide should be sprayed over the forests in their territory where they trap not only because it interferes with their ability to conserve wildlife and plants, but because it does not align with their Anishinaabe worldviews of how the forests should be treated.

Finally, litigating a section 35 claim requires a significant amount of time, money, and resources, especially if the plaintiff is seeking to prove the existence of Aboriginal rights and/or title. Therefore, in cases where the ultimate legal goal is to stop conduct that interferes with a trapline holder's ability to hunt, fish, or harvest plants as well as ensure that the animals and plants are protected, then tort law may be a more pragmatic avenue.

The gaps in constitutional law reiterate the need to find alternative legal avenues, such as tort law, to protect Indigenous trappers' environmental rights. Tort law is an appealing alternative legal avenue because it acts to directly address harm and is rooted in principles that synchronize with some Indigenous legal principles, such as owing a duty of care to others. Most tort law claims are grounded in the claimant's proprietary interests. Therefore, it is necessary to connect Indigenous trappers' interest in traplines to proprietary interest in the land. In Canada, the case law has started to show signs that the law could evolve to better protect Indigenous trappers' constitutional Aboriginal rights and title through the application of tort law. The following sections will discuss some of the developments in the case law, such as the *Saik'uz First Nation* and *Stellat'en First Nation v Rio Tinto Alcan Inc* decisions[49]

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46. For example, this scenario is currently playing out in Hollow Water Traditional Territory, as the elected band counsellors support the operation of a sand mine near the territory, whereas other members of the community, including trapline holders, are concerned about the negative environmental impacts of the mining operation to their trapline.

47. Kent McNeil, "Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got It Right?" (Annual Robarts Lecture; 12th) (Toronto: York University Printing Services, 1998) at 21, 26, cited in Collins & Morales, *supra* note 13 at 10.

48. Collins & Morales, *supra* note 13 at 11.

49. *Saik'uz First Nation, supra* note 14.

to demonstrate the practical ways in which tort law can be applied to protect Indigenous trappers' rights.

IV TORT ANALYSIS: THE CURRENT STATE OF TORT LAW AND POSSIBLE AVENUES FOR REMEDY AGAINST INJURY TO TRAPLINES FROM SPRAYING OF HERBICIDES

In this section I will discuss the ways in which tort law could be used by Indigenous trappers to seek remedy against injury to traplines from spraying of herbicides. I begin with a discussion of the landmark decision in the *Saik'uz First Nation* case.

A. The BCCA's Decision in *Saik'uz First Nation* and What It Means for Trappers

The first consideration for Indigenous claimants seeking to protect their traplines from the negative effects of herbicide spray through a property tort claim is whether their relationship to the trapline will qualify as sufficient "possessory interest" in the land. In the 2015 British Columbia Court of Appeal (BCCA) decision *Saik'uz First Nation*, the issue of whether Indigenous claimants could bring forward tort claims, which were grounded in not-yet-proven Aboriginal rights and/or title, was resolved in favour of Indigenous claimants.[50] In 2011, the first claims were brought by Saik'uz and Stellat'en First Nations, also referred to as the "Nechako Nations," against Rio Tinto Alcan in private and public nuisance and for breach of riparian rights as a result of operations of Rio Tinto's dam.[51] The Nechako Nations were attempting to address the issue of environmental harm to their traditional fisheries in the Nechako River area, which had occurred as a result of the construction of the dam in 1952 and continued operation by Rio Tinto Alcan. Initially, the British Columbia Supreme Court (BCSC) granted a motion to strike the claims on the basis that it was plain and obvious that the plaintiff's claims had no reasonable chance of success at trial, given that the tort's claims were grounded in unproven Aboriginal title and/or rights and interest in reserve land.[52] In 2015, the BCCA overturned this judgment, clarifying that asserted but unproven Aboriginal title and/or rights were sufficient to allow claims in nuisance and riparian rights to proceed to trial.[53] However, for the claims regarding property rights of reserve land, the BCCA found that claimants could not proceed based on riparian rights, as those water rights had not yet been conveyed when the reserve land was created.[54] Still, the court held that exclusive possessory rights to reserve lands were enough to sustain claims in nuisance or trespass.[55]

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50. *Saik'uz First Nation, supra* note 14 at para 60.

