# Implementation & Governance Challenges in Canada Respecting UNDRIP Article 31

**Daniel W. Dylan***

*Although occasionally Eurocentric thinkers and lawyers are aware that their governments are artificial constructs, they violently resist remaking these constructs. In fact and theory, they usually deny that their governments can be reimagined or modified to be more democratic or inclusive. Faced with the realization that some Indigenous idea or action might compete with their constructs, they evoke the Hobbesian nightmare of the chaos that would follow if they were to change the existing order. It is not the chaos they fear, but having their contrived superiority challenged.*
—Sákéj Youngblood Henderson[1]

*If you no longer speak your language and no longer practice your culture, then you have no right to demand aboriginal rights from us, because you are assimilated with the ruling power.*
—Réne Lévesque and Pierre E. Trudeau[2]

## Introduction

In November 2010, Canada endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) after previously refraining from doing so (along with the United States, Australia, and New Zealand).[3] UNDRIP is an international declaration which provides recognition for various indigenous peoples' rights under international law and sets "…the minimum standards for the survival, dignity and

---

* LLM, LLB, JD, BA (Hons); Assistant Professor, Bora Laskin Faculty of Law, Lakehead University. This paper was delivered at the Participation of Indigenous Peoples in the UNDRIP Implementation in Canada: Prospects and Challenges in Light of Parallel International Law Conference, Osgoode Hall Law School of York University, 21 September 2018.

[1] James Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1 at 16.

[2] *Royal Commission on Aboriginal Peoples*, "Transcript of 7 July 1993, vol 2" (Ottawa: Government of Canada, 1993), online (pdf): <data2.archives.ca/rcap/pdf/rcap-438.pdf>.

[3] Terry Mitchell & Charis Enns, "The UN Declaration on the Rights of Indigenous Peoples: Monitoring and Realizing Indigenous Rights in Canada" (April 2014), online (pdf): *CIGI Policy Brief No 39:* <cigionline.org/sites/default/files/cigi_pb_39.pdf> (Canada stated that it had "…significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as a veto; on self-government without recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve appropriate balance between the rights and obligations of indigenous peoples, Member States and third parties."); see also Terry Mitchell, "The Internationalization Of Indigenous Rights: UNDRIP In The Canadian Context, Special Report" (December 2014), online (pdf): *Centre for International Governance Innovation* <researchgate.net/profile/Terry_Mitchell/publication/269103723_THE_INTERNATIONALIZATION_OF_INDIGENOUS_RIGHTS_UNDRIP_in_the_Canadian_Context/links/548095c10cf20f081e725d17.pdf#page=12> [Mitchell, "Special Report"].

well-being of the indigenous peoples of the world."[4] The declaration is expansive and, although not a treaty or a convention, and thus (technically) non-legally binding, obligates endorsing states to take various measures to ensure that the rights provided under the declaration are respected in and by domestic law in each of their respective jurisdictions.[5] In June 2015, the Canadian Truth and Reconciliation Commission called "…upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation."[6] Then, in November of 2015, through a series of mandate letters, the Canadian Prime Minister instructed the federal Crown Canada Indigenous Relations & Northern Affairs (CIRNAC) Minister (as well as other federal ministers) to "implement" UNDRIP, and several months later, in May 2016, the CIRNAC Minister declared that "…Canada is now a full supporter, without qualification, of the declaration."[7] In May 2018, Romeo Saganash, Member of Parliament for Abitibi—Baie-James—Nunavik—Eeyou (Québec) sponsored Bill C-262—a private member's bill—or the *United Nations Declaration on the Rights of Indigenous Peoples Act,* which describes itself as an act "…to ensure that the laws of Canada are in harmony with the *United Nations Declaration on the Rights of Indigenous Peoples*."[8] The bill passed third reading in the House of Commons and is awaiting Senate readings and Royal Assent following what is likely to be Senate approval.[9] According to Bill C-262, UNDRIP is "…affirmed as a universal international human rights instrument with application in Canadian law."[10] Sections 4 and 5 of Bill C-262 require Canada, in consultation and cooperation with indigenous peoples in Canada, to take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP and to develop and implement a national action plan to achieve the objectives of UNDRIP.[11] Evidently, the focus of Bill C-262 is on UNDRIP *implementation* in Canada and the latent assumption inherent in the bill—not necessarily faulty—is that all of the contents of UNDRIP and the rights prescribed therein are within the legislative jurisdiction of Canada to harmonize with domestic

---

[4] UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2007), art 43 [UNDRIP].

[5] See Brenda L Gunn, "Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada" (2013) 31 Windsor YB Access Just 147 at 159 for a contrary point of view, which holds that UNDRIP is not merely aspirational and is legally binding; see also Mitchell, "Special Report", *supra* note 3 at 2.

[6] Truth and Reconciliation Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at Call to Action no 43.

[7] Indigenous & Northern Affairs Canada, "United Nations Declaration on the Rights of Indigenous Peoples" (3 August 2018), online: <aadnc-aandc.gc.ca/eng/1309374407406/1309374458958#a2>.

[8] Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018).

[9] *Ibid*.

[10] *Ibid*, s 3.

[11] *Ibid*, ss 4–5. (It is also interesting to note from a semantic point of view, if not more substantively, that the laws of Canada must conform to UNDRIP and not the other way around.).

law.[12] Such an implementation initiative and that of a national action plan (even if not viewed as a federal undertaking) raises a number of significant and complicated practical legal questions mostly respecting legislative jurisdiction;[13] however, even if Bill C-262 were *not* to receive Royal Assent, despite the non-binding nature of the UNDRIP, Canada would still be faced with the implementation obligations that its endorsement of UNDRIP imposes. Thus, the legal issues respecting implementation raised by UNDRIP endorsement and these jurisdictional questions would persist even in the absence of Bill C-262 receiving Royal Assent.[14] The federal government's "Overview of a Recognition and Implementation of Indigenous Rights Framework" seems to affirm the same.[15]

This article, however, is not concerned with raising such legal questions, or much less answering them, and instead focuses on the questions related to the implementation of UNDRIP Article 31, which is most succinctly described as the provisions which provide intellectual property rights to indigenous peoples and which ensure the recognition and protection of those rights by respective endorsing states. The implementation of Article 31 in Canada presents intricate legal questions that revolve around not only how Article 31 ought to or might be implemented, but also around which level of government properly has legislative jurisdiction to implement measures respecting indigenous peoples' right "…to maintain, control, protect and develop their intellectual property over…cultural heritage, traditional knowledge, and traditional cultural expressions."[16]

To overcome the difficult and problematic answers that Article 31 implementation questions generate, following the model provided by the Canadian Council of Ministers of the Environment (CCME),[17] this article proposes, from an instrumental and pragmatic perspective, that the federal government should assume, under Section 91(24) of the *1867 Act*,[18] exclusive *legislative* jurisdiction to harmonize with existing Canadian law, indigenous cultural heritage, traditional knowledge, traditional cultural expressions, and, under the auspices of the Canadian Intellectual

---

[12] Although it is an important facet of the discussion in this article, the author does not place primacy on establishing whether Canada is, with respect to international law, a monist or a dualist state. See for example Jutta Brunnée & Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Intl Law 3 at 5; see also *Canada (AG) v Ontario (AG)*, [1937] UKPC 6, [1937] AC 326 and *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 60.

[13] See W R Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada," (1963) 9 McGill LJ 185.

[14] See Mitchell & Enns, *supra* note 3 at 7.

[15] Canada, Minister of Crown and Indigenous Relations and Northern Affairs, *Overview of a Recognition and Implementation of Indigenous Rights Framework* (10 September 2018), online: <rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708>.

[16] UNDRIP, *supra* note 4, art 31.

[17] Canadian Council of Ministers of the Environment (CCME) is "the primary minister-led intergovernmental forum for collective action on environmental issues of national and international concern", online: <ccme.ca/>.

[18] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*1867 Act*].

Property Office, create an Office of Indigenous Knowledge Governance to strategically work with provincial and territorial governments and, most significantly, indigenous peoples and communities throughout the country, to coordinate the implementation and meet the mandates of Article 31. This article begins with a discussion of the rights provided to indigenous peoples in and by UNDRIP Article 31 in Part I. Part II then discusses and analyzes the problems that reconciling indigenous knowledge with Canada's existing intellectual property rights regime presents, and Part III discusses implementation and governance challenges that Article 31 presents in light of Canada's constitutional framework. Finally, Part IV proposes a first step to a solution that could be incorporated in any normative national action plan the federal government undertakes to meet its UNDRIP implementation obligations.

