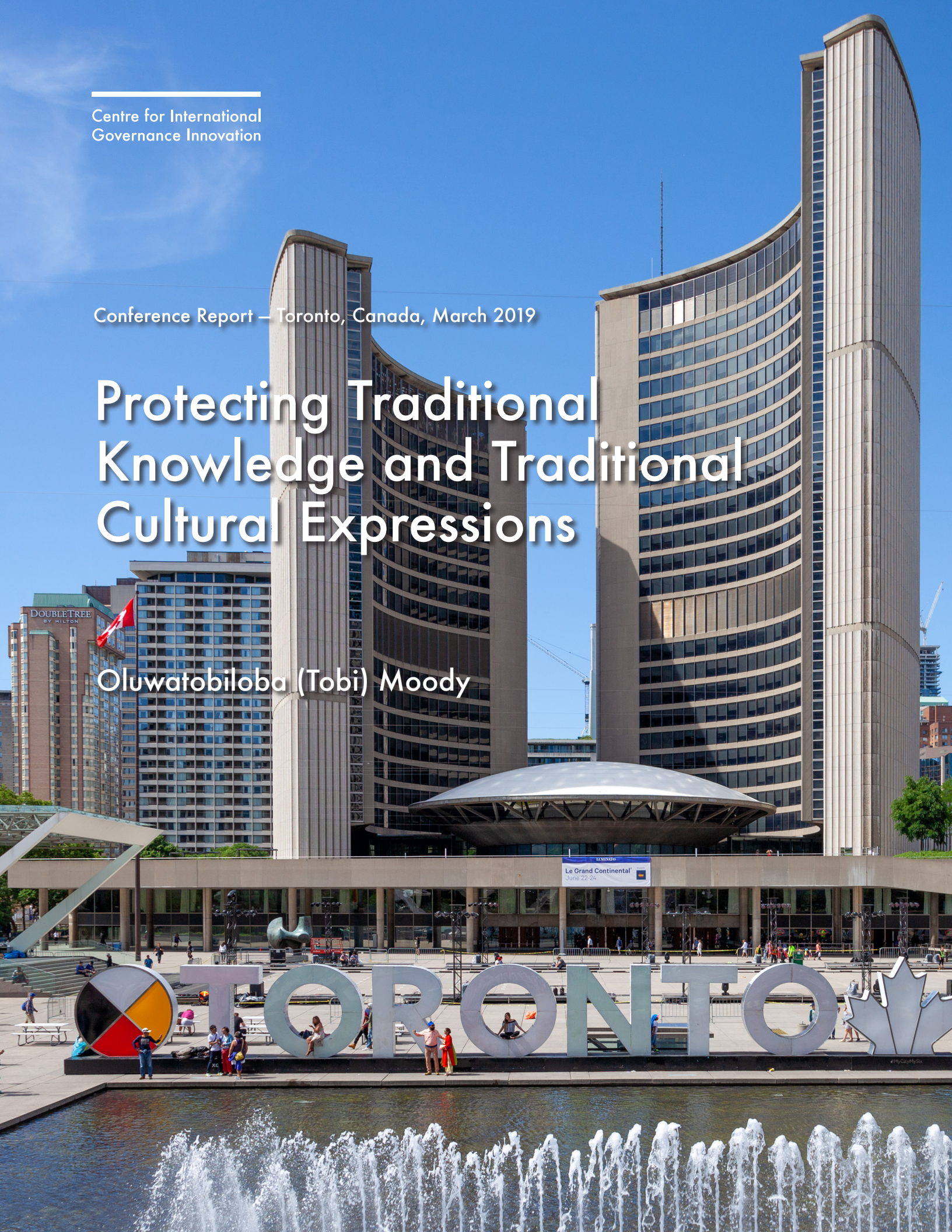

Centre for International
Governance Innovation

Conference Report – Toronto, Canada, March 2019

Protecting Traditional Knowledge and Traditional Cultural Expressions

Oluwatobiloba (Tobi) Moody



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CIGI Masthead

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Table of Contents

vi	About CIGI
vi	À propos du CIGI
vi	About International Law
vii	About the Author
1	Introduction
2	IP Rights, TK and TCEs: Navigating Complex Relationships
4	Canada's Indigenous Peoples' Approaches to Protecting TK and TCEs
5	Canadian Case Studies on the Intersection between IP Rights and TK Systems
8	The Way Forward
10	Agenda
11	Participants

About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research initiatives focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and have received support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan doté d'un point de vue objectif et unique de portée mondiale. Nos recherches, nos avis et nos interventions publiques ont des effets réels sur le monde d'aujourd'hui car ils apportent de la clarté et une réflexion novatrice pour l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos projets de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques internationales, et le droit international. Nous comptons sur la collaboration de nombreux partenaires stratégiques et avons reçu le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

About International Law

CIGI strives to be a leader on international law research with recognized impact on significant global issues. Using an integrated multidisciplinary research approach, CIGI provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law. The goal is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future.