51. *Ibid* at para 4; see also *Thomas v Rio Tinto Alcan Inc*, 2013 BCSC 2303 at paras 2–3, [2013] BCJ No 2748 [*Thomas*].

52. *Ibid* at 51.

53. *Saik'uz First Nation, supra* note 14 at paras 60–79.

54. *Ibid* at paras 81–85.

55. *Ibid* at para 88.

The BCCA's decision in *Saik'uz First Nation* is significant. The decision allows Indigenous claimants to have the same access to tort law to protect their environmental rights as non-Indigenous Canadians. The BCCA clarified that *sui generis* Aboriginal property interests will constitute a possessory interest in land, which is required to ground a number of tort law causes of action. Indigenous claimants with asserted but as-yet-unproven Aboriginal title and/or rights claims can bring forward tort claims grounded in the possessory interest of those lands. In doing so, the BCCA highlighted the repeated dicta within Canadian jurisprudence that Aboriginal rights were not created by section 35 but rather existed before the arrival of the first European colonizers.[56] The words "recognized and affirmed" within section 35 indicate that the Crown has already accepted the existence of Aboriginal rights and now it is a matter of identifying what those rights are.[57]

Given the difficulty of proving a claim to Aboriginal rights and/or title—to date there has only been one successful grant of Aboriginal title[58]—the *Saik'uz First Nation* decision has opened up the possibility of remedy through tort law for a large group of Indigenous claimants facing environmental harm. Specifically, the decision now makes it possible for an Indigenous trapline holder to meet the first qualification of standing in a claim of private nuisance, as well as a number of other tort claims, which I will elaborate on below.

B. Types of Tort Claims That Could Be Advanced

There a several types of tort claims that could be used to defend Aboriginal environmental rights. This section will review profit à prendre, private and public nuisance claims, trespass claims, breach of riparian rights, and defence of statutory authority.

1. Profit À Prendre

Profit à prendre refers to a right to enter on the land of another and take something from the land, such as minerals, oil, stones, trees, turf, fish, or game.[59] In some cases, it may be possible for Indigenous trappers to initiate property tort claims by grounding their possessory right to land through a profit à prendre right to the trapline. This approach was accepted by the BCCA in *Bolton v Forest Pest Management Institute,* where a registered trapline was found to be a sufficient interest in the land to substantiate the tort claim.[60] In their original pleadings the Nechako Nations argued that they had an Aboriginal right to fish, which could be likened to a profit à prendre and thus was sufficient to ground their claim in private nuisance.[61] On appeal, this pleading was upheld on the basis that if the Aboriginal right could be proved the profit à prendre right would be sufficient to ground a private nuisance claim.[62]

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56. *Ibid* at paras 63–66, citing *Van der Peet, supra* note 43 at para 28; *Delgamuukw, supra* note 43 at para 133; and *Tsilhqot'in. supra* note 38 at para 69.

57. *Tsilhqot'in, supra* note 38 at para 62.

58. *Ibid*.

59. *R v Tener,* [1985] 3 WWWR 673 at 690–691.

60. (1985), 21 DLR (4th) 242, [1985] 6 WWR 562 (BCCA).

61. *Thomas*, *supra* note 51 at para 22.

62. *Saik'uz First Nation*, *supra* note 14 at para 55.

2. Private Nuisance Claims

Once the issue of standing is resolved, a private nuisance claimant is required to demonstrate that the interference to their property, or property over which they have shown an adequate possessory interest, is both substantial and unreasonable.[63] The first part of this two-part approach, developed in *Antrim Truck Centre Ltd v Ontario (Transportation)*, requires plaintiffs to demonstrate that the interference is substantial, or "non-trivial."[64] Non-trivial interference does not necessarily require material injury; it is possible for non-material injury that results in loss of amenity to property to constitute a non-trivial interference. The courts have previously found that the use of aerial spraying of herbicides over a plaintiff's property may constitute a private nuisance.[65] Given that government reports have found that use of glyphosate can cause short-term reduction in numbers of some wildlife species, it is likely that the contamination of glyphosate within a trapline, which is typically used for activities such as harvesting plants and hunting wildlife, will meet the non-trivial interference test.[66]