## I. Understanding UNDRIP ARTICLE 31

A sufficient amount of scholarly attention and criticism has been devoted to the "internationalization" of indigenous rights as a result of UNDRIP and its status as a state-centered instrument embedded in Western liberal democracies;[19] however, what makes UNDRIP unlike other international instruments is that it was drafted with intensive indigenous participation.[20] As a result, the text of the declaration contains language that indigenous peoples themselves were involved in drafting.[21] As previously noted, UNDRIP Article 31 can be described as containing the provisions which provide intellectual property rights to indigenous peoples and which ensure the recognition and protection of those rights by respective endorsing states. It is necessary and important to examine the two separate sections that comprise Article 31 in their entirety. Section 1 provides the following:

> 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. [22]

As can be seen from the above, Section 1 is expansive and provides a broad array of rights across a broad spectrum of interests. Significant here, in the context of

---

[19] Mitchell, "Special Report", *supra* note 3 at 2; see also Will Kymlicka, "The Internationalization of Minority Rights" (2008) 6:1 Intl J of Constitutional L 1; see also Daniel J Gervais, "The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New" (2002) 12:4 Fordham IP Media & Ent LJ 929.

[20] Mitchell and Enns, *supra* note 3 at 3; see also Megan Davis, "To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On" (2012) 19 Austl Intl LJ 17.

[21] I use the term "indigenous peoples" and "indigenous communities" as terms of art within the convention and not as a means of homogenizing indigenous peoples in Canada or denying their inherent diversity.

[22] UNDRIP, *supra* note 4, art 31.

this article, are the rights of indigenous peoples "…to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions [as well as manifestations of the other phenomena listed]" and "…to maintain, control, protect and develop their *intellectual property* over such cultural heritage, traditional knowledge, and traditional cultural expressions."[23] For the purposes of this article, I will focus on the latter of these rights, namely the right to maintain, control, protect, and develop *intellectual property* over cultural heritage, traditional knowledge, and traditional cultural expressions, and in so doing, I am including in this analysis the right to maintain, control, protect, and develop cultural heritage, traditional knowledge, and traditional cultural expressions, and the other phenomena listed in the first part of Article 31(1) because Canada's existing system of laws and government seem to provide no other legal or practical means of protecting human endeavours, creative or otherwise, except through the intellectual property rights regime. Stated another way, cultural properties and expression—or at least those which qualify for legal protection—are protected by intellectual property rights in Canada, and that is it. In totality. As a result, the solution proposed in this article is very much one borne from an instrumentalist perspective.[24] Despite the value to be found in such an approach, there are detractions to employing it, including the possibility that the solution operates from a quasi-Eurocentric posture and may end up perpetuating the imposition of colonial law on indigenous peoples in Canada.[25] Nevertheless, in order for any Article 31 implementation solution to have any effective enforceability in Canada's existing legal structure it seems plausible—if not necessary—that the solution might come from within the existing legal regime, despite its quasi-Eurocentricism.[26] The solution proposed in this article is, however, very

---

[23] *Ibid* [emphasis added].

[24] Jeremy de Beer & Daniel Dylan, "Traditional Knowledge Governance Challenges in Canada" in Matthew Rimmer, ed, *Research Handbook on Indigenous Intellectual Property* (Chelton, Northampton: Edward Elgar Publishing Ltd, 2015); see also Aman K Gebru, "International Intellectual Property Law and the Protection of Traditional Knowledge: From Cultural Conservation to Knowledge Codification" (2015) 15 Asper Rev Intl Bus & Trade L 293 at 312–15.

[25] See Henderson, *supra* note 1 at 4–5 ("The fundamental assumption of Eurocentrism is the superiority of Europeans over Indigenous peoples. Eurocentrism is not a matter of attitudes in the sense of values and prejudices. It is the structural keeper of the power and context of modern prejudice or implacable prejudgment. It has been the dominant artificial context for the last five centuries and is an integral part of most existing scholarship, opinion, and law. As an institutional and imaginative context, it includes a set of assumptions and beliefs about empirical reality. Educated and usually unprejudiced Europeans and their colonizers accept these assumptions and beliefs as true 'natural' propositions supported by 'the facts.'").

[26] See Gebru, *supra* note 24 at 307–08 [citations omitted] ("As a result of colonization and occupation, indigenous and local communities have been oppressed socially, politically, and economically. The resulting inequalities continue to affect the status of such communities. Given this colonial history in which colonizing powers discredited and exploited indigenous and local communities and the resulting inequality, the strongest argument for the protection of TK is based on distributive justice. For instance, scholars claim that the current system of intellectual property protection is not equitable. They argue that TK holders do not get protection from Eurocentric protection mechanisms despite the fact that TK holders have created and conserved plant varieties and traditional knowledge for generations. The formal protection mechanisms protect improvements and innovations that utilize the TK which was created and conserved by indigenous people, while failing to protect the rights of TK holders in the first place. The resulting effect of such system is that TK holders who were the base of innovation are not only excluded from any kind of benefit but are charged in order to use improvements and innovations based on such knowledge. The call from such scholars is that the past injustices should be reversed through protection mechanisms that not only protect

much cognizant of the self-determination rights provided for in UNDRIP Articles 3, 4, and 5 and does not operate in isolation from them or from the rights provided for in Articles 18 and 19.[27] Rather, this article asserts that adoption of an instrumentalist perspective enables the rights of Article 31 to be fulfilled in conjunction with Articles 3, 4, 5, 18, and 19. Moreover, the solution proposed here is intended to promote symmetrical sovereignty between Canada and indigenous peoples in Canada[28] and not perpetuate the colonialism expressed by former Prime Minister Pierre Trudeau and Premier of Quebec Réne Lévesque seen at the beginning of this article. Thus, recognizing the benefits and detractions to adopting such an approach, I merely propose this solution as a *starting point* for a national action plan and not as a permanent or exhaustive solution or regime.[29]

Overall, harmonizing Article 31 rights with Canada's existing intellectual property rights regime is, as discussed in the next section, severely problematic because of the ambiguities a parsing of "intellectual property over…cultural heritage, traditional knowledge, and traditional cultural expressions" through the division of powers in the *1867 Act* produces. Stated another way, constitutional clarity is lacking in terms of which level of government properly has the jurisdiction to enact legislation that would harmonize these rights with existing Canadian law. In this vein, UNDRIP Article 31 section 2 simply provides that "[i]n conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights,"[30] and like most international instruments, leaves implementation and the precise content of those "effective measures" in each state to be resolved in accordance with its own laws. Again, it bears repeating that irrespective of Bill C-262's fate, by endorsing UNDRIP, Canada has, by virtue of Article 31 section 2, undertaken to implement effective measures to recognize and protect the exercise of intellectual

---

TK through Eurocentric measures but makes up for the inequality through frameworks that are respective and reflective of the interests of indigenous peoples and local communities. One way to right the wrongs of the past, according to such line of argument, is by establishing a special privilege to TK holders to control the way in which their knowledge is used.").

[27] UNDRIP, *supra* note 4, arts 3, 4, 5 ("Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development; Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions; Article 5: Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.").

[28] Felix Hoehn, *Reconciling Sovereignties* (Saskatoon: Native Law Centre, University of Saskatchewan, 2016) at 6, 53–59 ("Aboriginal sovereignty is compatible with Canada's Constitution and with federalism.").

[29] See Marijke Bassani, "International Cultural Heritage Law and World Heritage Listing: A Vehicle for 'White Control of Indigenous Heritage'?", (2017) 3 Santander Art & Culture L Rev 275; see also David R Downes, "How Intellectual Property Could Be a Tool to Protect Traditional Knowledge" (2000) 25:2 Colum J of Envtl L 253.

[30] UNDRIP, *supra* note 4, art 31, s 2.

property rights over cultural heritage, traditional knowledge, and traditional cultural expressions by indigenous peoples in Canada.[31]

However, Canada's obligation to implement such measures is not merely mandated by its endorsement of UNDRIP, but also because it is an equitable and moral imperative for Canada to do so.[32] In a country like Canada, a country fraught with a violent history of colonization and enduring colonialism,[33] cultural appropriation and the unauthorized uses, not just recently, but also historically, of indigenous knowledge, technology, science, agriculture, art, and culture—in short, indigenous traditional knowledge—persist in modern society and the contemporary economy.[34] It is to be remembered that Article 31(1) provides that "indigenous peoples have the *right* to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions…"[35] Resolution of this equitable and moral imperative—as much as, perhaps more than, the legal one—is, however, hampered by schisms which exist in Canada's intellectual property rights regime and its laws generally respecting indigenous traditional knowledge. These gaps, which remain unfilled, are the focus of the next section.

