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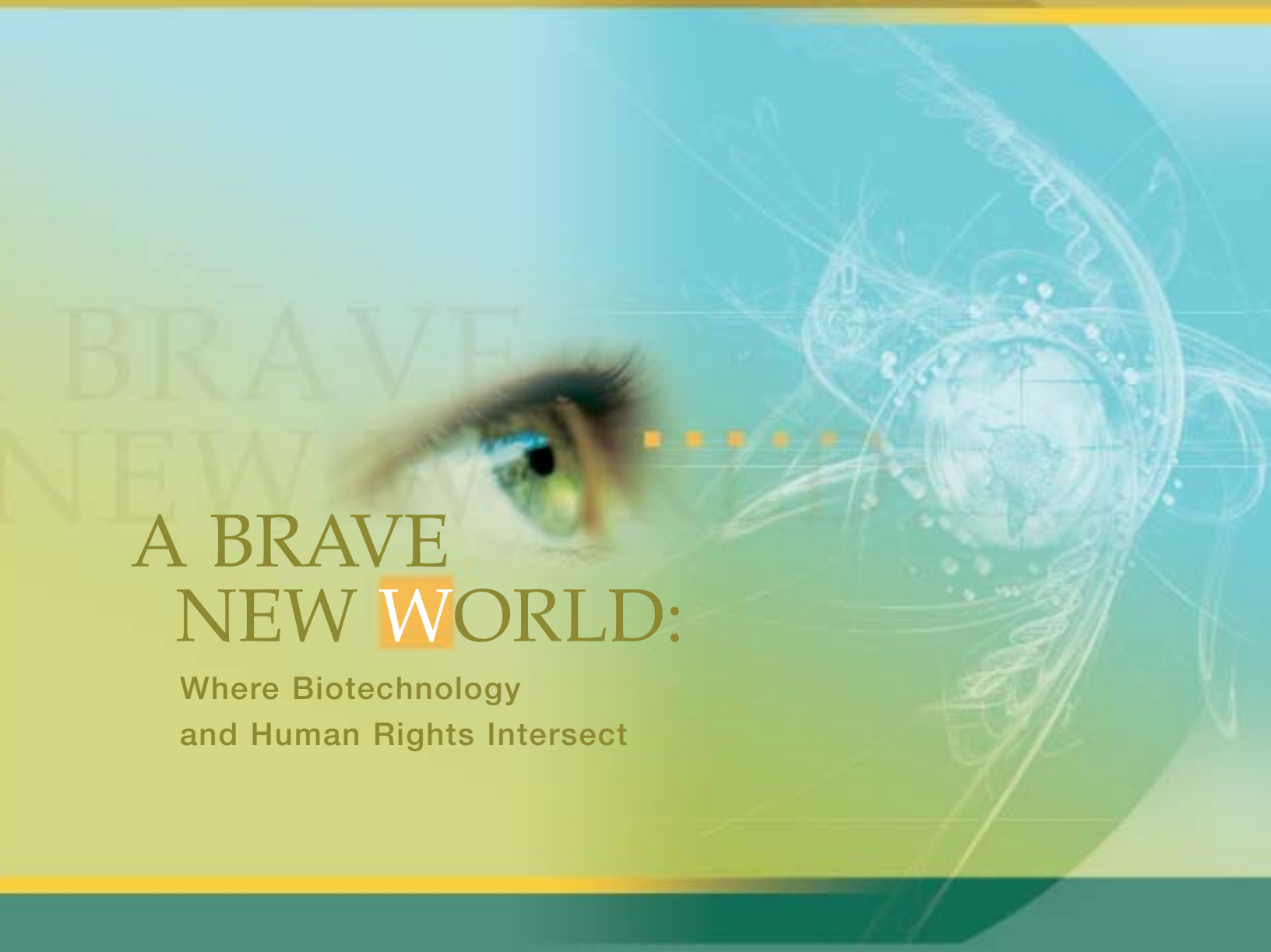

A BRAVE NEW WORLD:

Where Biotechnology and Human Rights Intersect

Chapter 7

Biotechnology, Rights and Traditional Knowledge

Canada

A Brave New World: Where Biotechnology and Human Rights Intersect

July 2005

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Cat. No. Iu199-6/2005E-PDF
ISBN 0-662-41902-2

Also available in electronic format on the Internet at: http://biotech.gc.ca

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Biotechnology, Rights and Traditional Knowledge

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7.1 Introduction

There are two major issues related to the impact of biotechnology on indigenous interests that can be investigated from a rights perspective. The first concerns the protection and use of indigenous traditional knowledge, innovations and practices. The second relates to concerns, drawn from historic and contemporary examples of targeted ill treatment, about the possibility that indigenous people are vulnerable to discrimination in the conduct of biotechnology research on human subjects.[1] Both of these matters are linked at a fundamental level to the question: what is the appropriate balance to be sought between the interest in recognizing and respecting indigenous cultural, political, economic and social integrity and that of encouraging research activities and scientific advances in the field of biotechnology that might be beneficial to society as a whole? This chapter focuses solely on the first issue, i.e., the protection and use of indigenous traditional knowledge. It does not include an answer to this question, but is based on an assumption that might inform one: a rights based analysis can help provide guidance to governments in finding the appropriate balance in relevant law and policy making.

An overview of the issue of biotechnology, rights and indigenous people is set out in this chapter, with a focus on the first of the two topics identified above — that concerning rights to indigenous knowledge, innovations and practices relevant to biotechnology applications of non-human biological resources. The concept of "rights" used here includes human rights to which every individual is entitled, as well as indigenous, or, using Canadian terminology, aboriginal rights that are held by indigenous individuals or peoples on the basis of their

[1] Human genetic resources are of interest for biotechnology research. It is believed that the study of the human genome will yield significant health benefits that will enrich the lives of all people. However, research on human subjects, or on the genetic material of human subjects, particularly at a level that could lead to the alteration of genetic material of individuals, groups or the human species, raise a host of challenging legal and ethical issues. Indigenous people have expressed grave concerns about the possibility that they will be targeted for discrimination during or as a result of such research, including possibly in the determination of who is part of a particular indigenous community. Since they often represent a relatively homogeneous gene pool, indigenous communities are regarded as a good focus for human genetic research. The Human Genome Diversity Project (HGDP), an international project which involves the collection and comparison of genetic material from diverse ethnic groups worldwide, including in particular indigenous peoples, has been met with concern by NGOs, some of which represent indigenous people. Public pressure has significantly delayed this project. Indeed, to date no human genetic data collection has been undertaken by the HGDP, except by its regional committees in China and Southwest Asia, which have collected some samples in their regions. (Personal communication with Henry Greely, Morrison Institute, Stanford University, HGDP North American Regional Committee, November 24, 2003) The coordinators of the HGDP are now encouraging that any sampling be undertaken only in accordance with ethical guidelines addressing indigenous peoples' and local community concerns. The guidelines that have been developed for this purpose are available at http://www.stanford.edu/group/morrinst/hgdp/protocol.html, last viewed on March 18, 2004. Other materials on this issue include the following: Steve Olson, "The Genetic Archaeology of Race", *The Atlantic Monthly*, April 2001, available at http://www.theatlantic.com, last viewed on November 24, 2003; Henry Greely, "What About the Other Human Genome Project? The Perils and the Prospects of the Human Genome Diversity Project", on file; UNESCO *International Declaration on Human Genetic Data*, adopted unanimously by the UNESCO General Conference on October 16, 2003; *Declaration of the Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project*, available at http://www.indians.org/welker/genome.htm, last viewed on October 21, 2003; M. Foster, "The Human Genome Diversity Project and the Patenting of Life: Indigenous Peoples Cry Out", (1999) 7 *Canterbury Law Review*, 343; UN Commission on Human Rights, *Human genome diversity research and indigenous peoples*, E/CN.4/Sub.2/AC.4/1998/4.

indigenous status.[2] Due to the nature of indigenous knowledge, innovations and practices, the primary focus is on indigenous rights.[3] For this reason, this chapter is quite different from the others in this compendium.

As is discussed further below in Section 7.3, the core rights assertion at issue can be framed for the purposes of this discussion as follows: *indigenous peoples have the right to own and control access to, and the use of, traditional knowledge, innovations and practices*. This assertion may be made both in relation to knowledge, innovations and practices that are only known to an indigenous community, and in relation to that which is already in the public domain[4], which is a more challenging matter to address. The underlying question to be considered is: do indigenous people have this right under international or Canadian law? If they do, this would have implications for biotechnology-related policy and law making.

It should be noted at the outset that the question of the existence of a right to control TK is highly speculative — there is little directly applicable law on the topic that can be used to find an answer. Indeed, it is even difficult to predict whether or how a TK claim might be framed in litigation before a domestic court, for example. However, TK is an emerging issue in the field of indigenous rights. More likely than not, international and domestic developments in relation to it will continue to grow in importance for Canada in the coming years. Accordingly, consideration of a rights dimension to TK issues related to biotechnology, however tentative, is useful.

The chapter begins with an overview that includes a description of the term "traditional knowledge" and of relevant public policy considerations. This is followed by a section investigating whether a basis exists in law to ground assertions that indigenous peoples have a right to own and control their knowledge, innovations and practices. International law and Canadian domestic law are addressed in turn in this regard. Finally, options that could be used to address indigenous interests in their knowledge, innovations and practices are identified and briefly discussed, with a view to potential gaps in existing approaches.

7.2 Overview: Biotechnology and Traditional Knowledge

The relationship between biotechnology and indigenous knowledge, innovations and practices can be illustrated with the following example.

The San, an indigenous group that live in parts of southern Africa (also referred to as Bushmen) have collected and used the sap of the *Hoodia gordonia* plant for centuries as a hunger suppressant and energy source. In 2001, the San became aware that the Council for Scientific and Industrial Research (CSIR) of South Africa had identified the active ingredient of the Hoodia, which it used as the basis for a patent. The CSIR patent was later purchased by Pfizer in the U.S. for development as the basis for an appetite suppressing drug. Although they initially received no benefits from the scientific application of information about the Hoodia, and were not initially consulted by CSIR, the San did eventually convince the organization to enter into benefit sharing negotiations with them. CSIR acknowledged that they used San traditional knowledge as a basis for their research into the Hoodia, and, in 2003, agreed to enter into an agreement whereby the San will receive payments of between 8 and 12 million Rand over four years, plus 6% of the royalties that are received by CSIR from Pfizer, should it develop a marketable product from the patent.[5]

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2 In keeping with international practice, the term "Indigenous" is used in this chapter when referring to Indigenous peoples or individuals in discussions about the international context. There is no widely accepted definition of "Indigenous peoples" at international law. However, for the purposes of this chapter, it is sufficient to say that the term includes the aboriginal peoples of Canada, which is the term used here when referring to the domestic context. Pursuant to section 35(2) of the *Constitution Act, 1982*, the aboriginal peoples of Canada includes the "Indian, Inuit and Métis peoples of Canada".

3 There is some debate about how the concept of indigenous or aboriginal rights relates to the concept of human rights. This chapter does not address the issue. Instead, the term "human rights" is used to describe rights to which everyone is entitled (although some may be specific to minorities, women, children, etc.) and "indigenous rights" are used to refer to rights to which only indigenous people are or would be entitled. The term "aboriginal rights" is more specific. Canadian domestic law describes these rights, which are discussed in Part 3 below on TK at the domestic level.

4 Although mostly used in a copyright context, the concept of public domain is used in this text to also include subject matter that is not patentable, either anymore or in the first place.

5 "Traditional Knowledge of the San of Southern Africa: *Hoodia gordonia*", presentation prepared by Victoria Geingos and Mathambo Ngakaeaja, Working Group of Indigenous Minorities in Southern Africa for the Second South-South Biopiracy Summit, August 22–23, 2002, Johannesburg, South Africa. [source]

The San were represented by the South African San Council in their negotiations with CSIR. This organization, together with the regional Working Group of Indigenous Minorities in Southern Africa, which represents indigenous groups in South Africa, Botswana, Namibia and Angola, is focused on protecting San heritage through a combination of community based education and capacity building projects, human rights advocacy and training, and litigation respecting rights to traditional lands.[6] The Council used rights based lobbying to convince the CSIR that it should address benefit sharing with the San.

As indicated in the Hoodia case, biological resources that hold promise for biotechnology research, and information about their potential applications, is often "discovered" through the study of the knowledge, innovations and practices of indigenous people. Indigenous groups, biotechnology companies and researchers, and States with large biotechnology industries or research potential all share an interest in biological resources and in information about its applications.[7] This both raises concerns for indigenous communities, and may provide them with some opportunities. The ability of indigenous groups to take advantage of these opportunities may be linked to recognition of and respect for indigenous rights.

"Biotechnology" is defined in the *Canadian Environmental Protection Act* as:

> …the application of science and engineering in the direct or indirect use of living organisms or parts or products of living organisms in their natural or modified forms.[8]

… and, for an international example, in the *Convention on Biological Diversity* (CBD), to which Canada is a Party, as:

> … any technological application that uses biological systems, living organisms, or derivates thereof, to make or modify products or processes for specific use.[9]

Classical biotechnology — the alteration of the frequency of genes over successive generations by crossing different species or varieties through hybridization — is based on pioneering work undertaken by Gregor Mendel in the 19th century concerning the science of heredity. Modern biotechnology emerged in the latter part of the 20th century. It involves techniques that operate at the cellular or molecular level to modify the genetic code of organisms. These techniques allow scientists to exchange genetic information between micro-organisms, plants and animals (including humans).[10]

The agricultural, pharmaceutical and environmental sectors of the biotechnology industry hope to find and modify biological resources found in plants, animals and micro-organisms to develop new products, medicines, processes, and applications. Many of the innovations that are developed will be protected through the intellectual property rights regime. Researchers, many of whom work for government funded institutes, are particularly interested in the biological resources to be found in mega-diverse regions of the world — those regions characterized by a high degree of biological diversity such as the Amazon basin — as well as those found in harsh or unique environments, including parts of Canada. Many of the regions and environments that attract the attention of researchers have for millennia been inhabited by indigenous peoples, who have long developed techniques that fall within the definitions of biotechnology set out above — observing, modifying and applying living organisms for a variety of purposes such as food production, medicines, and environmental management.[11]

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6 See the websites of the Working Group of Indigenous Minorities in Southern Africa and of the South African San Council, http://www.wimsareg.org and http://www.san.org.za, respectively, last viewed on March 24, 2004.

7 The convergence of interest between governments, companies and indigenous peoples in biological resources is not unlike a similar convergence of interest in respect of other natural resources like minerals, forests, and oil and gas. Efforts that have been undertaken to resolve the conflicts inherent in this convergence in relation to the latter natural resources through the identification of competing rights and interests at stake and of possible mutually beneficial solutions may therefore offer useful guidance for the resolution of conflicts in relation to biological resources.

8 *Canadian Environmental Protection Act*, 1999, c.33, s. 3(1).

9 *Convention on Biological Diversity*, available at http://www.biodiv.org, last viewed March 15, 2004, Article 2.

10 This paragraph is drawn from *Biotechnology: A reference tool for DOJ practitioners*, 2003, at 4 and 5.

11 In a short book comparing how economic advantages of North and South America have shifted from a situation in which the South was comparatively "richer" to one in which economic wealth favours the North, Felipe Fernandez-Armesto briefly discusses the history of maize production and trade among indigenous groups, including the application of plant breeding techniques to develop new varieties to suit local conditions. *History of the Americas*, 2003.

What is Traditional Knowledge?

Through an intimate relationship with their natural surroundings and long intergenerational practice, indigenous communities in all parts of the world have developed knowledge, innovations and practices that have traditional and contemporary applications. The term "traditional knowledge" or "TK" is used in this chapter as a helpful short hand for a broad conception of knowledge, innovations and practices that have roots in the past, but an evolving nature.[12]

The focus of this chapter is on TK that is most relevant to biotechnology, such as that used to locate or identify biological resources that might yield profitable patents, and, more importantly, to determine the possible uses of those resources, as in the Hoodia example described above. However, it is important to bear in mind the full breadth of matters the term refers to. TK encompasses a variety of matters that go well beyond the scope of the field of biotechnology. For indigenous peoples, TK issues are about more than knowledge — they are about culture, customary laws and practices, social organization, relationships with lands and resources, and collective self-determination.[13]

The term "traditional knowledge" has not been the subject of a widely accepted definition internationally or domestically. Instead, the term has been applied in different ways to suit the many different contexts and diffuse policy frameworks within which it is discussed. The Secretariat of the World Intellectual Property Organization (WIPO) uses the term to refer to "tradition-based literary works, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields."[14] The Secretariat has described "tradition-based" as referring to:

> … knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment.[15]

The application of the word "traditional" to indigenous knowledge, innovations and practices in this chapter should not be taken to mean that indigenous knowledge is frozen in a pristine time prior to contact with non-indigenous societies.[16] The evolving nature of TK is explained in the following passage:

> My focus here will be the legal defence of indigenous science. The familiar term, "traditional knowledge", implies a body of relatively old data that has been handed down from generation to generation essentially unchanged. Operating on that assumption, the main focus of Western research has been taxonomic: identifying plants and animals used by indigenous peoples, recording their local names, and cataloguing their reported uses. Local knowledge of the useful pharmacological and physical properties of native species is presumed to have been assembled a long time ago…. [and] can be elicited from any capable local informant. Within any community, however, people vary greatly in what they know. There are not only differences between ordinary folks and experts, such as experienced healers, hunters or ceremonialists; there are also major differences of experience and professional opinion among experts, as we should expect in any living, dynamic knowledge system that is continually responding to new phenomena and fresh insights.[17]

Describing traditional knowledge as a category of knowledge, however broad, does not do justice to the significance that TK holds for indigenous communities. TK is often described in relation to rights — "rights to land, territory and resources; rights to full disclosure and prior informed consent; rights to cultural integrity and

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12 "Traditional knowledge" is not necessarily the preferred term used by Indigenous peoples to refer to the breadth of matters the term is intended to cover. Sakej Henderson has written about the importance of maintaining aboriginal languages and world views, and risks of assimilating aboriginal thought into English, French or Spanish language traditions. See "Governing the Implicate Order: Self-Government and the Linguistic Development of Aboriginal Communities", 1993, copy on file.

13 The right of self-determination is discussed in more detail below.

14 WIPO/GRTKF/IC/3/9, at 11, available on the website of the World Intellectual Property Organization at http://www.wipo.org, last viewed March 15, 2004.

15 *Ibid*.

16 John Borrows has critiqued this idea. See, for example, *Recovering Canada: The Resurgence of Indigenous Law*, 2002, especially Chapter 3.

17 R. Barsh, "Defending Indigenous Science from Biopiracy: A Choice-of-Laws Approach, at 3. Unpublished. Copy on file.

customary practices; and rights to equitable benefit-sharing and control over access to traditional resources."[18]

Traditional knowledge is regarded as intimately connected to land and to culture. Russel Barsh offers that this is not a connection to "land in general, but to particular landscapes, landforms and biomes where ceremonies are properly held, stories properly recited, medicines properly gathered and transfers of knowledge properly authenticated."[19] As a cultural matter, TK cannot easily be separated from the languages within which it is expressed, and the worldview of the community that holds and uses it. Indeed, Barsh suggests that the greatest threat to TK arises within indigenous communities themselves which he thinks must carefully maintain their traditional languages and cultural practices in order to preserve their traditional knowledge and develop new innovations and applications for it.[20]

Finally, traditional knowledge is not something that must be isolated from the processes of learning and knowing found in the non-indigenous community. In this regard, John Borrows notes:

> There is contemporary worth in Indigenous traditions that consider all the constituent parts of the land to be related. While I regard this knowledge as imperfect and incomplete, it also insightful and wise. There is much to be gained by applying this knowledge within Aboriginal communities and within Canada as a whole. Our intellectual, emotional, social, physical, and spiritual insights can simultaneously be compared, contrasted, rejected, embraced, and intermingled with those of others.[21]

7.3 Public Policy Considerations Respecting TK and Biotechnology

Access to TK is important to society as a whole because it is often the basis for products that have wide and beneficial applications. Traditional knowledge has played a critical role in the development of important agricultural, industrial and pharmaceutical applications. There is a broad social interest in promoting research about life saving drugs, for example, by providing a regulatory environment that is conducive to the encouragement of the allocation of sufficient resources to efforts to leave no stone unturned in attempts to find organisms and applications that could yield fruitful results.