The second part of the two-part approach requires the plaintiff to demonstrate that the interference complained about is unreasonable. This analysis includes a consideration of the non-exhaustive factors enumerated in *Huron Steel*: severity of the interference, character of the locale, utility of the defendant's conduct, and sensitivity of the use interfered with.[67] The severity of the interference will include an analysis of the nature, duration, and effect of the harm. The severity of the interference is unique in Indigenous claims where the plaintiffs' rights to the trapline are often founded on the fact that hunting and harvest on that land is integral to their culture, livelihood, and well-being. As for the nature and duration of the harm, the aerial spraying of herbicides is done on a rotation, and the herbicide is said to be taken up by the targeted vegetation within around two days. However, it is unclear from the studies how long the contaminants continue to exist if ingested by wildlife or absorbed into water systems.[68]

The character of the locale, or neighbourhood, is another relevant factor to consider in the balancing test of "unreasonable" interference.[69] The court may consider the changing nature of the locale due to development, however they may also consider who was there first. In the case of an Indigenous trapline holder, the very claim of the existence of Aboriginal rights and/or title demonstrates that they were there first. Finally, in determining whether the interference is "unreasonable," the court may consider the utility of the defendant's conduct. However, in cases where the plaintiff has suffered physical or material damage to their property, the utility of the defendant's conduct, no matter how high, will not defeat the plaintiff's claim of unreasonable interference (especially where the defendant is a private party).[70] Therefore,

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63. *Antrim Truck Centre Ltd v Ontario (Transportation),* 2013 SCC 13 [*Antrim*].

64. *Ibid* at para 19.

65. See *Friesen v Forest Protection Ltd*, [1978] NBJ No 30 at para 34.

66. Thompson & Pitt, *supra* note 20 at 5.

67. *340909 Ontario Ltd v Huron Steel Products Ltd* (1992), 9 OR (3d) 305.

68. Thompson & Pitt, *supra* note 20 at 5.

69. See *St. Helens Smelting Co v Tipping* (1865), 11 HLC 642, (HL(Eng)); *Tock v St John's Metropolitan Area Board*, [1989] 2 SCR 1181.

70. This was confirmed by the Supreme Court of Canada in *Schenk v Ontario; Rokeby v Ontario*, [1987] 2 SCR 289, where salt-spraying caused physical injury to two families' farm properties; also see *Antrim, supra* note 63.

it is likely that the interference caused by aerial spraying of glyphosate-based herbicides, which kills plants and animals within traditional trapping territory, will constitute a non-trivial and unreasonable interference sufficient to ground a private nuisance claim.

3. Public Nuisance Claims

Public nuisance refers to "an unreasonable interference with the public's interest in questions of health, safety, morality, comfort or convenience."[71] A private party such as an individual trapper or trapline-holding family may only bring a claim in public nuisance with the permission of the attorney general. However, if the trapper claimant can show that they have a "special injury" as a result of the nuisance, then they may be able to bring the claim themself.[72] Case law is mixed on what constitutes a "special injury." In *Hickey et al v Electric Reduction Co of Canada, Ltd* the court held that special injury means the plaintiffs must have injury that is not only different in degree but in kind from that of the general public.[73] In contrast, in *Gagnier v Canadian Forest Products Ltd* the court rejected the *Hickey* approach and allowed crab fishers to privately pursue a public nuisance claim on the basis that a special injury, different in degree, was sufficient.[74] If the *Gagnier* approach is used, then trappers will have a better chance of being able to make a private claim in public nuisance, as typically herbicide spraying over public forests affects them to a higher degree than non-Indigenous Canadians because they are more likely to rely on that harvest as a food or medicinal source. Even if Aboriginal rights or title is claimed but not yet proved, it is arguable that preserving the environmental quality of the territory is so crucial that it would still meet the common law test for special injury.[75] Furthermore, if the trapper can prove that the harm interferes with the exercise of an Aboriginal treaty or Aboriginal right, then that will likely also meet the special injury test.[76] Notably, in *Saik'uz First Nation,* neither the BCSC nor the BCCA went into an analysis of whether the Nechako Nations had sufficient special injury to bring a claim in public nuisance.

4. Trespass Claims

In *Saik'uz First Nation,* the court confirmed that Aboriginal *sui generis* property interests are sufficient to substantiate a trespass claim. Previously, in *Tolko Industries Ltd v Okanagan Indian Band*, the Okanagan Indian Band was able to ground a trespass claim against Tolko Industries over an area of land where they had a previously proven their right to harvest

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71. *Ryan v Victoria (City),* [1999] 1 SCR 201 at para 52, *citing* LN Klar, *Tort Law,* 2nd ed (Toronto: Carswell, 1996). See also Collins, *Toxic Torts, supra* note 18 at 52.