## II. Traditional Knowledge & Intellectual Property Rights

The proper or appropriate nomenclature when discussing Article 31 seems evident given the way that article is drafted, but it too presents complex legal questions and is, for better or worse, a natural starting point in its discussion.[36] "Traditional Knowledge," or simply "TK," for example, is an amorphous term of art in both international and Canadian law, and while it is similar to, it is not synonymous with "intellectual property." Moreover, "traditional knowledge," both in concept and putative definition, encompasses health, food, environmental, cultural, industrial, technological, self-government, and self-determination issues.[37] Although lacking a precise, uniform, and universally-accepted content to the definition, "traditional knowledge" is a term of art that is used both internationally and domestically to capture the substance that comprises indigenous peoples' cultural heritage, traditional knowledge, and traditional cultural expressions, both in developing and developed

---

[31] In this context, "ordinary" intellectual property rights are not contemplated, bur rather, rights over tangible and intangible autochthonous phenomena.

[32] See Graham Dutfield, "Intellectual Property Rights in Traditional Knowledge," (2000) 21:3 Science Communication 274.

[33] Daniel W Dylan, "'We The North' as the Dispossession of Indigenous Identity and a Slogan of Canada's Enduring Colonial Legacy" (2019) 56:3 Alta L Rev 1.

[34] See Rosemary J Coombe, "The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law," (2001) 14:2 St Thomas L Rev 275.

[35] UNDRIP, *supra* note 4, art 31 [emphasis added].

[36] See Gebru, *supra* note 24.

[37] de Beer and Dylan, *supra* note 24 at 518.

countries.[38] On some level, terms such as “indigenous knowledge,” “traditional ecological knowledge,” “traditional environmental knowledge,” “traditional cultural expression,” and others are meant to be and are indeed on some level synonymous with the term traditional knowledge—but each depends on the unique cultural character of human situations and the particular characteristics the circumstances to which the term is being applied, and an understanding that one term may work in one context and not in another.[39]

Traditional knowledge, however, is the term of art that is recurrently used to describe the concept and the universal (tangible and intangible) content of indigenous knowledge, heritage, tradition, expression, and culture in scholarly research and discussion.[40] Because of this universality, the resulting use of this term therefore tends to have an unfortunate homogenizing effect. Nonetheless, from a legal point of view, however, some term of art is necessary in order for the legal issues to be met and addressed, and this is one most commonly used by legal scholars. I shall, therefore, use the term “traditional knowledge” in this context throughout this article and as a means of encompassing all of the intellectual property rights provided for in Article 31(1).[41] Furthermore, there is no term of art which would perfectly encapsulate all the rich and diverse knowledge contained in indigenous communities and cultures, and the absence of a precise, uniform, and universally-accepted content to the definition, while enduringly problematic, continues to present legal problems to intellectual property and indigenous law scholars in light of other related issues.[42] Moreover, despite indigenous peoples’ participation in the drafting of UNDRIP, not all of indigenous knowledge is easily or necessarily cabined in any of these terms.

In an effort to bring some clarity to these issues, however, the World Intellectual Property Organization (WIPO), for example, defines traditional knowledge as “…knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.”[43] WIPO further distinguishes between traditional knowledge in a general sense and a narrow sense. Traditional knowledge in the general sense “embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge” whereas traditional knowledge in the narrow sense “refers to

---

[38] See Gebru, *supra* note 24 at 298–99; Doris Estelle Long, “Traditional Knowledge and the Fight for the Public Domain” (2006) 5:4 John Marshall Rev of Intellectual Property L 317 at 318.

[39] Robert K Paterson, “Canadian and International Traditional Knowledge and Cultural Expression Systems,” (2017) 29 IPJ 191 at 196.

[40] See Sarah Harding, “Defining Traditional Knowledge - Lessons from Cultural Property (2003) 11:2 Cardozo J Intl & Comp L 511; see also Henry P Huntington, “We Dance Around in a Ring and Suppose: Academic Engagement with Traditional Knowledge,” (2005) 42:1 Arctic Anthropology 29.

[41] See Madhavi Sunder, “The Invention of Traditional Knowledge,” (2007) 70:2 Law & Contemp Problems 97.

[42] F Mauro & P D Hardison, “Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives,” (2000) 10 Ecological Applications 1263.

[43] Word Intellectual Property Organization, online <wipo.int/tk/en/tk/>.

knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations."[44] WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) continues to expand both the definition and understanding of the term "traditional knowledge" and its work on the attendant legal issues that international protection for traditional knowledge creates.[45] Currently, the IGC has prepared Draft Articles which will hopefully eventually result in an international instrument respecting protection measures for genetic resources, traditional knowledge, and folklore.[46] Despite the homogenizing effect that the term "traditional knowledge" creates in these vital dialogues, it is important to remember that genetic resources—something inclusive of but different from traditional knowledge and the traditional intellectual property paradigm—also play an important part in the discussion here.[47]

Although the international legal community has at least a working (and perhaps incomplete) definition of traditional knowledge, generally speaking, the Canadian legal community does not. For example, the *Nunavut Planning and Project Assessment Act*, which is applicable in Nunavut only, provides a definition of traditional knowledge as "the accumulated body of knowledge, observations and understandings about the environment, and about the relationship of living beings with one another and with the environment, that is rooted in the traditional way of life of Inuit…"[48] Given that the statute only applies territorially (in Nunavut), the definition has no national effect. Similarly, the *Yukon Environmental and Socio-economic Assessment Act* defines traditional knowledge as "the accumulated body of knowledge, observations and understandings about the environment, and about the relationship of living beings with one another and the environment, that is rooted in the traditional way of life of first nations."[49] Given that the statute only applies territorially (in Yukon), again this definition has no national effect. The *Mackenzie Valley Resource Management Act*, which applies in the Northwest Territories, refers to traditional knowledge throughout that statute but does not actually define the term.[50] Ontario's

---

[44] *Ibid*.

[45] World Intellectual Property Organization, online: *Intergovernmental Committee* <wipo.int/tk/en/igc/>.

[46] World Intellectual Property Organization, "The Protection of Traditional Knowledge: Draft Articles", online: <wipo.int/meetings/en/doc_details.jsp?doc_id=368218>.

[47] See Chidi Oguamanam, "Intellectual Property Rights in Plant Genetic Resources: Farmers Rights and Food Security of Indigenous and Local Communities" (2006) 11 Drake J Agric L 273, Chidi Oguamanam, "Genetic Resources & Access and Benefit Sharing: Politics, Prospects and Opportunities for Canada after Nagoya," (2011) 22:2 J Envtl L & Prac 87, Chidi Oguamanam, "The Convention on Biological Diversity and Intellectual Property Rights: The Challenge of Indigenous Knowledge," (2003) 7 Southern Cross U L Rev, Chidi Oguamanam, "Canada: Time to Take Access and Benefit Sharing over Genetic Resources Seriously," (2010) 60 UNBLJ 139–49; see also Tesh W Dagne, "Protection of Biodiversity and Associated Traditional Knowledge (TK) in Canada: Ensuring Community Control in Access and Benefit-Sharing (ABS)," (2017) 30 J Envtl L & Prac 97.

[48] *Nunavut Planning and Project Assessment Act*, SC 2013, c 14, s 73(1).

[49] *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7, s 2(1).

[50] *The Mackenzie Valley Resource Management Act*, SC 1998, c 25.

*Great Lakes Protection Act* provides that “First Nations and Métis communities that have a historic relationship with the Great Lakes-St. Lawrence River Basin may offer their traditional ecological knowledge for the purpose of assisting in anything done under this Act” but does not define “traditional ecological knowledge.”[51] Manitoba’s *The East Side Traditional Lands Planning and Special Protected Areas Act*, provides that “a planning council may apply traditional knowledge in relation to those matters [it considers under section 10(3)], yet it does not define “traditional knowledge.”[52] The federal *Species at Risk Act* states in its preamble that “the *traditional knowledge* of the aboriginal peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures,” provides that the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) “must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and *aboriginal traditional knowledge*,” and must “establish subcommittees of specialists to assist in the preparation and review of status reports on wildlife species considered to be at risk, including subcommittees specializing in groups of wildlife species and a subcommittee specializing in *aboriginal traditional knowledge…*” without defining the term “aboriginal traditional knowledge.”[53] The *Canadian Environmental Assessment Act* permissively provides that the “environmental assessment of a designated project *may* take into account community knowledge and Aboriginal traditional knowledge,” but does not define “community knowledge” or “Aboriginal traditional knowledge.”[54] There are, in fact, some two-hundred-and-fifty references to “traditional knowledge” or “aboriginal knowledge” which can be found in Canadian statutes and regulations and almost all lack definitional uniformity and consistency.[55]

This lack of uniformity or consistency with respect to the use of the term “traditional knowledge,” while part of the problem, is not, however, the problem in itself. While the absence of uniformity or consistency in this respect also illustrates the lack of legal and policy coherence among governments in Canada,[56] the problem lies, again, in comprehensively defining traditional knowledge. In the absence of such a definition, the implementation of legal mechanisms that would enable indigenous peoples and communities to maintain, control, protect, and develop their *intellectual property* over cultural heritage, traditional knowledge, and traditional cultural expressions or that would enable these rights to be recognized and protected is very difficult to reconcile with Canada’s existing intellectual property rights regime.[57]

---

[51] *Great Lakes Protection Act*, 2015, SO 2015, c 24, s 28.