About the Author

Oluwatobiloba (Tobi) Moody is a CIGI fellow and former CIGI post-doctoral fellow. In this role, he researched international law and governance pertaining to intellectual property with a specific focus on the protection of traditional knowledge and genetic resources. Prior to joining CIGI, Tobi conducted academic legal research in the Faculty of Law at Queen's University, was an assistant legal officer at the World Intellectual Property Organization in Geneva, a legal intern at the Appellate Body Secretariat of the World Trade Organization and an associate counsel at Olaniyi George & Co. LLP in Nigeria. Tobi has a Ph.D. in intellectual property from Queen's University, where he studied as a Vanier scholar, an LL.M. in international trade and investment law from the University of the Western Cape in South Africa, a B.L. from the Nigerian Law School and an LL.B. from the University of Ibadan in Nigeria.

Introduction

On April 26, 2018, Canada's minister of innovation, science and economic development, the Honourable Navdeep Bains, announced Canada's new intellectual property (IP) strategy. One of the key significant inclusions within the IP strategy is its reference to and provision for Canada's Indigenous peoples. A key objective of the strategy is to build up understanding on issues relating to the relationship between traditional knowledge (TK), traditional cultural expressions (TCEs) and the IP system.

In furtherance of this objective, this workshop was jointly organized by the Centre for International Governance Innovation (CIGI) and Innovation, Science and Economic Development Canada (ISED), in collaboration with the Assembly of First Nations (AFN). In initiating conversations on the complex relationship between TK, TCEs and IP rights, the workshop offered an important opportunity to share information and strengthen discussions between representatives of First Nations, government officials, academics and policy experts on the importance of recognizing, promoting and protecting TK and TCEs. The workshop focused on the opportunities and challenges associated with using the IP system to protect TK and TCEs. The workshop set out to achieve the following key objectives:

- information sharing;
- initiating conversations with First Nations, pursuant to Canada's IP strategy, about the importance of recognizing, valuing and protecting their TK and TCEs;
- learning more about First Nations' perspectives to protect their TK and TCEs;
- providing information on the main principles of the IP system and discussing their relationship with the protection of TK and TCEs; and
- discussing case studies from Indigenous communities and highlighting the practical experiences of Canada's Indigenous communities with the IP system.

To this end, the event was comprised of a series of sessions aimed at creating awareness,

learning, and stimulating dialogue and engagement among all participants.

Held at the Native Canadian Centre of Toronto, the event was facilitated by Mathieu Courchene, a member of the Sagkeeng First Nation from Manitoba and president of the Hunter-Courchene Consulting Group. A total of 50 participants attended the workshop.

The session commenced with an opening prayer and welcome led by Elder Edmond Sackaney, a member of the Fort Albany First Nation. Under his guidance, participants were led in a smudging exercise to help ensure that the discussions proceeded within a good frame of mind and heart. Participants introduced themselves and introductory remarks were provided by representatives from ISED, CIGI and the AFN, respectively, outlining how they hoped the sharing of ideas at this meeting would commence a discussion about the ways in which Indigenous communities desire to develop, use, govern and protect their TK and TCEs. The federal government's stated commitment to domestic implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provided important context for this discussion. UNDRIP article 31 specifically spells out the rights of Indigenous peoples to their cultural property, TK and TCEs: "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."

In addition to article 31, UNDRIP is replete with references to Indigenous culture, land, resources and knowledge, showing the importance and centrality of this issue in achieving recognition and respect for Indigenous peoples' rights. Canada's embrace of UNDRIP and this workshop's focus on elements of article 31 were seen as a welcome step in the implementation process. It was also suggested that such discussions could lead to more engagement of Indigenous experts in the

articulation of Canada's positions in international negotiations relevant to TK and TCEs.