72. Allen M Linden, Lewis N Klar, & Bruce Feldthusen, *Canadian Tort Law: Cases, Notes & Materials*, 14th ed (Toronto: LexisNexis, 2014) at 659–660.

73. *Hickey et al v Electric Reduction Co of Canada*, Ltd (1970), 2 Nfld & PEIR 246 at 372.

74. *Gagnier v Canadian Forest Products Ltd.,* 1990 CanLII 538 (BCSC) at 19.

75. Collins Morales, *supra* note 13 at 15; Lynda M Collins & Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap" (2010) 47:4 Alberta L Rev at 959–991.

76. Collins, "Protecting Aboriginal Environments," *supra* note 39 at 61. See also Meghan Murtha, "Granting Salmon Standing: Modernizing Public Nuisance to Serve the Public Interest in Environmental Protection" (2009) 17 Tort L Rev 45.

timber.[77] The BCCA's decision in *Saik'uz First Nation* expanded trespass as a cause of action to Indigenous claimants, as it is now arguable that even plaintiffs who ground the trespass claim in a not-yet-proven Aboriginal rights and/or title claim have sufficient possessory interest to bring the claim forward. The success of environmental trespass claims typically rests on the issue of directness, as the plaintiff is required to prove that the defendant directly—whether intentionally or negligently—caused the contaminant to enter the plaintiff's land.[78] In the case of Indigenous trapper claimants, if the aerial spraying is conducted directly over their territory that falls within their trapline, then the issue of directness will likely be overcome.[79] However, if the aerial spraying occurs in neighbouring territory, it will be necessary for the claimants to demonstrate that the arrival of contaminants onto the trapline was a direct result of the defendant's conduct.[80]

5. Breach of Riparian Rights

The owner of land connected to water such as a river has riparian rights, which include "the right to access the water, the right of drainage, rights related to the flow of water, rights relating to the quality of water, rights relating to the use of water and the right of accretion."[81] These common law water rights may be limited through the enactment of water legislation, as was the case in *Cook v Corporation of the City of Vancouver*.[82] In *Saik'uz Nation*, the BCCA held that because the common law riparian rights were extinguished by the enactment of the *Water Act Amendment Act*[83] before the creation of the Aboriginal land reserve, interest in the reserve lands did not suffice to ground a claim for breach of riparian rights.[84] However, the Saik'uz Nations argued that the *Water Act Amendment Act* was constitutionally inapplicable to Aboriginal title lands, and the BCCA allowed this claim to proceed.[85]

6. Defence of Statutory Authority

The leading case on the use of defence of statutory authority against a nuisance claim is *Ryan v Victoria (City),* where the Supreme Court of Canada (SCC) found that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority. In cases where the defendant is a statutory body operating in the public interest, rather than merely a private company regulated by statute, it is less clear if or how the court is to apply a defence of statutory authority,[86] although in *Antrim* the SCC clarified that private interests should

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77. *Tolko Industries Ltd. v Okanagan Indian Band*, 2010 BCSC 24.

78. Collins, *Toxic Torts*, *supra* note 18 at 70.

79. See Collins, *Toxic Torts*, *supra* note 18 at 72, citing Lewis N Klar, *Tort Law*, 3rd ed (Toronto: Carswell, 2003) at 103 (noting that the operation of gravity does not render an intrusion indirect).

80. Collins, *Toxic Torts*, *supra* note 18 at 71.

81. *Saik'uz First Nation, supra* note 14, citing Gérard V La Forest, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 200–201.

82. [1914] AC 1077, 18 DLR 305.

83. *Water Act Amendment Act, 1925*, SBC 1925, c 61.

84. *Saik'uz Nation, supra* note 14.

85. *Ibid* at paras 26, 59.

86. Collins *Toxic Torts*, *supra* note 18 at 162.

not presumptively be trumped by public purpose.[87] In the case of aerial herbicide spraying authorized by the MNRF in Ontario, the conduct that causes the nuisance—the spraying—is authorized by the governmental authority, yet the defence of statutory authority may not apply if defendants are unable to prove that harm to the traplines was inevitable. For example, it may be proven that alternative pesticides were available that were equally effective in protecting trees yet less harmful to wildlife. Similarly, courts may be reluctant to apply the defence simply because of the significant impacts of the nuisances at issue on the private interests of Anishinaabe trappers.

