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INDIGENOUS KNOWLEDGE: OUR RIGHTS, OUR LAW, OUR JURISDICTION

FISHERIES INDIGENOUS KNOWLEDGE FORUM

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Who I Am?

- Lagax'niitsk – Holder Hereditary Title
- Kitasoo Xai’xais First Nation, Tsimshian Nation
- 12 years doing Indigenous Knowedge in 2 UN forums: World Intellectual Property Organization & Convention on Biological Diversity – Article 8(j)
- IK protection through development of IK Protocols, modern day treaty heritage chapters, inclusion of IK in regulatory processes and constant student of Indigenous legal orders
- Indigenous resource lawyer
- Recently, a co-drafter of the Bill 41 – Declaration on the Rights of Indigenous Peoples tabled on October 24, 2019

Introduction

- Indigenous peoples use an oral tradition to chronicle important information, which is stored and shared through a literacy that treasures memory and the spoken word
- Oral transmission allows for a constant re–creation of our legal orders
- Reinterpretation of traditions for contemporary needs is a methodological strength
- Narrowing culture to “traditional knowledge” paralyzes the dynamic nature of our legal orders and undermines the broader issue of Indigenous legal jurisdiction
- Indigenous legal orders are dynamic by their very nature
- We must be cautious of interpreting issues of TK and cultural misappropriation thru intellectual property, privacy law, contract and enviro regulatory lense
- The core of the advocacy is equitable affirmation of Indigenous legal orders alongside the common and civil law traditions

Nature of Indigenous Knowledge

- There are two key points to be made in the Canadian legal context on this point:
  - First, Indigenous knowledge is an incidental right of each constitutionally protected Indigenous and treaty right, and
  - Second, Indigenous rights, and corresponding Indigenous traditional knowledge–based rights, are collective not individual in nature
- Canadian Indigenous groups take a rights–based approach to their ownership, management and control of their Indigenous knowledge
- The Supreme Court of Canada has affirmed this:

  “to ensure the continuity of Indigenous practices, customs and traditions, a substantive Indigenous right will include an incidental right to teach such a practice, custom and tradition to a younger generation.”

Indigenous Knowledge and legal orders

- Indigenous peoples frequently access their historic experiences and cultural epics in order to formulate and apply their own law
- These often contain multiple meanings and their deceptive simplicity hides a sophisticated structure and substance
- Answers to tough legal questions are not formulaic or self–evident; they require hard choices concerning the appropriate inferences to be drawn from the facts and cases in any dispute
- Like any source of law, reflection and interpretation is seldom evident upon first hearing or reading

Indigenous Knowledge and legal orders

- Similarities between Indigenous and non–Indigenous legal interpretation needs further assessment and integration
- More effort must be devoted to understanding how these two legal paths run in parallel, in the same direction and intersect
- The challenge is to create a true validation and affirmation process, learning to incorporate both Indigenous and non–Aboriginal perspectives into a mutual understanding
- Canada has extensive legal experience harmonizing laws among jurisdictions occurs within our own federation and between Nation States at the international level

The Domestic Basis – Judicial Commentary and Reconciliation

- Indigenous peoples had rights of self–government and self–regulation at the time of sovereignty.
- Those rights rested on the customs, traditions and practices of those peoples and formed an integral part of their distinctive cultures.
- The Supreme Court has recognized that the assertion of Crown sovereignty does not prohibit a continuing co–existence with Indigenous legal orders.
- Courts have also held that Indigenous legal orders is neither abrogated nor derogated by provincial, territorial or federal law unless there is “clear and plain” intention of the sovereign power by act of Parliament or legislature.
- The Supreme Court of Canada in Mitchell v. M.N.R., in declaring the source of Indigenous rights, Chief Justice McLachlin wrote that “English law… accepted that the Indigenous peoples possessed pre-existing laws and interests, and recognized their continuation…”
- As such, she held, “[A]boriginal interests and Indigenous legal orders were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights.”

The Domestic Basis – Judicial Commentary and Reconciliation

- Canadian courts have also explicitly recognized the substantive role that Indigenous legal orders plays in developing the Indigenous perspective of an Indigenous right in issue
- Van der Peet and Delgamuukw

  “a morally and politically defensible conception of Indigenous rights will incorporate both [Indigenous and non–Aboriginal] legal perspectives”
- Reconciliation of Indigenous prior occupation with the assertion of Crown sovereignty requires that true reconciliation will place equal weight on the Indigenous perspective and the perspective of the common law

Origins of Legal Interest in Indigenous IP

- Legal research inquiring into the origin of the Canadian Government's claim that "intellectual property jurisdiction is non-negotiable in self-government negotiations"
- Conclusion: there is no jurisdiction of self government that is legally prohibited from negotiation per Pamajewon
- Legal research led to an invitation to make submissions to WIPO's fact finding mission that attempted to answer "is the intellectual property regime adequately protecting Indigenous TK and TCEs?"
- Answer: No. IPR's focus on time limited rights for individuals, vs. Knowledge that is collective in nature and generational created a substantive gap
- UN Solution: Create an Committee to discuss and eventually negotiate a new IPR that accommodates and protects Indigenous Peoples TK and TCE

WIPO - IGC

- Established in 2000 after fact-finding mission report concluded that IPR was failing to protect Indigenous culture: TK and TCE
- Copyright lasted only a natural life – not ingenerational; patents required a novelty that did not match evolving rights; trademarks had limited protection and required public disclosure of symbols and names and trade secrets did not match the extensive cultural protocol for conditional sharing
- Initial body of work was progressive and questioned the status quo, but as negotiations have now extended 17 years and the IGC has had 34 sessions including negotiations on draft provisions for TK, TCE and Genetic Resources (“GR”) progress has stalled
- Unclear whether there will be a TK/TCE protective international regime

Future Directions: Sui Generis Approach

- Establishing mechanisms that empower Indigenous legal orders in the national context such as:
- pilot project negotiations with specific Indigenous groups to facilitate Indigenous laws on Indigenous knowledge protection;
- regional–based pilot projects;
- national strategic planning sessions with national Indigenous organizations and other Indigenous experts in Indigenous knowledge protection;
- national and/or regional Indigenous knowledge think tanks;
- legislative review and reform;

Future Directions: Sui Generis Approach

- a national Indigenous knowledge policy;
- national and/or regional sui generis legislation
- Creating international reciprocity measures that make Indigenous legal orders applicable in foreign jurisdictions;
- Proceeding to towards the development of harmonized minimum standards, guiding principles and overarching normative statements which may constitute an international norm–setting instrument; and
- Advancing a sui generis legally–binding instrument or instruments, as necessary, with substantive Indigenous legal orders enabling components

Concluding Remarks

- The greatest challenge posed by Indigenous knowledge is the fact that it forces us to examine the roots of other sources of law on equal footing
- To integrate Indigenous knowledge forces us to admit the limits of the current system
- Perhaps the most difficult aspect and the tremendous reluctance surrounding a sui generis approach is that it is negative evidence that the current system was unable to protect Indigenous knowledge
- To move forward progressively, we must get past denial that the system is working and address our constitutional partners as equals
- Legislation that is co-developed creates an opportunity where challenges lie


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