The workshop was broadly divided into four main segments. The first segment involved a series of presentations aimed at setting the context for the day's discussions by highlighting the complex relationships between IP rights and TK and TCEs, including references to the global contexts. The second segment focused on Canada's Indigenous peoples and their specific approaches to sharing, protecting, valuing and commercializing TK and TCEs. The third segment involved breakout sessions where participants were able to reflect in smaller groups on case studies highlighting the relationships between the IP system, TK and TCEs. In the fourth segment, participants discussed the way forward and next steps.

IP Rights, TK and TCEs: Navigating Complex Relationships

The first segment commenced with a presentation by a CIGI representative on "Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions from a Global Perspective." The presentation focused on introducing the conceptual framework of IP rights and highlighting the nature of its relationship with efforts to effectively protect TK and TCEs. The first part of the presentation was a discussion of the nature of IP rights and the defensive and positive use of IP rights. IP refers to creations of the mind, such as inventions, literary and artistic works, designs, and symbols, names and images used in commerce.¹ Some of the major forms of IP, including their defining characteristics, were also highlighted:

- Patents grant time-limited monopolies (20 years) to inventors, enabling them to maximize returns on their invention for the period of the patent, after which it falls into the public domain. The three principal requirements to obtain a patent are novelty, utility and inventiveness.

- Trademarks are signs that can be represented graphically to distinguish goods or services of one producer from those of other producers. They can last for 15 years from the date of registration at the Canadian Intellectual Property Office (CIPO) and may be subsequently renewed multiple times for a fee. The key requirement for protection is distinctiveness of the sign.
- Copyright is a legal term used to describe economic and moral rights that creators have over their original literary, dramatic, musical and artistic works during their lifetime. After the creator's death, copyright passes on to their heirs for 50 years following the end of the calendar year in which the creator died.
- Industrial designs seek to protect original, visually appealing, aesthetic designs applied to useful articles. They can last up to 15 years after the filing date at CIPO.
- Trade secrets help protect undisclosed knowledge indefinitely through secrecy and access agreements. Three main elements are required: such knowledge must have commercial value, it must not be in the public domain and it should be subject to reasonable efforts to maintain secrecy.

The presentation then highlighted the interrelationship between IP rights and the governance of TK and TCEs. It was noted that TK and TCEs represent integral aspects of the cultural heritage of Indigenous peoples, often forming part of their cultural and spiritual identity. TK is a living body of knowledge passed on from generation to generation within a community.² TCEs are used to explain the forms in which traditional culture is represented. These may include songs, music, dance, art, designs, names, signs, symbols, performances, handicrafts, narratives and other types of artistic or cultural expressions. TCEs are integral to the cultural and social identities of Indigenous communities, as they embody know-how and skills and transmit core values and beliefs.³ In addition to explaining the scope and limitations of IP forms, the presentation noted some core justifications for protecting TK and TCEs, as well as the major challenges of using the IP system to protect TK and TCEs. Finally,

1 World Intellectual Property Organization, "What is Intellectual Property?", online: <www.wipo.int/about-ip/en/>.

2 *Ibid.*

3 *Ibid.*

the presentation provided participants with a picture of the global framework for protecting TK and TCEs, with reference to international instruments and processes related to TK: for example, UNDRIP; the American Declaration on the Rights of Indigenous Peoples; the Nagoya Protocol on Access and Benefit Sharing (ABS); the Convention on Biological Diversity; the International Treaty on Plant Genetic Resources for Food and Agriculture; the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization; the Indigenous Peoples' and Local Communities' Indigenous Knowledge Platform in the Paris Agreement on Climate Change; and the United Nations Economic, Social and Cultural Organization. It was highlighted that there needs to be coherence between international and domestic approaches to the protection of TK and TCEs.

The second presentation of the day, "Intellectual Property and Traditional Knowledge and Traditional Cultural Expressions," presented by a representative from ISED, was an introduction to the Government of Canada's initiatives relevant to IP, TK and TCEs. Reinforcing some of the themes from CIGI's presentation, the ISED presentation highlighted the importance of IP protection and provided an overview of Canada's current IP regime. The presentation further discussed the complex relationship between IP rights, TK and TCEs, and provided a summary of challenges and opportunities for protecting TK through the IP system. Finally, the ISED presentation updated participants on Canada's recent IP strategy, with a focus on opportunities for Indigenous peoples.

