

IP Law and Indigenous Traditional Knowledge

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February 2018

1. IP Law: Canadian Framework
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1. IP Law in Canada

Indigenous traditional knowledge

- “knowledge and practices of Indigenous communities developed over the centuries and transmitted orally from generation to generation”
- collectively owned and takes the form of stories, songs, values, beliefs, techniques, practices
- Canadian law does not have a specific regime to protect ITK

1. IP Law in Canada

Intellectual property

- Intellectual vs material property
- Canadian law protects various types of intellectual property rights that can apply to Indigenous knowledge:
 - Copyright
 - Patents
 - Trademarks
 - Certification marks
 - Appellations of origin
 - Industrial designs
 - Plant breeders' rights
 - ...

1. IP Law in Canada

Copyright

- ***Copyright Act (R.S.C., 1985, c. C-42)***
- exclusive legal right given by the State to an originator or an assignee to reproduce material
- Copyright only protects the expression of the idea and not the idea itself.
 - TK is the idea (e.g. a legend) vs the expression of a legend (e.g. fixed in a recording, a written or a visual form) → Can lead to cultural appropriation.
- Other obstacles:
 - Unknown or multiple authors
 - Term of protection is limited to 50 years (after death of author) s.6.

1. IP Law in Canada

Patents

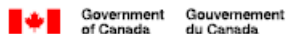
- ***Patent Act (R.S.C., 1985, c. P-4)***
- Patents provide a legally protected, exclusive right to make, use and sell an invention
- Invention must be new, useful and inventive.
- Certain ITK techniques could be patentable.
- TK may not be considered “new” (if it has been in the public domain for many years, handed down from generation to generation).
- Scientific research is generally required.
- Costly procedure
- Term of protection is 20 years.

1. IP Law in Canada

Trade-mark

- ***Trade-marks Act* (R.S.C., 1985, c. T-13)**
- “*trade-marks*” generally a word or a sign that is used by a person for the purpose of distinguishing their goods or services from others. Examples?
- No time limit
- Cannot prevent misappropriation of indigenous knowledge itself but can be used for Aboriginal names and logos.
- “*official marks*” special protection for governments, can be used by Indigenous governments.

1. IP Law in Canada



Canadian Trademarks Details

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1856276 - SALAWEG

Application/Registration numbers

Application number 1856276

Status

CIPO status FORMALIZED

Key Dates

Filed 2017-09-07

Interested Parties

Applicant	ASSOCIATION DE GESTION HALIEUTIQUE AUTOCHTONE MI'GMAQ ET MALÉCITE (AGHAMM), Personne morale sans but lucratif 10, boul. Perron Gesgapegiag G0C 1Y1 QUEBEC
Representative for service	ROBIC CENTRE CDP CAPITAL 1001, SQUARE-VICTORIA, BLOC E - 8E ETAGE MONTREAL QUEBEC H2Z 2B7
Agent	ROBIC CENTRE CDP CAPITAL 1001, SQUARE-VICTORIA, BLOC E - 8E ETAGE MONTREAL QUEBEC H2Z 2B7

Descriptive Reference

Name	SALAWEG
Type	Word Mark
Category	Trade-mark

Index headings

SALAWEG

SALÉ

Foreign Character Translation

Le mot 'salaweg' peut être traduit de la langue mi'gmaq par 'salé'.

1. IP Law in Canada

Certification marks

- Awarded to an entity that does not produce or sell good or service but rather **controls** how **others** produce or sell goods or service that meet a certain standard.
- Useful for Aboriginal Nations because it indicates to consumers the goods/services have genuinely been produced by people of FN, Inuit or Métis ancestry.
- E.g. “Igloo tag” (INAC, 1959) and “Genuine Cowichan Approved”



1. IP Law in Canada

Appellations of origin

- Serve as indication of the geographic origin of a product (e.g. Champagne).
- Protect traditional agricultural and food processing techniques (e.g. wine and cheese).
- Closer notional relationship with issues related to the protection of Indigenous knowledge, products and practices.
- Flexibility in IP rights is possible.

