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Parliamentary Review of the *Copyright Act*
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Canada needs to create a fair and balanced intellectual property system that works for everyone, including Aboriginal peoples in Canada. Over millennia, Aboriginal peoples in their knowledge systems have developed a wealth of traditional knowledge (TK) and traditional cultural expressions (TCEs) which they rightly wish to protect and promote using their constitutional rights as well as the intellectual property system.

Copyright Act is inconsistent with Constitutional Rights of Aboriginal Peoples of Canada

In the *Constitution Act, 1982*,[1] the inclusion of the rights of the Aboriginal People of Canada in Section 35 was the culmination of their long, hard struggle for recognition of their inherent rights and treaties. Section 35(1) reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Section 35(1) did not create rights, but rather provided for the constitutional recognition and affirmation of inherent rights created by Aboriginal law. Under Section 35(2), "'Aboriginal Peoples of Canada' includes the Indian, Inuit and Métis peoples."

Moreover, the *Canadian Charter of Rights and Freedoms* contains a key provision protecting Aboriginal and treaty rights. Section 25 reads:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
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> a. any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

[1] Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982.

b. any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

This non-derogation clause is a "shield" that affirms aboriginal and treaty rights, and protects them from abrogation in the name of other rights or freedoms guaranteed to Canadians. It functions as a safeguard of collective Aboriginal and treaty rights.

The rights of Aboriginal peoples are thus enshrined in the Constitution, and Section 52(1) states in part that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Therefore, the protection of the rights of Aboriginal peoples laid out in the non-derogation clause is part of the supreme law of Canada, and no law that contradicts it can be enforced.

This section affirms constitutional supremacy and the rule of law and protects Aboriginal and treaty rights against all conflicting legislation. Its broad language dictates that all legislation, or the "common law," must be consistent with Aboriginal constitutional rights. Where any legislation or common law rule is inconsistent with the Charter, it should be modified if possible to comply with the Constitution.[2]

These constitutional reforms necessarily created protections of inherent and ancestral rights derived from Aboriginal law and defend treaty-based and other rights of the Aboriginal peoples.

The Supreme Court of Canada has affirmed Aboriginal rights as communal rights in the Constitution.[3] It has clarified that these inherent rights are those "practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans."[4] The purpose of the affirmation is to protect those that were historically important

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[2] *R. v. Swain*, [1991] 1 S.C.R. 933 at 978-79; *R. v. Salituro*, [1991] 3 S.C.R. 654 at 675; *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835 at 878; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para 91; *R. v. Golden*, [2001] 3 S.C.R. 679 at para 86. Similar provisions may be found in the following international instruments binding on Canada: article 2 of the *International Covenant on Civil and Political Rights*; article 2(1)c) of the *Convention on the Elimination of All Forms of Racial Discrimination*; article 2(f) of the *Convention on the Elimination of All Forms of Discrimination Against Women*; and article 4(1)b) of the *Convention on the Rights of Persons with Disabilities*. See also article 25 of the *American Convention on Human Rights*.

[3] *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*]; *R. v. N.T.C. Smokehouse Ltd*., [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [1996] 3 S.C.R. 139; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911; *R. v. Powley*, [2003] 2 S.C.R. 207, *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 [*Marshall-Bernard*]; v Sappier; R v Gray (2006) S.C.C. 54 [*Sappier-Gray*].

[4] *Van der Peet*, *ibid.* at para 44; *Mitchell*, *ibid.* at para 15.

features of particular Aboriginal communities.[5] Moreover, these traditions, customs and practices are dynamic; they can be translated and understood in light of their corresponding modern legal rights.[6] The translation process between ancestral practice and modern Canadian law is integral to the constitutional reconciliation of Aboriginal and Canadian laws and perspectives.[7] TK and TCEs can be translated into, and correspond to, intellectual property rights.

In the treaties, the nations and tribes retained these TKs and TCEs under their jurisdiction and law. The Supreme Court has commented that "[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982."[8] The treaties are constitutional instruments of mutual reconciliations, solemn promises and lasting obligations.[9] They are not a systemic view of either legal system; they are partial agreements, or a reconciliation of the distinct legal traditions of each nation.