Legal regimes currently in force internationally and in Canada tend to favour the promotion of innovation in biotechnology research by rewarding creators and inventors who share their novel creations and applications. "Modern thinking on [intellectual property rights systems] is that they are socially agreed-upon incentives designed to encourage innovation as well as public disclosure of information about those innovations."[22] Under intellectual property regimes, private property rights are conferred to reward the investment in research and development by inventors and creators, and to encourage the public disclosure of inventions or creative works. In order to balance this interest with that of maintaining the public domain needed to promote a free flow of ideas and information for the use of all inventors and creators, this private property right reward is limited in duration.[23]

Although it does not necessarily exclude the recognition of intellectual property rights in TK applications or innovations, the intellectual property regime has not developed to date with TK in mind, and accordingly does not address many of its unique characteristics, or indigenous peoples' perspectives about the way it should be held, shared and respected. For example, instead of being the property of an individual creator or inventor, traditional knowledge is understood to be a community asset that is held and applied for the benefit of the members, although particular people in a community may be recognized as experts in a particular type of knowledge, or as holders of particular roles in its protection or dissemination. Further, traditional knowledge is not viewed as time limited. Instead it is seen as exclusive and held for time immemorial. Indigenous

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18 G. Dutfield and G. Posey, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous and Local Communities*, 1996, at 211 to 212.

19 Barsh, *supra* note 17, at 5. See also L. Whitt, M. Roberts, W. Norman and V. Grieves, "Belonging to Land: Indigenous Knowledge Systems and the Natural World", (2001) 26 Okla. City U.L. Rev. 701.

20 Barsh, *supra* note 17, at 25. See also Sakej Henderson, *supra* note 12; and M. Battiste, *Maintaining Aboriginal Identity, Languages and Culture in Modern Society*, Royal Commission on Aboriginal People, 1993.

21 Borrows, *supra* note 16, both quotes at 147.

22 D. Downes, "How Intellectual Property Could be a Tool to Protect Traditional Knowledge", (2000) 25 Colum. J. Envtl. L. 253 at 261.

23 *Ibid.*

peoples' interests in traditional knowledge are therefore not necessarily well served by the intellectual property rights regime.[24]

From a practical perspective, traditional knowledge is controlled by its holders. An indigenous person or group holding traditional knowledge can protect that knowledge by deciding not to share it with outsiders, such as biotechnology researchers. If this were the whole story, there would be no need for a discussion about the rights dimension of TK, but the matter is not so simple.

The traditional knowledge of indigenous groups is often used without their consent — for example by researchers engaged in bioprospecting or so-called "bio-piracy" — to gain access to valuable genetic or biological resources.[25] The unauthorized use of TK is common partly because a considerable amount of indigenous knowledge has already been collected and described by anthropologists, ethnobotanists and others.[26] Further, with possible exceptions respecting the sacred, indigenous communities have not always tried to keep their knowledge secret from those interested in hearing about it. The extent to which traditional knowledge is in the public domain makes it difficult to protect through the existing legal tools that are available to secure intellectual property rights, such as patent law or copyright.[27] At the same time, it is possible that a patent holder that uses traditional knowledge as a basis for a patent may be able to use defensive measures under patent protection schemes to bar indigenous holders of the knowledge from using it for commercial or possibly non-commercial purposes. The result is a two fisted blow — indigenous people may not be able to use intellectual property law to their advantage, and might also have it used against their interests.

An additional issue concerns biological resources that are collected on lands traditionally used or occupied by indigenous people. In many cases this is easily done without the approval and involvement of the relevant community. This is a matter of concern for indigenous groups who argue that they should receive benefits when genetic resources are gathered on their traditional lands in the same way that landholders — the State or private parties — might receive benefits by controlling access to certain lands. It should be noted, however, that the lands in which indigenous peoples assert they have an interest based on traditional use or occupancy often encompass much more acreage than governments are prepared to recognize or accommodate, often because such lands have legitimately been taken up for valid reasons.[28]

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[24] According to the Royal Commission on Aboriginal People (RCAP), "Under Canadian law, almost all Traditional Knowledge is already considered to be in the public domain and thus beyond protection. In the few cases where TK benefits from protection and where present law applies, the protection is short-lived." (*RCAP Report*, 1996, Volume 3, Chapter 6, Section 1.3 at 596. Available at http://www.ainc-inac.gc.ca/ch/rcap/index_e.html, last viewed April 1, 2004) See also R. Coombe, "Intellectual Property, Human Rights & Sovereignty: New Dilemmas of Indigenous Knowledge and the Conservation of Biodiversity", (1998) 6 *Indiana Journal of Global Legal Studies* 59, Dutfield and Posey, supra note 18, J. Githaiga, "Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge", (1998) 5 *Murdoch University Electronic Journal of Law*, 1, available at: http://www.murdoch.edu.au/elaw/issues/v5n2/githaiga52.txt, last viewed October 1, 2004, L. Whitt, "Indigenous Peoples, Intellectual Property and the New Imperial Science", (1998) 23 Okla. City U.L. Rev. 211; s. Ragavan, "Protection of Traditional Knowledge", (2001) 2 Minn. Intell. Prop. Rev. 1; D. Gervais, "Spiritual but not Intellectual? The Protection of Sacred Intangible Traditional Knowledge", (2003) 11 Cardozo J. Int'l & Comp. L. 467; and G. Dutfield, "Intellectual Property Rights and Development", *UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development*, 2003, available at: http://www.ictsd.org/pubs/ictsd_series/iprs/PP.htm, last viewed March 30, 2004.

[25] "Bio-piracy has been defined as the process through which the rights of indigenous cultures to genetic resources and knowledge are 'erased and replaced for those who have exploited indigenous knowledge and biodiversity'." In C. Correa, *Traditional Knowledge and Intellectual Property: A Discussion Paper*, 2001, at 4. In M. DeGeer, "Biopiracy: The Appropriation of Indigenous Peoples' Cultural Knowledge", (2003) 9 New Eng. Int'l & Comp. L. Ann. 179 at 180, it is defined as "the illegal appropriation of life — micro-organisms, plants, animals (including humans) and the traditional cultural knowledge that accompanies it." In essence, the term refers to the misappropriation of TK or genetic resources. "Bio-prospecting" is a term referring to the search for such resources.

[26] Discussed in Downes, *supra* note 22, Correa, *supra* note 25, and in M. DeGeer, *supra* note 25, among other sources.

[27] It should be noted in addition that once a patent is granted, the patent holder can take defensive measures to stop others from using the knowledge concerned. Litigation or the threat of litigation could be used by a patent holder to bar further use of the knowledge by the indigenous group that initially held it for commercial or possibly other purposes.

[28] It should also be acknowledged that indigenous claims to land are often ignored by governments in many countries and that the traditional lands of indigenous peoples have in the past and continue to be taken from them for illegitimate purposes. Reconciling indigenous land claims with other land use priorities in reasonable and fair ways is a challenge world wide. The UN Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights has requested Erica-Irene Daes to conduct studies on indigenous peoples and their relationship to land and on indigenous peoples and natural resources. Daes has produced some materials in this regard: E/CN.4/Sub.2/2001/21; E/CN.4/Sub.2/2002/23; and E/CN.4/Sub.2/2003/20. To date, this work has been disappointing — drawing selectively upon certain materials while ignoring important principles of territorial integrity and State sovereignty over natural resources. These reports do not draw upon significant policy and legal measures that are used in Canada to reconcile competing interests in relation to land use and land ownership issues, many of which could be modeled by other countries.

Not only does the unauthorized use of traditional knowledge or of genetic resources found on the traditional lands of indigenous peoples often mean that they lose out on benefits arising from their utilization, sacred knowledge and plants, animals and other organisms that are important to indigenous groups may be misused to the detriment of the cultures, economies and systems of social organization that are the foundation of their communities. Indeed, concerns about the misuse of the sacred and about negative impacts on the community and environment often outweigh economic considerations. It is sometimes argued that regardless of any relevant economic considerations, indigenous communities should be able to prohibit access to certain genetic resources and associated TK for reasons that are important to them.[29]

According to the International Chamber of Commerce and the Biotechnology Industry Organization, the biotechnology industry appears to be prepared to take the concerns of indigenous peoples more seriously.[30] Companies that are active in field research are not responsible for the resolution of broader claims that are made by indigenous groups related to rights to traditional lands, the protection of cultural heritage and to the right to self-determination — all of which are issues squarely within the authority of State governments to consider. However, the acknowledgement by some such companies that they should, for example, only obtain traditional knowledge with the prior informed consent of the knowledge holders and ensure that benefits flow to indigenous knowledge providers, suggests that the view that ethical and rights-related considerations are triggered by the utilization of TK is growing in acceptance.[31]

On the other hand, there is no doubt that indigenous claims raise concerns for the biotechnology industry, which is well served by a system that promotes fairly easy and inexpensive access to biological resources in the interests of the promotion of innovation and research.[32] A particular area of concern relates to any recognition of rights to control traditional knowledge that is already in the public domain. The isolation of Quinine, a leading anti-malarial drug, for example, was based on information shared by indigenous communities with European explorers in the 17th century regarding the use of the bark of the *Chincona ledgeriana* tree to treat malaria.[33] Recognition of a right to traditional knowledge related to matters that have long been in the public domain would raise some possibly insurmountable difficulties.

Efforts to address the concerns that indigenous people have with the utilization of their traditional knowledge and of genetic resources on lands they traditionally used or occupied (or actually own) will likely involve the striking of a balance between public policy goals respecting the encouragement of innovation and the free flow of

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29 Intellectual property law can provide offensive means to protect traditional knowledge from misappropriation, not only defensive ones. For example, an indigenous group could use intellectual property principles and procedures to bar the commercial monopolization of their knowledge by others. Barsh notes that to "be patentable,…, knowledge must be novel in some way. An idea that is already being used somewhere, or would be obvious to anyone familiar with the particular branch of technology concerned, is not eligible for patent protection." In the absence of satisfactory screening procedures to determine whether an applicant has disclosed reliance on TK, however, the resources needed to monitor the plethora of patents that are processed, for example, by the US Patent and Trademark Office, can place offensive measures beyond the reach of traditional knowledge holders. (Barsh, *supra* note 17) These measures do not address issues about confidentiality of traditional knowledge. In relation to this, Christie suggests that any law reform initiatives aimed at addressing indigenous concerns about the misappropriation of traditional knowledge should create a "wall of secrecy" around aboriginal culture, rather than a "marketplace of ideas" promoting its utilization. (G. Christie, "Aboriginal Rights, Aboriginal Culture, and Protection", (1998) 36 Osgoode Hall L.J. 447 to 484 at para. 92. On the other hand, Borrows discusses the importance of recognizing the interdependent nature of "Aboriginal/non-Aboriginal relationships" as an element of enhanced Canadian unity. (See Borrows, *supra* note 16, especially Chapter 6.) This view would appear to favour more of an exchange of knowledge and ideas than the "wall of secrecy" suggested by Christie. The Royal Commission on Aboriginal Peoples states that "In asserting claims to their traditional knowledge, Aboriginal people are not trying to retreat from the world… Aboriginal people are willing to share the wealth of their cultures and … knowledge… At the same time, they want to ensure that their knowledge is used appropriately… They also want fair compensation…", *RCAP Report*, 1993, Chapter 6, Volume 3, Section 1.3, *supra* note 24.

30 See the websites of the International Chamber of Commerce at http://www.iccwbo.org, last viewed March 16, 2004, and of the Biotechnology Industry Organization at http://www.bio.org, last viewed March 16, 2004, for information about the views of these organizations. In particular, see the ICC discussion paper called "Protecting traditional knowledge" and a letter from L. Val Giddings, Vice President for Food and Agriculture, Biotechnology Industry Organization to Claudia McMurray, Deputy Assistant Secretary for Environment, US Department of State, dated February 5, 2004.

31 See "Biotechnology's Foreign Policy", speech delivered by C. Feldbaum, President of the Biotechnology Industry Organization to BIO 2002, the International Biotechnology Convention and Exhibition on June 10, 2002 in Toronto. Available at http://www.bio2002.org/press/carl.asp, last viewed on March 11, 2004.

32 BIO letter, *supra* note 30.

33 *Ibid*.

ideas and information, and those respecting the interest in finding ways to respect indigenous peoples and to promote and support their cultural, social, political and economic goals. An analysis of indigenous rights to TK could provide helpful guidance in finding that balance.

7.4 Rights and Traditional Knowledge

Chapter 1 of this paper provides an overview of the major domestic and international sources of human rights law, as well as a discussion of existing and evolving human rights concepts relevant to biotechnology. That overview need not be repeated here. Instead this section will focus on a discussion of possible sources of rights relevant to traditional knowledge. As indicated above, the concept of "rights" used in this chapter includes human rights to which every individual is entitled, as well as indigenous, or, using Canadian terminology, aboriginal rights. Due to the nature of traditional knowledge, and the fact that international and domestic indigenous rights are addressed differently under the law than human rights, and are not discussed elsewhere in this paper, the focus of the discussion is primarily on indigenous rights.

Subject to certain challenges posed by the collective nature of some of the rights claimed, or in fact held, by indigenous groups in Canada and internationally,[34] indigenous individuals are entitled to all of the same human rights as any other individuals under the law, at least in theory if not in practice. All indigenous individuals are entitled to the same legally recognized universal human rights as every other individual; indigenous women are entitled to all the same legally recognized women's rights as non-indigenous women; indigenous children are entitled to all of the same legally recognized children's rights as non-indigenous children; aboriginal individuals in Canada are entitled to all of the human rights protections as provided in the *Canadian Charter of Rights and Freedoms*.

A statement that indigenous individuals are entitled to the same human rights as everyone else places a comfortable gloss on a much more difficult story. Indigenous people are often targeted for discriminatory treatment.[35] Discrimination is experienced by indigenous individuals directly and by indigenous people as a group on a systemic basis. For example, aboriginal people in Canada have a long and difficult experience with discrimination.[36] This experience has contributed to a situation in which aboriginal people continue to be "on the bottom of every list where it's a bad place to be, such as regarding life span, income, and so forth, and on top of every list where that is the worst place to be, such as concerning unemployment, suicide, diabetes and the like."[37]

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[34] This statement is made because conflicts can arise between individual rights to which all indigenous individuals are entitled and indigenous rights that are held by collectivities. At the international level, a widely accepted mechanism to resolve such conflicts does not exist. Indeed, some States participating in the sessions of the UN Working Group on the Draft Declaration on Indigenous Rights have objected wholeheartedly to any recognition of collective rights in that instrument, a position that stymies progress considerably in that process. Germany and Japan, for example, have suggested that they will not support the adoption of a declaration describing collective rights. Canada does not share the views of these States, preferring instead to clarify which rights in the declaration can be described in collective terms and which as individual rights. A framework to address conflicts between collective aboriginal rights and individual human rights does exist in the Canadian Constitution, but is undeveloped in the case law. This framework is discussed in Part 2 below. Cases addressing conflicts between community and individual interests include: *Corbière v. Canada* [1999] 2 S.C.R. 2003 and *Re. Desjarlais and Piapot Band No. 75*, [1990] 1 CNLR 39 (Fed. CA). See also S. Matiation, *Discrimination, HIV/AIDS and Aboriginal People*, 1999, for a discussion about a specific situation in which a misperceived conflict can arise. Available at http://www.aidslaw.ca, last viewed November 19, 2003.

[35] In its resolution E/CN.4/2001/57, the Commission on Human Rights decided to appoint a special rapporteur on the situation of human rights and fundamental freedoms of indigenous people. The first report of the Special Rapporteur, Mr. Rodolfo Stavenhagen, was submitted in 2002 as document E/CN.4/2002/97. In that report, the major human rights issues confronting Indigenous peoples, in the view of the Special Rapporteur, are identified.

[36] Canada's *Statement of Reconciliation* to aboriginal peoples includes the following paragraph: "Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the *Indian Act*. We must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations." Available at: http://www.ainc-inac.gc.ca/gs/rec_e.html, last viewed March 25, 2004. The history of the relationship between aboriginal and non-aboriginal Canadians is described at length in the 1996 Report of the Royal Commission on Aboriginal Peoples, Volume 1, available at: http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html, last viewed on March 25, 2004.

[37] B. Morse, "Symposium: Tribal Sovereignty: Back to the Future? A View From the North: Aboriginal and Treaty Issues in Canada", (1995) 7 St. Thomas L. Rev. 671 at 674. The fact that significant disparities continue to exist between the well-being of registered Indians in Canada and other Canadians is confirmed in the following report: D. Beavon and M. Cooke, "An Application of the United Nations Human Development Index to Registered Indians in Canada" in *Aboriginal Conditions*, ed. J. White, D. Beavon, and P. Maxim, 2003.

Indigenous people also assert rights that differentiate them from non-indigenous people. Differentiated indigenous rights are linked to the particular history of indigenous people, their relationship to land and traditional activities, their collective integrity and to their unique cultures and practices. Although differentiated indigenous rights are found both in Canadian domestic law and in a small number of international instruments (some of them nascent), it can be challenging for legal systems based on western liberal theory to fully integrate and apply them.

Patrick Macklem suggests that both undifferentiated and differentiated rights have appeal for indigenous people. Undifferentiated rights attach to indigenous people "not on account of their indigenous difference but instead because they relate to aspects of identity that are seen as constituting fundamental attributes of all human beings."[38] The appeal of differentiated rights "lies in the intuition that there is something about indigenous difference that merits legal protection".[39] Incongruities between the rights that indigenous people are entitled to as human beings and those rights they are entitled to as indigenous peoples pose significant conceptual challenges, particularly in relation to conflicts between individual and collective rights, a theme that is often repeated in discussions about indigenous rights.[40]

This section is divided into three parts. The first frames the core right to traditional knowledge that is asserted by indigenous peoples, based on an admittedly very narrow sample of representative statements and declarations. The second part addresses rights and TK at the international level. The third addresses the domestic. With respect to parts two and three, it is first helpful to be aware of: (1) the context within which issues about biotechnology, rights and traditional knowledge are arising, and (2) the legal framework within which indigenous rights are being addressed. Background sections addressing these matters in each part are followed by discussions focused on the main topic of this chapter — whether there is a basis in law for an indigenous right to own and control TK.

7.4.1 Framing a Right to Traditional Knowledge

As mentioned above, it is difficult to frame a right to traditional knowledge. This is partly because of its nature — TK is viewed as intimately connected to indigenous traditional lands, cultures and world views. Separating a "TK right" from other rights asserted by indigenous peoples is therefore challenging. Further, in Canadian law in particular, the determination by the courts of whether a right to TK exists will be fact and site specific. Finally, as indicated in the discussion below, a widely accepted iteration of a "right to TK" does not exist in international or Canadian law.

In order to frame the right at issue for the purposes of this paper at least, it is helpful to draw upon a few samples of claims that have been made by indigenous representatives themselves. The three identified here amount to a very narrow selection, but are instructive nonetheless. Although such statements and declarations have no binding force they do contribute to the development of relevant principles that may influence international and domestic policy and law makers.[41]

In June 1993, indigenous people representing a number of groups met in New Zealand for the First International Conference on the Cultural and International Property Rights of Indigenous Peoples. The *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* that was endorsed by the participants includes the following:

> We declare that Indigenous Peoples of the world have the right to self determination: and in exercising that right must be recognized as the exclusive owners of their cultural and intellectual property.
>
> We recognize that Indigenous Peoples are capable of managing their traditional knowledge themselves, but

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38 P. Macklem, "Indigenous Rights and Multinational Corporations at International Law", 24 Hastings Int'l & Comp. L. Rev. 476, at 481.