2. Aboriginal rights

Intellectual property system is not always adapted to protection of ITK

Other alternatives?

Justification under s.35 of the Constitution Act, 1982

- “The existing Aboriginal and treaty rights are hereby recognized and affirmed.”
- In *Adams and Delgamuukw*, Justice Lamer stated Aboriginal rights encompass practices, customs and traditions not tied to land (leaves door open for the inclusion of ITK).

2. Aboriginal rights

- To our knowledge, no case has been decided under s.35 specifically recognizing Indigenous Knowledge.
- S. 35 protects against state encroachment (ex. Québec Medical Act and ancestral medical practices)
- Not necessarily easy to use if third party uses ecological knowledge without consent for example
- Evidentiary burden is very difficult, in accordance with the *Van der Peet* test (*practice integral to the distinctive culture of the aboriginal group claiming the right at the time of contact*).

3. International Context

U.N. Convention on Biological Diversity

- 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*)

3. International Context

Nagoya Protocol

- 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.
- States 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)

3. International Context

UNDRIP: United Nation Declaration on the Rights of Indigenous Peoples

- Declaration (not Treaty)
- Canada voted against in 2007
- Approved in 2011, with reservation
- « Full support » in 2016
- Bill 262 in 2018
- 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)

3. International Context

WIPO: World 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 obstructing process

4. Research

TCPS 2 (2014): Tri-Council Policy Statement

- Ethical conduct for research involving humans
- Joint policy of Canada's 3 federal research agencies: CIHR, NSERC, SSHRC
- **Applying policy in Aboriginal Contexts**
 - Requirement of Community Engagement in Aboriginal Research (ss. 9.1 & 9.2)
 - Respect for Community Customs and Codes of Practice (s. 9.8)
 - Research Agreements (s.9.11) and Collaborative research (9.12)
 - Mutual Benefits in Research (s. 9.13)
 - Privacy and Confidentiality (s.9.16) and IP related research (s. 9.18)

4. Research



OCAP (1998)

- Set of standards that establish how First Nations data should be collected, protected, used, or shared. They are the *de facto* standard for how to conduct research with First Nations.
- **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.

5. Solutions

- Using IP Law tools if possible; Otherwise:
- **Protocols**
 - Regulate use of Indigenous knowledge by looking at how research on Indigenous Knowledge will be done and transferred.
 - *Mi'kmaq Ecological Knowledge Study Protocol*, 2nd ed. (Assembly of Nova Scotia Mi'kmaq Chiefs)
 - *Mi'kmaw Ethics Watch*
Mi'Kmaw Research Principles and Protocols

5. Solutions

Contractual Agreements

- Enter into a written agreement with the entity which wishes to use the community's Indigenous knowledge.
- Clauses to be included:
 - Contracting parties
 - Description of Project
 - PIC
 - Privacy of the individual Indigenous knowledge provider
 - Ownership and use of knowledge
 - Sharing of Indigenous knowledge
 - Participation (or control) of the community in the project
 - Benefits for the Community

6. Personal Information

Personal information includes any factual or subjective information, recorded or not, about an identifiable individual (age, name, ID number, income...).

Legislation sets out the ground rules for how businesses must handle personal information in the course of commercial and other activity. (ex AGHAMM)

- Federal
 - *Personal Information Protection and Electronic Documents Act (S.C. 2000, c. 5)*
- Provincial
 - *Act respecting the protection of personal information in the private sector, CQLR c P-39.1*
 - *Civil Code of Quebec, c CCQ-1991 and Charter of Human Rights and Freedoms, c C-12 (apply in case of any doubt)*

6. Personal Information

Applicable Rules

○ Limit Collection

- The golden rule is that personal information must be collected solely for specific purposes and that only the personal information required to fulfill these purposes be collected.

○ Seek Consent

○ Limit the Use, Retention, Disclosure of Personal Information

○ Keep your files Updated, Safe and Accessible

7. Questions?