Neither the oral nor the written promise in the reconciled treaties indicates that the nations or tribes delegate or transfer any jurisdiction to the Queen, Canada or the provinces with respect to their TK and TCEs. The judicial interpretation of the oral and written promises of the treaties[10] provides firm guidance on these issues in favour of the retaining TK and TCEs within Aboriginal jurisdiction and laws. The courts have affirmed that according to the terms of most of the treaties, the British sovereign did not give Indians "rights"—the nations gave the British sovereign specific rights or responsibilities in their territory.[11] If these inherent rights held under

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[5] *Van der Peet*, *ibid.* at para 69.

[6] *R. v. Marshall-Bernard*, *supra* note * at para 51.

[7] *Ibid.*

[8] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para 20 [*Haida Nation*].

[9] *R. v. Badger*, [1996] 1 S.C.R. 771 at para 41 [*Badger*] stated: "it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See *R. v. Sioui*, [1990] 1 S.C.R. 1025, at 1063; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at 401." See generally James (Sa'ke'j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007).

[10] *Badger*, *ibid* at para 41; *R. v. Marshall*, [1999] 3 S.C.R. 456 at para 78; Siku Allooloo, Michael Asch, Aimée Craft, Rob Hancock, Marc Pinkoski, Neil Vallance, Allyshia West, and Kelsey Wrightson, *Treaty Relations as a Method of Resolving IP and Cultural Heritage Issues (An Intellectual Property Issues in Cultural Heritage Community-Based Initiative)*, IPinCH and the Social Sciences and Humanities Research Council of Canada (2014), www.sfu.ca/ipinch/sites/default/files/resources/reports/treatyrelations_finalreport_2014.pdf

[11] *United States v. Winans*, 198 US 371, 381 (1905). A treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." Felix S. Cohen, *Handbook of Federal Indian Law* (Washington DC: Interior Department, 1942) at 33-34 and 39–40 [Cohen, *Handbook*] at 122: "Perhaps the most basic principle of all Indian law, supported by a host of decisions … is the principle that *those powers lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather*

Aboriginal laws were never clearly or specifically delegated or transferred to the king in a treaty, the nations or tribes retained these Aboriginal rights.[12] The treaties may have transformed some Aboriginal law and rights into vested and protected treaty rights in imperial constitutional law, but that does not change the Aboriginal source of the law and rights.[13]

The mutual intent of the treaties was to ensure that settlement would cause no harm to the ways of life and heritage of the Aboriginal peoples. In return for permission to settle in a particular area, the British sovereign promised to act in ways that were beneficial to treaty nations. The British sovereign promised not to take things that belong to the treaty nations without first gaining their consent.[14] The treaty protection of the inherent TK and TCEs is part of the constitutional fiduciary obligation and the honour and integrity of the Crown.[15]
Under the constitutional reforms described above, Canada is required to understand that Aboriginal peoples under their constitutional rights must be the ultimate decision-makers with respect to the disposition of their traditional heritage, knowledge and cultural expressions. To the extent that Canada has acted outside of this promise concerning the TK and TCEs of Aboriginal peoples in the past, it has acted inconsistently with the constitutional rights of the Aboriginal peoples. Because of past and present wrongs, Canada needs to affirm that the constitutional authority for these issues is a matter of Aboriginal peoples' laws. As Micheal Asch has stated, Canada needs to constrain its actions to conform with the treaty understanding that nothing could

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inherent powers of a limited sovereignty which has never been extinguished. Each tribe begins its relationship with the federal government as a sovereign power, recognized as such in treaty and legislation."

[12] Even where a treaty is silent on an issue, the nations and tribes reserve the right to maintain their way of life; see *Menominee Tribe v. United States*, 391 US 404, 406 (1968). Further, "[t]reaties must be understood as grants of rights from Indian people who reserve all rights not granted," Nell Jessup Newton et al., eds., *Cohen's Handbook of Federal Indian Law* (Newark: Matthew Bender, LexiusNexis, 2005) at 26 [Newton, *Cohen's Handbook*].

[13] *Badger*, *supra* note 8 at para 41 stated some of the applicable principles of interpretation of the terms of a written treaties with Aboriginal nations and the British sovereign: "[A]ny ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at 36; *Simon*, supra, at 402; *Sioui*, *supra*, at 1035; and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at 142–43. … [T]he onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be 'strict proof of the fact of extinguishment' and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. See *Simon*, supra, at 406; *Sioui*, *supra*, at 1061; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at 404.

[14] See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 discussing the take-up clause for settlement and other purposes in the Victorian treaties and the need for Canada to consult with treaty nations.

