

The protection of Indigenous medical knowledge through legal agreements

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1. International context

- U.N. Convention on Biological Diversity
- Nagoya Protocol
- UNDRIP
- WIPO
- WHO
- UNESCO Universal Declaration on Cultural Diversity

1. International context

U.N. Convention on Biological Diversity 1992

- Treaty – Canada is a Party
- Preserve indigenous knowledge and practices (*article 8j*)
- Promote wider application with approval of the holders of knowledge (*article 8j*)
- Equitable sharing of the benefits (*article 8j*)
- Access on mutually agreed terms (MAT) and subject to prior informed consent (PIC) (*article 15*)

1. International context

Nagoya Protocol (CBD)

- Treaty – Canada is not a Party
- State must implement legislation to ensure access to genetic resources is with PIC of the Contracting party and MAT
- Genetic resources include plants and associated TK, takes into account indigenous customary laws, protocols
- State must inform user of rights of IP: PIC and fair and equitable benefit sharing
- Also applies to intro-State-use
- Has been criticized (vagueness, lack of binding minimum requirements)

1. International context

UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples

- Declaration (not Treaty)
- Canada voted against in 2007, support in 2011, “Full support” in 2016
- Bills in 2018 and 2020
- Right to TM and practices (art. 24)
- Right to land and resources (art.25, 26)
- Right to TK, sciences, technologies, including human and genetic resources, seeds medicines, ...intellectual property (art.31)

1. International context

WIPO: World of Intellectual Property Organization

- IGC on IP and Genetic Resources, Traditional Knowledge and Folklore
- Draft treaties (in development):
 - 1. Traditional Knowledge (TK)
 - 2. Traditional Cultural Expressions (TCEs)
 - 3. Genetic Resources (GRs) (mandatory disclosure of patent)
- Canada participating in the obstruction of integration of more recognition of Indigenous knowledge

1. International context

WHO: World Health Organization

- The WHO adopted a new Traditional Medicine strategy (2014-2023)
- It recognizes the importance of TM, its developments, but the policies and regulations must be established by natural authorities
- Resolution WHA67.18 (World Health Assembly):
 - 3. REQUESTS the Director-General:
 - (...)
 - (3) to continue to promote international cooperation and collaboration in the area of traditional and complementary medicine in order to share evidence-based information, taking into account the traditions and customs of indigenous peoples and communities



1. International context

UNESCO Universal Declaration on Cultural Diversity

- Declaration (not Treaty)
- Annex II Main lines of an action plan for the implementation of the UNESCO Universal Declaration on Cultural Diversity, para 14 (art. 12d)):
 - 1. Respecting and protecting TK
 - 2. Recognizing the contribution of traditional knowledge
 - 3. fostering synergies between modern science and local knowledge

2. Canadian framework

- Intellectual property laws not well adapted to protect IMK
 - Patents (not novel, collective guardianship, limited duration)
 - Copyright (expression of idea, not idea itself, author not known...)



2. Canadian framework

- Aboriginal rights in s.35 of the *Constitution Act, 1982*; *Adams* and *Delgamuukw* includes practices
- Very specific test & evidentiary burden
- Protects against state encroachment not third parties
- Very few cases re: indigenous medicine
- Right to not receive Western medicine: *Hamilton v. J.J.* 2014
- Could be used to protect against prosecution for “illegal practice of medicine”
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2. Canadian framework

More recognition for Indigenous knowledge and medicine:

- **Report of the Royal Commission on Aboriginal Peoples** (1996): V3, s. 3.6.6 (right to protect access and use of TK)
- **Tlicho Agreement 2003**: Law-making power for the Tlicho with regards to Tlicho traditional medicine (s. 2.10.12; 7.4.4, 13.2.1); use of both TK and western science.
- **Nisga'a Self-government Agreement**: Can legislate over Nisga'a healers (C.11, s. 86)
- Recent federal laws refer to Indigenous knowledge: ***Impact Assessment Act, Fisheries, Languages, Youth protection, etc.***

2. Canadian framework

First Nations and Inuit have developed their own protocols to govern use of IK and OCAP principles



OCAP (1998)

- **Ownership:** refers to the relationship of First Nations to their cultural knowledge, data and information
- **Control:** affirms that First Nations, their communities and representative bodies are within their rights in seeking to control over all aspects of research and information management processes that impact them
- **Access:** refers to the fact that First Nations must have access to information and data about themselves and their communities, regardless of where it is held
- **Possession:** refers to the physical control of data

2. Canadian framework

In addition, Indigenous communities have implemented protocols to govern transfer of Indigenous knowledge:

○ **Protocols**

- *Mi'kmaw Ecological Knowledge Study Protocol*
- *Mi'kmaw Research Principles and Protocols*
- *First Nations of Québec and Labrador Sustainable Development Institute Protocol*
- *National Inuit Strategy on Research*
- ...