[52] *The East Side Traditional Lands Planning and Special Protected Areas Act*, SM 2009, c 7, ss 10, 10(4).

[53] *Species at Risk Act*, SC 2002, c 29, preamble, ss 10, 18 [emphasis added].

[54] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, ss 19(3), 52 [emphasis added].

[55] A Westlaw search, on file with the author.

[56] de Beer & Dylan, *supra* note 24 at 518–20; see also *Gebru*, *supra* note 24 at 306.

[57] The author wishes to emphasize that while this article operates from the perspective of fashioning a solution from an instrumental vantage point, the author would also emphasize that any solution achieved needs to be done so through with indigenous peoples as “partners in Confederation.” See Kiera L Ladner,

Moreover, indigenous peoples themselves do not necessarily cabin their knowledge in legal, intellectual property, or other types of Western-Eurocentric definitions. One scholar has aptly written that the "question of terminology is one of the most difficult challenges to exploring means to resolve the incompatibility between legal systems and indigenous values."[58] Furthermore, the Western notion of private property, much less intellectual property, is mostly anathema to indigenous peoples and communities in Canada.[59] Conversely, although certainty and clarity may be lacking in the scope of subject matter, the possibility exists that the lack of certainty and clarity enables wider interpretations of that scope to be considered. The over-arching question we are left with then, in the absence of a legal definition, is: what exactly is traditional knowledge and how can it be reconciled, if at all, with existing Canadian law in order to meet the obligations of Article 31(2)? Answers to this question, even incipient ones, are developed by first examining the Canadian intellectual property rights regime and then jurisdictional issues which are the subject of Part III.

The Canadian intellectual property rights regime is comprised of copyright, trade-marks, patents, trade-secrets, industrial designs, geographic indications, plant-breeders' rights, integrated circuit topographies, and the public domain. Industrial designs, plant-breeders' rights, and integrated circuit topographies have little to no applicability in the present context and will not be discussed here. Instead, the discussion will focus on copyright, trade-marks, patents, trade-secrets, geographical indications, and the public domain and will reveal that none of these utilities lend themselves well to indigenous peoples' and communities' right to "maintain, control, protect and develop their *intellectual property* over…cultural heritage, traditional knowledge, and traditional cultural expressions."[60]

### Copyright

Legislative jurisdiction over copyright is enjoyed by the federal government.[61] Copyright law in Canada is driven by federal statute and judicial interpretation of the Copyright Act.[62] Canada is also a signatory to the Berne Convention, the Rome Convention, and TRIPS.[63] The Copyright Act provides the legal foundation of

---

"Visions of Neo-colonialism? Renewing the Relationship with Aboriginal Peoples," (2001) Can J of Native Studies 105.

[58] Paterson, *supra* note 39 at 194.

[59] See Daniel J Gervais, "Spiritual but Not Intellectual - The Protection of Sacred Intangible Traditional Knowledge" (2003) 11:2 Cardozo J Intl & Comp L 467; see Gebru, *supra* note 24 generally.

[60] UNDRIP, *supra* note 4 [emphasis added].

[61] *1867 Act*, *supra* note 18, s 91(23).

[62] *Copyright Act*, RSC, 1985, c C-42.

[63] *Berne Convention for the Protection of Literary and Artistic Works*, 9 September, 1886, revised at Paris 24 July 1971, 25 UST 1341, 1161 UNTS 3; *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)*, 496 UNTS 43, BTS 38 (1964); *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994); see also Graham Dutfield, "TRIPS-Related Aspects of Traditional Knowledge" (2001) 33:2 Case Wes Res

copyright law in Canada and voluminous jurisprudence has served to fill important gaps inherent in the statute. The aforementioned international instruments add various ingredients to this regime. Copyright law in Canada serves, essentially, to protect the expression of ideas, but not the ideas themselves.[64] For an author's expression or work to be protected by copyright law, the expression or work "must be the product of an author's exercise of skill and judgment [and the] …exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise."[65] If an author's work meets this standard, it will deemed to be "original"—in the sense that it originates from the author. Stated another way, the work "need not be creative, in the sense of being novel or unique."[66] An additional requirement for copyright protection to accrue to the author of an expression or work is that it be fixed in some tangible medium.[67] The result of the regime is that any idea expressed in a work, so long as it is not a literal or non-literal copy and is expressed in an "original" and "fixed" form will enjoy copyright protection for the author's life time plus 50 years and will not be deemed a duplication or unauthorized reproduction of another author's idea or work.[68] "Moral rights" protect an author's choice to be associated with their work. An example from May 2017 serves well to illustrate the problem of copyright in respect of traditional knowledge and implementing Article 31.

In May 2017, an exhibition of paintings by a non-indigenous artist in Toronto, Amanda PL, influenced by the Woodlands style of painting, made world-renowned by Anishinaabe artist Norval Morriseau and others, was cancelled by the gallery exhibiting the artist's works due to cultural appropriation concerns.[69] Chippewa artist Jay Soule would say of the artist's work: "what she's doing is essentially cultural genocide, because she's taking his stories and retelling them, which bastardizes it down the road. Other people will see her work and they'll lose the connection between the real stories that are attached to it…"[70] Eugene Morriseau, one of Norval Morriseau's children would remark: "seeing this lady portray exactly like my dad's artwork is almost like, I didn't like it and as if she's copying…We promised our father that we would try to carry on his legacy and if this thing opens up to, if non-natives

J Intl L 233; and Daniel Gervais, "Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach" (2005) 2005:1 Michigan State L Rev 137.

64 See *Cinar Corporation v Robinson*, 2013 SCC 73 at para 24 and *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 8.

65 *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 16.

66 *Ibid*.

67 *Copyright Act*, *supra* note 62, s 2; see also *Canadian Admiral Corporation Ltd v Rediffusion Inc*, [1954] Ex CR 382, 20 CPR 75.

68 The recently concluded United States–Mexico–Canada Agreement (USMCA) has within the three signatory nations extended the terms of copyright to the author's life plus an additional 70 years instead of an additional 50 years.

69 Shanifa Nasser, "Toronto Gallery Cancels Show after Concerns Artist 'Bastardizes' Indigenous Art" (28 April 2017), online: *CBC News* <cbc.ca/news>.

70 *Ibid*.

start painting like my dad the meaning of his artwork is going to be lost."[71] He would also add: "[w]e don't want that door open and if she does, somebody else is going to do it then all stories and all the storytelling, they're not going to be there no more, it's going to be meaningless."[72] Despite Morriseau's valid cultural appropriation concerns, copyright protection would accrue to Amanda PL's works because they are both original and fixed in a tangible and permanent medium. Of course, copyright protection accrued to Morriseau's works, just like they do to Amanda PL's, but, unless Amanda PL's works, or any other author's works, are literal or non-literal copies of another work, they will be protected under Canadian copyright law.[73]

In response to the criticism of her work by Morriseau and others, Amanda PL would say: "I think it's a shame to say that an artist can't create something because they're not from that race…That's like saying any other culture can't touch something like abstract art unless you're white, or you can't touch cubism art."[74] She would also add: "I just tried to learn all I could about the Aboriginal culture, their teachings, their stories, and I've tried to capture the beauty of the art style and make it my own by drawing upon elements of nature within Canada that have meaning to me…This just happens to be the style that I'm drawn towards at this time. This is how I choose to express myself and this is how I choose to continue to paint."[75] These diverging views, both equally accurate, illustrate that the copyright regime does not, in its current form, lend itself well to indigenous peoples' "right to maintain, control, protect and develop their intellectual property over [their] cultural heritage, traditional knowledge, and traditional cultural expressions" or ensure a regime that recognizes and protects them.[76]

### Trademark

The Canadian trade-mark regime is similarly problematic. Legislative jurisdiction over trade-marks is also enjoyed by the federal government.[77] Similar to copyright, trade-mark law is driven by federal statute, with the jurisprudence filling various gaps left within the *Trade-marks Act*;[78] however, the common law provides actions in the

---

[71] Willow Fiddler, "Norval Morriseau's Family Speaks Out about Controversial Toronto Artist" (9 May 2017), online: *ATPN News* <aptnnews.ca>.

[72] *Ibid*.

[73] It should be noted here that the discussion regarding the protections copyright law offers is perhaps more nuanced than indicated here. The copyright regime is not pre-occupied with whether an idea has been copied; rather, whether expression has been copied. It could very well be the case that Amanda PL copied Morriseau's expressions, not his ideas, and in that sense the question might be one of whether the copyright regime extends to methods, distinct styles, genres, and kinds of painting. See Dan L Burk, "Method and Madness in Copyright Law" (2007) 2007 Utah L Rev 587.