[15] *Badger*, *supra* note 8 at para 41; *Marshall*, *supra* note 9 at para 4. The Court in *Badger* stated: "[T]he honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of 'sharp dealing' will be sanctioned. See *Sparrow*, *supra*, at 1107–8 and 1114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (Ont. C.A.), at 367."

be more reasonable than a desire to ensure that Aboriginal peoples are the custodians of their cultural heritage.[16]

Together these constitutional provisions protect the right of Aboriginal peoples to maintain, control, protect and develop their dynamic cultural heritages, traditional knowledges, and traditional cultural expressions.[17] A fundamental purpose of Section 35 is to provide cultural integrity, continuity and security for Aboriginal peoples in the future.[18]

The implementation of constitutional reform in Canada remains in its early stages. The Crown's complex and far-reaching constitutional obligations to Aboriginal peoples under Section 35 require an increased awareness, both cultural and legal, about how federal, provincial and territorial laws should protect and implement and harmonize the constitutional rights of Aboriginal peoples and harmonize them with Canadian laws.[19]

Canada needs to have additional consultations with holders of Aboriginal and treaty rights on the issue of the implementation of the constitutional rights of Aboriginal people. The Supreme Court of Canada has held that the constitutional duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.[20] It has stated that the duty to consult with holders of Aboriginal and treaty rights to protect and promote their constitutional rights is required by the constitutional supremacy clause, the honour of the Crown and the goal of constitutional reconciliation of powers and rights.

This statement gives notice to the inconsistency between the federal Copyright Act and the constitutional rights of Aboriginal peoples. The Copyright Act should be amended to be consistent with the constitutional rights of Aboriginal peoples. As a first step, the Act should be

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[16] Micheal Asch, "Concluding Thoughts and Fundamental Questions." In C. Bell and R. K. Patterson, *Protection of First Nations Cultural Heritage: Law, Policy, and Reform* (Vancouver: UBC Press, 2009), 319–410 at 394. Cultural heritage blends tangible and intangible expressions of human knowledge and creativity.

[17] Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) is an important reference in this regard; see page 8 and footnote 24.

[18] *Sappier-Gray, supra* note 2 at para 22.

[19] Marie Battiste and James (Sa'ke'j) Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Vancouver, BC: UBC Press Purich Publishing 2000); Val Napoleon and Catherine Bell, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives,* Companion Volume (Vancouver: UBC Press, 2008); Catherine Bell, "Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform." In Catherine Bell and Robert K. Paterson, eds., *Protection of First Nations Cultural Heritage: Law, Policy, and Reform, supra* note 15 at 15–77; Robert K. Paterson, "Canadian and International Traditional Knowledge and Cultural Expression Systems," (2017) 29:2 *Intellectual Property Journal* 191–276.

[20] *Mikisew Nation, supra* note 13 paras 33–34; *Haida Nation, supra* note 7 at paras 19 and 35.

amended to protect and promote the TK and TCEs of Aboriginal peoples with a non-derogation clause.

A Non-Derogation Clause is Needed for the Protection and Promotion of Traditional Knowledge and Cultural Expressions

The purpose of the non-derogation clause is to clarify that these Aboriginal knowledges and cultural expressions are protected and promoted under Sections 52(1) and 35 of the *Constitution Act, 1982* and Section 25 of the *Charter*.

> For greater certainty, nothing in this Act shall be construed to abrogate, derogate or infringe from any existing aboriginal or treaty rights of the Aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982* but shall be construed so as to protect and promote these constitutional rights.

Aboriginal law and traditions of the Aboriginal peoples have always protected and nourished the TK and traditional cultural expression of their spiritual and performance heritage. These traditional expressions are vast.[21] They include oral traditions, literatures, designs, sports and games, visual and performing arts, dances, songs and designs. Traditional arts may embody both traditional knowledge (the method of making) and TCEs (their external appearance). Many forms of ceremonies, powwow, designs and totems of this heritage reside in the traditional owners (or custodians) of the stories or images. These manifestations carry not only the sacred knowledges but also the law of the Aboriginal peoples.