C. Potential Downsides of a Tort Law Approach

Although tort law is well suited to dealing with isolated incidents of harm, it is not as well suited to dealing with widespread harm, which can often accompany pollution or contamination.[88] Tort law is also reactive rather than proactive; a claim cannot be made until the tortfeasor acts in a way that infringes on the trappers' rights.[89] Still, there are upsides. For example, if the appropriate test is met, a claimant in tort law may be successful in achieving injunctive relief to stop the defendant's conduct before irreparable harm is done to a trapline.[90]

V CONCLUSION

The environmental harm that Indigenous trappers face, and the interference to their ability to use and manage the trapline as they have traditionally done, is a significant and widespread issue in Canada. In light of this environmental harm, caused by the chemical contamination and pollution that accompanies industrial operations, Indigenous trappers face many barriers to obtaining legal recourse. Relying on constitutional law alone is insufficient for individual Indigenous trappers, who face particular barriers to remedying environmental harm through constitutional claims that require the authorization of the entire First Nation's or Band's representatives. In addition, seeking remedy through Aboriginal constitutional claims is extremely cumbersome on any individual claimant. Tort law has the potential to provide useful remedies that other areas of the law may not provide, such as injunctive relief and compensatory relief. However, principles of tort law are grounded in protecting property interests, as they are understood by the common law. As a result, it is not always clear if and how Aboriginal rights and/or title can fit into tort law causes of actions.

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87. *Ibid* at 163–164, citing N Benson, "What to Do about Useful Nuisances: *Antrim Truck Centre* and Its Implications for Toxic Torts" (2012), 20 Tort L Rev 107.

88. Collins, "Protecting Aboriginal Environments," *supra* note 39 at 76.

89. Geoffry WG Leane, "Indigenous Peoples Fishing for Justice: A Paradigmatic Failure in Environmental Law" (1997) 7 J Env L & Prac 297, cited in Collins, "Protecting Aboriginal Environments," *supra* note 39 at 77.

90. The test for interlocutory injunction, as laid out by the SCC in *Metropolitan Stores (MTS) Ltd v Manitoba Food & Commercial Workers, Local 832*, [1987] 1 SCR 110, and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, requires the court to consider whether (1) there is a serious question to be tried, (2) the applicant will suffer irreparable harm if the injunction is refused, and (3) the balance of convenience favours an injunction.

The 2015 *Saik'uz First Nation* decision was ground-breaking in that it has opened the door to Indigenous claimants wishing to exercise environmental rights through the law of torts. As Justice Tysoe explained:

> it seems to me there is no reason in principle to require [the claimants] to first obtain a court declaration in an action against the Province before they can maintain an action against another party seeking relief in reliance on their Aboriginal rights. As any other litigant, they should be permitted to prove in the action against another party the rights that are required to be proved in order to succeed in the claim against the other party.[91]

This puts Indigenous claimants on equal footing with non-Indigenous Canadians seeking to pursue a tort claim to protect their property interests. However, the reality for Indigenous trappers is that being placed on equal footing may not be enough to assist them in achieving their goals through tort law. Indigenous trappers have unique legal rights, and as such they face unique injury when those rights are interfered with.

In the case of the TEK Elders from Sagamok Anishnawbek First Nation, a successful tort claim will likely require an incorporation of Anishinaabe legal principles. These may include prioritizing a cumulative effect analysis and acknowledging the duties and obligations trapline holders owe to the plants and animals, which flow from their rights to use the trapline. Creating space for Indigenous concepts of land ownership, which often centre on the capacity to maintain reciprocal relationships with the land, within tort law is required to fully allow Indigenous claimants such as trappers to have full access to the purview of tort law.

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91. *Saik'uz First Nation*, *supra* note 14 at 66.

THE INDIGENOUS DOMAIN AND INTELLECTUAL PROPERTY RIGHTS

James [Sa'ke'j] Youngblood Henderson[1]

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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1. Research Fellow, Indigenous Law Centre, College of Law, University of Saskatchewan. Tribal citizen of Chickasaw Nation.

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.

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

*Erin Chochla**

CONTENTS

* This article was accepted for publication before the author began her clerkship at the Federal Court.

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*.