[74] *Nasser*, *supra* note 69.

[75] *Ibid*.

[76] UNDRIP, *supra* note 4.

[77] *1867 Act*, *supra* note 18.

[78] *Trade-marks Act*, RSC, 1985, c T-13.

tort of passing off.[79] In Canadian law, trade-marks serve to protect the "goodwill" that consumers associate with and use to distinguish the source or origin of specific wares or services available in the marketplace. "Goodwill", in the trade-mark sense refers to the reputation that consumers associate with a particular good or service from a particular supplier or provider—in other words, a particular "brand." Writing on behalf of the majority in *Mattel*, Justice Binnie would say that trade-marks "operate as a kind of shortcut to get consumers to where they want to go, and in that way perform a key function in a market economy."[80] Trade-marks, however, are almost entirely only available to goods and services in the Canadian marketplace, and the trade-mark regime provides strict rules about what is trademarkable, and what is not. Because indigenous peoples' "cultural heritage, traditional knowledge, and traditional cultural expressions" are not goods or services as contemplated by and in a market economy and the *Trade-marks Act*, trade-marks also do not lend themselves well to ensuring the rights that Article 31 provides. Furthermore, even if trade-marks were available, they would only protect the *source* or *origin* of the cultural heritage, traditional knowledge, and traditional cultural expressions, not those phenomena themselves or the subject matter to which they pertain.[81] The "passing-off" action at common law is of little value too because a good or service protected by a mark needs to already be registered to be subject to imitation by imposters and would-be appropriators. Thus, using the previous example, Norval Morriseau could not trade-mark his name (as trade-mark law technically does not allow this), but if he were alive, he might be able to use or register a trade-mark of some sort that would let art collectors know which are his authentic works, so as to enable these collectors to distinguish his work from Amanda PL's, or other similar indigenous and non-indigenous artists—but again, he would generally not be able to trade-mark a particular type or style of art, and neither would Amanda PL.[82] As with copyright, the principle underlying the trade-mark regime is to

---

[79] *Ibid*, ss 7(b), (d); see also *Consumers Distributing Co v Seiko Time Canada Ltd*, [1984] 1 SCR 583, 10 DLR (4th) 161; *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65; and, *Orkin Extermination Co Inc v Pestco Co of Canada Ltd* (1985), 50 OR (2d) 726, 19 DLR (4th) 90 (CA).

[80] *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 21.

[81] See Catherine W Ng, "Some Cultural Narrative Themes and Variations in the Common Law" (2009) 99 TMR 837 for an example where the Snuneymuxw First Nation, for example, was under section 9(1)(n)(iii) of the *Trade-marks Act* able to register ten of its petroglyphs and other designs; it ought, however, to be noted that "official marks" are not, technically, equivalent to trade-marks, and are instead a form of prohibited mark which prevents others from registering marks which may cause confusion with the mark registered by the "public authority" under this provision. Thus, see *Ontario Association of Architects v Association of Architectural Technologists of Ontario*, 2002 FCA 218 and *City of Terrace and Kitasoo Band Council v Urban Distilleries Inc*, 2014 FC 833.

[82] It should be clarified that under section 12(2) of the *Trade-marks Act*, *supra* note 78, "[a] trade-mark that is not registrable by reason of paragraph (1)(a)…[i.e. a word that is primarily merely the name or the surname of an individual who is living or has died within the preceding thirty years]…is registrable if it has been so used in Canada by the applicant or his predecessor in title as to have become distinctive at the date of filing an application for its registration." Thus, theoretically, under certain circumstances it may be possible for an artist to obtain a trade-mark in a name.

balance rights holders' rights against users' rights, and the law perpetually struggles to ensure an equitable balance is achieved between them.[83]

**Patent**

Like the copyright and trade-marks regime, the patent regime presents problems of its own. Legislative jurisdiction over patents, like copyright and trade-mark, is also enjoyed by the federal government.[84] Similar to copyright and trade-mark, patent law is driven by federal statute, with the jurisprudence filling various gaps left within the statute, although Canada is also a signatory to the *Paris Convention* which adds a rich layer of fabric to the patent regime.[85] Patents, under the *Patent Act*, protect inventions that are novel, useful, and non-obvious. An invention that is "new," in other words, not the subject of prior art, offers some actual and practical utility to society or the economy, and would not be obvious to someone skilled in the art to which the subject matter of the patent application pertains, would likely obtain a patent from the Canadian patent office. The obvious problem here, in respect of patents, is that "cultural heritage, traditional knowledge, and traditional cultural expressions" are most often not inventions in the manner that the *Patent Act* demands: novel, useful, or non-obvious.[86] Additionally, Canada is a "first-to-file" jurisdiction, meaning that the first entity or party to seek registration of the patent is the one (assuming it is patentable subject-matter) granted the patent, not the actual inventor or discoverer.[87] Thus, any party appropriating indigenous peoples' and communities' cultural heritage, traditional knowledge, and traditional cultural expressions would, filing first, likely receive a patent even if the subject matter of the patent was directly the result of appropriation or theft. Thus, much like the copyright and trade-mark regime, the patent regime, in its current manifestation, also does not lend itself well to ensuring the rights that Article 31 provides. That said, Chidi Oguamanam, a legal scholar at the University of Ottawa, has championed the implementation of the *Nagoya Protocol* to the *Convention on Biological Diversity*, and an access-and-benefits sharing regime in Canada which would ensure that bio-prospectors would provide benefits for the genetic resources they legitimately develop through access to indigenous peoples'

[83] *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 at paras 30–31 ("The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated […] The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.").

[84] *1867 Act*, *supra* note 18, s 91(22).

[85] *Paris Convention for the Protection of Industrial Property*, as last revised at the Stockholm Revision Conference, 20 March 1883, 21 UST 1583, 828 UNTS 305.

[86] Gebru, *supra* note 24 at 301. An additional problem exists in that even if patentability could, theoretically, be established on novelty, disclosure of prior art could also, theoretically, negate that putative patentability.

[87] *Patent Act*, RSC 1985, c P-4, s 28.

genetic resources, cultural heritage, traditional knowledge, traditional cultural expressions, and other phenomena.[88]

**Trade-Secrets**

While one of the threads that form the fabric of the intellectual property rights regime in Canada, trade-secrets function mostly in the form of contract law and are thus mostly within the jurisdiction of the provincial governments under section 92(13) of the *1867 Act*.[89] That said, trade-secrets and confidential information may, to some degree, enjoy protection under the common law and equity.[90] In any event, when in the form of contract law, Party A agrees to share with Party B some commercial knowledge, information, or other phenomena, and by way of what is typically a non-disclosure agreement, Party B agrees not to disclose to any unauthorized party the knowledge, information, or other phenomena which was disclosed by Party A.[91] Conceptually, trade-secrets operate to withhold contributions from rather than provide them to the public domain and public knowledge. Trade-secret, when manifested in the form of a contract, does not lend itself well to ensuring the rights that Article 31 provides because it is impossible—a futility, a nullity—to contemplate that indigenous peoples (or communities) could contract in this fashion with an infinite number of other persons and entities as a means of maintaining, controlling, protecting, and developing their intellectual property over cultural heritage, traditional knowledge, and traditional cultural expressions, and much less successfully enforce those agreements. This is not to say that such contractual agreements cannot be formed, in isolated cases, but given that cultural heritage, traditional knowledge, and traditional cultural expressions are not typically of a commercial nature (although the desire to exploit intangibles commercially may exist), there is little point—conceptually, if nothing else—in referring to them as "trade-secrets."[92] Moreover, any unauthorized disclosure would merely be treated as a breach of contract and only entitle the aggrieved party to monetary damages, a remedy which is not at the forefront of the goals and objectives of Article 31 and UNDRIP as a whole. Finally, however, relying on the common law or equity to ensure information is kept confidential or secret may run into the problem that the subject matter of the information is not amenable to such protection.

**Geographical Indications**

Geographical indications function similarly, but not exactly as trade-marks, and see little operation in Canada—at least comparatively speaking to the other intellectual

---

[88] See Chidi Oguamanam, "Genetic Resources & Access and Benefit Sharing: Politics, Prospects and Opportunities for Canada after Nagoya," (2011) 22:2 J Envtl L & Prac 87.

[89] *Supra* note 18.

[90] See *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 69 OR (2d) 287.

[91] That said, a non-disclosure agreement can generally pertain to any subject matter.

