

# The Uphill Struggle to Protect Indigenous Traditional Knowledge in Settler States that Value Short-term Private Ownership: How is Canada Doing?

**Bradford W. Morse**

**Dean of Law, University of Waikato**

**Professor Emeritus, University of Ottawa**

**Dean Designate, Thompson Rivers University**

# Outline

- Brief overview of IP problems
- International Instruments
- Considering Settler-Indigenous Treaty solution
- The Canadian Experience



# International Intellectual Property (IIP)

- Intellectual Property (IP) law developed within states as domestic law to protect private property rights while encouraging the wide distribution of knowledge, whether through copyright of artistic creations or patents of scientific inventions. Consumer fraud was inhibited by allowing companies to trademark their brands to ensure authenticity of products purchased.
- Goal of IIP is to develop consistency of IP law globally to protect rights of IP holders & minimise production of fakes, which can be dangerous with some goods

# Indigenous Peoples & IP

- IP law has never effectively considered the rights of Indigenous Peoples – both as holders of Traditional Knowledge (TK) and as victims of abuses by IP ‘owners’
- IP’s emphasis upon identifying “natural persons” at law as the creator or inventor of ‘new’ works eligible to obtain IP protection excludes virtually all TK and manifestations of culture that are created by communities, that evolve over centuries, may include sacred knowledge unable to be shared, & will continue to evolve in the future vs exclusive rights to the individual ‘creator’ for a limited # of years , & then fully in public domain to be used in any way that anyone may wish
- This is not only a (1) collective vs individual rights conflict but also one (2) reflecting a temporal conflict AND a difference (3) in worldview of where knowledge comes from & how it develops & (4) some knowledge is sacred or access must be controlled

# Further IP Failures

- IP law's focus on the sanctity of individual property rights allows the holder to do almost anything with IP, including acts that may be seen as sacrilegious, offensive or derogatory to Indigenous Peoples
- IP law fails to recognise ongoing Indigenous guardianship obligations to flora & fauna that may be essential to species survival but also integral to cultural survival & personal whakapapa [ancestral identity] - even if this means a breach of Indigenous law by both the IP owner and Indigenous guardians
- No requirement to consult TK holders on initiative to seek IP rights, let alone obtain "free, prior and informed consent" (FPIC) - leads to biopiracy & abuse

# Convention on Biological Diversity, 1992

**Preamble:** “Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources... of sharing equitably benefits arising from the use of traditional knowledge, ...”

**Article 8.** “Each Contracting Party shall, as far as possible and as appropriate:  
(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices...”

**Article 10. Sustainable Use of Components of Biological Diversity** “Each Contracting Party shall, as far as possible and as appropriate:...

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;

(d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; ...”

# UN Declaration on Rights of Indigenous Peoples (DRIP)

- Overwhelmingly endorsed by UNGA on 13 September 2007 (143-4)
- Reaffirms many well established principles & human rights but recasts in Indigenous context so as to set new international benchmarks for state & UN agency compliance
- Framed in positive language of great breadth
- Jointly developed over 25 years by Indigenous & states representatives globally

# Reflects Indigenous Worldview

## *Article 25*

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to **uphold their responsibilities to future generations** in this regard.”





# Customs & Traditions

Article 11(1) Indigenous peoples have the right to practise and **revitalize their cultural traditions and customs**. This includes the right to **maintain, protect and develop the past, present and future manifestations of their cultures**, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

(2) States **shall provide redress through effective mechanisms**, which may include **restitution, developed in conjunction with** indigenous peoples, with respect to their **cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent** or in **violation of their [i.e., Indigenous not state] laws, traditions and customs**.

This builds on UNESCO Conventions on the *Safeguarding of Intangible Cultural Heritage* of 2003 & *Protection and Promotion of the Diversity of Cultural Expressions* of 2005

Puts clear onus on states to provide appropriate remedies for stolen cultural property + obligation to recognise ongoing Indigenous rights to control how their cultures are practised as well as presented to public

# Spiritual & Religious Protection

The vital importance of spiritual connection to traditional territories & TK for cultural identity and survival is captured again in a discrete provision.

Article 12 (1) Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the **right to the use and control of their ceremonial objects**; and the right to the repatriation of their human remains.

(2) States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

# DRIP' s Inclusion of IP

*Article 31* (1) 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**.

(2) In conjunction with indigenous peoples, **States shall take effective measures to recognize and protect the exercise of these rights**.

Reflects response to Western IP law's inadequacy to protect Indigenous intellectual property but will it work??? WIPO been working for over decade & CBD since 1992 but no success so far

# DRIP' s Effect

- Great scope of coverage - including self-determination (Art 3-5), no discrimination, recognition of right to the conservation and protection of the environment (Art 29), etc
- BUT not binding as NOT a treaty; no UN enforcement mechanism; & few states will give it domestic force [Bolivia has]
- What to do? Room for domestic action for local protection & to spur international developments?