39 *Ibid.*, at 482.

40 Discussed in: J. Arbour, "The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms, (2001) 21 *Supreme Court Law Review* 3; P. Macklem, *Indigenous Difference and the Constitution of Canada*, 2001; G. Christie, "A Brief Discussion about Section 25 and Issues around Group Rights", unpublished, copy on file.

41 Michael Davis, Social Policy Group, *Indigenous Peoples and Intellectual Property Rights*, Research Paper 20 1996-97, Parliament of Australia, Department of the Parliamentary Library, at 15, available at http://www.aph.gov.au/library/pubs/rp/1996-97/97rp20.htm, last viewed on March 17, 2004.

> are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community.[42]

Other statements in the document address the relationship to land and resources, as well as other cultural matters.

Reflecting the close relationship between lands and TK, the following statement is contained in the *Kimberley Declaration*, issued by the International Indigenous Peoples Summit on Sustainable Development, which took place in South Africa at the same time as the World Summit on Sustainable Development in August 2002:

> As peoples, we reaffirm our rights to self-determination and to own, control and manage our ancestral lands and territories, waters and other resources. Our lands and territories are at the core of our existence… they are inextricably linked to our survival and preservation and further development of our knowledge systems…[43]

A third example of a statement about indigenous concerns in relation to TK comes from an organization called Llamado de la Terra/Call of the Earth, an indigenous peoples' initiative on intellectual property policy, which held a workshop in November 2003 in Como, Italy to prepare for the third session of the Convention on Biological Diversity Working Group on Access and Benefit Sharing, held in December of the same year. In a deck presented during the working group session by representatives who attended the workshop, two principles of interest were identified:

> We hold sovereign rights over our knowledge, biological diversity and its components. Our knowledge is intrinsically linked to our biological diversity and therefore our knowledge is inalienable from our biological diversity.[44]

In addition, regarding the possible elaboration and negotiation by the Parties to the CBD of an international regime on access and benefit sharing with respect to genetic resources and associated traditional knowledge, Call of the Earth states that such a regime "must ensure that the right to prior informed consent of indigenous peoples is guaranteed and protected, as a fundamental principle in the exercise of self-determination and sovereignty of indigenous peoples".[45]

Although these statements represent only a narrow sample of those made internationally by indigenous people who are active in debate about TK, they are reflective of the core assertion that is widely made: *indigenous peoples have the right to own and control access to, and the use of, traditional knowledge*. Those who make this assertion do not necessarily draw a distinction between traditional knowledge that has not yet been disclosed and that which is in the public domain. The statement by Call of the Earth that indigenous people have sovereign rights over their traditional knowledge suggests that the distinction is irrelevant to them — whether information is public or not, indigenous people want to control how it is used, and, if they consent to its use by third parties, receive monetary or non-monetary benefits, as the case may be, in return.

As noted above, the assertion of rights to knowledge that is publicly available poses difficulties as this could have a significant impact on the biotechnology industry, on governments and on society, given that many advances in biotechnology have been based on knowledge about plants and other organisms that has long been in the public domain.[46]

7.4.2 The International Level

A. The International Biotechnology, Rights and TK Context

The WIPO Secretariat notes that "TK arises as an issue in relation to food and agriculture, biological diversity and

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[42] *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, adopted in June 1993 by the over 150 delegates that attended the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, held in Aotearoa, New Zealand, available at http://users.ox.ac.uk/~wgtrr/mataatua.htm, last viewed on March 17, 2004.

[43] *The Kimberley Declaration*, adopted by the Indigenous Peoples Summit on Sustainable Development at Kimberley, South Africa, August 23, 2002. Available at http://www.yachaywasi-ngo.org/kimberley.htm, last viewed on March 17, 2004.

[44] Llamado De La Terra/Call of the Earth, "Outcomes of the International Indigenous Workshop on Indigenous Perspectives on an International Regime on Access and Benefit Sharing to Traditional Knowledge and Associated Genetic Resources", held in Como on November 22–24, 2003, presented in Montreal on December 2, 2003, at 4. Copy on file.

[45] *Ibid.*, at 6.

[46] BIO letter, *supra* note 30.

the environment, biotechnology innovation and regulation, human rights, cultural policies and trade and economic development."[47] A number of international organizations address TK, albeit often described according to the particular lexicon in use in each fora. For example, the UNESCO General Conference adopted the *Universal Declaration on Cultural Diversity* in November 2001, which links the protection of traditional knowledge with human rights;[48] the World Health Organization is undertaking work on traditional medicines;[49] and the *International Treaty on Plant Genetic Resources*, which was negotiated under the auspices of the Food and Agriculture Organization, and will come into force following its ratification by forty States, addresses issues of interest to traditional farmers, including indigenous traditional farmers.[50]

Although developments in each of these fora are relevant to the issue of "TK rights", international negotiation respecting the relationship between traditional knowledge and biotechnology is primarily playing out in three international venues: the *Convention on Biological Diversity* (the CBD), WIPO and TRIPs Council.[51] The debate in these venues is arguably dominated by a focus on the economic interests of competing power blocs led by a number of States.[52]

That part of the biotechnology industry that is interested in access to genetic resources and protection of its intellectual property is primarily found in the United States, Japan and the European Community, which generally favour a situation in which intellectual property laws are similar across jurisdictions through broad adherence to TRIPs and to other international agreements relevant to the regulation of intellectual property.[53] Opposing them "are rapidly industrializing countries such as Brazil and India, which have emerging bioscience industries of their own as well as vast untapped reservoirs of biodiversity and Indigenous knowledge in their internally-colonized hinterlands."[54] These industrializing countries support efforts to recognize the intellectual property rights of indigenous peoples, possibly through novel measures, in order to reduce the ease with which researchers can access traditional knowledge without the provision of benefits. However, they do not necessarily support the flow of benefits derived from the application of traditional knowledge directly to indigenous communities. Rather, domestic legal systems might be used to ensure that traditional knowledge is treated as a national resource rather than as a resource of the indigenous peoples that hold it.[55]

An assessment of the rights implications of the international biotechnology debate is therefore a pressing concern. In fact, a narrow focus on economic interests appears to be giving way to a concern about the interests and rights of indigenous peoples related to biotechnology driven issues. In this environment, indigenous groups are having more success than they had in the past in giving voice to their concerns about the utilization of their TK. As is discussed in more detail below, both the Parties to the *Convention on Biological Diversity* (CBD) and the members of the World Intellectual Property Organization have created space for indigenous participation. As a result, references to, if not the elaboration of, indigenous rights related to traditional knowledge, have progressively increased in the various decisions adopted by the Parties to the CBD and in documents prepared by the

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47 WIPO document, *supra* note 14, at 6.

48 Available at http://www.unesco.org/culture/pluralism/diversity/html_eng/decl_en.shtml, last viewed on March 30, 2004. The September 2003 General Conference of UNESCO adopted the *Convention on Intangible Cultural Heritage*, which is also relevant to traditional knowledge issues. That Convention is now available for ratification by the members of UNESCO. Canada has not ratified it due to concerns about the approach it takes to intangible cultural heritage.

49 For information about the activities of WHO, see http://www.who.int/health_topics/traditional_medicine/en/, last viewed March 30, 2004.

50 Available at: http://www.fao.org/ag/cgrfa/itpgr.htm, last viewed March 30, 2004.

51 "TRIPs" is the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, one of the family of agreements regulating international trade among the members of the World Trade Organization (WTO), all of whom are also party to TRIPs. It is the most comprehensive multilateral agreement on intellectual property rights. TRIPs Council is the body established under TRIPs to monitor the operation of the agreement and governments' compliance with it.

52 The *Convention on Biological Diversity* is focused on the conservation of biological diversity. Nevertheless, economic considerations about the relationship between conservation and the financial benefits to be gained by certain States through the regulation of access to genetic resources is a dominant theme.

53 Some States, notably the United States, have been seeking stronger protections for intellectual property rights in their bilateral and multilateral negotiations than those found in TRIPs.

54 Barsh, *supra* note 17, at 13.

55 *Ibid.*, at 14. This is not necessarily contrary to the provisions of the CBD, which reiterates State sovereignty over resources. Article 3 provides that States have "… the sovereign right to exploit their own resources pursuant to their own environmental policies…" Similarly, Article 15 begins with the words, "Recognizing the sovereign rights of States over their natural resources,…" Indigenous groups might argue that the CBD does not include any statement indicating that indigenous ownership and control of traditional knowledge is replaced by that of States.

WIPO Secretariat for the edification of the international community.[56] Meanwhile, the members of the World Trade Organization (WTO) have agreed to consider the relationship between TK and TRIPs as part of the trade and development agenda adopted at the ministerial session held in Doha in 2002.[57]

B. Indigenous Rights at International Law

The international legal system is based on the premise that States are sovereign entities that are the sole subjects of international law. Early in the 20th century the international system was described by reference to billiard ball States crashing one into the other.[58] The domestic treatment of the contents of each billiard ball was regarded as a matter of sovereignty of little interest to the international community. Beginning after World War II, this vision of the international system, perhaps never very accurate, has progressively accommodated a shift in favour of consideration of the rights of individuals and peoples and the responsibilities of those who govern them.

Over the course of twenty years or so, indigenous people have emerged as one of the most important "non-State" actors in the international theatre. Today, representatives of indigenous groups are more frequently able to express their concerns in various international fora alongside representatives of States, international organizations more frequently integrate consideration of indigenous issues in their work and activities, and States more frequently experience recriminations internationally for discrimination against indigenous groups living within their borders.

On the basis of a number of developments in the last twenty years, indigenous groups have managed to influence the international system in a number of profound ways. These developments include: (1) the increased use by indigenous groups of international human rights complaints mechanisms; (2) the on-going negotiations towards declarations on indigenous rights at the OAS[59] and UN; (3) the ever-increasing attention being paid to indigenous issues by a variety of international organizations such as the CBD, WIPO, the World Bank, UNCTAD[60] and others; and (4) the efforts by the members of the UN to integrate the consideration of indigenous issues in all relevant international activities in which they participate via in particular the establishment of the UN Permanent Forum on Indigenous Issues.[61]

Despite the considerable success that indigenous people have had in making their voices heard at the international level, a widely accepted elaboration of their rights at international law has not yet occurred. Instead, indigenous rights are addressed piecemeal in various instruments, by various treaty bodies and through various processes. The lack of a widely accepted elaboration — a declaration endorsed by the members of the United Nations or a widely ratified international convention, for example — does not mean that international norms respecting international indigenous rights are not evolving. Indeed, some commentators argue that such norms have already emerged and are part of customary international law — that body of international law derived from shared State practice undertaken based on the widely accepted view that such practice is governed by internationally recognized rules.[62]

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56 This is discussed in more detail below.

57 The November 14, 2001 Ministerial Declaration of the members of the WTO (the Doha Declaration) includes the following work item for the TRIPS Council: "19. We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the *Convention on Biological Diversity*, the protection of traditional knowledge and folklore, and other relevant new developments raised by members…" There has been very little progress on this work so far.

58 The "billiard ball" analogy is attributed to Oppenheim and is discussed by B. Kingsbury in "Sovereignty and Inequality", 9(4) Eur. J. of Int'l L., available at http://www.ejil.org/journal/Vol9/No4/art1-01.html, last viewed on October 8, 2003. Kingsbury notes that the orthodox view throughout most of the 20th century was that the "… division of the world into functionally and juridically similar territorial units implied that, provided the entity was treated internationally as a state, its domestic structure and regime type did not matter."

59 "OAS" refers to the Organization of American States.

60 "UNCTAD" refers to the United Nations Committee on Trade and Development.

61 The UN Permanent Forum on Indigenous Issues was established by the UN Economic and Social Council (ECOSOC) in accordance with its resolution E/RES/2000/22 as a subsidiary organ of the Council. The Forum consists of 16 members, 8 of which are appointed by governments and elected by the Council and 8 of which are appointed by the President of the Council, following broad consultations with Indigenous organizations. The Forum acts as an advisory body to the Council with a broad mandate to consider and report on Indigenous issues. For more information, see the Forum website: http://www.un.org/esa/socdev/pfii.

62 See Kingsbury, "Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples", *The Reality of International Law: Essays in Honour of Ian Brownlie*, 1999.

Such a conception of customary international law is easier to hold for those who have a flexible view of what constitutes State practice in the early part of the new century. Benedict Kingsbury, for example, has described World Bank operational policies that make Bank funding conditional on a State's treatment of its domestic indigenous population as a non-traditional candidate for designation as a source of "customary international indigenous law".[63] He states that "the iteration, elaboration, and application of norms involves interactions and dialogues among public international institutions, national law and policy, indigenous peoples, NGOs, market actors, the academy, and others."[64] If Kingsbury is correct, the elaboration of international indigenous rights is indeed active as more and more international and national players participate in dialogue about indigenous issues. On the other hand, Kingsbury's attention to non-traditional candidates for international norm creation may reflect a lack of less contentious evidence of State practice and *opinio juris* respecting customary international law on indigenous rights.

James Anaya argues that indigenous peoples have used the international system to more radically alter the State sovereignty norm than that brought about by the internationalization of individual human rights. In Anaya's view, indigenous claims to group autonomy and collective rights of control over lands and resources challenge the primacy of the State more fundamentally than do the assertions of classical human rights theory. Further, indigenous groups have used international human rights to shift policies addressing indigenous peoples from a focus on assimilation to one based on respect, and have gained recognition as having a unique status that merits their enhanced participation in international processes.[65]

For Anaya, customary international norms respecting indigenous rights have already emerged in binding form. This view tends towards one end of a spectrum, and may not s be shared by many States. However, States cannot deny, in the words of Bob Dylan, that "something is happening", even if they "don't know what it is"[66] in relation to the process of international norm creation respecting indigenous rights.

C. Are There Rights to Traditional Knowledge at International Law?

"Rights" in relation to traditional knowledge have not been formulated internationally in a treaty or other widely accepted instrument. The key international instrument addressing traditional knowledge is the *Convention on Biological Diversity* (CBD). Although it is not a human rights instrument, the CBD does set out obligations for States Parties, including Canada. Accordingly, subsection (i) below addresses the CBD and a related forum, the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (IGC). "Rights talk" is more and more common at both fora in relation to indigenous peoples and traditional knowledge. Subsection (ii) therefore addresses whether there is a basis in international human and indigenous rights instruments to ground assertions respecting the existence of an indigenous right to own and control traditional knowledge.

(i) Traditional Knowledge, Biological Diversity and Intellectual Property

The CBD

Traditional knowledge was first given some prominence internationally in connection with the topic of sustainable development. At the 1992 United Nations Conference on the Environment and Development in Rio de Janeiro, at which Canada played a leading role, a number of instruments were elaborated that include consideration of TK issues.[67] The most important of these is the *Convention on Biological Diversity*, which was signed by most of the

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63 Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law", *People's Rights*, 2001, at 340.

64 Kingsbury, 1999, supra note 62 at 327 to 328.

65 J. Anaya, "Indigenous Peoples and International Law Issues, (1998) 92 Am. Soc'y Int'l L. Proc. 96, at 96 to 98.

66 B. Dylan, *Ballad of a Thin Man*, Copyright 1965.

67 Besides the CBD, the *Rio Declaration on the Environment and Development* and *Agenda 21*, a comprehensive plan of action for the world with respect to sustainable development address TK. Principle 22 of the Rio Declaration proclaims that: "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development." Chapter 26 of Agenda 21 is entitled "Recognizing and Strengthening the Role of Indigenous People and their Communities." It includes the following objective, which governments "should aim at fulfilling," "in full partnership with indigenous people and their communities," "where appropriate": "26.3(a) Establishment of a process to empower indigenous people and their communities through measures that include: (iii) Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development." The full texts of the Rio Declaration and of Agenda 21 are available at http://www.un.org/esa/sustdev/documents, last visited on March 22, 2004.

178 governments that attended the Rio Conference. Today the CBD is one of the most widely ratified international treaties currently in force.[68] It includes three main objectives: (1) the conservation of biological diversity; (2) the sustainable use of its components; and (3) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[69]

The CBD recognizes the unique contribution indigenous people and their traditional knowledge make to sustainable development. First, in the preamble to the Convention the Parties recognize "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components." Article 10(c) states that each Contracting Party shall, "as far as possible and as appropriate", "[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices…"[70] Most importantly, from the perspective of indigenous groups interested in the protection of their traditional knowledge, the CBD includes the only reference to traditional knowledge currently to be found in any binding international treaty. Article 8j provides:

> Each Contracting Party shall, as far as possible and as appropriate
>
> j. Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[71]

Although it is qualified by the words "as far as possible and as appropriate" and by reference to national legislation, Article 8j establishes important State obligations respecting the utilization of traditional knowledge: (1) TK should be respected, preserved and maintained; (2) the approval and involvement of traditional knowledge holders should be sought in the promotion of the wider application of TK; and (3) the equitable sharing of the benefits arising from the utilization of TK should be encouraged.

The obligations set out in Article 8j are reinforced by steps that have been taken by the Parties to the CBD in furtherance of the implementation of its provisions. First, the Conference of the Parties (COP) of the CBD meet every two years when they negotiate, consider and adopt pages of resolutions in decisions aimed at progressive implementation of the commitments they took on when they ratified the Convention.[72] References to traditional knowledge, and, of more interest from the perspective of this chapter, to the need to "respect the rights of indigenous and local communities", to the notion of prior informed consent with respect to access to traditional knowledge, and other themes of interest to indigenous groups, have increased over time in COP decisions.[73]

Second, in 1998, the COP established the Working Group on Article 8j and Related Provisions (WG8J), with a mandate to provide advice to the COP on the development of legal and other forms of protection for TK and respecting the implementation of Article 8j, to develop a programme of work on the topic, to recommend priorities and to provide advice on measures to strengthen cooperation at the international

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68 There are 188 Parties to the CBD. Canada ratified the Convention on April 12, 1992. A noteworthy non-Party is the United States, which has signed the Convention, but not ratified it. A list of Parties is available at the CBD website: http://www.biodiv.org.

69 CBD, *supra* note 9, Article 1.

70 *Ibid.*, Article 10(c).

71 *Ibid*, Article 8j. Other articles of particular interest in relation to traditional knowledge include Article 15, which addresses genetic resources, Article 16 on transfer of technology and Article 22 on the relationship between the CBD and other international conventions.

72 The Conference of the Parties (COP) was established pursuant to Article 23 of the CBD. Its mandate is to "keep under review the implementation of" the Convention. It considers amendments to the Convention, establishes and amends protocols, establishes subsidiary bodies to address specific issues, among other things. It therefore generally carries out a legislative or normative function. The administrative functions of the CBD are carried out by a Secretariat, established by Article 24, and located in Montreal.

73 See generally, the COP decisions on Article 8j and on genetic resources. Decisions on protected areas, tourism, and mountain biological diversity are also of interest. COP decisions are available at the CBD website: http://www.biodiv.org, last viewed March 29, 2004.

level among indigenous and local communities on TK issues.[74] In addition to providing a venue for discussion about traditional knowledge and its relationship to the conservation of biological diversity, WG8J has permitted extensive indigenous participation alongside States in negotiations and debate respecting Article 8j, although States retain ultimate decision making authority.