As noted, the objective of the IP strategy is to contribute to a more inclusive IP system by supporting IP awareness and capacity building for Indigenous communities, as well as supporting the participation of Indigenous peoples in the development and implementation of IP law, policy and programs as they relate to the protection of TK and TCEs both domestically and internationally. This strategy is aligned with the government-wide commitment to reconciliation and inclusive economic growth. There was interest from some participants in the possibility of using geographical indications to protect Indigenous knowledge. ISED also highlighted the public awareness function of the government with respect to IP education for Indigenous

peoples and noted that CIPO was available to provide basic IP awareness upon request. It was emphasized that general IP awareness could not be substituted for professional legal advice.

Wrapping up the first segment was a presentation by a representative of the AFN. Entitled "First Nations Traditional Cultural Expressions, Traditional Knowledge and Genetic Resources," the presentation highlighted the importance of TK to Indigenous peoples, as well as its growing importance within the fields of medicine, entertainment, fashion and other areas today. The presentation noted that the AFN was actively engaged in this area because of the growing interest in the value of First Nations' TK and TCEs. Providing a discussion of the nature and relevance of TK and TCEs, the presentation highlighted the existing limitations of effectively using IP forms such as copyright and trademarks to protect TCEs.

Some key issues that remained of concern included originality, formalities, term of protection, fixation and others. With respect to the time limitations that exist on IP protections, for instance, the representative noted the concern that TK could ultimately become part of the public domain. Several other gaps in the IP system make it untenable for TK to be effectively protected through IP. For TK, the AFN representative also pointed to some key incompatibilities that render the IP system unsuitable for protection, specifically the fact that TK is not generally considered novel, the non-recognition of rights holders and that TK is not captured under existing IP law.

The presentation also highlighted TK associated with genetic resources and some concerns about the patent system with respect to its protection. These concerns include the cost of monitoring and enforcing compliance, the misappropriation that continues to be enabled by the IP system, and the documentation and disclosure as part of the protection process under patent regimes, time limitations and so forth. Based on the above discussion, the representative expressed concerns that the IP system could enable theft, misappropriation, misuse, illegal copying, biopiracy or circumvention of ABS obligations regarding the use of TK and TCEs. The AFN representative further reflected on the global regimes for genetic resources, noting that through processes such as digital sequencing, existing laws are becoming outdated for the new and emerging forms of exploitation of Indigenous knowledge and

resources through synthetic alternatives. The representative ended the presentation by indicating that they are developing materials for First Nations.

Canada's Indigenous Peoples' Approaches to Protecting TK and TCEs

The second segment began with a presentation by an academic on “Traditional Knowledge, Traditional Cultural Expressions and Canadian Intellectual Property Law.” The presentation was aimed at triggering a discussion among participants on the complexities of the relationships between TK, TCEs and IP law, in particular within the Canadian context. Drawing on extensive examples and insights from recent research in the field, the presentation highlighted some challenges and gaps within the IP system, in particular regarding copyright law and TCEs. Some of the issues covered in this context included the concept of the public domain as the natural destination for time-limited IP protection, the challenges associated with fixation of TCEs, and the difficulty of defining authorship within traditional contexts, as well as the limited scope and duration of moral rights, among others.

The presentation emphasized the importance of recognizing the historical and discriminatory tendencies that underlie most of IP law and therefore stressed the need to galvanize action based on a human rights approach beyond a mere IP rights approach. Highlighting some of the discriminatory ideologies that a new approach would need to address, the presentation focused on inappropriate and discriminatory uses of TCEs, denial of Indigenous peoples' rights to determine strategies and priorities for protections, undermining of economic opportunities and enabling of Indigenous exploitation through IP, violation of Indigenous laws, facilitation of loss and destruction of Indigenous heritage as some of the issues that warrant consideration of novel IP strategies. It was suggested that there was nothing preventing Canada from giving enhanced protection to TK and TCEs, and the presenter referred to various approaches in other

countries that could provide some inspiration for Canada to respond to the challenge, including copyright exceptions and advisory panels in New Zealand. It was acknowledged that a potential approach could involve a staged response, with repatriation legislation being an initial small step.

This presentation resulted in an important exchange among participants. There was a call for an Indigenous-led approach — one that involves Indigenous lawyers, Indigenous scholars and Indigenous Elders as a key driving force. There was also reflection on the work of Stephen Munzer and Kal Raustiala⁴ as presenting an interesting model that has been used in certain cases, but nonetheless fails to capture the full scope of protection for Indigenous cultural expressions. Another participant stressed the importance of funding for Indigenous communities to assist their governments in strengthening their protocols as a basis for engaging with Indigenous knowledge.