# World Conference on Indigenous Peoples

- UN's "Outcome document" from WCIP September 2014 –
  - "12. We recognize the importance of indigenous peoples' health practices and their **traditional medicine and knowledge.**"
  - "22. We recognize that the **traditional knowledge**, ... make an **important contribution to the conservation and sustainable use of biodiversity.** We acknowledge the **importance of the participation of indigenous peoples**, wherever possible, **in the benefits of their knowledge**, innovations and practices. "
  - "26... recognize the importance...traditional sustainable agricultural practices..."
  - "34... recognize the significant contribution to...sustainable development..."
  - "35...respecting the contributions ...including **knowledge** through experience in hunting, gathering, fishing, pastoralism and agriculture, as well as their sciences, technologies and cultures."

# Canadian Experience

- First Nations, Inuit & Métis peoples have had extremely little involvement in Canadian legislative & policy development regarding IP *OR* implementation of IP law at national or regional level
- Little indigenous involvement in Canada's policy re International IP developments re CBD, WIPO, Free Trade Agreements, Bilateral Investment Treaties, etc.
- Canada's IP law affords virtually no protection or participation in decision-making
- Canada was only country to raise objections to WCIP Outcome Document; & then filed 2 page statement after mtg stating it would not honour DRIP sections with FPIC clause IF= veto

# Species At Risk Act, 2002 (SARA)

- SARA has 1<sup>st</sup> ever CDN statutory recognition of ITK via Preamble states:

“the traditional knowledge of aboriginal peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures,”

- SARA also create: National Aboriginal Council on Species at Risk (NACOSAR) to advise Minister & Cdn Endangered Species Council; & ATK Subcommittee of COSEWIC

- Builds upon an ecosystem approach of blending ATK with western science – each of = value

# Canada – A Few Significant Developments

- Museum management – include some consultation or involvement with Indigenous peoples on what will be displayed & how as well as who owns objects
- Land Claim Settlements re ownership & control of cultural ‘artefacts’ – Nisga’ a Nation Treaty
- Land Claim Settlements re obligation to consult with Indigenous party prior to Canada entering any new international treaty that might affect the settlement or the Indigenous party



# Confirming Control by Treaty

- Nisga' a Nation Treaty, Ch 17
  - Recognise vital import to cultural & sacred beliefs of continuing relationship to significant treasures
  - Confirm ownership of “any Nisga'a artifact discovered within Nisga'a Lands”
  - Allocate ownership of identified Nisga'a “artifacts” in possession of Cdn Museum of Civilization & Royal BC Museum between museums & Nisga' a