Participation in WG8J has allowed indigenous groups to articulate their views and to place their concerns about rights and TK on the agenda. Indigenous groups also seek a heightened level of participation in another important venue established by the COP, the Working Group on Access and Benefit Sharing (WGABS).[75] Based on WGABS recommendations, a decision initiating the negotiation and elaboration of an international access and benefit sharing regime with respect to genetic resources was adopted by the COP at its seventh session in February 2004. A paragraph of the relevant COP decision calls for increased indigenous participation in that process.[76]

Besides establishing a framework of obligations related to TK, at least for the States that have ratified it, the CBD, and the process that States are engaged in through the biannual COP meetings, and regular working group sessions on various matters, has helped in the identification of key issues respecting TK, albeit not necessarily in terms of formal obligations. Article 8j and related provisions of the CBD, together with various COP decisions, and WG8J and WGABS recommendations suggest, as indicated at the beginning of this chapter, that TK is not just about knowledge, it is about the relationship, often described in the language of rights, between indigenous people and land, culture and control over matters integral to their communities, including control over decisions whether to seek economic reward by marketing their assets.

The progressive identification of relevant TK issues and the elaboration of means to implement Article 8j by the Parties to the CBD, together with the active participation of indigenous representatives, give additional focus to relevant State obligations in the CBD. Although COP decisions are not binding, they are relevant to norm creation or elaboration in the context of the CBD.

The WIPO IGC

In 2000, the members of WIPO established the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (the IGC) as an international forum for debate and discussion about the interplay between intellectual property and genetic resources, traditional knowledge and folklore.[77] Although they are independent of each other, on the basis of direction received from the members of WIPO and the Parties to the CBD, who are not all the same, the IGC and the CBD COP and WG8J are engaged in something of a pained dialogue about traditional knowledge issues. The CBD process is regarded as leading on questions about the relationship between TK and the conservation of biological diversity, while WIPO, via the IGC in large part, leads on questions about the relationship between TK and intellectual property rights. In fact the situation is more complex. Nevertheless, it is helpful to mention the WIPO IGC here.

The IGC finds itself in the middle of the divide that separates States representing the major power blocs in global intellectual property issues. Developed countries with large biotechnology industries are not all convinced that the intellectual property system requires significant alteration to accommodate intellectual property rights in TK. Developing countries believe the status quo is not effective. Certain modifications to the intellectual property system have been proposed such as voluntary or mandatory disclosure requirements whereby patent applicants

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74 CBD, COP Decision IV/9, available at http://www.biodiv.org, last viewed on March 29, 2004.

75 The Working Group on Access and Benefit Sharing was established by the COP at its fifth meeting, held in 1998, to develop guidelines and other approaches to address access to genetic resources and benefit-sharing, the topics covered by Article 15 of the CBD. See CBD, COP Decision V/26, available at http://www.biodiv.org, last viewed on March 29, 2004. Based on a recommendation from the WGABS, the COP adopted the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* at its sixth meeting in 2000. See COP Decision VI/24, available at http://www.biodiv.org, last viewed March 29, 2004.

76 The final decisions from the seventh meeting of the COP, held in February 2004 are not yet available on the CBD website, but will eventually be accessible there. The final draft decision respecting access and benefit sharing, document UNEP/CBD/COP/7/L.28, can be found at http://www.biodiv.org, last viewed April 1, 2004. See in particular item D, beginning on page 3 of the document ("international regime on access to genetic resources and benefit sharing").

77 For information about the IGC, visit the WIPO website at http://www.wipo.org. The initial mandate is contained in WIPO document: WO/GA/26/6, para. 14.

would have to indicate whether TK was used in developing the product, and whether genetic resources were collected and where. Adding to the complexity, countries representing in particular the megadiverse developing world ultimately seek modifications to TRIPs, which is the key standard bearer respecting the global intellectual property rights regime.[78]

The IGC amounts to a compromise of sorts — it was established to examine these issues, but not to create a venue for the negotiation of an intellectual property or *sui generis* regime to protect TK, at least not yet. Based partly on Member State contributions, the WIPO Secretariat has produced useful documents on the subject of TK, which may have some impact on the level of understanding internationally about the relationship between TK and the intellectual property system. However, many developing countries feel that its research reports, albeit well crafted and thoughtful, do not amount to much. These countries are anxious for accelerated movement towards the development of an international regime addressing traditional knowledge.[79]

At this point, the CBD and WIPO fora are each significant in relation to TK and rights. Canada is an active participant in both venues in discussions about TK and related issues of importance to indigenous people, and supports indigenous participation therein. Although neither the CBD nor the WIPO IGC is an indigenous rights elaborating venue, "rights talk" is increasingly prevalent in both, and principles that are important to indigenous people, such as prior informed consent with respect to access to TK, are being discussed and elaborated. References to rights in CBD and WIPO documents, however, are made without an analysis of possible sources for them in international human rights law, which is the focus of the following subsection. Since it is possible that States will decide that an international *sui generis* regime addressing traditional knowledge and its relationship to intellectual property law needs to be elaborated, such an analysis is wanting.

(ii) International Rights Instruments

Arguments in favour of the proposition that indigenous peoples have a right to own and control traditional knowledge would likely draw on a number of sources. This subsection addresses those that are likely to be the most important in this regard: international instruments addressing indigenous rights specifically, and those addressing human rights generally that are sometimes applied to the specific circumstances of indigenous peoples. Neither international nor Canadian judicial bodies have addressed TK rights under international law specifically. Nevertheless, some guidance may be drawn from these sources.

International Instruments Addressing Indigenous Rights Specifically

ILO Convention 169

International Labour Organization (ILO) *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, adopted by the General Conference of the ILO on June 27, 1989, is currently the only multilateral treaty in force focusing exclusively on the rights of indigenous peoples.[80] Although ILO 169 is an important source of obligations for the 17 countries that have ratified it, and is referred to from time to time in international documents, it has not been ratified by very many countries, including a number of those that are particularly active in international discussions about indigenous rights such as Canada, the United States and Australia. In addition, the Convention neither addresses the right of indigenous peoples to self-determination, nor the subject of traditional knowledge, as it was adopted before TK became an issue on the international agenda. However, it does contain relevant provisions, including Article 7(1), which states:

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.[81]

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[78] For a recent update on debates about the relationship between the CBD, WIPO and TRIPS, see Volume 4, Number 5 of *Bridges Trade BioRes*, available at: http://www.ictsd.org/biores/04-03-19/story2.htm, last viewed March 30, 2004.

[79] A new "accelerated" mandate for the WIPO IGC was adopted by the WIPO General Assembly in September 2003. The African Group submitted a proposal to the sixth IGC session, held in March 2004, that it feels would be in keeping with this mandate, available at http://www.wipo.int/documents/en/meetings/2004/igc/pdf/grtkf_ic_6_12.pdf, last viewed March 30, 2004.

[80] Came into force September 5, 1991.

[81] ILO Convention 169 is available at http://www.unhchr.ch/html/menu3/b/62.htm, last viewed March 31, 2004.

Although its treatment here is brief, it should be noted that it has been argued that ILO Convention 169 reflects emergent customary international law[82] and could therefore arise in cases addressing international indigenous rights to TK.

Draft Declarations on Indigenous Rights

Other than ILO Convention 169, international instruments specifically addressing indigenous rights are either non-binding[83] or in draft form only. Of these instruments, the most important are the two separate draft declarations on indigenous rights currently being discussed at intergovernmental working groups under the auspices of the UN and the OAS.[84] If they are ever adopted, these declarations will occupy a central position in the articulation of international indigenous rights, although they too would be hortatory and non-binding instruments. However, even in their current form, the draft declarations have been referred to as sources of relevant principles of international law,[85] including by the Supreme Court of Canada.[86] Accordingly their significance to questions about the existence of international indigenous rights respecting traditional knowledge should not be ignored regardless of their current status.

Discussions at both the OAS and UN working groups on the draft declarations are addressing a number of contentious and challenging issues, such as the right of indigenous peoples to self-determination, the nature and scope of any collective rights, and the elaboration, in a thorough manner, of indigenous rights to land and resources. Both working groups are conducting their negotiations on the basis of draft texts prepared by experts. Although there are important differences between them, including the fact that indigenous representatives have been granted a greater degree of participation in the UN working group than in that operating at the OAS, for the most part the rights described in the two draft texts are similar. Since the two processes are fairly similar, the following discussion focuses on the UN *Draft Declaration on the Rights of Indigenous Peoples* (the draft Declaration). Canada is an active participant in both processes, and encourages the participation of indigenous people in them.

In 1993, the UN Working Group on Indigenous Populations (WGIP), a working group of five experts, completed a ten year process of drafting a declaration on the rights of indigenous peoples, during which time they took into account input from States and indigenous people.

In 1995, a working group of states (the *ad hoc* open ended Working Group on the Draft Declaration (WGDD)) was established by the UN Commission on Human Rights, and given the responsibility to elaborate a Declaration for adoption by the UN General Assembly. The CHR also committed in that resolution to adopt a Declaration by the end of the International Decade of the World's Indigenous People (1994–2004). At its first meeting, the WGDD agreed to use the draft Declaration prepared by the experts as the basis for its work.

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82 In submissions he made to the Royal Commission on Aboriginal Peoples in 1995, James Anaya wrote that the Convention "represents a core of expectations that are widely shared internationally and, accordingly, it reflects emergent customary international law generally binding upon the constituent units of the international community." J. Anaya, "Canada's Fiduciary Obligations Towards Indigenous Peoples in Quebec Under International Law", in Royal Commission on Aboriginal Peoples, *Canada's Fiduciary Obligations to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec, Volume 1: International Dimensions*, 1995, at 20. Given its small number of Parties, Anaya's statement seems to exaggerate the Convention's international customary law making importance.

83 For example, the UN General Assembly and UN Human Rights Commission have adopted resolutions respecting indigenous issues annually for a number of years. These declarations are non-binding hortatory statements. Some argue that they do have an effect on the generation of international norms over time, particularly where accompanied by other evidence that they reflect generally accepted principles of law.

84 The UN *Draft Declaration on the Rights of Indigenous Peoples* is included in document E/CN.4/sub.2/1994/2/Add.1 (1994). It is available at http://www1.umn.edu/humanrts/instree/declra.htm, last viewed March 31, 2004. The *Proposed American Declaration on the Rights of Indigenous Peoples* was approved by the Inter-American Commission on Human Rights on February 26, 1997. This is the text that has been the basis for negotiations since then. The Chair of the Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Peoples has prepared a consolidated text that includes proposed revisions, dated June 2003. The consolidated text is available at http://www.dialoguebetweennations.com/OASdeclaration/english/ConsolidatedTextofDD.htm, last viewed March 31, 2004.

85 See Inter-American Commission on Human Rights, *Mary and Carrie Dann v. United States*, Report 75/02, December 27, 2002, paras. 128 to 130; Inter-American Commission, *Maya Indigenous Communities of the Toledo District v. Belize*, Report 96/03, October 24, 2003; and Inter-American Court of Human Rights, *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Ser. C) No. 79 (2001), Concurring Opinion of Judge Sergio Garcia Ramirez. In contrast, Russel Barsh notes that the declarations, if adopted, would only be largely advisory in nature, and that declarations of UN bodies are rarely regarded as sources of law by domestic courts. (Barsh, *supra* note 17, at 11 and 12.)

86 The UN and OAS draft Declarations and ILO Convention 169 are referred to by the Court in *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911.

With the end of the decade approaching, pressure has increased within the WGDD to achieve a declaration that can be forwarded through the UN for adoption by the General Assembly. Given that only a couple of the articles in the draft have been provisionally adopted to date, and the number of different positions that have been tabled by States during recent sessions,[87] it would be surprising if consensus on the document emerges before the end of 2004, the target date for adoption. It is more likely that the mandate of the WGDD will have to be extended in order to complete the process.

The draft Declaration includes a provision addressing traditional knowledge. Article 29 provides:

> Indigenous Peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.
>
> They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seed, medicines, knowledge of the properties of fauna and flora, oral traditional, literatures, designs and visual and performing arts.[88]

In 1994, the Secretariat of the Commission on Human Rights produced a technical study on the draft Declaration with the objective of explaining the genesis of and relationship between certain articles, with recommendations to States for revisions to the text to reduce duplication and increase clarity. The study does not offer much insight about the foundation for draft Article 29, noting the existence of Article 8j in the CBD. Also mentioned is work that was then underway by the Special Rapporteur on Indigenous Cultural Heritage respecting the development of guidelines on that topic.[89] Since then, the *Principles and Guidelines for the Protection of the Heritage of Indigenous People* have been elaborated by the Special Rapporteur. The Guidelines have not been adopted by the members of the UN and are not binding, but do reflect the approach taken in Article 29 of the draft Declaration, including the following:

> To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right of indigenous peoples to maintain and develop their own cultures and knowledge systems, and forms of social organization.[90]

Although draft Article 29 and the Guidelines do speak to the claims asserted and objectives to be inferred from the indigenous peoples' statements outlined above, the declaration remains in draft form, and the guidelines on indigenous cultural heritage are not binding. It is not yet certain whether States will resolve concerns that were expressed by some participants in informal intersessional consultations held prior to the 2002 meeting of the WGDD about the relationship between the principles addressed in draft Article 29 and intellectual property laws.[91]

Generally, progress at the WGDD has been very slow. Some indigenous representatives insist that the declaration must be submitted to the General Assembly and adopted as is. Most States that are active in the process, however, seek changes to some or all of the draft articles.[92] Although it would not be a binding treaty, a UN declaration on the rights of indigenous peoples would be used widely by indigenous groups and their supporters (including States in some cases) to advance their interests, by international treaty bodies and others to interpret and define international

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87 See, for example, the last two reports of the Chairperson-Rapporteur of the Working Group: E/CN.4/2003/92 and E/CN.4/2004/81.

88 UN draft Declaration, *supra* note 84. The June 2003 Chair's consolidated text of the *Proposed American Declaration on the Rights of Indigenous Peoples* includes the following provisions respecting traditional knowledge and intellectual property: "1. Indigenous peoples have the right to the recognition of the property, control, development, and protection of their cultural patrimony through special regimes that recognizes the communal nature of said property. Such regimes shall be established with their informed consent and participation. 2. Indigenous peoples also have the right to the legal protection of that property through patents, commercial trademarks, copyright, and other general procedures of intellectual property. 3. The patrimony of indigenous peoples includes, *inter alia*, the knowledge, ancestral designs and procedures, artistic, spiritual, technological, scientific, and biogenetic expressions, as well as the knowledge and developments of their own related to the utility and qualities of medicinal plants." *Supra* note 84.

89 UN Commission on Human Rights, *Technical review of the United Nations draft declaration on the rights of indigenous peoples*, Note by the secretariat, E/CN.4/Sub.2/1994/2, paras. 49 to 51 and 97. Of some interest, the study does not link Article 29 of the draft Declaration with Article 15 of the ICESCR, which is discussed below.

90 The text of the *Draft principles and guidelines for the protection of the heritage of indigenous people* is included in Annex 1 to E/CN.4/sub.2/2000/26.

91 The views expressed are summarized in the Summary of the Informal Intersessional Consultations: Geneva 16 to 19 September 2002, available at http://www.treatycouncil.org/new_page_552.htm, last viewed March 31, 2004.

92 *Supra* note 87.

indigenous rights, and by domestic courts to inform their interpretations of relevant domestic law.[93] The OAS process towards the adoption of a declaration on indigenous rights is following a similar timeline, and will also likely be widely used if it is ever adopted, although it will have a hemispheric rather than global focus.

International Human Rights Instruments Generally

ICESCR and ICCPR

Canada has ratified the two core international instruments that define international human rights — the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Articles that are relevant to TK issues are found in both Covenants. None of these articles address an indigenous right to own and control traditional knowledge, or any other indigenous right for that matter, in specific terms. However, they are binding instruments with respect to the States that have ratified them and set out universal human rights that can be applied to the circumstances of indigenous peoples.

One possible source of human rights relevant to the question whether indigenous groups are entitled to the protection of their traditional knowledge is found in Article 15 of the ICESCR. Of the provisions that are found in the two Covenants, this article is regarded as the most clearly relevant to intellectual property rights and to cultural matters.[94] The relationship between human rights and intellectual property rights has received little attention internationally until recently. Intellectual property rights have generally been viewed as matters of economic interest. This understanding has been challenged most deeply by the HIV/AIDS crisis in some regions of the world, particularly sub-Saharan Africa, and the links that were made between that crisis and certain restrictions on access to HIV treatments.[95] Traditional knowledge is a second issue driving debate about this topic, although so far in the shadows of the former.

Article 15 provides as follows:

1. The States Parties of the present Covenant recognize the right of everyone:

   a. To take part in cultural life;

   b. To enjoy the benefits of scientific progress and its applications;

   c. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.[96]

In a report prepared for the 24th session of the Committee on Economic, Social and Cultural Rights (CESCR), three human rights considerations relevant to intellectual property and to the interpretation of Article 15 are identified: (1) the central role played by intellectual property rights in the world economy underscores the need for human rights advocates to claim the rights of the author, creator and inventor, whether an individual, a group, or a community, as a human right; (2) the rights of everyone in the global community to secure access to knowledge is equally important; and (3) whether existing intellectual

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93 It is always possible that the declaration, if adopted, would become the basis for a future treaty on Indigenous rights, although the slow negotiation process to date would suggest that such a step will not be taken for some time.

94 Article 15 of the ICESCR is an elaboration of Article 27 of the *Universal Declaration of Human Rights* (UDHR). A similar article is also found in the *American Declaration on the Rights and Duties of Man*.

95 The chapter of this paper addressing patents contains a discussion of this issue.

96 ICESCR, Article 15.

97 A. Chapman, "Approaching Intellectual Property as a Human Rights: Obligations Related to Article 15(1)(c), discussion paper submitted to the Committee on Economic, Social and Cultural Rights, 24th session, E/C.12/2000/12, October 3, 2000, at para. 5.

property laws are consistent with human dignity and the realization of human rights.[97]

Although these considerations are undoubtedly important, the value of Article 15 as a source of rights relevant to traditional knowledge may be limited. This is partly because it has not been the subject of much consideration, including by the CESCR, until recently.[98] Accordingly, little guidance is available regarding its interpretation or its application to traditional knowledge.

A lack of attention to Article 15 can be attributed in part to the lesser importance that has been placed on economic, social and cultural rights as compared to more concrete civil and political rights.[99] In addition, the lack of a mechanism for individuals or groups to bring complaints against States under the ICESCR may have reduced opportunities to elaborate the content of this Article.[100]

More importantly for the purposes of this chapter, Article 15 does not reflect indigenous views about traditional knowledge. The right described in the Article, like all of the rights in the ICESCR and ICCPR, with the exception of Common Article 1, the right to self-determination of peoples, is cast as a right of individuals. This vision of the rights described in the Covenants is not conducive to the view that traditional knowledge is collectively owned and controlled by indigenous communities. Further, although the international community has recognized the interrelatedness of all human rights,[101] the rights set out in the two Covenants are expressed in discrete terms. As indicated above, the assertion of a right to control TK is related to broader claims by indigenous peoples about collective land, cultural and self-determination rights that are not fully elaborated in the two Covenants.

In addition, the emphasis in Article 15 on sharing intellectual advances globally does not respond to the competing interest that indigenous people have in controlling access to traditional knowledge and, if it is consensually disclosed, how it is used. A desire among indigenous communities to maintain control over TK may not necessarily entail keeping it secret but it can mean that the interests of the community holding the knowledge may receive greater weight than the interests of others to use the knowledge that is protected. Article 15 does not itself provide sufficient guidance to resolve the balancing that may be required because it is based on a view that the competing interests are those of the individual creator versus those of society as a whole. By providing creators with an incentive to share their innovations in the form of monopoly property rights for a defined period of time, the intellectual property system arguably reflects the values expressed in Article 15, but falls short of considerations important to indigenous communities in relation to their traditional knowledge.