3. Protection through legal agreements

○ Contractual Agreements

- Entering into a written agreement with the entity which wishes to use the community's indigenous knowledge
- Clauses to be included:
 - Contracting parties
 - Description of the Project
 - Prior informed consent (collective and individual)
 - Privacy of the individual Indigenous Knowledge provider
 - Guardianship/ ownership and use of knowledge
 - Sharing of Indigenous knowledge
 - Participation (or control) of the community in the project
 - Benefits for the community

4. Example

Cree Anti-diabetic Plants Project

- Several projects funded by CIHR since 2003
- 3 Universities, 1 Hospital, 4 Cree communities, CBHSSJB, (GGCEI), elders (in northern Québec)
- Objective: Measure effectiveness of traditional plants on symptoms of diabetes and interaction between medicines and plants
- Long term: Improve services offered by CBHSSJB
- Fear of misappropriation, misuse, commercialization

4. Example

Important principles of the agreement

- Confidentiality and Eeyou control over IK
- Integrated some customary law/concepts
- Process for review of publications
- Collaborative research
- Joint ownership of intellectual property
- Benefit-sharing



4. Example

- **Confidentiality of IK and Eeyou control over use**
 - Eeyou medicinal knowledge is confidential
 - Prior informed consent must be obtained from Band Council, Elders and individual participant
 - Consent of Elders and communities is necessary to publish or transfer
 - Can only be used for specific research; consent necessary to change/expand project