In the next session, the presenters provided introductory remarks to stimulate a discussion on Indigenous peoples' approaches to sharing, protecting, valuing and commercializing TK and TCEs. The discussion was aimed at highlighting Indigenous approaches to protecting TK and TCEs and to understanding and dealing with instances of misuse and misappropriation of TK and TCEs.

The first discussion focused extensively on the status of Indigenous laws vis-à-vis federal IP laws. The first speaker sought to clarify that IP law represented a part of the Eurocentric ideas of colonization, noting that while these constitute federal laws, Aboriginal and treaty rights of Indigenous peoples are protected by section 35 of the Constitution Act, 1982, and UNDRIP, and have the constitutional status of supreme law pursuant to section 52 of the Constitution Act. In discussing the hierarchical structure of the legal system, the speaker observed that federal IP laws must be consistent with the Constitution or else risk being found to be of no force and effect. However, the Eurocentric and colonial IP system has, until now, prevailed, such that these infringements on Indigenous laws and knowledge systems have not been addressed. The speaker suggested that the entire IP system should be viewed with suspicion, as it is a purely European system of law that does

⁴ Stephen Munzer & Kal Raustiala, “The Uneasy Case for Intellectual Property Rights in Traditional Knowledge” (2009) 27 *Cardozo Arts & Ent LJ* 37.

not acknowledge or respect diverse perspectives of knowledge generation and transmission. The speaker pointed out that IP laws, and the institutions that support them, are not Indigenous laws, which the courts have acknowledged predate Canada's laws. The speaker noted that aspects of IP law are important and could potentially offer useful resources for Indigenous peoples. However, the incursion of IP laws into Canada's domestic legal framework and their use by Indigenous peoples need to be informed by the foundational Aboriginal and treaty rights held by Indigenous peoples. The Constitution affirms the right of Indigenous peoples to continue their traditional practices, and any law that seeks to deprive them of this right is inconsistent with the Constitution. The importance of Indigenous languages in the evolution and recreation of TCEs was also emphasized. While reflecting on misappropriation, the speaker noted how Indigenous cultures, values and customs play a foundational role — although often unacknowledged — in the fabric of Canadian society today. Most of what is considered Canadian identity or values can be traced back to ideas and values drawn from Indigenous societies. While acknowledging the importance of interdependence between Indigenous and non-Indigenous systems, the speaker pointed out that Indigenous peoples were unique and complete and did not require other cultures to feel or be made complete. The speaker stressed the importance of Indigenous peoples' knowledge of their traditional laws so that these laws could be passed on intergenerationally.

The second speaker pointed to the broader context of TK protection, noting that the destruction of lands, deforestation activities and increased clearcutting were a form of cultural genocide (ethnocide). These foundational issues needed to be addressed before any proper discussion of TK protection could be undertaken. The presenter noted that it was incorrect to believe that discussions on TK protection could proceed without addressing the broader challenges linked to dispossession of Indigenous peoples from their ancestral lands and resources — the very resources that were key to the generation of TK and TCEs for Indigenous peoples. This theme resonated with a number of participants, who highlighted the need to view the protection of TK and TCEs holistically, within the broader context of Indigenous peoples' connection to their lands, resources and culture, and the importance of the land, which cannot be separated from spiritual values.

It was suggested that Indigenous peoples need to be the ones to advance with respect to issues of protecting TK and TCEs. ISED noted that it was also important to work in collaboration with government to build greater awareness and understanding and to explore potential solutions. While all Indigenous groups and Canadians share a common geographic region, there is a need to understand each other so that progress can be made. ISED noted, as part of its commitment to Indigenous-led approaches, that the majority of money under the Indigenous aspect of the IP strategy would be transferred to Indigenous organizations.

The third speaker acknowledged Canada's problematic history and the broken relationships between Indigenous peoples and settlers to Canada. It was noted that there is an urgency with respect to discussions on the protection of TK and TCEs. As Canada continues to negotiate treaties internationally and as these treaties affect Indigenous rights, there is a need to have more Indigenous voices and representation at the table. The importance of Indigenous youth to the advancement of the discussion was also emphasized, in particular, those youth who have both a Western education and a grounding in their Indigenous communities' teachings.