A second, and possibly more fruitful, source of rights relevant to TK is Article 27 of the ICCPR — the right of an individual to practice his or her culture in community with others. Article 27 provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[102]

The Human Rights Committee has considered a number of complaints by indigenous individuals against the governments of the States in which they live, including Canada.[103] However, these have tended to relate to the participation by individuals in certain traditional activities or to benefit from programs or laws that are available to a select class of indigenous people living in the State

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98 *Ibid.*, at para. 25. This is changing. The CESCR has produced a draft General Comment on a subparagraph of Article 15 — Article 15(1)(c) — which it shared selectively with experts in August 2004 and considered during its 33rd session in November 2004. Under pressure from non-governmental organizations and others, the Committee did not adopt the draft pending further review.

99 See A. Eide and A Rosas, "Economic, Social and Cultural Rights: A Universal Challenge", in *Economic, Social and Cultural Rights*, 2nd ed., 2001, ed. A Eide.

100 This may change. A UN working group has been established to consider whether a complaints mechanism should be developed for the ICESCR, akin to the optional protocol to the ICCPR.

101 See the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on June 25, 1993, for example.

102 ICCPR, Article 27.

103 A full list of the Human Rights Committee jurisprudence respecting complaints by indigenous people can be found at http://www.bayefsky.com, last viewed March 31, 2004.

concerned.[104] Complaints related specifically to traditional knowledge have not been made.

Nevertheless, the Committee has developed some of its own relevant jurisprudence through its consideration of these complaints. Reflecting this, in its General Comment respecting Article 27, the Committee has shown a desire to accommodate aspects of indigenous rights claims related to cultural matters. For example, the Committee has suggested that positive legal measures may be required to ensure the enjoyment of the rights set out in the Article, and further that culture manifests itself in many forms, "including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples."[105]

The Committee's general approach to indigenous complaints appears to embrace the notion that competing interests must be balanced by States, but with a view to rights based bottom lines. For example, the Committee has stated that:

> A State may understandably wish to encourage development or allow economic activity by enterprise. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in Article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under Article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27.[106]

In determining whether the right to enjoy one's culture is actually denied as opposed to impacted in a limited way, the Committee will consider whether the members of the minority in question were given opportunities to participate in the decision making process related to the measures that a complaint relates to, and whether the minority will continue to be able to benefit from its traditional economy.[107] Key principles identified by the Committee in relation to Article 27 include the following: (1) a balance of interests in the carrying out of government activities, with due regard to the core human rights obligation at stake, should be achieved; (2) affected indigenous groups should be involved in relevant decision making; and (3) affected indigenous groups should still be able to benefit from their traditional activities and economies after the government activity is undertaken. These principles could each be relevant to any complaints arising in relation to indigenous concerns about the impact of government activities on traditional knowledge.[108]

There are limits to the usefulness of Article 27 in relation to questions about traditional knowledge. First, the optional protocol to the ICCPR establishes a process for individual complaints, but does not do so for groups, in the view of the Human Rights Committee, thereby limiting its value for indigenous peoples.[109] In addition, the Committee has acknowledged that it is limited by the language of the individual rights it has been mandated to interpret. In clarifying that the right to self-determination in Article 1 of the ICCPR and the right protected under Article 27 are different, the Committee has stated that Article 27 is an individual right, not a right of peoples.[110] Finally, Article 27 describes a right to enjoy one's own culture in community with others. It does not describe a right of a community to own and control its cultural assets, which may include traditional knowledge thereby falling short of the claim made by indigenous groups regarding traditional knowledge.

Finally, it should be noted that the fact that Article 15 of the ICESCR and Article 27 of ICCPR are cast as individual

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104 Examples include *Lovelace v. Canada* (24/1977)(R.6/24), ICCPR, A/36/40 (30 July 1981) 166, concerning the complainant's exclusion from "Indian status" under the *Indian Act*; *Kitok v. Sweden* (197/1985), ICCPR, A/43/40 (27 July 1988) 221, concerning the complainant's exclusion from Sami membership and thereby from reindeer herding privileges; and *Mahuika v. New Zealand* (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11, concerning the regulation of Maori fishers.

105 Human Rights Committee General Comment No. 23, adopted during the Committee's 50th session in 1994, para. 7. For a discussion, see S. Prichard and C. Heindow-Dolman, "Indigenous peoples and international law: A critical overview", (1998) 3 AILR 473.

106 *Lansmann v. Finland* (511/1992), ICCPR, A/50/40/ vol. II (26 October 1994), 66 (CCPR/C/52/D/511/1992) at para. 9.4.

107 *Mahuika v. New Zealand*, *supra* note 104, at para. 9.5.

108 Note that these principles appear comparable to some of those found in Canadian law and discussed further below.

109 General Comment No. 23, *supra* note 105, para. 3.1.

110 *Ibid.*, at paras. 3.0, 3.1 and 3.2.

rights means that they, and the other articles of the Covenants, may place limits on what steps can be taken by States and any indigenous governments (such as aboriginal governments operating pursuant to self-government agreements in Canada) to try to address indigenous claims that they have a collective right to control the utilization of their traditional knowledge. Particularly in the absence of a widely accepted iteration of the collective rights of indigenous groups internationally, the balancing that might be required between individual rights in the Covenants and asserted collective rights would favour individual rights since their status at international law is generally unquestioned.

This might mean, for example, that any legal or policy mechanisms used to attempt to uphold indigenous control over traditional knowledge might have to give way to the rights of all individuals, whether indigenous or non-indigenous, to enjoy the benefits of scientific discovery or to enjoy the highest attainable standard of physical or mental health.[111] Since the collective rights of indigenous peoples have not been elaborated in a widely accepted form internationally, a framework for the determination of the appropriate principles, priorities or balance to be applied in cases of conflict between individual and collective rights are also underdeveloped.

The Inter-American Human Rights System

Indigenous rights have been considered by the Inter-American Court on Human Rights (the IA Court) and the Inter-American Commission on Human Rights (IA Commission), both of which are established under the *Inter-American Convention on Human Rights* (IACHR). Canada is not a Party to the IACHR, but as a member of the Organization of American States (OAS), is subject to the *American Declaration of Rights and Duties of Man* (the American Declaration). Individuals can lodge complaints with the IA Commission against OAS member States on the basis of violations of the articles of the Declaration. Reports by the Commission about the merits of such complaints have no binding force, but carry moral weight internationally.

Both the IA Court and the IA Commission have taken a keen interest in the rights of the indigenous peoples of the Americas. To date, the cases concerning indigenous peoples that have come before these bodies have addressed questions about indigenous rights to real property. Given the relationship between traditional knowledge and indigenous traditional lands, these cases could prove to be significant, including in relation to questions about access to genetic resources on such lands. An important case considered by the IA Court, for example, resulted in the suspension of a forestry concession to a foreign company operating in Nicaragua, pending the demarcation and titling, in accordance with Nicaragua domestic law, of the traditional lands of the indigenous group concerned.[112] Also of interest from the perspective of the relationship between traditional knowledge and the cultural rights recognized under the American Declaration, the Commission has decided that it can consider a complaint by an aboriginal person against Canada that is based on an argument that traditional trading practices between different indigenous groups across national boundaries is protected as a cultural right.[113]

In general, the IA Commission and IA Court have demonstrated a willingness to try to interpret the words of the IACHR and of the American Declaration to accommodate the communal nature of indigenous peoples' concepts of their rights, at least in relation to the right to property described in those instruments.[114] Although neither has

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111 Found in Article 12 and Article 15 of the ICESCR.

112 *The Case of the Mayagna (Sumo) Awas Tingni Community*, *supra* note 85.

113 See Inter-American Commission on Human Rights Report No. 74/03 on admissibility in relation to Petition 790/01, *Grand Chief Michael Mitchell v. Canada*, October 22, 2003. The Report is available at: http://www.cidh.org/annualrep/2003eng/Canada.790.01.htm, last viewed on March 24, 2004. The Commission has determined admissible the petitioner's complaint that restrictions on his ability to conduct cross border trade without the payment of customs duties and other taxes is contrary to the cultural rights provisions of the *American Declaration of the Rights and Duties of Man*. The merits phase of the complaint will now proceed. Article XIII therein states that: "Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author."

114 *The Case of the Mayagna (Sumo) Awas Tingni Community*, and the Reports on the *Mary and Carrie Dann* case and *Maya Indigenous Communities of the Toledo District* case each address indigenous rights to real property. (All supra note 85) The right to property that is found in the IACHR and American Declaration are not identical but have been interpreted in the foregoing cases to similarly protect indigenous collective rights to land. The right to property described in the two instruments may be interpreted to include intangible property, although this topic has not yet arisen before the IA Court or IA Commission. (See IACHR, Article 21 and American Declaration Article XXIII). In the *Yanomami Case*, Report 12/85, the IA Commission recognized the collective rights of the Yanomami people of Brazil to the delimitation and demarcation of Yanomami territory.

considered complaints specifically addressing rights to control traditional knowledge, the flexibility and interest they have shown in relation to indigenous peoples' claims is noteworthy, and makes the Inter-American system particularly significant in the development of international law respecting indigenous rights.

The Right to Self-Determination

The right to self-determination of peoples has an important role to play in the determination of the existence and scope of indigenous rights. Accordingly, despite the fact that it is described in Common Article 1 of the two Covenants, it is discussed here as a separate matter, rather than in connection with Article 15 of the ICESCR and Article 27 of the ICCPR above.

In her history of the Paris Peace Conference of 1919 at which the Treaty of Versailles was negotiated and Europe, the Middle East, and other parts were carved up by the dominant powers at the time, Margaret MacMillan quotes then U.S. President Woodrow Wilson, an ardent supporter of the principle of self-determination of peoples, a novel concept at the time, as saying: "When I gave utterance to those words ('that all nations had a right to self-determination'), I said them without the knowledge that nationalities existed, which are coming to us day after day."[115] Of course, it should have come as no surprise that the notion that peoples should be free to determine their political status and to pursue their economic, social and cultural development would be embraced wholeheartedly by those who felt oppressed or otherwise ill governed during a period of imperial decline.

During much of the 20th century the principle of self-determination, now enshrined as a right of peoples in Common Article 1 of the ICCPR and ICESCR, was viewed as a decolonizing principle. However, in relation to indigenous peoples, it is regarded somewhat differently. Indigenous claims to self-determination are certainly a challenge to the view that the State is the dominant body to which allegiance is owed and identity defined, but they do not necessarily include a complete rejection of its role. Kingsbury notes that "[m]ost of the groups participating in the international indigenous peoples movement,… expect to continue in an enduring relationship with the State in which they presently live."[116]

International law does not yet define who are the "peoples" that have a right to self-determination, or what the right itself consists of. According to the traditional view mentioned above, the "peoples" referred to in Common Article 1 is understood to apply to the entire population of existing States and to "peoples" living in colonial situations. The right was equated to a right of independent statehood. In this traditional approach to self-determination, the entire population of, for example Canada, constitutes a people for the purposes of Article 1. Indigenous collectivities and other sub-national groups in Canada participate in the exercise of this right of self-determination as part of the people of Canada, with a right to vote and otherwise participate in the governance process, and possibly even with the benefit of special measures to address their specific needs or interests.

The Supreme Court of Canada opined about the international right of self-determination in *Reference Re: Secession of Quebec*. In its decision, the Court noted that the "precise meaning of the term "people" remains uncertain", and did not offer its own definition. It did note, however, that in certain circumstances a "people" may include "only a portion of the population of an existing state" and the term "does not necessarily mean the entirety of a state's population".[117]

In a discussion paper presented at the 6th session of the UN Working Group on Minorities, Asbjorn Eide notes that it is still a matter of debate whether indigenous peoples are "peoples" in the sense of Common Article 1, and raises questions about the content of the right, especially as regards the concept of territorial sovereignty. Eide points out that discussion of the relationship between Common Article 1 and the reference to self-determination in the draft declaration has been one of the most controversial elements in that process:

> 13. A long debate took place … [at] the working group… Representatives of indigenous groups

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[115] M. MacMillan, *Paris 1919*, 2003, at 12.

[116] B. Kingsbury, 2001, *supra* note 63, at 91.

[117] [1998] 2 S.C.R. 217, at para. 123, and para. 124, respectively. Simply qualifying as a "people" under international law is not necessarily accompanied by a right to secede or otherwise be self-governing. Critical in that regard is the existence of circumstances of oppression against the "people" in question.

> argued in favour of a full-fledged right to self-determination, though that did not necessarily mean that the right would be used to secede from the States of which they now formed part. Representatives of Governments were either opposed to inclusion of the right to self-determination or sought to give it a more limited meaning than was given to that right in the context of decolonisation.
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> 14. Two revised understandings of the right to self-determination are under discussion. One concerns so-called "internal" self-determination which essentially refers to the right to effective, democratic governance within States, making it possible for the population as a whole to determine their political status and pursue their development. The other seeks to equate the right to self-determination with the right to some — but unspecified — degree of autonomy within sovereign States.[118]

Eide suggests that notions of territorial autonomy and cultural autonomy should generally be kept separate conceptually and in practice:

> …it is difficult to accept a principle of territorial autonomy based strictly on ethnic criteria, since this ran counter to the basic principles of equality and non-discrimination between individuals on racial and ethnic grounds. There are, on the other hand, strong arguments in favour of forms of cultural autonomy which would make it possible to maintain group identity.[119]

However, he goes on to note that "what is special for indigenous peoples is that the preservation of cultural autonomy requires a considerable degree of self-management and control over lands and other natural resources".[120] In other words, it is difficult to disassociate the notion of cultural autonomy from that of territorial autonomy in the development of an understanding about the right to self-determination as applied to indigenous groups. This means that many of the most vexing conceptual challenges related to the application of this right to indigenous peoples cannot easily be set aside on the basis that traditional knowledge is really about cultural autonomy, particularly in light of the close relationship between traditional knowledge, innovations and practices, and land based activities.

Questions concerning an indigenous peoples' right to self-determination have received a great deal of attention during the meetings of the WGDD.[121] There, discussion about the right to self-determination is framed by article 3 of the Draft Declaration, which states:

> Indigenous peoples have a right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[122]

States and indigenous representatives have focused their discussions on the relationship between Article 3 and Common Article 1 of the two Covenants, the scope and content of the right to self-determination as exercised by indigenous collectivities within existing democratic States, and the relationship between the rights of individual members of indigenous collectivities and the rights of the collective. More generally, the concept of a right of self-determination of indigenous peoples raises a number of difficult issues, including the following: who is an indigenous "people"; who forms the collective; can an indigenous collectivity be a people if they do not have a land base; can a right of self-determination be applied differently to different indigenous peoples within one State; can the right be exercised while respecting the political, constitutional

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118 UN Commission on Human Rights, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, E/CN.4/Sub.2/2000/10, paras. 13 and 14.

119 *Ibid.*, para. 15.

120 *Ibid.*

121 The specific application of the right to self-determination to indigenous peoples has also been discussed by the Committee for the Elimination of Racial Discrimination and by the Committee on Human Rights. See *Right to self-determination: 23/08/96, CERD General recommendation 21, (General Comments)*, 48th session, 1996, where at para. 5 the Committee states: "Also, Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups." The Human Rights Committee linked the issue of self-government in Canada with the right to self-determination in its concluding observations on Canada's fourth periodic report to the Committee (CCPR/C/79/Add.105, at para. 8). In its concluding observations on Norway's fourth periodic report, the Committee called upon Norway to report on the Sami peoples' right to self-determination (CCPR/C/79/Add.112, at para. 17).

122 UN draft Declaration, *supra* note 84.

and territorial integrity of the State; and what is the appropriate balance to be achieved between the rights of individuals and those of the collective?[123]

These issues may appear to be tangential to questions about rights respecting a community's knowledge, but they are relevant to the development of an understanding about how claims to "traditional knowledge rights" relate to claims to a right to self-determination. The lack of consensus internationally about the scope and content of a right to self-determination for indigenous peoples therefore makes it challenging to rely on this right as a basis for TK protections. An indigenous community, for example, claiming that the misuse of elements of its traditional knowledge by a third party researcher is contrary to its right to self-determination may find that it is not a "people" for the purposes of such a right based on a careful analysis of applicable international law. Another community claiming that information disclosed to a third party by one of its members is nevertheless still subject to community control on the basis of a right to self-determination might find that any efforts to restrict an individual's ability to share information for certain purposes, such as personal health and well-being, conflict with applicable international human rights law.[124]

D. Summary

A right of indigenous peoples to control traditional knowledge does not yet exist in any widely accepted form at international law. Although it can be said that an indigenous community can control knowledge that it holds simply by refusing to disclose it, it is not clear what a community could do from a rights based perspective to restrict its members from sharing information with third parties, or to restrict third parties from using traditional knowledge that is already in the public domain.

By ratifying the CBD, 188 States have accepted a somewhat qualified obligation to respect, preserve and maintain indigenous knowledge, innovations and practices associated with the conservation of biological diversity. Although the CBD is not itself a human rights instrument, "rights talk" respecting TK and related issues such as culture, traditional lands and self-determination, is increasingly common in decisions of the COP and relevant CBD working groups.

The sources that are available to better appreciate the basis for such "rights talk" appears to be somewhat thin: (1) internationally recognized human rights found in the ICCPR and ICESCR do not include collective rights, indigenous rights specifically, or a right to control TK, although Article 27 of the ICCPR could be relevant to complaints arising from impacts on an indigenous person's ability to enjoy his or her culture in community with others, possibly including traditional knowledge, and can be the subject of judicial proceedings in relation to countries that have accepted the optional protocol;[125] (2) although the treaty bodies interpreting the IACHR and *American Declaration of Rights and Duties of Man* have shown flexibility and interest in relation to indigenous peoples issues, traditional knowledge has not yet featured in complaints before them; (3) ILO Convention 169 is not widely ratified and does not address the right to self-determination of peoples or any rights to control TK specifically; (4) the draft Declaration remains mired in slow debate, as the mandate of the WGDD draws to a close;[126] and (5) the right to self-determination requires further elaboration and analysis before its application to indigenous peoples will be widely embraced, or before the implications of its application will be well understood by governments and indigenous peoples.

Despite these limitations, each of these potential sources of rights provide fodder for arguments that inform the claims made by indigenous representatives, as very narrowly canvassed above. Similar limitations in relation to international law present challenges to any claim to international indigenous rights, let alone those in the domain of TK. This has not stopped international and domestic judicial bodies from drawing guidance from

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[123] The reports of the Chairperson-Rapporteur of the UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples indicates that many States do not accept the principle that all indigenous collectivities have a right to self-determination. See E/CN.4/1996/84; E/CN.4/1997/102; E/CN.4/1998/106; E/CN.4/1999/82; E/CN.4/2000/84; E/CN.4/2001/85; E/CN.4/2002/98; E/CN.4/2003/92; and E/CN.4/2004/81.

[124] A helpful and extensive discussion of the relationship between individual and group rights in the Canadian Constitution is contained in: J. Arbour, "The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an Analytical Framework for section 25", April 4, 2003. Copy on file.

[125] This includes Canada, which ratified the optional protocol in 1976.

[126] It may be renewed for an additional period to give participants an opportunity to bring discussions about it to a close, either with the adoption of a declaration or with clarification that the draft has no status at international law in the opinion of the members of the UN.

international legal instruments and international policy developments that are viewed by them to be relevant to indigenous peoples' claims, and to be possible sources of customary international law.[127] Although evolving international norms respecting the rights of indigenous peoples may not provide clear or comprehensive obligations, they nevertheless provide some guidance for States that wish to undertake biotechnology policy making with a view to impacts on indigenous interests. This is particularly true for a country like Canada that is a Party to the CBD and that participates actively in international processes at which indigenous peoples' rights are being discussed, elaborated and analyzed.