Usually, a group or society, rather than an individual, holds the knowledge or expressions of a given nation or tribe. These groups monitor or control the use of these expressions to pass on important knowledge, cultural values and belief systems to later generations. The groups have the authority to determine whether the knowledges, expressions, stories and images may be used, by whom they may be created and the terms of reproduction.[22]

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[21] Greg Younging (Opsakwayak Cree Nation and former Chair of the Indigenous Peoples Caucus of the Creator's Rights Alliance), "Indigenous Knowledge and Intellectual Property Rights in Context," in Government of Canada, Department of Canadian Heritage (ed.), *Discussion Papers: Traditions National Gatherings on Indigenous Knowledge*, Ottawa: Undated, at p. 47, as cited in Department of Canadian Heritage, "Traditions: National Gatherings on Indigenous Knowledge – Final Report" (2005) p. 4, note 3, available at http://lfs-indigenous.sites.olt.ubc.ca/files/2014/07/Canadian20Heritage20traditions.pdf. As Younging explains, the concept of traditional knowledge "encompasses a broad range of Indigenous knowledge ranging from: ancient stories, songs and dances; traditional architecture and agricultural [knowledge]; biodiversity related and medicinal, herbal and plant knowledge; ancient motifs, crests and other artistic designs; various artistic mediums, styles, forms and techniques; spiritual and religious institutions and their symbols; and various other forms of Indigenous knowledge."

[22] In 1994, the Federal Court of Australia in *Milpurrurru and Others v. Indofurn Pty Ltd and Others* (1993) 130 ALR 659 found a copyright infringement of a painting by Aboriginal artists entitled Djanda and the Sacred Waterhole by designs on carpet made at a carpet factory. See Terri Janke/WIPO (2003) *Minding Culture: Case*

Before the copyright law was developed in the Canadian common law and statutory law, the various confederations, nations, tribes, clans and societies created, preserved and nourished these knowledges and expressions.

The federal Copyright Act was designed to protect the new and/or improved expression of ideas in a wide range of artistic, literary and creative works.[23] It only protects the way or style of the expressing ideas, not the ideas themselves, which are conceived as not belonging to anyone. To qualify for protection, these forms of expression must be original creations of their authors or creators. Original creations do not have to be completely new. Inspiration is allowed but copying a material part of another work is not. Generally, the Act protects very original or artistically creative works.
At the minimum, the Copyright Act should be amended to contain a non-derogation clause to protect the TK and cultural expressions of the Aboriginal peoples or to prevent their misappropriation by others. Such a clause is necessary to prevent an Aboriginal people's TK and cultural expressions from being used without their authorization, and to ensure that the people in question have the opportunity to share in the benefits of such use.

Much uncertainty exists about which expressions of TK and TCEs are protected by the existing Copyright Act. While the Act may protect some creations or innovations related to TK or TCEs, the distinction between works inspired by TCEs and works that are copies is vague, tenuous and questionable. In many situations, it is difficult or impossible to identify the author/s or creator/s of TCEs, as these are collective in nature and transmitted from generation to generation. As a traditional cultural expression is handed down from one generation to the next, it continually evolves, develops and is recreated within the Aboriginal people concerned.

Canadian common law has not defined "traditional knowledge," "traditional ecological knowledge," "traditional cultural expressions" or "indigenous knowledge." In the filters of contemporary Eurocentric thought, traditional knowledge is formulated to mean the know-how, skills, innovations and practices developed by Aboriginal peoples, while traditional cultural expressions are interpreted as the tangible and intangible expressions of traditional knowledge and cultures.

Studies on Intellectual Property and Traditional Cultural Expressions, pages 9–13, http://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf.

[23] These include, among others: novels, poems, plays and newspaper articles; films, musical compositions and choreography; paintings, drawings, photographs and sculpture; computer programs and electronic databases; and maps and technical drawings.

Canadian federal law, past and present, did not and does not consider these TKs and TCEs worthy of protection. The intellectual property system in Canada does not protect or promote these constitutional rights, nor offer any solution. It is time for federal law to be made consistent with Aboriginal and treaty rights of Aboriginal people.

Potentially either Aboriginal law under the constitution or an amended federal Copyright Act may be relevant to protection and promotion of TCEs and works inspired by them.

Furthermore, Canada has endorsed the United Nations Declaration on the Rights of Indigenous Peoples (2007). Article 13 of the Declaration states:

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.[24]

Article 31 of the Declaration states:

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.[25]

Canada should begin consultations with the Aboriginal peoples about how they want to protect and promote their traditional knowledge and traditional cultural expressions. They may choose to protect them by Aboriginal law or by cooperating in the establishment of protective legislation that gives intellectual property-style protection to traditional knowledge and traditional cultural expressions.

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[24] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: http://www.refworld.org/docid/471355a82.html.

[25] Ibid.