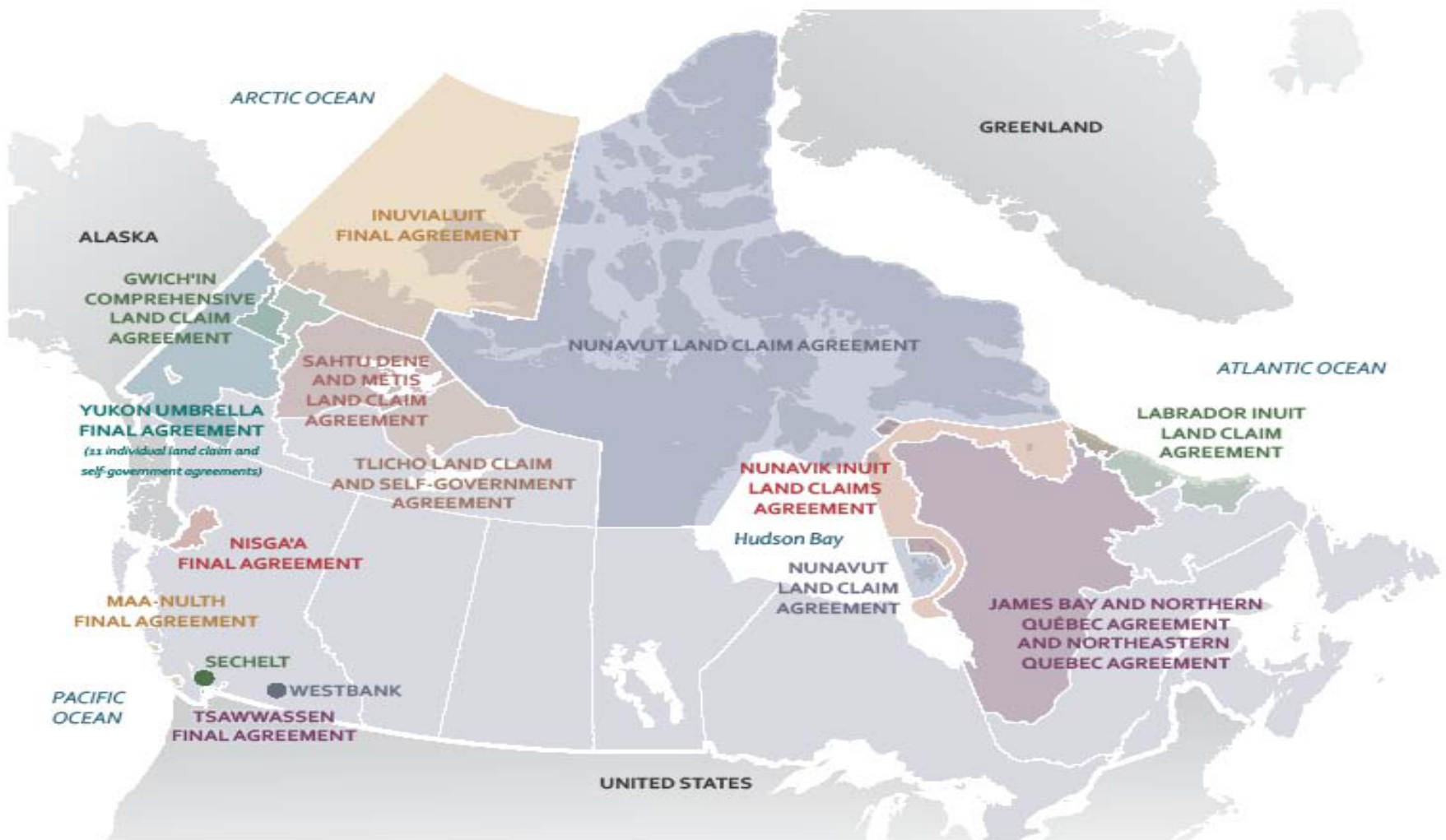
# Nisga'a Precedent

- Commit both museums to return all objects on 2 lists – 276 spiritual objects returned by 15 Sept 2010 to be housed in new Nisga'a Museum
- Create mechanism to reach custodial agreements re Nisga'a role re artifacts to be retained by museums & enable future transfers
- Create presumption that all objects coming from Nisga'a people or territory are Nisga'a artefacts
- As part of Treaty, this agreement has constitutional protection cannot be altered without mutual agreement of all 3 parties
- Nisga'a Nation = 3<sup>rd</sup> order of sovereign government with legislative power re culture & cultural property so can also enact its own laws in field

# Modern Treaties

- Most Aboriginal title settlements since 1975 create special regimes to manage fish & wildlife harvesting through joint boards to decide/recommend allocations per species re harvest times & methods for specific regions. ATK play large role in decisions
- Some settlements also have joint land use planning & water boards that rely in part on ATK in decisions
- Some with joint environmental assessment & screening panels + joint management of parks

# Modern Treaties in Canada



# CDN Examples of Parks Creation

- Western Arctic – create Ivvavik National Park (10,168 km<sup>2</sup> on North Slope of Yukon) & Herschel Island Territorial Park
- Nunavik – Torngat Mountains National Park, Labrador (10,000 km<sup>2</sup>)
- Nunatsiavut – Auyuittuq, North Baffin, Ellesmere Island & Wager Bay National Parks = 103,334 km<sup>2</sup> (and many conservation areas)
- Vuntut Gwitchin First Nation Final Agreement -Vuntut National Park (4,345 km<sup>2</sup>)
- Others in place or reserved for designation as National Parks once full agreement reached with local Indigenous peoples – most with harvesting rights

# Law Making & Management Decisions

## Yukon Territory Agreements (1993-on)

- Specific legislative powers are set out in the self-government agreements
- Each agreement contains explicit language that describes powers of each Yukon First Nation, including powers over use, management and protection of natural resources, land & the environment. This creates opening to use ITK in development & administration of their laws.

UMBRELLA  
FINAL  
AGREEMENT



COUNCIL  
FOR YUKON  
INDIANS

# Changing CDN Landscape

- 24 Comprehensive Land claims settlements since 1975 mean some First Nations, Metis & Inuit now own or control over 60 million hectares of land [231,644 sq mi/600,000 sq km] = 7%+ of Canada; Inuit alone over 45M ha. of land
- \$ - range from \$10s to \$1000 million = \$3.2 BN
- Commercial rights re natural resources & continued traditional economy rights
- Co-management of parks, waters, land use; wildlife & environmental project screening
- Dispute resolution – binding arbitration common
- BUT this limited mostly to northern Canada
- 95 Specific Claims settled since 2007 = \$1.8 BN but \$ only

# Conclusions

- Biodiversity rapidly disappearing
- CBD has not met high hopes of 20 years ago
- IP laws violate indigenous law & injure TK
- Domestic Indigenous –State Treaties could be partial solutions
- Cdn experience has been regionally focused, often linked to land claim settlements & issues where state sees real gains from drawing upon ITK. Much of nation untouched by these changes & still not address IP concerns re ITK