The available guidance can be conservatively summarized as follows: (1) indigenous peoples and indigenous issues have been given a special status in international negotiation processes relevant to their interests, suggesting that their claims enjoy a level of recognized merit; (2) indigenous individuals are entitled to the human rights recognized at international law — treaty bodies are considering complaints lodged by indigenous individuals, even though the international human rights instruments they are empowered to interpret do not address indigenous rights in specific terms; (3) the notion that indigenous peoples have collective rights, including a right to self-determination in some form, are being elaborated internationally, and are increasingly accepted by the international community as a basis for further discussion and norm creation, although the appropriate balance between collective and individual rights has not been resolved, and any descriptions of such rights are not yet widely accepted; (4) the special relationship that indigenous people have with the land, and with their cultural practices and traditions is a significant element in discussions about international indigenous issues; and, (5) most broadly, taken together, developments internationally suggest that it is increasingly accepted that ways should be found to respect indigenous people and communities in relevant law and policy making. However, in doing so, States must also respect the human rights of all people and weigh other important public policy interests. Each of the foregoing "guiding elements" has some relevance to questions about the existence of an indigenous right to own and control traditional knowledge.

With respect to the issue of biotechnology and traditional knowledge more specifically, it can be stated that: (1) the many countries that have ratified the CBD, including Canada, have taken on a number of obligations respecting traditional knowledge; (2) indigenous issues are at the centre of international debate about whether and how traditional knowledge should be addressed in international intellectual property regimes, access and benefit sharing approaches, and in environmental conservation measures, among other topics; (3) indigenous people have been given a role in the identification of relevant issues and development of solutions respecting TK in various venues in which their level of participation is elevated to such an extent that it is not all that dissimilar from that of States; (4) traditional knowledge is increasingly being associated with "rights talk"; and (5) although they are imperfect, undeveloped by international or domestic judicial bodies in relation to their application to TK, or, in the case of the draft Declaration, for example, incomplete and possibly destined to remain that way, the sources of international norms respecting indigenous rights can be used to develop a better understanding about what the "rights talk" respecting TK is all about.

Indeed, all interested parties must be aware that judicial bodies may well look to the sources discussed above for guidance if questions about the existence, nature and scope of "TK rights" are put to them. Although the status at law (or lack thereof) of the various sources should determine the weight they are to be given, if any, the fact that some have no status does not bar judges from considering them as relevant background, or governments and other interested parties from looking to them for guidance as to how TK should be addressed in relevant laws and policies.

7.4.3 The Domestic Level

It is important to recall that the legal, political, economic, social and cultural realities of aboriginal people in Canada are incredibly diverse. A careful and comprehensive assessment of any rights relevant to the issue of traditional knowledge and biotechnology would have to focus independently on each of the three major indigenous groups in Canada — the Inuit, Métis and First Nations,

[127] *Supra* notes 85 and 86.

which are referred to as the "aboriginal peoples of Canada" in the *Constitution Act, 1982*.[128] Such an assessment might also have to distinguish further between those who have "Indian status" under the *Indian Act* and those who do not; those who live on or off reserve; those who live in cities and those who live in remote communities; those whose communities are party to historic treaties or modern land claims or self-government agreements; and possibly, those individuals or communities who have managed to maintain and enrich their cultural traditions since European contact from those who, with the passage of time and the challenges posed by a troubled history of interactions with non-indigenous society, have not. These important details are well beyond the scope of this chapter. Instead, the following discussion will more generally outline the contours of aboriginal and treaty rights and their analysis under Canadian law, with a view to traditional knowledge issues. As was the case in relation to the international discussion above, the focus is on the question whether there may be a basis in Canadian law for an assertion that aboriginal people have a right to own and control their traditional knowledge.

Any answer to this question is highly speculative because Canadian courts have not yet been asked to consider whether such a right exists. Further, as discussed below, under Canadian law, the existence of aboriginal rights are determined based on the particular facts and particular circumstances relevant to the group claiming the right. A determination that one group has certain aboriginal rights based on the specific facts at issue does not necessarily mean that any other aboriginal group in Canada has those same rights. The structure of Canadian law respecting aboriginal rights makes it impossible to make any general pronouncement concluding that they do or do not exist.

Further, it should be noted that due to the nature of traditional knowledge, which is regarded as a collective rather than individual good, the focus of this section is on collective aboriginal and treaty rights, rather than on the human rights that are protected under Canadian domestic law. An overview of the Canadian human rights framework is set out in the first chapter of this paper and need not be repeated here. However, subsection C below will briefly address the framework available to address conflicts that might arise between individual human rights and collective aboriginal rights.

A. The Domestic Biotechnology, Rights and TK Context

Canada's active participation in international fora in which discussion about traditional knowledge figures prominently is relevant to a description of the domestic context for TK issues. International legal and policy developments respecting TK rights can be used domestically to inform, for example, legal and policy initiatives, legal arguments in litigation, community approaches to TK protection and preservation, and positions taken in land claim and self-government negotiations. Of particular relevance, Canada must take steps to implement obligations it accepted by ratifying the CBD, including those found in Article 8j, which is discussed above. Due to the connections that exist between traditional knowledge and broader matters of interest to aboriginal people, many of the policy and legal activities undertaken by Canada in relation to aboriginal issues may be relevant in this regard, including those in the field of claims settlement, the environment, cultural promotion and protection, and political and economic development.

The TK agenda in Canada has been driven by a combination of forces. Principally, these include (1) the interest, shared by governments and aboriginal peoples, in understanding how traditional knowledge and practices fit within the evolving domestic legal and policy framework, (2) self-government and land claim negotiations, (3) requirements found in some legislation respecting the utilization of traditional knowledge,[129] and (4) general

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[128] *Constitution Act, 1982*, s. 35(2).

[129] Such legislation includes the *Species at Risk Act*, 2002, c.29, which includes provisions respecting the establishment of a sub-committee on traditional knowledge to assist in the determination of whether any particular species is at risk in accordance with the Act, the *Yukon Environmental and Socio-economic Assessment Act*, 2003, c.7, which suggests that traditional knowledge is a feature of a complete information gathering process in relation to proposed projects, the *Canadian Polar Commission Act*, 1991, c.6, which defines "knowledge" as including traditional knowledge, which is within the mandate of the Commission to consider and disseminate within the scope of its activities to promote knowledge about the North, the *Canadian Environmental Assessment Act*, 1992, c.37, which indicates that traditional knowledge should be used in environmental assessments, and the *Canadian Environmental Protection Act*, 1999, c.33, which also refers to traditional knowledge as a relevant source of information about environmental issues.

considerations about the need to respect, preserve and maintain aboriginal cultures, including languages, traditional activities and practices, and world views.[130]

To date the link between biotechnology and TK has been a less prominent driver than the matters listed above. This may be partly because it is not yet clear whether genetic resources from organisms found in Canada will be fruitful for biotechnology researchers, although the country does offer harsh environments in some abundance, which are often of interest.[131] This may change now that the Parties to the CBD have initiated a process for the negotiation and elaboration of an international access and benefit sharing regime respecting genetic resources in which indigenous groups will play a key role.[132]

Canada's domestic policy making process with respect to access to genetic resources will proceed at the same time that the "international regime" discussions take place among CBD Parties. Currently there is something of a legal and policy *tabula rasa* in this area domestically. There are virtually no specific controls on bioprospecting in Canada. The legal controls that do exist depend on a combination of the category of resource sought (for example, whether *in situ* or *ex situ*),[133] and whether the resource is on public lands, where a combination of federal, territorial and provincial legislation might be relevant, private lands, where trespass laws are applicable, or on Indian reserves or lands owned by aboriginal communities pursuant to land claims agreements, where specific access rules may apply.[134]

It is probably impossible to come up with a credible estimate of the potential value, in financial terms, that could be derived from the traditional knowledge of aboriginal people in Canada by the biotechnology industry. Regardless, the following factors mean that developments in this field could have an important impact on aboriginal law and policy making, as well as on the negotiation of agreements intended to resolve outstanding land and self-government issues: (1) a link clearly exists between biotechnology and TK; (2) this link is the focus of some debate internationally through a variety of intergovernmental fora; and (3) the debate is significant to Canada both because of the existence of its aboriginal population and because of the size of its biotechnology industry.

Meanwhile, regardless of developments in the field of biotechnology, the consideration of the appropriate legal and policy framework within which to situate aboriginal culture, including languages, traditional knowledge, customary laws and practices, and world views in general, will continue to increase in importance in Canada. Guided by the recognition given to aboriginal and treaty rights under the Canadian Constitution,[135] case law that is particularly relevant to aboriginal people will continue to be developed by the courts and by litigants; various tools, such as the negotiation of agreements, will be utilized to create space for aboriginal people to fulfill their goals; and public policy making, although driven by the priorities of the government of the day, will continue to confront fundamental questions about the nature of reconciliation, the meaning of shared citizenship within a multidimensional state, and the challenges posed by the diversity that exists in the aboriginal community — not to mention in Canada as a whole. This evolving process will over time have continuous relevance to biotechnology related law and policy, as it will with respect to other important Canadian policy priorities of the day.

B. Aboriginal Rights under Canadian Domestic Law

Canada has a fairly well developed legal and policy framework respecting many aboriginal issues. However, existing aboriginal rights are not actually well defined. Indeed, uncertainty in this regard, together with the encouragement

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130 By way of illustration, a stated objective in the government's *Copyright Act* reform agenda is to address traditional knowledge. See http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00877e.html, last viewed on March 25, 2004.

131 For a discussion about how bioprospecting came to Yellowstone National Park, and the impact a major biological resource-based discovery had on park management, see H. Doremos, "Nature, knowledge and profit: the Yellowstone bioprospecting controversy and the core purposes of America's national parks", (1999) 26 *Ecology Law Quarterly* 401. Following the discovery, Yellowstone developed a model agreement addressing research on the Park's biological resources. A copy of this agreement is on file.

132 *Supra*, note 76.

133 "*In situ*" refers to genetic material contained in its living organism and located in its natural habitat. "*Ex situ*" refers to genetic material that is still in its natural state, but is no longer in its natural habitat.

134 H. Mann, *Access to Genetic Resources in Canada: The Legal Framework, Final Report (Draft)*, March 12, 2002, prepared for the Biodiversity Convention Office, Environment Canada. Copy on file.

135 Section 35(1) of the *Constitution Act, 1982* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

of the Courts,[136] has contributed to the adoption of policy approaches that favour the negotiation of settlements respecting aboriginal rights over litigation. The Government of Canada has developed policies to guide it in the negotiation of self-government agreements, comprehensive land claims, and specific claims respecting unfulfilled treaty obligations.[137] The resolution of self-government issues and land claims is discussed further below.

Existing aboriginal and treaty rights are recognized and affirmed in section 35(1) of the *Constitution Act, 1982*. A body of case law is growing in Canada in which the courts have developed tools for the assessment of the existence, nature and scope of the "aboriginal rights" that are referred to in section 35, but left undefined. The analysis to be used to determine whether aboriginal rights exist in a specific case is set out in section C below.

"Treaty rights" are defined in the many historic treaties[138] and growing number of self-government and comprehensive land claims agreements that have been given constitutional protection under section 35.[139] Treaties define certain rights of aboriginal people living in most parts of Canada. Generally they involve a surrender of undefined rights in exchange for some form of consideration. Historic treaties were generally brief and often addressed issues such as peace and friendship, hunting, gathering and fishing, and reserve land allotments. Modern treaties are detailed and comprehensive, addressing such matters as self-government powers, governance structures, land and resource allocations, hunting, gathering and fishing, and land and resource co-management. Modern land claim negotiations are generally used to try to resolve outstanding claims with respect to those parts of the country in which aboriginal rights were generally not addressed in historic treaties, such as British Columbia, the territories north of 60 degrees North latitude, northern Quebec and Labrador.[140]

Litigation in Canada has tended to focus on the existence and nature of aboriginal title, issues about treaty interpretation, and the existence of aboriginal or treaty rights to undertake traditional activities, such as hunting, gathering and fishing, all on a case by case basis. While aboriginal knowledge finds indirect expression in the activities that have so far been the subject of litigation, the cases have focused on impacts on a particular aboriginal group's ability to go out and physically practice an activity based in historic traditions rather than on impacts on a group's ability to hold or control knowledge intimately connected to certain activities or places.[141]

Out of aboriginal and treaty rights litigation, a body of law has developed that provides guidance as to when aboriginal and treaty rights exist, whether such rights can be infringed by government action, and when such infringement can be justified. This body of law is familiar to counsel working in the field of aboriginal law, and has been described in detail elsewhere. Accordingly, an extensive discussion need not be included here. Instead, a general overview follows.

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136 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, at para. 186, where Lamer C.J. stated: "Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in [*R. v. Sparrow* [1990] 1 S.C.R. 1075, at 1105], s. 35(1) 'provides a solid constitutional base upon which subsequent negotiations can take place'. Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated… to be a basic purpose of s. 35(1) — 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'. Let us face it, we are all here to stay."

137 By name, they are the *Comprehensive Land Claims Policy*, *Aboriginal Self-Government Policy*, and *Specific Claims Policy*. Information about them is available at: http://www.ainc-inac.gc.ca/ps/clm/index_e.html, last viewed March 25, 2004.

138 "Historic treaties" are those negotiated by aboriginal groups and representatives of the British Crown roughly from the 18th century to the early part of the 20th century.

139 Not all self-government agreements that have been concluded to date in Canada are constitutionally protected under section 35. For example, there are fourteen First Nations in Yukon. Just over half of them have concluded self-government agreements that do not address the question of their constitutional status. When the parties to self-government or land claims agreements agree that the agreements are constitutionally protected, they include a provision to this effect.

140 The first "modern claims agreement", the *James Bay and Northern Quebec Agreement* was concluded in 1975 by the Crees of Quebec, the Government of Quebec and Canada. Since then, land claims agreements have been concluded with the Inuvialuit, Sahtu Dene, Gwitchin and Dogrib (or Tlicho) of NWT, with the Inuit of Nunavut, which also resulted in the establishment of the new territory in 1999, with the Nisga'a of BC, and with more than half of the fourteen Yukon First Nations. A number of self-government agreements have also been concluded. Those containing the broadest law making authorities are with the Nisga'a and the Tlicho.

141 For discussion, see Christie, *supra* note 29 and D Robbins, "Aboriginal Custom, Copyright & the Canadian Constitution", 1999, available at http://www.ubcic.bc.ca/docs/Robbins.pdf, last viewed March 31, 2004.

With the addition of section 35 to the Constitution, the Crown's power to unilaterally extinguish aboriginal or treaty rights prior to 1982 has been curtailed.[142] In a number of important decisions, the Supreme Court of Canada has examined the effect of section 35(1). In essence, existing aboriginal and treaty rights as of 1982 are constitutionally protected. This does not mean that such rights cannot be infringed. The Supreme Court has indicated that aboriginal and treaty rights can be infringed where this can be justified.

The justification analysis involves an assessment of whether (1) a valid legislative objective is served by the infringement, and (2) if a valid legislative objective is found, whether the infringing action is consistent with the honour of the Crown and the fiduciary nature of the *sui generis* relationship between the Crown and the aboriginal peoples of Canada.[143] The Court has provided a fairly extensive list of examples of valid legislative objectives, such as "the development of agricultural, forestry, mining and hydroelectric power, the general economic development [of a province], protection of the environment or endangered species, the building of infrastructure and the resettlement of foreign populations to support these aims."[144]

In many cases, the Crown must engage in meaningful consultations with affected aboriginal communities in order to satisfy the justification test. Failure to consult will not necessarily prove fatal to the Crown's case, but is an element to be considered when determining whether the infringement of the right is justified. Further, in its decision in *Delgamuukw*, the Supreme Court concluded that there is always a requirement to consult, which may in some circumstances require consent, when there is an infringement of existing aboriginal title.[145] The courts have also suggested that there may be a requirement to consult in relation to provincial hunting and fishing regulations that impact on existing rights.[146]

In addition, on November 18, 2004, the Supreme Court of Canada rendered its decisions in two important cases, *Haida Nation v. British Columbia (Minister of Forests*)[147] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,[148] which assists in the resolution of a question that had arisen in relation to the justification test and the duty to consult.[149] The question was: are these matters applicable only once aboriginal rights have been established by statute, treaty or court decision, or are they triggered when a *prima facie* case can be made, or even when a claim is simply asserted, that existing aboriginal rights may be infringed by a government decision or activity? In addressing this issue the Court focused on consultation, concluding that a legal duty to consult and in some cases accommodate potential aboriginal rights can apply when the Crown has knowledge of the potential existence of an aboriginal right and contemplates conduct that might adversely affect it. This duty is not part of the justification test, rather its source is in the principle of the honour of the Crown. Prior to these cases, the Supreme Court of Canada had only discussed consultation in the context of established or proven section 35 aboriginal rights.

The foregoing suggests that aboriginal and treaty rights analysis in practice under Canadian law is not about absolutes, it is about balancing sometimes competing interests. Government contributions to efforts to find the right balance must be guided by the honour of the Crown arising from the *sui generis* fiduciary relationship she has with aboriginal peoples.[150] This is in Keeping with the

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142 In *R v. Badger* [1996] 1 S.C.R. 771, the Supreme Court of Canada stated that prior to the enactment of s. 35 in 1982 the Crown was empowered to unilaterally modify or alter aboriginal and treaty rights by legislative and other means. This is consistent with the 1990 Supreme Court of Canada decision in *R v. Horseman* [1990] 1 S.C.R. 901, which said that s. 12 of the *Natural Resource Transfer Agreements* between Canada and the three Prairie provinces, enacted without any aboriginal input, effectively extinguished original treaty rights and replaced them with others. The onus of proving that a treaty or aboriginal right has been extinguished via legislation lies with the Crown.

143 Discussed in *Sparrow, supra,* note 136 and in *Delgamuukw, supra,* note 136, at paras. 161 to 163, among other cases.

144 *Delgamuukw*, *supra* note 136, at para. 165.

145 *Ibid*., at para. 168

146 *Badger*, *supra* note 142 and *R. v. Marshall* [1999] 3 S.C.R. 456.

147 2004 SCC 73, aff'g [2002] 2 C.N.L.R. 121, 2002 BCCA 147, additional reasons (2002), 216 D.L.R. (4th) 1, 2002 BCCA 462 (CA).

148 2004 SCC 74, rev'g (2002), 211 D.L.R. (4th) 89, 2002 BCCA 59 (CA).

149 For a discussion of the issues that was referred to by the Supreme Court of Canada in the decisions, see s. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult", 79 Cdn. Bar Rev. 252 (2000).

150 There is a difference between the fiduciary relationship and fiduciary duties. The relationship between the Crown and aboriginal peoples is characterized as a *sui generis* fiduciary relationship, which means that the honour of the Crown is always at stake in its interactions with aboriginal peoples. In specific circumstances, aboriginal communities may have valid reason to believe that the Crown will act exclusively in their best interests, due to statutory obligation, unilateral promise, or mutual agreement. In those cases a fiduciary duty may arise. Breach of a fiduciary duty carries different legal consequences than does a failure to uphold the fiduciary relationship. The Supreme Court of Canada has clarified this distinction: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245.

Supreme Court's statement that the purpose of section 35(1) is "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[151]

C. Are There Rights to Traditional Knowledge under Canadian Law?

To date, traditional knowledge has not been the subject of aboriginal rights litigation specifically, but is relevant to land claim and self-government negotiations, and is increasingly addressed in bilateral agreements between resource development companies or researchers and aboriginal communities. Traditional knowledge is also mentioned in some legislation, where it is regarded as a component of complete information gathering processes in relation to environmental and land use matters.[152]

Although advances in biotechnology have not been a driving force in relation to any of these matters, an outline of the ways that traditional knowledge has been addressed, or is affected by or relevant to, aboriginal and treaty rights litigation and self-government and land claim agreements provides some guidance for the construction of a rights based framework for the assessment of biotechnology policy.