[92] See Deepa Varadarajan, "A Trade Secret Approach to Protecting Traditional Knowledge" (2011) 36:2 Yale J Intl L 371.

property rights mechanisms discussed herein (though they are similarly related to certification marks under the *Trade-marks Act*).[93] Geographical indications serve to protect the geographic source or origin or a particular good or service. WIPO defines them as:

> a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a GI, a sign must identify a product as originating in a given place. In addition, the qualities, characteristics or reputation of the product should be essentially due to the place of origin. Since the qualities depend on the geographical place of production, there is a clear link between the product and its original place of production.[94]

Much like trade-marks, geographical indications must be attached to a product, and merely serve to authenticate the *origin* or *source* of that product—they do not protect against new or "original" expressions of that product, nor do they necessarily prevent against unauthorized appropriation of subject matter or content.[95] As a result, in the Canadian context, geographical indications also do not generally lend themselves well to ensuring the rights that Article 31 provides are recognized and protected.[96]

**The Public Domain**

One additional and final dimension to the Canadian intellectual property rights regime illustrative of the schisms between the existing intellectual property rights regime and traditional knowledge is the concept of the public domain. The public domain is a legal construct that enables works, inventions, and other subject matter, which were previously protected by some utility of the intellectual property rights regime—and those not protectable at all—to be freely used by anyone upon the expiry of that intellectual property protection.[97] As an example, the works of Mozart are in the public domain, and anyone may perform them without risking any sort of intellectual property right infringement. The public domain works against indigenous peoples and communities in Canada because the "cultural heritage, traditional knowledge, and traditional cultural expressions" of indigenous peoples and communities in Canada have existed for centuries and are therefore seen to *already* be in the public domain,

---

[93] *Trade-marks Act*, *supra* note 78, s 2 ("certification mark means a mark that is used for the purpose of distinguishing or so as to distinguish goods or services that are of a defined standard with respect to (a) the character or quality of the goods or services, (b) the working conditions under which the goods have been produced or the services performed, (c) the class of persons by whom the goods have been produced or the services performed, or (d) the area within which the goods have been produced or the services performed, from goods or services that are not of that defined standard…").

[94] World Intellectual Property Organization, online: *Geographical Indications* <wipo.int/geo_indications/en/>.

[95] *Institut national des appellations d'origine des vins et eaux-de-vie v Andres Wines Ltd* (1987), 60 OR (2d) 316, 40 DLR (4th) 239 (H Ct J), aff'd (1990) 74 OR (2d) 303, 71 DLR (4th) 575.

[96] Dagne, *supra* note 47.

[97] See John Frow, "Public Domain and Collective Rights in Culture," (1988–99) 13 IPJ 39 at 39–48.

meaning that even if any of the above-discussed intellectual property rights utilities were applicable *per se*, they would not be but for the works; that is, the "cultural heritage, traditional knowledge, and traditional cultural expressions" already being in the public domain.[98] "One of the interesting things in talking to indigenous peoples about the public domain is the response they provide," writes Doris E. Long.[99] "The concept of the public domain does not currently exist in many indigenous communities except in the form of 'your public domain' versus 'my cultural heritage," she continues.[100] "When asked, indigenous peoples often respond with the same question. 'How come "public domain" is my stuff? Yours is copyrightable and mine is in the public domain. How did that happen?' The answer, of course, is that we have developed a nice approach to protection. New works get protected. Their works have been around too long. Therefore, we all get to use them."[101]

**Additional Concerns**

The idea that traditional knowledge is a form of "property," like most westernized intellectual property rights regimes, is commercially oriented and focused on providing intellectual property protections to, in the case of copyright, unitary authors and their works—a very romantic ideal and notion of authorship.[102] With a small exception for joint authorship found in the *Copyright Act*, the intellectual property rights regime, in totality, does not contemplate intellectual property protections for expression and works authored collectively or communally.[103] Much of traditional knowledge is kept by indigenous communities as a whole and not simply by one person in the community.[104] Furthermore, much of traditional knowledge is also usually not fixed in a tangible medium—oral traditions, for example, enable this knowledge to be handed down from generation to the next and so on.[105] Thus, even if traditional knowledge could be reconciled with the existing intellectual property rights regime, the thorny question of who, from a particular indigenous community, ought to be or is, in fact, entitled to seek out the intellectual property protections, either individually or on behalf of the community, persists.[106] Finally, the idea that traditional

[98] Long, *supra* note 38; see also Graham Dutfield, "The Public and Private Domains: Intellectual Property Rights in Traditional Knowledge" (2000) 21:3 Science Communication 274.

[99] Long, *supra* note 38 at 320.

[100] *Ibid*.

[101] *Ibid*.

[102] See Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) 68:2 Chicago-Kent L Rev 841; Rosemary J Coombe, "Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property" (2003) 52:4 DePaul L Rev 1171; and Keith Aoki, "(Intellectual) Property and Sovereignty: Notes toward a Cultural Geography of Authorship," (1996) 48:5 Stan L Rev 1293.

[103] It is important here to state that trade-mark and patent holders are not authors, and should therefore, be distinguished in this context.

[104] Susan Scafidi, "Intellectual Property and Cultural Products" (2001) 81:4 BUL Rev 793.

[105] Henderson, *supra* note 1.

[106] Shubha Ghosh, "Reflections on the Traditional Knowledge Debate" (2003) 11:2 Cardozo J Intl & Comp L 497; see also Ajeet Mathur, "Who Owns Traditional Knowledge?" (2003) 38:42 Economic and Political

knowledge is a form of "property," is mostly anathema to most indigenous communities, such knowledge often being seen as being sacred and for the benefit of the whole community, not a single author or individual or for commercial exploitation purposes.[107] Finally, bringing all of these issues together, the regime's problems culminate in the total exclusion of traditional knowledge, indigenous peoples, and local communities from any form of (offensive or defensive) intellectual property rights or legal protection.

For many of the reasons discussed above, several scholars have persuasively and accurately argued that traditional knowledge is not governable through a traditional westernized intellectual property rights regime; it is *sui generis* and therefore requires its own regime, separate and distinct from the existing intellectual property rights regime.[108] What I propose in this article is perhaps the first step in developing that *sui generis* regime; however, before proceeding to examine that solution, viewed from a legislative jurisdiction vantage point, the implementation and governance challenges respecting traditional knowledge that make a *sui generis* regime desirable—even necessary—need to be examined.

## III. Implementation and Governance Challenges in Canada

Exacerbating the problem of reconciling traditional knowledge with Canada's existing intellectual property rights regime, which is ultimately inapposite and exclusionary to indigenous peoples in Canada, are jurisdictional problems precipitated by the division of powers in Canada's Constitution. Elsewhere, Professor Jeremy de Beer, a legal scholar at the University of Ottawa, and I have identified and discussed these jurisdictional issues.[109] The *1867 Act*, which forms part of Canada's Constitution, in sections 91 and 92, respectively, divides the legislative powers of the federal government and the provincial governments.[110] As discussed above, the federal government enjoys legislative jurisdiction over copyright, trade-marks, and patents; however, that discussion illustrated that traditional knowledge is generally not reconcilable with Canada's intellectual property rights regime. For that reason, an assertion by the federal government that traditional knowledge is protectable under any heads of these powers would be difficult to sustain because traditional knowledge is not viewed as being copyrightable, trademarkable, or patentable. Section 91(24) of

---

Weekly 4471; see also *John Bulun Bulun & Anor v R & T Textiles Pty Ltd*, FC Austl, Von Doussa J, Unreported, 3 September 1998.

[107] See Gervais, *supra* note 59 and Gebru, *supra* note 24 generally.

[108] See Chidi Oguamanam, "The Protection of Traditional Knowledge: Towards a Cross-Cultural Dialogue on Intellectual Property Rights," (2004) 15:1 Australian Intellectual Property J 34; see also Michael Halewood, "Indigenous And Local Knowledge In International Law: A Preface To Sui Generis Intellectual Property Protection," (1999) 44 McGill LJ 953; J Janewa OseiTutu, "A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law" (2011) 15:1 Marq Intell Prop L Rev 147; and Thomas Cottier  Marion Panizzon, "Legal Perspectives On Traditional Knowledge: The Case For Intellectual Property Protection: (2004) 7:2 J Intl Econ L 371.

[109] de Beer & Dylan, *supra* note 24 at 524–32.