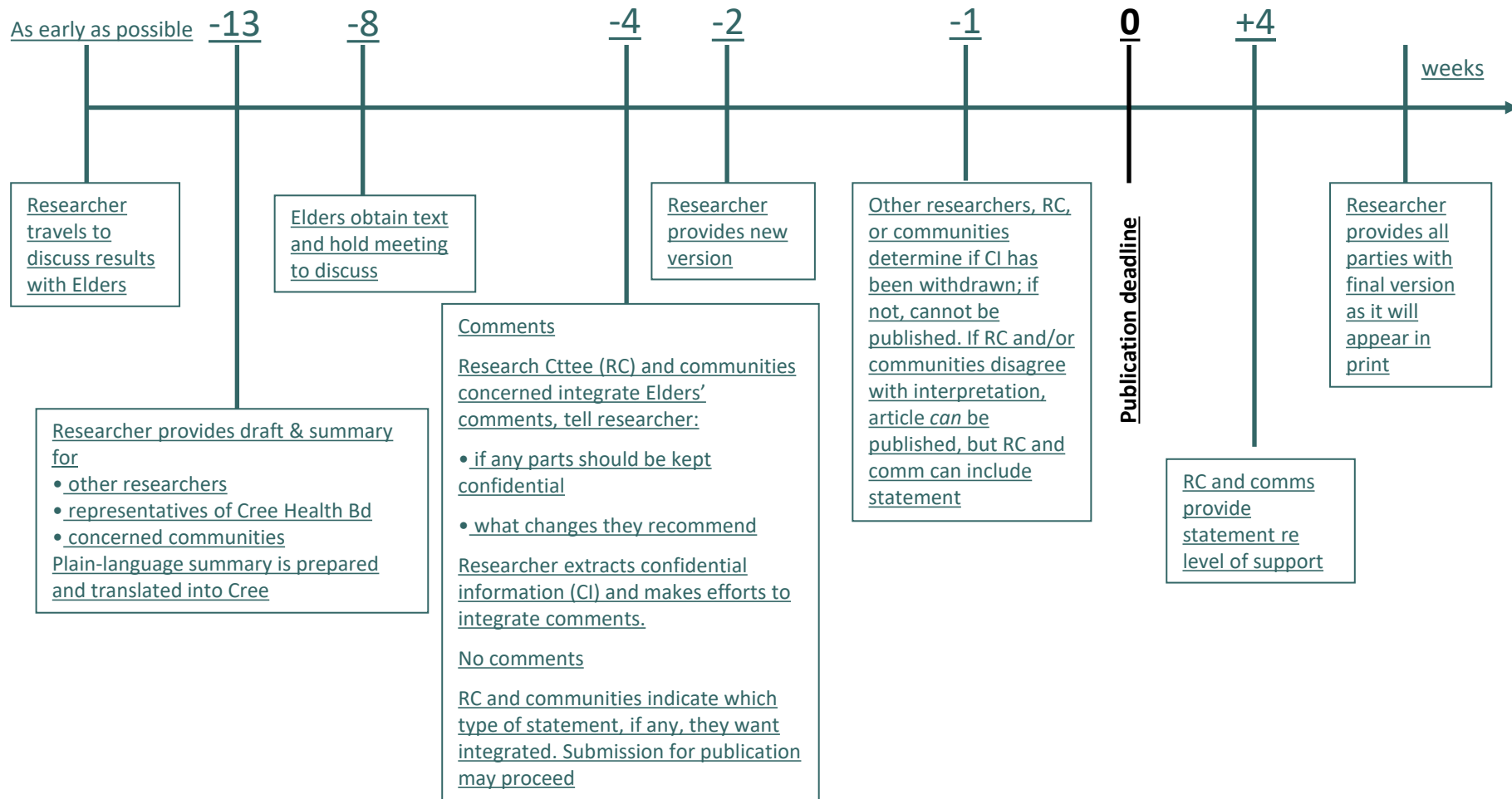
4. Example

○ Review of publications

- Very important part of scientific research
- Risk that IK is disclosed
- Summary and translation into Cree
- Elders and communities review publications prior to it being sent to editor
- Comments and extraction of IK if necessary

4. Example

Working Procedure for Review of Publication and Similar Documents



4. Example

- **Collaboration research**
 - Initially not enough feed-back, not enough collaboration
 - Regular meetings
 - Planification stage
 - Review of publications
 - Reports to communities
 - Acknowledgement of Elders in publications



4. Example

- **Joint ownership of intellectual property**
 - Results and IP are jointly owned
 - Objective : Co-authors, depending on contribution
 - Patenting: consent of Researchers and Universities, communities (with consultation of Elders)
 - 51% ownership for the Cree entities, 49% Universities
 - Patent was a possibility. Communities and Elders had provided consent concerning initial steps for one invention but didn't go forward for other reasons

4. Example

○ **Benefit sharing**

- Sharing of scientific knowledge
- Jobs (1 full-time and occasional)
- Herbaria, other materials
- Training
- If commercialization, % profits (51% Cree ownership)

Post-initial project

- Even if measures were put in place, relationship still has important tensions



5. Lessons learned

Collaboration with communities requires:

- Openness to accepting a completely different worldview, even if one doesn't understand it or if principles do not seem « logical » or go against scientific or academic principles
- Openness for the potential relation to stop short
- Respect that communities may not wish to do research at all
- The worldview is often to oppose any commercialization
- Non transfer of knowledge is a guarantee that commercialization will not happen



5. Lessons learned

Non-Indigenous Researcher or Partner :

- Willingness to take much larger time commitment
- Build a relationship of trust
- Respect that communities may not wish to do research/ commercialization at all
- Openness for the potential relation to stop short
- Maintain the relationship (not a « project »)

5. Lessons learned

Lessons learned as a lawyer:

- Limits of law/agreements
- Limits of bridging customary law and Western intellectual property concepts
 - ownership/guardianship;
 - Licence for confidential information / knowledge similar (vs trust)
 - sharing based on trust relationship hence secondary use prohibited; third parties not subject
- Risks of relying on agreement (ex if confidentiality not respected)
- Need to « live » the agreement day after day otherwise ignored

5. Lessons learned

Lessons learned for communities

- To ensure compliance with principles in agreement, it is very high maintenance: need full-time paid positions;
- Make principles known in advance before starting the relationship (in protocol for example)

5. Lessons learned

- Elements that would enhance the protection (and non disappearance) of Indigenous medical knowledge:
 - Urgency: knowledge holders are not young
 - Long-term funding & training in communities is required (not attached to a project)
 - Fund community-led projects
 - For researchers: Long-term involvement, not last minute “authorization”
 - Acceptance on the part of Universities & funders that there will be less/no publications, less/no commercialization

6. Questions?

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