(i) Aboriginal Rights and TK

The test for the existence of aboriginal rights was set out as follows by Lamer, C.J. in the Supreme Court's *Van der Peet* decision:

> … in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. [para. 46]
>
> […]
>
> The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive — that it was one of the things that truly *made the society what it was*. [emphasis from original][153]

Lamer C.J. went on to state that although the practices, customs and traditions which constitute aboriginal rights may be exercised in a modern form, they should have continuity with the practices, customs and traditions that existed prior to contact with European society….[154]

In its decision in *Delgamuukw*, the Supreme Court elaborated on the concept of aboriginal rights, in particular in relation to the relationship between aboriginal people and their traditional lands. In his reasons for judgment, Lamer C.J. notes that section 35(1) must recognize and affirm both aspects of the existence of aboriginal societies prior to the assertion of Crown sovereignty — the prior occupation of land and the prior social organization and distinctive cultures of aboriginal peoples on that land.[155] The test for aboriginal title enunciated by Lamer C.J. in *Delgamuukw* is similar to the test for the existence of other aboriginal rights, drawing on the historic relationship of the aboriginal group concerned with its traditional lands, but with a requirement that the current occupation of lands have continuity with the historic occupation.[156]

The broad similarities between the tests for aboriginal rights in general and for aboriginal title reflect the Court's view that aboriginal title sits at one end of a spectrum of aboriginal rights. All the rights within the spectrum receive constitutional protection. Lamer C.J. states:

> … aboriginal rights which are recognized and affirmed by s.35(1) fall along a spectrum with respect to their degree of connection to the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the occupation and use of the land where the activity is taking place is not sufficient to support a claim of title to the land… In the

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151 *Delgamuukw*, par. 186.
152 *Supra* note 129.
153 *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 55.
154 *Ibid.*, at paras. 60 to 67.
155 *Delgamuukw*, *supra* note 136 at para 141.
156 The tests for existing aboriginal title and existing aboriginal rights are similar, but not identical. For example, with respect to the former, in order to establish title, an aboriginal group must establish that it had exclusive use at the time of Crown sovereignty. The important date in relation to the establishment of aboriginal rights is the time of contact with European society.

> middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land… an aboriginal group… may… have a site-specific right to engage in a particular activity… At the other end of the spectrum, there is aboriginal title itself… What aboriginal title confers is the right to the land itself.[157]

The determination of whether aboriginal rights exist in any particular circumstances, or, if they exist, can be infringed, is made under Canadian law on a case by case basis. Accordingly, it is difficult to draw any conclusion regarding the existence of aboriginal rights respecting traditional knowledge in the absence of a fact situation. The following comments are therefore aimed at a general level and are speculative.

Due in part to the difficulty inherent in identifying a particular element or aspect of traditional knowledge as a discrete item that can be the subject of a *Van der Peet* analysis, as compared to a particular activity, it is not easy to predict how a TK right claim would be framed. On the one hand, in *Van der Peet* itself it is difficult to disassociate the TK aspect of the fishing right claimed from the traditional fishing activity that the case addressed. Indeed, it becomes difficult to define an activity in the absence of a description about the knowledge, innovations and practices that inform the manner in which it is carried out. Based on the outline above about what traditional knowledge is, it would seem that aboriginal knowledge, innovations and practices would be part of any aboriginal right that can conceivably be described. Once a particular practice, custom or tradition is found to constitute an aboriginal right, traditional knowledge associated with that practice, custom or tradition might also be protected by section 35.

The same might be said about aboriginal title. As is suggested in various places in this chapter, an integral feature of traditional knowledge is that it has been honed through an intimate relationship with the lands of the people who hold it.

On the other hand, not all aboriginal knowledge, innovations and practices would satisfy the test. Relevant TK would be that which has continuity with pre-contact knowledge, innovations and practices, and that is integral to the distinctive culture of the group claiming the right. Borrows has expressed concerns that the aboriginal rights tests that have been developed by the Supreme Court unnecessarily and inappropriately have the effect of freezing the practices, customs and traditions of aboriginal peoples in historic times.[158] This effect might be a particular concern in relation to traditional knowledge as it is suggested that such knowledge forms part of a comprehensive, interrelated world view. By this view, it is difficult to pull knowledge about a particular plant and its uses, for example, out of the context in which the knowledge is applied or out to the context of the community's relationship with the world around it.

Canadian scholars are investigating whether an aboriginal rights claim respecting tangible or intangible cultural property could be fruitfully made based on the *Van der Peet* analysis. Catherine Bell and Robert Patterson, for example, have argued that in the context of claims to tangible cultural property (such as repatriation of community artefacts), the "right" at stake might be a right to own and pass on property based on customary laws and practices, to the extent such laws and practices can satisfy the test.[159] A challenge that arises in relation to questions about aboriginal rights to cultural property is to describe the right in a way that the courts can work with. Bell and Patterson propose that the courts should increase the flexibility of the basic *Van der Peet* analysis to address cultural property rights because of the importance of such property to aboriginal communities.[160] Flexibility in the activity-based rights analysis in *Van der Peet* has indeed

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[157] *Delgamuukw, supra*, note 136.

[158] Borrows, *supra* note 16.

[159] C. Bell and R. Paterson, "Aboriginal Rights to Cultural Property in Canada", 3(1) Int'l J. Cultural Property, 167 (1999). Bell and Patterson are leading a Social Sciences and Humanities Research Council of Canada funded project on aboriginal cultural heritage. The research program is described as follows on its website: "This research program… will examine Canadian legislation affecting ownership, protection and control of First Nation cultural heritage and develop strategies for reform. The research has four primary objectives: to disseminate information about the existing legal regime; to facilitate respect for, and understanding of, First Nations concepts of property and laws affecting cultural heritage; to assist First Nation community partners collect and develop archival and educational resources on local indigenous laws and cultural heritage; and to critically analyse domestic law and provide recommendations for reform." More information about the project is available at: http://www.law.ualberta.ca/research/aboriginalculturalheritage/index.htm, last viewed on March 25, 2004.

[160] *Ibid.*, at 182.

been shown. In *Delgamuukw*, for example, the Supreme Court modified the test for aboriginal rights in order to apply it to questions about the existence of aboriginal title, which is not a right to conduct an activity, but a "right to the land itself."[161]

A Canadian case that did consider tangible cultural property was *Kitkatla*, which concerned the issuance of lumber permits by provincial officials in a part of British Columbia where a significant number of culturally modified trees were found.[162] Like the courts below, the Supreme Court of Canada found the evidence to support a claim to aboriginal rights to such cultural objects to be too thin to make a ruling on that issue. Instead, the Court's attention was focused on the question of whether B.C. had the requisite authority pursuant to the constitutional division of powers to regulate heritage objects. The Supreme Court upheld the decisions of the B.C. courts concluding that the province had the authority to pass its *Heritage Conservation Act*, which supported the protection of some, but not all, of the culturally modified trees, with a view to balancing conservation with economic development. The Supreme Court did state, however, that "[h]eritage properties and sites may certainly, in some cases, turn out to be a key part of the collective identity of people", and that in "some future case, it might very well happen that some component of the cultural heritage of a First Nation would go to the core of its identity in such a way that it would affect the federal power over native affairs and the applicability of provincial legislation."[163]

Gordon Christie has considered the applicability of the *Van der Peet* approach to intangible aboriginal knowledge, such as that expressed in storytelling. He argues that although the test was developed with a view to its application to discrete identifiable activities — what could be called 'bricks and mortar' claims — it may work well in relation to "narratives, ceremonies and other intellectual products" of aboriginal communities that more closely define the "essential being of the Aboriginal life-world."[164]

Christie suggests that in order to fall within the scope of the analysis, the right at issue could be cast as a right to the "exclusive control and use, by the Aboriginal community," of the traditional knowledge.[165] This description of the right at issue is reflective of the indigenous statements identified above in the section on international law. It would then have to be demonstrated that the interest in exclusive control and use existed pre-contact and continues to this day. In light of the fact that so much traditional knowledge is in the public domain, this part of the test might be difficult to meet. Christie argues that the fact that aboriginal communities were willing to share their knowledge in the past, however, does not mean that they consented to its use by others for any purpose, and should not preclude an argument of continued exclusive control.[166] Aboriginal title case law might provide some support for Christie's view. The relevance of exclusivity is a consideration that the courts have addressed in the context of claims to aboriginal title, in which exclusive occupation is relevant. In that context, exclusive occupation need not necessarily mean "occupation that prohibits entry by all others."[167]

Christie concludes by arguing that although an argument might successfully be made that aboriginal knowledge can find some protection under Canadian law through the application of a *Van der Peet* analysis and section 35, this is not really the goal from the perspective of aboriginal people. For Christie, the objective is to uphold the view

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161 *Delgamuukw*, *supra* note 136, at para. 140. In *R v. Powley* [2003] 2 S.C.R. 207, the Supreme Court of Canada applied an aboriginal rights analysis to the question whether Métis have such rights, which required some modification of the standard test.

162 *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146. "Culturally modified trees" are trees that "have been altered by aboriginal people as part of their traditional use and have cultural, historical and scientific importance for" the First Nations that modified them. (*Kitkatla*, at para. 1)

163 *Ibid.*, at para. 78. For a discussion that predates the decision of the Supreme Court, see C. Bell, "Protecting Indigenous Heritage Resources in Canada: A Comment on Kitkatla v. British Columbia", 10(2) Int'l J. Cultural Property 246 (2001).

164 Christie, supra note 29, at para. 74.

165 *Ibid.*, at para. 75.

166 *Ibid.*, at paras. 79 to 80.

167 For a discussion about the exclusivity requirement, see *Delgamuukw, supra* note 136, at paras. 155 to 159. At para. 155 Lamer C.J. states: "Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to *exclusive* use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title." Later, at para. 157, he adds: "A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title."

that "Aboriginal communities are best situated, and best able, to control the dissemination of culturally significant information."[168] Further, he argues that many communities are already doing so, at least with respect to knowledge that has not already become widely available.[169]

Aboriginal rights litigation generally arises in cases in which an aboriginal group asserts that they have rights that are infringed by an activity authorized by government contrary to law. In the case of TK, for example, a relevant case might take the form of an assertion that the use of sacred traditional knowledge by a government biotechnology research institute infringes an aboriginal right to exercise control over the way such knowledge is used. The mere assertion of the aboriginal right at stake is not the end of the matter. In order for the activity to be contrary to law, it must fail the justification test described above. The activity would meet the test if it satisfied the valid legislative objective test and was carried out in a way that upholds the honour of the Crown. Generally speaking, consultation is a tool that can be used to satisfy the second part of the justification analysis, and in many situations is a good policy objective regardless whether it is actually legally required in a specific case.

Some Comparative Examples from Other Legal Systems

Cases related to traditional knowledge are arising in other countries. They may not offer direct guidance as to how the topic would be addressed by Canadian courts, but may foreshadow how claims related to it could arise. In New Zealand, for example, the Maori have asserted a claim essentially to all of the flora and fauna in the country, including a claim to a right to have their traditional knowledge and cultural property protected.[170] On the one hand, the claim has been asserted on the basis of the words of the foundational document governing the relationship between Maori and New Zealand, the Waitangi Treaty, so any decision may have limited value in Canada from a comparative basis, at least as a source of direct guidance to Canadian courts. On the other hand, at a more general level the claim reflects the same kind of comprehensive and holistic world view that is expressed by aboriginal groups in Canada and, due to its broad scope, reinforces that if TK based claims are ever made here, they would have broad implications.

In Australia, a few cases have considered issues about the misuse of tangible cultural property in the context of copyright law. One case, *Bulun Bulun*, involved a suit by an aboriginal artist and community against a private company that had reproduced the artist's work without permission.[171] The artist made a claim on the basis of the Australian *Copyright Act*, which was successful. In the same lawsuit, counsel for the community had difficulty framing a claim within the scope of Australian copyright and common law, and eventually abandoned an argument that the knowledge represented in the artwork at issue was an aspect of aboriginal communal title.[172]

Instead, the Court accepted an argument that the aboriginal artist stood in a fiduciary relationship with the community. The Reasons for Judgment include an extensive discussion about the continuity of aboriginal customary laws respecting ownership and use of traditional knowledge and cultural property in Australian common law following the assertion of British sovereignty. These customary laws continued to be valid until

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168 Christie, *supra* note 29, at para. 93.

169 *Ibid*.

170 *Indigenous Flora and Fauna & Maori Intellectual Property Claim, Wai 262*. The claim is before the Waitangi Tribunal in New Zealand, a commission of inquiry that was established in 1975 by the *Treaty of Waitangi Act* to consider claims by Maori based on the Treaty, which was signed by the Maori and representatives of the British Crown in 1840. The Tribunal is currently at the stage of writing a statement of issues for the claim, according to the Tribunal website. (See http://www.waitangi-tribunal.govt.nz/inquiries/current/, last viewed April 1, 2004) Briefly, the claimants use rivers in Hawkes Bay - where farming and crops have progressively lowered the water table - as an example to explain the loss of indigenous knowledge and identity. At one level the river is a habitat for fish and eels. When the river floods, it waters the native plants on its banks. Tampering with the river affects the knowledge associated with the habitat. If the eels die, the knowledge of how and where to catch them is lost. If the flax that grows on the bank is affected, the knowledge of weaving cannot be passed on. The claimants argue that all of this affects the identity of the people. The claim also looks at legislation and how it has regulated the way in which Maori interact with society, and the way that their traditions have come under attack - such as the *Tohunga Suppression Act* of 1907 which banned traditional healers from practicing. The claimants argue that a consequence was the loss of traditional medicinal knowledge.

171 *Bulun Bulun & Anor v. R & T Textiles Pty Ltd.* [1998] 1082 FCA (3 September 1998). Another Australian case of interest is *Milpurrurru v. Indofurn Pty Ltd.*, (1994) 54 FCR 240, which established that aboriginal customary law could be used in the determination of damages for breach of copyright. For a brief discussion, see M. Blakeney, "Protecting Expressions of Aboriginal Folklore under Copyright Law, 1995, available at http://www.murdoch.edu.au/elaw/issues/v2n1/blakeney21.html, last viewed on March 4, 2004.

172 The concept of aboriginal communal title under Australian law is discussed in *Mabo v. The State of Queensland* [No.2] (1992) 175 C.L.R. 1.

they were displaced by the enactment of the *Copyright Act* in the early part of the 20th century.[173] Despite this, the Court was disposed to view aboriginal customary law as part of the factual matrix leading it to conclude that the relationship between the aboriginal artist and the community was one of mutual trust and confidence, a relationship Australian law recognizes as a fiduciary relationship, with accompanying obligations. The Court noted that if a person in such a fiduciary relationship failed to take reasonable steps to enforce copyright in a work of art based on traditional knowledge, the community concerned would have a legal basis for a claim against the artist.[174]

In drawing upon comparative examples, it is important to bear in mind that Canadian law is significantly distinct from the law of its commonwealth confrères in the South Pacific in that existing aboriginal rights are recognized and affirmed in the Constitution, which carries with it a host of implications respecting government conduct that are not present elsewhere. Nevertheless, these examples illustrate that claims related to TK could have broad impacts and implications, as suggested by the New Zealand Wai 262 claim, and that a certain amount of creativity on the part of litigants and judges may be called for to address them, as suggested by the copyright cases from Australia.

(ii) Self-Government and Land Claim Settlements

As noted above, the Supreme Court of Canada has encouraged the Crown to resolve aboriginal rights issues through negotiations rather than litigation, given the complexity of competing interests at stake. A variety of agreements are now routinely negotiated between aboriginal groups, governments and companies, from comprehensive land claim and self-government agreements such as those with the Nisga'a and Tlicho, to interim resource co-management agreements, impact benefit agreements, environmental agreements and others. Indeed, in a submission it made in relation to a case before the Inter-American Court of Human Rights, the Assembly of First Nations describes this approach as something of a model for countries that wish to support resource development projects on the traditional lands of indigenous peoples.[175] Some communities are also negotiating traditional knowledge access agreements with researchers, although legal requirements to do so do not exist under Canadian law, leaving these matters up to communities and researchers to address. Such agreements are also sometimes negotiated in the context of certain statutory requirements, as a few statutes in Canada require consideration of relevant traditional knowledge, although they do not establish requirements as to how such knowledge should be obtained.[176]

Canada's land claim and self-government negotiations are guided by its *Comprehensive Land Claims Policy* and *Aboriginal Self-Government Policy*, respectively. Traditional knowledge arises in relation to both of these processes.

In relation to land claims, traditional knowledge arises in a variety of ways, some of them indirect. For example, article 16.6.17 of the 1993 *Council of Yukon Indians Umbrella Final Agreement*, which forms the template for individual final agreements with Yukon First Nations, describes an obligation for Yukon First Nations to provide Renewable Resource Councils with information relevant to the board's functions concerning fish and wildlife, which could include traditional knowledge. This is a reasonable inference to be drawn from the article when it is read within the meaning of the objectives of Chapter 16, which clearly indicate that it is the intention of the parties to incorporate traditional knowledge in Council decision making.[177] Similarly, article 12.1.6 of the *Tlicho Agreement* provides that in exercising their powers under chapter 12, the parties and the renewable resources board established

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173 *Bulun Bulun*, *supra* note 171, at 21.

174 *Ibid.*, at 29.

175 P. Macklem and E. Morgan, "Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in Awas Tingni v. Republic of Nicaragua", 22 *Human Rights Quarterly* 569 (2000).

176 See Christie, supra note 29; Kaska Nation, *Development of a Traditional Knowledge Protocol — From Concept to Best Practice*, copy on file; Council of Yukon First Nations, *Traditional Knowledge Research Guidelines*, 2000, available at: http://www.contaminants.ca/done/tkGuidelines/TK%20Guidelines.pdf, last viewed March 31, 2004; Namgis First Nation, *Guidelines for Visiting Researchers/Access to Information*, copy on file; Inuit Tapirisat of Canada, *Principles Regarding Research in the North*, available at http://www.users.ox.ac.uk/-wgtrr/inuit.htm, last viewed November 18, 2003; and K. Bannister, "Use of Traditional Knowledge of Aboriginal Peoples for University Research: An Analysis of Academic Ethics and Research Policies in British Columbia, Canada", May 2003, submitted to the Biodiversity Convention Office, Environment Canada, copy on file.

177 *Umbrella Final Agreement*, 1993, Chapter 16, available at: http://www.ainc-inac.gc.ca/pr/agr/index_e.html, last viewed April 1, 2004.

under the agreement "shall take steps to acquire and use traditional knowledge as well as other types of scientific information and expert opinion."[178]

Certain legislation enacted to give effect to land claims commitments, such as the *Yukon Environmental and Socio-Economic Assessment Act*, contain references to the inclusion of relevant traditional knowledge in decision making respecting land use issues. While references to traditional knowledge in relation to land and natural resource co-management matters does not mean that rights to TK are being recognized, it does suggest that the close relationship between TK and aboriginal land use is acknowledged by the parties involved. Aboriginal groups that are concerned about the impact of references to traditional knowledge in land claims agreements, particularly in relation to provisions like article 16.6.7 of the UFA, which create knowledge disclosure obligations for First Nations, may wish to elevate the discussion to the level of rights, and argue that protections are required in return for commitments to share certain knowledge.