[110] *1867 Act*, *supra* note 18.

the *1867 Act*, however, gives jurisdiction over "Indians, and Lands reserved for the Indians" to the federal government. Despite the abhorrent nomenclature of that section, and the *Indian Act*,[111] this constitutional power has enabled the federal government to exercise legislative jurisdiction over indigenous peoples in Canada, to create the Department of Crown Indigenous Relations & Northern Affairs (and all of its predecessors), and to administer a complex bureaucracy to manage the department, and the indigenous peoples it serves.[112] However, that section arguably does not necessarily contemplate governance beyond persons and land, such that indigenous "cultural heritage, traditional knowledge, and traditional cultural expressions" might be included within it. An assertion of jurisdiction to implement Article 31 based on 91(24) is therefore somewhat, if not seriously, tenuous. Concurrently, as is argued here, it may, however, provide the strongest normative claim—among the weaker ones explored in this article—to anchor an assertion of *legislative* jurisdiction to coordinate, in a regime of cooperative federalism, the implementation by all levels of government and indigenous peoples and communities, the mandate, goals, and objectives of Article 31.[113]

Under section 92(13), which gives legislative jurisdiction to the provinces respecting property and civil rights, provincial governments might have a claim to assert jurisdiction over indigenous peoples' and communities' right to "maintain, control, protect and develop their intellectual property over…cultural heritage, traditional knowledge, and traditional cultural expressions" because the exercise of such rights are made in conjunction with a form of property, even though such property is not properly intellectual property as contemplated by the intellectual property rights regime, but is yet, still, arguably, a form of property.[114] Additionally, under section 92(16) of the *1867 Act*, which provides jurisdiction over "[g]enerally all Matters of a merely local or private Nature in the Province," the provinces could assert jurisdiction over traditional knowledge because traditional knowledge may be seen as being the substance of localized and private matters because, once again, it is not, arguably, within the legislative dominion of the federal powers contained in section 91. Such a claim to jurisdiction would, however, likely be just as tenuous as some of the others thus far discussed. Notwithstanding, in performing this analysis, the author is mindful

---

[111] *Indian Act*, RSC, 1985, c I-5.

[112] Mitchell and Enns, *supra* note 3 at 6. ("By global standards, the array of legal, political and administration accommodations with Aboriginal people in Canada is striking. While discussion in Canada often misrepresents the CDN$7-8 billion in annual expenditures on Aboriginal people (much of the spending represents money allocated to standard government services, such as schooling, health care and economic development, that are provided to all Canadians), the reality is that Canada provides a substantial amount of money specifically for indigenous communities and the needs of their communities. The outcomes do not match the fiscal commitment, a source of frustration for the Government of Canada and dismay for indigenous governments, which point to the high cost of program delivery in isolated and northern communities and the legacy of historical mistreatment as the primary cause for the level of expense. In global terms, however, the Canadian commitment to Aboriginal affairs is, on the surface, substantial. The few countries with better indigenous socio-economic outcomes, principally Scandinavia and New Zealand, actually have less well developed legal or self-determination frameworks for Aboriginal peoples.").

[113] de Beer & Dylan, *supra* note 24 at 539.

[114] *Ibid* at 531.

of the interjurisdictional immunity and paramountcy doctrines; however, because the issues are not borne of competing statutes at different levels of government, but of jurisdiction to *enact* any such statutes discussion of these doctrines is better left for when and if any conflict was to emerge among competing statutes and/or between the federal and provincial governments.[115]

In totality, what is revealed by the foregoing analysis is that the content of "traditional knowledge" and most, if not all, of the rights provided for in Article 31 cannot be properly recognized or protected by Canada's existing intellectual property rights regime or even its laws generally. While the federal government has thus far approached the issue of traditional knowledge governance in a fragmented fashion,[116] some legal and policy coherence needs to be achieved if a regime of "effective measures" which recognizes and protects Article 31 rights is to be established in Canada. My proposal as to how this regime might be crafted is the subject of the next section.

## IV. A Solution to Article 31 Implementation

As noted earlier, UNDRIP Article 31(2) states that "[i]n conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of [Article 31(1)] rights."[117] Two important points must be drawn out from that provision in order to develop the solution proposed here.

First, Article 31(2) makes it clear that any measures which are developed to recognize and protect the exercise of Article 31 rights must be taken in conjunction with indigenous peoples. For far too long—since the colonial presence first landed on Canada's shores—indigenous peoples have been divorced from the legal and policy developments that ultimately and profoundly affect them. In fact, indigenous peoples and communities have been victimized, repeatedly, by governments, their laws, and policies—laws and policies which have colonized them, stolen land from them, stolen lives from them, marginalized them, impoverished them, murdered them, incarcerated them, and perpetrated numerous atrocities upon them.[118] The destructive and violent treatment that governments have imposed on indigenous peoples in Canada is far too large a subject to be dealt with effectively and appropriately here, but suffice it to say, implementing UNDRIP, and specifically Article 31, absolutely, resolvedly, and unequivocally, demands participation from indigenous peoples and communities

[115] See *Canadian Western Bank v Alberta*, 2007 SCC 22.

[116] de Beer & Dylan, *supra* note 24 at 532.

[117] UNDRIP, *supra* note 4, art 31, s 2.

[118] See T Alfred & J Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism, Government and Opposition," (2005) 40:4 Government and Opposition 597; Jennifer Henderson & Pauline Wakeham "Colonial Reckoning, National Reconciliation? Aboriginal Peoples and the Culture of Redress in Canada," (2009) 35:1 English Studies in Can 1; Jeff Corntassel, Chaw-win-is & T'lakwadzi. "Indigenous Storytelling, Truth-telling, and Community Approaches to Reconciliation" (2009) 35:1 English Studies in Can 137; Adam J Barke, "The Contemporary Reality of Canadian Imperialism: Settler Colonialism and the Hybrid Colonial State" (2009) 33:3 American Indian Q 325.

throughout Canada.[119] Furthermore, UNDRIP Article 31 rights need to be viewed in conjunction with the self-determination rights provided for in Articles 3, 4, 5 and the participatory and consultative rights provided for in Articles 18 and 19.[120]

Second, Article 31(2) mandates endorsing states to take measures to *recognize* and *protect* the exercise of Article 31 rights. The provision's touchstones are therefore "recognition" and "protection" of those rights. In other words, Canada must take effective measures to ensure that indigenous peoples' and communities' rights "to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions" and "to maintain, control, protect and develop their *intellectual property* over such cultural heritage, traditional knowledge, and traditional cultural expressions" are *recognized* and *protected* by and in domestic law. Without devolving into purely semantic arguments, I take recognition and protection to mean the creation of enforcement mechanisms at law that are not merely limited to "justification of any government regulation that infringes upon or denies aboriginal rights" the way section 35 constitutional jurisprudence has evolved.[121] For example, whether the effective measures implemented are defensive, offensive, positive, protectionist, preservationist, conservationist, or instrumentalist, or a combination thereof, are matters that may decided upon at a later date.[122]

The most persuasive argument for effective implementation measures to meet this robust onus of recognition and protection is therefore predicated on cognitive and ideological acceptance that a management regime which recognizes and protects those Article 31 rights is normatively a *sui generis* one.[123] Given the definitional, categorical, and jurisdictional problems Article 31 implementation raises in Canada's constitutional framework, it is therefore my proposal—beyond the one that Professor de Beer and I have made elsewhere—that the federal, provincial, and territorial governments need to work cooperatively and with indigenous peoples and

---

[119] UNDRIP, *supra* note 4, arts 18–19.

[120] *Ibid*, arts 3, 4, 5, 18 and 19.

[121] *R v Sparrow*, [1990] 1 SCR 1075 at 1109, 70 DLR (4th) 385. ("There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words 'recognition and affirmation' incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick* […] and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v The Queen*…); see also *Dagne*, *supra* note 47 at 104–06.

[122] See Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Routledge, 2010) at 110–17; and Gebru, *supra* note 24 at 302–05.

[123] Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation," (2010) 26 NJCL 121 at 131.

communities to develop a sustainable and functional national action plan in respect of Article 31 implementation.[124]

To do so, I propose that the federal government assume *legislative* jurisdiction (under section 91(24) of the *1867 Act*)—but not *management* jurisdiction—over traditional knowledge and the rights provided for in Article 31 in order to coordinate harmonizing legislation and to create an Office of Indigenous Knowledge Governance, run under the auspices of the Canadian Intellectual Property Office (CIPO) but with intergovernmental participation modelled on the Canadian Council of Ministers of the Environment (CCME), that would recognize and protect the rights provided for under Article 31 and enable indigenous peoples and communities to maintain, control, and protect their intellectual property over the rights provided for in Article 31. Doing so would allow each stakeholder to contribute to the dialogue and to ultimately develop a framework under which the *sui generis* nature of traditional knowledge could be implemented and begin a process where the rights provided for in Article 31 were normatively recognized and protected under Canadian law.