Canadian Case Studies on the Intersection between IP Rights and TK Systems

The third segment of the day focused on case studies and involved breakout sessions that reflected on three main questions:

- Have you or your community had similar experiences, or are you aware of other similar situations?
- How did you or your community deal with the situation?

→ How do you think the situation could have been dealt with differently or should have been handled?

A total of six breakout groups were formed, with careful effort made to ensure that each group had a balance of Indigenous representatives, academics, government officials and organizing team members. Each breakout team was required to appoint a rapporteur to provide feedback to the broader group at the end of each case study's discussions.

The first presentation reflected on TK and the patent system, in particular the Mi'kmaq experience with a skin cream derived from a plant that had been used for many generations within the community to treat skin conditions. The knowledge of this medicine, which had been held within a single family in the community, was almost completely lost. In a bid to revive this knowledge, Elders and community members tried to piece together the processes of making this medicine. Once the art of preparing the medicine had been perfected, university chemists were invited to test its potency. The results confirmed the medicine was a highly potent antibacterial. Steps were taken to revive and relearn local traditions and methods that would support the preparation of this medicine.

With increased attention on the impressive test results, the community was faced with questions about ownership and commercialization of the medicine. While the Elders did not wish to keep the knowledge of the medicine a secret, given the number of people who could benefit, they also felt uncomfortable with individuals holding patent rights to the medicine. For the Elders, the most important consideration was that the community would benefit from this knowledge, and this could lead to economic development. They felt that the Western IP system would not be a good fit for the protection of the knowledge, so they are considering developing some kind of hybrid system that combines local Indigenous elements with the federal IP system.

Drawing from the numerous issues raised in the case study, the six groups discussed the above questions in further detail and later presented key messages to the broader group. Some of the key messages and reflections arising from the various group discussions included:

→ TK ownership is generally understood as a collective right. The governance of TK

should therefore be done communally, not individually, to ensure the ethical sharing of TK within and outside the community.

→ There should be proper consultation within communities with respect to beneficiaries and objectives for protection of TK and TCEs.

→ There remains a need for policy makers to understand creation and human interaction with nature from the perspective of Indigenous peoples to develop effective policy to protect TK.

→ There is a need to understand Indigenous peoples' local community laws.

→ Protection of TK should also include repatriation of stolen artifacts and recordings containing the knowledge and cultural expressions of Indigenous peoples.

→ Databases are of limited value since there is considerable secret TK.

→ The challenge with protecting TK and TCEs through contracts is that First Nations must bear the burden of expensive lawsuits. The government needs to do more to proactively recognize rights and customary laws of Indigenous peoples, notably through criminal law.

→ There can be value in raising awareness about the IP system, as well as Indigenous governance systems, TK and TCEs among government, Indigenous communities and the public at large.

→ Examples of TK related to Indigenous agricultural products that have been misappropriated or not respected and are at risk include Indigenous strains of corn and Black Duck Wild Rice.

→ The skin cream derived from the tree belongs to the tree, not the Mi'kmaq, and the Mi'kmaq are responsible for protecting the tree and the holders of the TK, which is related to their protection of the land.

→ TK cannot be separated from the land. For example, TK regarding a particular medicinal use of a plant includes where, when and how to pick the plant.

→ For Indigenous communities, creation stories, connections to the land, historical accounts, traditional ecological knowledge,

teachings, language and cultural stories have been kept alive through oral traditions. As a result, protocols, procedures and customs are not always recorded on paper.

The second case study presentation focused on TCEs and the Canadian trademark and copyright systems. The system for recognition of trademarks was explained as the legal mechanism developed to protect consumers' reliance on brands in the marketplace. The presenter noted that within the Canadian context, a trademark is a mark that is used by a person for the purpose of distinguishing goods or services manufactured, sold, leased, hired or performed by them from those manufactured, sold, leased, hired or performed by others (and includes a certification mark, a distinguishing guise or a proposed trademark). Governed by the Trademarks Act,⁵ trademarks draw economic value from the goodwill or reputation that the mark holds for its owner's goods or services and, more specifically, the communication it makes to consumers about those goods or services. Trademarks serve the public interest by protecting the integrity of the marketplace and assuring consumers that they are buying from the source they think they are buying from and receiving the quality they associate with that particular trademark. In discussing remedies available in cases of trademark infringement, the presentation noted that "passing off" action is available under common law as a viable protection mechanism.