Further, land claims agreements typically involve the transfer of some Crown lands to the aboriginal community involved as "fee simple" settlement land. These lands are held collectively by the community, which exercises most of the rights of a private property owner, including with respect to the control of access to the lands, subject to the terms of the applicable land claim agreement, and to laws of general application. This means that aboriginal communities that have entered into land claim agreements will have the capacity, albeit not unfettered, to control bioprospecting on their lands.[179] Outside of the context of comprehensive land claims, communities that are Indian bands under the *Indian Act* with reserve lands will also have an ability to exercise some control over access to biological resources on reserve, although the Crown is actually the owner of reserve lands, which it holds for the exclusive use and benefit of the bands.[180]

Traditional knowledge is also important in self-government negotiations. As a matter of policy, the Government of Canada has recognized the inherent right of self-government as an existing aboriginal right under section 35, to be exercised on the basis of negotiated agreements operating within the framework of the Canadian Constitution. The *Aboriginal Self-Government Policy* states:

> Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.[181]

The Policy establishes three categories of matters. The first, which includes the establishment of governing structures, aboriginal language, culture and religion, administration of aboriginal laws, natural resource management, and others, is regarded as a list of possible subjects for negotiation leading to the recognition of aboriginal jurisdiction and law making authority over these matters. The second includes matters over which aboriginal governments might be granted a level of authority subordinate to federal or provincial authority. The third includes those matters over which it is essential that the federal government retain its law making authority.[182]

Noteworthy from the perspective of traditional knowledge issues, federal powers respecting intellectual property are included in the third category list, while aboriginal culture is included in the first. The result is that aboriginal governments may have the power to make

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[178] *Tlicho Agreement*, 2003, Chapter 12, available at: http://www.ainc-inac.gc.ca/pr/agr/index_e.html, last viewed April 1, 2004.

[179] Land claims agreements typically make reference to fee simple settlement lands and to settlement areas. Fee simple settlement lands are lands that the aboriginal group receives fee simple title to – that is, the lands they own pursuant to the settlement agreement. Fee simple settlement lands amount to a portion of the total settlement area. In some cases, the aboriginal group may receive title to the subsurface resources that lie beneath some or all of their fee simple settlement lands. The "settlement area" is the total area covered by the agreement. Generally this area reflects the traditional use patterns of the aboriginal group. The group will have certain rights as specified in the agreement in the total settlement area, such as certain hunting and fishing priority rights, along with certain co-management opportunities.

[180] Indian bands have some by-law making authorities under the *Indian Act* R.S. 1985, c.I-5 that may be relevant to access issues. In practice, they may assert and exercise additional powers.

[181] Self-Government Policy, *supra* note 137, at 3.

[182] *Ibid*, at 5 to 7.

laws respecting aboriginal culture, but not respecting the federal power over intellectual property matters.[183] As a result, challenging relationship of laws issues could arise. Due to the transnational nature of intellectual property matters, such issues could ultimately feature domestic law and both private and public international law dimensions.

Although traditional knowledge is not specifically mentioned in the *Aboriginal Self-Government Policy* lists, it is fair to assume that it is closely connected to aboriginal "language, culture and religion", which is a list one item for purposes of negotiation.[184] Accordingly, it is one of the areas that Government views as "internal to the group, integral to its distinct aboriginal culture, and essential to its operation as a government or institution."[185]

(iii) Individual versus Collective Rights Issues

Due to the nature of traditional knowledge, which is regarded as a collective rather than individual good, the focus of this section has been on collective aboriginal and treaty rights. As indicated above, an overview of the domestic human rights law framework is provided in chapter one of the paper. As was the case in relation to the discussion of international law and "TK rights", however, it is important to note that conflicts might arise between any aboriginal right to control traditional knowledge that might be found to exist, and individual human rights set out in the *Canadian Charter of Rights and Freedoms*.

Chapter one identified a few Charter rights that could conceivably be engaged in the context of biotechnology. Two of these are the "right to life, liberty and security of the person" and the right to equality in sections 7 and 15, respectively, of the Charter. It is not clear whether or how these Charter rights could arise in relation to conflicts between , for example, an aboriginal community's interest in protecting and controlling traditional knowledge and the rights of an individual member of a community or individual non-aboriginal person. For discussion purposes, it can be speculated that perhaps a situation could arise in which individuals would benefit from knowledge that a community does not wish to disclose.

Assuming that the Charter applies to such a situation,[186] and that the aboriginal community is acting on the basis of an existing aboriginal or treaty right, the question of the interpretation of section 25 of the *Constitution Act, 1982* might arise. Section 25 addresses the relationship between aboriginal and treaty rights recognized and affirmed by section 35 and the rights of individuals guaranteed by the Charter. It provides:

> The guarantee in the 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
>
> a. any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1963; and
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> b. any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

The section has not yet been interpreted in a determinative way by the courts, but could play some sort of shielding or balancing function in resolving conflicts between aboriginal and individual rights.[187] For the purposes of this chapter, it is simply mentioned here as a relevant feature of the domestic rights framework that is likely to play an

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[183] *Nisga'a Final Agreement*, Chapter 11, Articles 41 to 42. Available at http://www.ainc-inac.gc.ca, last viewed April 1, 2004. Article 41 states: "Nisga'a Lisims Government may make laws to preserve, promote, and develop Nisga'a culture and Nisga'a language, including laws to authorize or accredit the use, reproduction, and representation of Nisga'a cultural symbols and practices, and the teaching of Nisga'a language." Pursuant to s. 91 of the *Constitution Act, 1867*, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within certain classes of subjects, including "Patents of Invention and Discovery" and "Copyrights".

[184] The meaning of the word "culture" is hard to define. In the *Universal Declaration on Cultural Diversity*, the members of UNESCO state that culture "should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and … encompasses in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs." (*Supra* note 48, preamble para. 5).

[185] Self-Government Policy, supra note 137, at 5.

[186] Pursuant to s. 32(1) of the *Constitution Act, 1982*, the Charter applies to "the Parliament and government of Canada in respect of all matters within the authority of Parliament…" and "to the legislature and government of each province in respect of all matters within the authority of the legislature of each province". The Charter also applies to aboriginal governments exercising authorities delegated to them by Parliament. Self-government agreements include provisions reinforcing that the Charter applies to self-governing aboriginal groups.

[187] Arbour, *supra* note 40.

increasingly prominent role over time in litigation respecting the relationship between aboriginal rights and Charter rights, particularly with the negotiation and implementation of more self-government agreements.[188]

D. Summary

There is no case law in Canada confirming that aboriginal people as a whole, or any particular aboriginal group in particular, has a right to own and control traditional knowledge. As indicated above, Canadian case law has developed in such a way that it is capable of addressing the latter issue — the rights of particular aboriginal groups on a case by case basis — rather than the former — the rights of all of the aboriginal peoples of Canada as a whole. However, a few general comments can be made that may provide guidance to policy makers working in the field of biotechnology.

Tests have been developed by Canadian courts to assess in which circumstances aboriginal and treaty rights exist, such that they are subject to the protections provided by section 35 of the *Constitution Act, 1982*. These tests focus on those practices, traditions and customs of an aboriginal group that have continuity with those that were exercised prior to European contact and that are integral to its distinctive culture. Although litigation respecting the assessment of the existence of unextinguished aboriginal rights tend to have focused to date on such topics as title to lands and the ability of a group to continue to carry out some sort of tradition based activity, such as hunting, fishing or trapping, there is nothing in the case law to suggest that questions about an aboriginal right to own and control traditional knowledge could not be tested through the courts. However, at this point it is purely a matter of speculation whether litigation would result in a determination that such rights exist.

There are two general principles that can be drawn from the discussion above: (1) aboriginal and treaty rights analysis under Canadian law is not about absolutes — it is about balancing competing interests within the scope of the framework established by the Constitution and by the common law, but on the basis that in arriving at the appropriate balance, the fiduciary relationship that exists between the Crown and aboriginal peoples must always be respected; and (2) this is often better done by engaging in contextual negotiations and consultations that address the interests of all parties concerned, rather than resorting to the blunt tool of litigation.

Although no court has held that an aboriginal right to own and control traditional knowledge exists under Canadian law, government is always well advised to consider whether its activities could infringe aboriginal rights that may be found to exist, along with those that have already been established through case law, land claim or self-government agreement, or statute. A consultative approach can often help avoid unnecessary litigation and lead instead to results that are satisfactory to all parties involved. Consultation may be an appropriate tool to turn to at any stage in the process of addressing biotechnology issues relevant to aboriginal people and their TK, including policy development, where aboriginal representatives could be specifically invited to participate in the process of obtaining input from interested parties, to the development of legislation, to the design of particular activities. Regardless of whether an applicable rights determination is ever made, in matters related to TK, aboriginal input is clearly desirable.

Finally, policy makers in the field of biotechnology should be sensitive to the link that exists between traditional knowledge access and ownership issues and the provisions of land claim and self-government agreements.

7.5 Options to "Respect, Preserve and Maintain" TK

This chapter is not about intellectual property law or policy and does not identify or compare all of the options that may be available for the protection of TK, or to address "TK rights". However, it is useful to identify some of the available mechanisms. In this section, the rights discussion is therefore momentarily set aside.

Tools for the protection of traditional knowledge have been identified in a host of materials available elsewhere. The protection of traditional knowledge through intellectual

[188] Also of interest in relation to the relationship between collective and individual rights, s. 35(4) of the *Constitution Act, 1982* states: "Notwithstanding any other provision of this Act, the aboriginal and treaty rights [recognized and affirmed pursuant to] subsection (1) are guaranteed equally to male and female persons."

property laws or *sui generis* laws and policies specifically addressing indigenous knowledge is being addressed by WIPO and has been considered by a number of commentators.[189] Further work on this topic will also be undertaken by the CBD Working Group on Article 8j.[190]

Meanwhile, some countries are developing policies respecting access to genetic resources and benefit sharing in relation to their utilization that will have to address indigenous interests (Canada and New Zealand, for example) or have already completed such a law and policy-making process (Australia).[191] Other countries have enacted laws regulating the protection of traditional knowledge[192], or, in Canada, addressing the use of traditional knowledge in legislation regulating environmental assessments and land use decision making.[193] Indigenous communities have also developed best practice guidelines for the utilization of traditional knowledge, subject to their prior informed consent, that are available to policy makers.[194] In addition, WIPO is researching how indigenous customary laws and practices might be respected in relation to access to and use of TK, along with a number of Canadian commentators.[195]

Accordingly, a body of materials exists that can be mined for ideas as to how to deal with issues about access to, and the utilization of, traditional knowledge. The existence of this body of materials suggests that there is a level of recognition that indigenous peoples' interests in TK should be respected and that steps should be taken to promote benefit sharing with indigenous communities when their TK is utilized, principles that reflect those found in Article 8j of the CBD.

Many available mechanisms that are available to assist indigenous people to control when and how traditional knowledge is used have significant shortcomings. As has been mentioned elsewhere in the chapter, although existing intellectual property law tools can sometimes be used to protect traditional knowledge, they are significantly limited in this regard because, for example, they can be prohibitively expensive to use, traditional knowledge is often publicly available and indigenous peoples claim immemorial ownership of traditional knowledge rather than time limited interests in it. The international community appears to be poised to more actively seek ways to address these problems, which have implications for Canadian law and policy making in this field. Further, simply mentioning traditional knowledge in certain pieces of legislation without considering impacts from a rights-based perspective can raise problems. For example, in Canada once traditional knowledge is used for the purposes of environmental assessments, it may become available to the public as a result of the application of the *Access to Information Act*.[196]

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189 See WIPO documents, *Traditional Knowledge: Policy and Legal Options*, WIPO/GRTKF/IC/6/4, *Elements of a Sui Generis System for the Protection of Traditional Knowledge*, WIPO/GRTKF/IC/4/8 and *Comparative Summary of Existing Sui Generis Measures and Laws for the Protection of Traditional Knowledge*, WIPO/GRTKF/IC/5/INF/4. For commentary on the issues, see: M. Denhez, "Protecting Traditional Cultural Expression: The Existing Canadian Toolkit", unpublished, copy on file; H. Mann, *Indigenous Peoples and the Use of Intellectual Property Rights in Canada*, prepared for Industry Canada, available at: http://www.nativemaps.org/abstracts/indigenous_people.pdf, last viewed March 31, 2004; Department of Indian Affairs and Northern Development and Industry Canada, *Intellectual Property and Aboriginal People: A Working Paper,* 1999; A. Gupta, "Rewarding Conservation of Biological and Genetic Resources and Associated Traditional Knowledge and Contemporary Grassroots Creativity", Indian Institute of Management Ahmedabad Working Papers, 2003, available at: http://netec.wustl.edu/WoPEc/data/Papers/iimiimawp2003-01-06.html, last viewed March 31, 2004; Downes, *supra* note 22; and Correa, *supra* note 25.

190 See UNEP/CBD/COP/7/L.19/Rev1, item H, "*Development of elements of sui generis systems for the protection of traditional knowledge, innovations and practices*". Available at http://www.biodiv.org, last viewed April 1, 2004.

191 For a description of the Australian approach to the regulation of access and benefit sharing, see Commonwealth Public Inquiry, *Access to Biological Resources in Commonwelath Araes*, 2000; and the power point presentation by the Director of the Australian office responsible for access and benefit sharing: http://www.med.govt.nz/ers/nat-res/bioprospecting/seminar-20030221/burton/burton-slides.ppt, last viewed March 31, 2004. For links to actual or proposed laws regulating access to genetic resources in other countries see the website of the Environmental Law Alliance Worldwide: http://www.elaw.org/resources/topical.asp?topic=Access+to+Genetic+Resources, last viewed March 31, 2004.

192 See WIPO document, *Comparative Summary of Existing Sui Generis Measures and Law for the Protection of Traditional Knowledge*, WIPO/GRTKF/IC/5/INF/4.

193 *Supr*a note 129.

194 *Supra* note 174.

195 See WIPO documents, *Traditional Knowledge: Policy and Legal Options*, WIPO/GRTKF/IC/6/4, *Elements of a Sui Generis System for the Protection of Traditional Knowledge*, WIPO/GRTKF/IC/4/8 and *Comparative Summary of Existing Sui Generis Measures and Laws for the Protection of Traditional Knowledge*, WIPO/GRTKF/IC/5/INF/4. For commentary on the role of customary laws in Canadian common law generally, see, for example, Borrows, *supra* note 16 and Sakej Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241. For a historical perspective, see M. Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America", (1995) 33 Osgoode Hall L.J. 785.

196 The *Access to Information Act*, R.S. 1985, c. A-1, includes some exceptions to the kinds of information that must be disclosed with government files upon a request made by a member of the public in accordance with the Act. For example, commercial information from a private company is excluded. Traditional knowledge is not.

It is also questionable whether an aboriginal group should be required to disclose TK, which appears to be the case, for example, under certain land claims agreements as described above, although such requirements are found in negotiated settlements with the consent of all the parties to them. Finally, it may not be enough to leave the issue of access to TK to aboriginal people to regulate alone through the negotiation of "TK contracts" with researchers and others. If there is a valid rights dimension to TK, additional protective measures may be required that involve recourse to enforcement mechanisms operated by the State in cases of misappropriation.

The identification of options to "respect, preserve and maintain" traditional knowledge with a view to a rights perspective raises once again the issue of balance, that was mentioned in the first paragraph of this chapter. The appropriate balance to target in efforts to reconcile indigenous interests with other public policy considerations respecting the wide dissemination and use of all sources of knowledge that carries social benefits is a fundamental issue in discussion about the relationship between biotechnology and TK. Borrows has suggested that indigenous customary laws and practices respecting the utilization of traditional knowledge might be usefully assessed as a source of principles upon which to undertake this reconciliation.[197]

The relationship between customary laws and protocols and access to traditional knowledge is a topic of debate internationally.[198] Many countries have experience integrating indigenous law with Western legal traditions.[199] Indeed, indigenous law respecting land ownership played an important role in a recent indigenous rights decision of the Constitutional Court of South Africa.[200] With respect to the Canadian context, Mark Walters has suggested that the "… challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly different legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined… a morally and politically defensible conception of rights will incorporate both legal perspectives."[201] In response to this notion, Lamer C.J. has stated that in considering a claim for the existence of an aboriginal right,

> … a court must take into account the perspective of the aboriginal people claiming the right…It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada.[202]

Pressure to find ways to incorporate customary laws and practices into Canadian common law are likely to increase over time, particularly if the breadth of the discussion expands to include laws enacted by self-governing aboriginal communities. In this regard, it may be preferable to use the broader term "indigenous laws" rather than "customary laws".

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197 Personal communication with J. Borrows, March 19, 2004, copy of written comments of Borrows to this effect on file. Borrows argues that the aboriginal rights analysis found in Canadian case law is conducive to recognition of customary laws and protocols. For example, aboriginal customary law respecting adoption was given recognition by the B.C. Court of Appeal in its 1993 decision in *Casimel v. Insurance Corporation of British Columbia*, available at: http://www.courts.gov.bc.ca/jdb-txt/ca/93/05/c93-0563.htm, last viewed March 17, 2004. Besides the question of the status of aboriginal customary laws in Canadian common law, Borrows suggests that aboriginal concepts about justice and balance can be drawn upon to inform the balancing that may be required between the interests of aboriginal people and Canadian society as a whole. Also see Borrows, *supra* note 16.

198 The WIPO IGC is addressing questions about the relationship between customary laws and practices and the protection of traditional knowledge through intellectual property or *sui generis* approaches. See, for example, the WIPO Secretariat's publication, Traditional Knowledge: Policy and Legal Options, WIPO/GRTKF/IC/6/4. Available at www.wipo.org, last viewed March 15, 2004.

199 For an Australian example, see *Bulun Bulun*, *supra* note 169. For one from New Zealand, see *Bioprospecting in New Zealand: Discussing the Options*, Ministry of Economic Development, available at http://www.med.govt.nz/ers/nat-res/bioprospecting/discussion/bioprospecting-07.html, last viewed October 7, 2003 or New Zealand Law Commission Study Paper 9, Maori Custom and Values in New Zealand Law, 2001, available at http://www.lawcom.govt.nz, last viewed March 31, 2004.

200 *Richtersveld Community and Others v. Alexkor Ltd. and Another* 2001 (3) SA 1293 (LCC), available at: http://www.concourt.gov.za/files/alexkor/alexkor.pdf, last viewed March 31, 2004.

201 M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 *Queen's L.J.* 350, at 412 to 13.

202 *Van der Peet*, supra note 153, at para. 49.

The diversity of aboriginal customary laws and practices makes assessing whether they offer useful principles to assist in finding an appropriate balance between the interests of aboriginal people in TK and other policy considerations a truly daunting task. On the other hand, a more modest but very important implication of Borrow's suggestion may provide the basis for a practical starting point: in matters related to TK, a better understanding of indigenous interests, understandings and perspectives is critical. In order to achieve this, indigenous people should be given opportunities to participate in policy making respecting traditional knowledge and to provide guidance in the development of options to address their interests.

7.6 Conclusion

The interest that the biotechnology industry and governments that support it share with indigenous peoples in biological resources and traditional knowledge about its applications both poses challenges for all parties, and creates some opportunities. A satisfactory approach to this situation may be one that permits the utilization of such resources and knowledge for the benefit of everyone, but recognizes that indigenous people's interests in them must be respected. Society at large shares a common interest in supporting the economic, cultural, social and political development of indigenous peoples. While this statement can be supported on the basis of a host of reasons, it is reinforced by the bedrock of rights.

This chapter suggests that a specific indigenous right to own and control traditional knowledge is not yet recognized under international or Canadian law. However, such a right, or something like it, might be given shape internationally with continued efforts to consider and address indigenous peoples' issues in various fora, including the CBD, WIPO and the Working Group on the Draft Declaration. It might also be given some expression under Canadian law or through the medium of self-government and land claim negotiations and agreements.

However, even now a fundamental principle is present at the international and domestic levels. This principle is sometimes but not always connected with a legal obligation. For example, it can be found in Human Rights Committee opinions respecting complaints about alleged violations of Article 27 of the ICCPR and in Canadian case law addressing certain specific fact situations. More often, it simply makes good policy sense, reflected in decisions by States to include indigenous representatives in international negotiation processes about matters that concern them, or in decisions by governments in Canada to seek indigenous views about a host of topics. Indigenous people should be given opportunities to play a central role in law and policy making about issues that are of importance to them, including issues respecting the utilization of traditional knowledge in biotechnology research. Making a final determination that an indigenous right to control TK is well established in law is not a necessary requirement before such a principle can be embraced and implemented.