**Canadian Intellectual Property Office**

The Government of Canada states that the "CIPO, a Special Operating Agency (SOA) associated with Innovation, Science and Economic Development Canada, is responsible for the administration and processing of the greater part of intellectual property in Canada."[125] CIPO's mandate is to deliver "high quality and timely IP products and services to customers, and to increase awareness, knowledge and effective use of IP by Canadians," and its mission is to "contribute to Canada's innovation and economic success by providing greater certainty in the marketplace through high-quality and timely IP rights, fostering and supporting invention and creativity through knowledge sharing, raising awareness to encourage innovators to better exploit IP, helping business compete globally through international cooperation and the promotion of Canada's IP interests; and, administering Canada's IP system and office efficiently and effectively."[126]

Sadly, CIPO's 2017-2022 business strategy, which places considerable effort on harmonizing Canada's intellectual property rights regime with a multitude of international intellectual property instruments, has not identified reconciliation of traditional knowledge and UNDRIP as one of its objectives.[127] Neither does Canada's

---

[124] de Beer & Dylan, *supra* note 24 at 537.

[125] Canada, Canadian Intellectual Property Office, online: *Mandate* <ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr00025.html#mandate>.

[126] *Ibid*.

[127] Innovation, Science and Economic Development Canada, Canadian Intellectual Property Office, online: *Canadian Intellectual Property Office Five-Year Business Strategy 2017-2022* < ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr04283.html>.

Intellectual Property Strategy, an $85 million intellectual property initiative.[128] The reasons for these results are not entirely clear either; however, given its current international intellectual property harmonization efforts, and despite the irreconcilability of traditional knowledge with the existing intellectual property rights regime, CIPO still seems like the apposite entity under which to coordinate Article 31 UNDRIP implementation and a national action plan because of Article 31's reference to *intellectual property* rights. Additionally, if a *sui generis* regime were developed in Canada for traditional knowledge, another reason why CIPO is best suited to coordinate such a regime would be the need to reconcile it with Canada's overall and continually internationalized intellectual property framework.[129] If indeed one of CIPO's missions is, among the others, to foster and support creativity through knowledge sharing, then it seems appropriate for it to act as the overseer of a special Office of Indigenous Knowledge Governance; however, it would not exclusively manage that office. Instead, the Office of Indigenous Knowledge would operate in a fashion similar to the CCME, which is the subject of discussion below.

**Canadian Council of Ministers of the Environment**

As noted earlier, Bill C-262 is focused on the implementation of UNDRIP and the development of a national action plan to do so. Given the implementation and governance challenges that were revealed in Part III of this article, the manner in which such challenges—again, irrespective of Bill C-262's fate—might be initially overcome may be found in an existing paradigm which presents similar implementation and governance challenges: the environment.[130]

In Canada, governance and legislative jurisdiction over the environment is provided neither exclusively to the federal or provincial governments in the *1867 Act*. Instead, these governments each enjoy jurisdiction over various aspects of environmental management and governance. Given the legal and practical challenges overlapping and inter-jurisdictional nature management and governance of the environment presents to the federal, provincial, and territorial governments, the CCME was created to alleviate some of the problems posed by those challenges.[131]

The CCME is an intergovernmental partnership-cum-organization that functions with the participation of each environment minister from the provinces and the federal environment minister. The chair of the council changes from one jurisdiction to another each year. Its agenda is "made up of issues that are Canada-

---

[128] Innovation, Science and Economic Development Canada, Canadian Intellectual Property Office, online: *Intellectual Property Strategy, Industry Canada* <ic.gc.ca/eic/site/108.nsf/eng/home>.

[129] See Paul Kuruk, "The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge" (2007) 17:1 Ind Intl & Comp L Rev 67.

[130] See Edward A Parson, "Environmental Trends and Environmental Governance in Canada" (2000) 26 Can Pub Pol'y (Supplement: The Trends Project) S123.

[131] Indigenous Peoples in Canada have fashioned their own laws respecting the environment—see Jessica Clogg et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 J Envtl L & Prac 227.

wide, international and intergovernmental in nature, and of interest to a significant portion of CCME member governments/regions."[132] The Ministers making up the CCME focus on "achieving environmental results through cooperative action" and employ "consensus decision-making."[133] Each respective minister remains accountable in their home jurisdiction and assumes responsibility for implementing any CCME-made decision, but each agree to work cooperatively respecting those decisions.[134] The CCME aims to provide information to the public in a timely fashion and conducts consultations with indigenous peoples and other stakeholders, and its action plans take into account environmental, economic, and social considerations.[135]

The situation respecting the implementation of UNDRIP Article 31 could be viewed as much the same as governance of the environment is viewed. Following the model provided by the CCME, I propose that the federal government assume legislative jurisdiction over traditional knowledge and the rights provided for in Article 31 and that it create, under the auspices of CIPO, an "Office of Indigenous Knowledge Governance" (OIKG). This office would operate with the participation of the federal Crown Indigenous Relations & Northern Affairs Minister and a ministerial representative from each province and territory and deal with aspects of indigenous knowledge governance in Canada at the *sui generis* regime's *inception point*. Necessarily, indigenous peoples, through their various associations and organizations, would be vital stakeholders in the OIKG. Once constituted, there are two iterations of the model that could manifest at that juncture.

In the first iteration, indigenous peoples however so internally organized within the office, would serve as the permanent chair of the OIKG and would ensure that participating ministers from each government work towards consensus-made decisions cognizant of and determined by neighbouring Article 31 rights, with each participating minister still accountable to and responsible for implementing OIKG consensus-made decisions in their own respective jurisdictions. Jurisdiction for each government to do so is found in the various heads of power found in sections 91 and 92 of the *1867 Act* discussed earlier.

In the second iteration, the OIKG chair would change from year-to-year, from minister to minister, as the case may be, and each participating minister would remain accountable to and responsible for implementing OIKG consensus-made decisions in their own respective jurisdictions; however, a veto power would be provided to indigenous representatives to ensure that indigenous peoples' Article 31 rights are respected, that the *sui generis* regime is developed in the fashion that they determine, and to ensure overall conformity with UNDRIP. In either iteration, the OIKG would record of all its proceedings and make information available to the public to monitor

---

[132] Canadian Council of Ministers of the Environment, online: *Principles* <ccme.ca/en/about/principles.html>.

[133] *Ibid*.

[134] *Ibid*.

[135] *Ibid*.

its progress towards developing a *sui generis* regime for Article 31 rights. Once a constitutional framework was established, legislative and management jurisdiction would be handed over to a consortium of indigenous peoples which properly represented all First Nations, Inuit, and Métis peoples in Canada. Such a solution, while not ideal, I argue, is a normative, pragmatic, and positive first step towards developing and implementing (one part of) a national action plan to achieve the objectives of Article 31 and to ensuring that the laws of Canada are consistent with UNDRIP.[136]

## Conclusion

This article had endeavoured to illustrate how, from a modest instrumentalist perspective, a national action plan for implementing one portion of UNDRIP might be pragmatically achieved. Admittedly, it is grounded in a Eurocentric or quasi-Eurocentric posture as a result. However, the solution proposed herein takes the view that the rights provided for in Article 31 cannot be reconciled with Canada's existing intellectual property rights regime, and normatively deserve a *sui generis* regime if they are to be properly recognized and protected under Canadian law. When (and if) Bill C-262 receives Royal Assent, Canada will be required to develop a national action plan to implement Article 31 and the other provisions of UNDRIP, thus removing any lingering uncertainties as to the binding nature of UNDRIP. When that happens, national UNDRIP harmonization and implementation is inevitably incumbent.

An Office of Indigenous Knowledge Governance, operating under the guidance of the Canadian Intellectual Property Office, created by the federal government assuming *legislative* jurisdiction over Article 31 rights under section 91(24) of the *1867 Act*, and with provincial, territorial, and most importantly, indigenous representatives and participants, provides a modest and tenable first step towards dealing with the implementation challenges Article 31 presents. It ought to be remembered that the purpose of this article has been to illustrate some of the legal difficulties Canada's existing legal regime presents to the harmonization of UNDRIP and indigenous peoples' "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" and "their *intellectual property* over such cultural heritage, traditional knowledge, and traditional cultural expressions." No solution to Article 31 implementation or development of a national action plan will be easy to achieve, as the issues faced by indigenous peoples, communities, and Canada are similarly faced by other endorsing states and indigenous peoples therein. Many questions will need to be answered, and none will be done so easily. Any solution to the implementation challenges that Article 31 present, however, will need to overcome the legal andideological barriers that have thus far and historically prevented recognition and

---

[136] See Stephen R Munzer & Kal Raustiala, "The Uneasy Case for Intellectual Property Rights in Traditional Knowledge" (2009) 27:1 Cardozo Arts & Ent LJ 37.

implementation of UNDRIP and other indigenous rights in Canada.[137] This article, however, offers how the rights provided to indigenous peoples and communities by UNDRIP Article 31 might begin to be recognized and protected at law in Canada and looks forward to the solution's monitoring, progress, expansion, should it be adopted by all stakeholders who necessarily must be part of its design, deployment, success and crystallization of UNDRIP rights in Canada.

[137] Gunn, *supra* note 5 at 169; Joffe, *supra* note 123 at 131.