Trademarks were distinguished from official marks, and the possibility of using official marks for protecting traditional names was also discussed. While official marks are not trademarks, they are types of "prohibited marks" within the context of section 9 of the Trademark Act. Official marks prohibit others from adopting marks that incorporate, resemble or could be mistaken for any badge, crest, emblem or mark adopted and used by any public authority in Canada as a trademark. Indigenous emblems may be protected as official marks under Canadian law.

The presentation covered important issues with respect to copyright and Indigenous art, noting some of the key sensitivities arising from intercultural borrowing and copying of Indigenous art and stories. Focusing on a number of important examples that highlighted the

sensitivity of misappropriation, the presentation concluded with the following hypothetical case study aimed at stimulating a discussion:

The work of JB incorporates imagery which is sacred and important to his people, community, and their collective cultural heritage. His painting "Buffalo," was created in accordance with traditional laws and customs, and with the necessary consent of the appropriate elders. The art of painting and the act of creating artistic works is a continuing responsibility handed down through the generations.

The Acme company, a Canadian-registered corporation, hired a graphic designer to reproduce the motifs and styles, but not JB's exact paintings and then hired a manufacturer in China to produce prints, clothing, temporary tattoos with those motifs and imported them into Canada, marketed and sold them across Canada as Indigenous products.

JB and Ms. Brown, a representative of the Indigenous community, commenced action in court against the Acme Company.

This case study generated a rich and lively discussion within the breakout groups, guided again by the three above-mentioned questions. Some of the key messages arising from the group studies follow:

- Lessons could be drawn from other jurisdictions, such as Australia, where authorities have tried to reinforce copyright law to address intercultural borrowing, fake art and the misappropriation of Indigenous peoples' TCEs.
- It might be helpful to bring test cases to challenge appropriation of Indigenous culture and build knowledge and capacity. Codifying Indigenous laws will greatly assist judges, lawyers and law schools to understand and interact respectfully with Indigenous systems.
- Respect for Indigenous peoples must underlie every discussion around solutions regarding appropriation.
- The IP system does not constitute a suitable mechanism for effectively protecting TK. There is a need for Indigenous peoples

⁵ Trademarks Act, RSC 1984, c T-13.

to come together to determine how best to protect Indigenous knowledge.

- The general public's ignorance regarding Indigenous knowledge protection remains a huge problem. Public education must be integrated into efforts to address this problem. Part of the solution should be domestic and international campaigns that create awareness and educate people on respecting Indigenous peoples.
- A global public education campaign is needed to stop misappropriation of Indigenous knowledge at the international level. Education strategies should include international contexts and highlight the history and values of Indigenous peoples.
- Corporations should face consequences for misuse and misappropriation of TK and TCEs as compared to individuals.
- It must be recognized that it is unethical to use TK and TCEs without attribution.

The Way Forward

In the final session, the facilitator noted that while key information had been shared, questions remained, such as who else needs to be part of the discussion, where does the discussion go from here and what practical next steps need to be followed. The facilitator stressed the importance of learning more about First Nations' perspectives and opened the floor for a discussion on the way forward. Several useful suggestions and recommendations were highlighted in the ensuing discussion:

- Create a working group under the Indigenous Bar Association (IBA), for example, to review and discuss the interrelationship between IP rights and TK systems. Although it was noted that the IBA is comprised of Indigenous, Métis and Inuit lawyers qualified to practise law in Canada, they do not necessarily have knowledge of *Indigenous peoples' own laws*, therefore, they would need the guidance of Elders and knowledge keepers who are more familiar with Indigenous law.
- An Indigenous advisory body comprised of Indigenous scholars, Elders and

youth could provide a useful resource to ISED in moving forward with the implementation of the IP strategy.

- In accordance with the Truth and Reconciliation Commission's recommendations (call to action no. 50), funding is needed to create Indigenous law institutes and legal research establishments that will support the training and education of Indigenous lawyers. It is when Indigenous laws and legal traditions are understood that effective change can be made. Other needs were also identified, such as:

- strengthening Indigenous laws and institutions to support dispute resolution on issues affecting Indigenous peoples, instead of using adversarial colonial structures in the courtroom;
- disrupting the colonial narrative by recognizing that the underpinnings of Canadian law are racist and discriminatory to all Indigenous peoples;
- seeking input by the government from First Nations communities whenever challenges or questions arise regarding solutions on ways to move forward;
- building capacity for Indigenous communities and raising awareness of Indigenous laws and the challenges associated with the misappropriation of TK;
- treating Indigenous peoples as equals and making increased funding available to Indigenous peoples, associations and organizations for self-governance in this area;
- ensuring that TK is not stolen, but reiterating that Canada cannot exercise jurisdiction over First Nations' knowledge, as it does not belong to Canada (the federal government could make it a crime to steal First Nations' knowledge without exercising jurisdiction over the knowledge);
- ensuring that initiatives relating to the protection of TK and TCEs are Indigenous-led (effort must be made to meet with communities and listen to and learn from Indigenous peoples);
- rethinking the existing colonial IP system to provide a more balanced basis for

engagement (an exception to IP rules is needed, stating that none of the rules may derogate from and must accord with Indigenous rights; the federal government must ensure that its laws and policies are consistent with the Aboriginal and treaty rights of Indigenous peoples);

- learning from other jurisdictions by examining global experiences and seeing what has and has not worked to protect TK and TCEs elsewhere; and
- continuing to facilitate events such as this workshop, engaging in studies and, in keeping with the importance of Indigenous-led initiatives, co-developing such initiatives with Indigenous peoples.

The meeting ended with a presentation of gifts and a closing prayer as well as final remarks by Elder Sackaney. In his final encouragement, he noted, “I ask you not to put out the fire of this meeting. Let the embers burn for a while, so the next time we meet, it will flare up.”

Agenda

March 1, 2019

Native Canadian Centre of Toronto,
16 Spadina Road, Toronto, Canada

8:30–9:15 a.m.	Registration and breakfast
9:15–9:25 a.m.	Recognition of lands and prayer
9:25–10:15 a.m.	Facilitator introduction; opening remarks by ISED, CIGI and the AFN; and participant introductions
10:15–10:30 a.m.	Navigating complex relationships: intellectual property, traditional knowledge and traditional cultural expressions from a global perspective
10:30–10:45 a.m.	Introduction to the Government of Canada's initiatives relevant to intellectual property, traditional knowledge and traditional cultural expressions
10:45–11:00 a.m.	First Nations traditional cultural expressions, traditional knowledge and genetic resources
11:00–11:15 a.m.	Health break
11:15 a.m.–12:00 p.m.	Traditional knowledge, traditional cultural expressions and Canadian intellectual property law
12:00–1:00 p.m.	Indigenous peoples' approaches to sharing, protecting, valuing and commercializing TK and TCEs: models of sharing and third-party use and misappropriation of TK and TCEs (what types of situations most frequently arise, what tools have been used to address them and what have been the results)
1:00–2:00 p.m.	Lunch
2:00–2:15 p.m.	Case study presentation: traditional knowledge and the patent system
2:15–3:00 p.m.	Breakout session 1
3:00–3:15 p.m.	Case study presentation: Indigenous cultural expressions and the trademark and copyright system
3:15–3:30 p.m.	Health break
3:30–4:15 p.m.	Breakout session 2
4:15–4:45 p.m.	Lessons and approaches for further discussion
4:45–5:00 p.m.	Closing remarks, next steps and closing prayer

Participants

Stacy Allison-Cassin, Vice Chair,
Indigenous Matters Committee, Canadian
Federation of Library Associations

Bassem Awad, Deputy Director, CIGI ILRP

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Veronique Bastien, Manager, Heritage Canada

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University of Alberta

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Sustainable Nutrients Inc.

Jameson Brant, Indigenous Relations
Officer, Canadian Museum of History

Camille Callison, Learning and Organizational
Development Librarian, University of Manitoba

Stephanie Chong, Partner, Hoffer
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Stephanie Gillespie, Senior Advisor,
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Julie Harris, Indigenous Heritage Circle

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University of Windsor Faculty of Law

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First Nation (Algonquin)

Chief Leo Metatawabin, Fort Albany First Nation

Angela de Montigny, Indigenous Fashion Designer

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Hillary Paul, Indigenous and
Northern Affairs Canada

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Natural Resource Operations and Rural
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Scott Robertson, President,
Indigenous Bar Association

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Elder Edmond Sackaney, Head
Councillor, Fort Albany First Nation

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Ministry of Indigenous Affairs

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Bob Watts, Chief of Staff, Assembly of First Nations

Rod Whitlow, Delegate, Six
Nations of the Grand River

Stuart Wuttke, General Counsel,
Assembly of First Nations

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