THE IMPLEMENTATION OF *UNDRIP*: LEGAL DIMENSIONS OF INDIGENOUS PEOPLES' CULTURAL HERITAGE AND PROPERTY IN CANADA

ROBERT G. HOWELL* AND COLTON DENNIS**

Canada, both federally and in British Columbia, has formally adopted the United Nations Declaration on Indigenous Peoples *(*UNDRIP*). Despite Canada's adoption of* UNDRIP*, the laws, customs, and practices of Indigenous Peoples are* sui generis *and must be recognized and applied as such. This article considers the nature of Indigenous culture and heritage and the potential for recognition and protection on a proprietary basis judicially or legislatively — or a combination of both — within the framework of* UNDRIP*. This article further considers a means of linkage between federal and provincial law on the one hand, and Indigenous peoples' law, custom, or practice on the other. Lastly, this article examines various or ancillary matters that are essential to establishing justiciability in the recognition and protection of heritage and culture of Indigenous peoples.*

TABLE OF CONTENTS

* Professor, Faculty of Law, University of Victoria, British Columbia. I would like to thank the following research assistants who have researched aspects of Cultural Property over recent years: Colton Dennis, Joannie Fu, David Jol, Katie Mysak, Kyle Schille, and Clayton Gray (completed a directed research paper). I would also like to thank Johnesha Johnson, Carden Serviss, and Rachel Steinhoff for secretarial assistance. I also acknowledge the grant of $5,000 from the Canadian Foundation for Legal Research in April 2020 that funded the principal components of research for this article.

** Associate, McCarthy Tétrault LLP, Vancouver, British Columbia. The authors note that the views expressed in this article are their own and do not necessarily represent the views of McCarthy Tétrault LLP.

This work is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License. Authors retain copyright of their work, with first publication rights granted to the *Alberta Law Review*.

I. INTRODUCTION

This article examines the legal dimensions of affording legal recognition of Canadian Indigenous peoples' cultural heritage and property. The immediate context is the implementation of Parliament and in British Columbia of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*).[1] The writers do not attempt to identify or describe specific cultural customs, practices, items, or objects, tangible or intangible, movable or immovable, of any Indigenous people. This is being done by scholars with knowledge of Indigenous sources.[2] The laws, customs, and practices of Indigenous peoples themselves are the *only* sources that can be looked to for such identification and description.

Indigenous peoples are nevertheless part of Canadian society — provincial and federal. The laws, customs, and practices of Indigenous peoples, while singular to identify and describe an Indigenous cultural feature, will need to be given application in the wider community outside of the territory of the particular Indigenous people by a federal or provincial court. A legal mechanism should therefore be found to achieve this purpose. To simply absorb Indigenous Laws into common law might be efficient, but would defeat the distinctiveness of Indigenous Law. While part of Canadian law, Indigenous Laws, customs, and practices are neither federal nor provincial law, but rather are *sui generis* laws. Recognition and application must preserve this distinctiveness. This article will reflect on either legislative or common law means to achieve this purpose.[3] Indeed, to be effective, especially for movable (tangible or intangible) features of heritage or culture, the linkage must extend internationally under convention or treaty systems designed to facilitate effective international mechanisms as is already the situation in the categories of current

---

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53 (2007) [*UNDRIP*].

2 See e.g. Angela Cameron, Sari Graben & Val Napoleon, eds, *Creating Indigenous Property: Power, Rights, and Relationships*, vol 1 (Toronto: University of Toronto Press, 2020); Catherine Bell & Val Napoleon, eds, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) (the first volume is focused more on identification); Catherine Bell & Robert K Paterson, eds, *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform*, vol 2 (Vancouver: UBC Press, 2009) (the second volume looks more to the integration of the Aboriginal perspectives into the laws and practices of the wider Canadian and global communities).

3 From a constitutional perspective, any legislation will likely need to be federal because section 91(24) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No. 5 would likely apply: see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 177–81 [*Delgamuukw*]. Any provincial legislation would go beyond being of "general application" and would likely be seen to be specifically directed to an Aboriginal interest, and thereby may tread into exclusively federal jurisdiction. Furthermore, the *Constitution Act, 1867*, s 92(13) grants legislative jurisdiction over property and civil rights — a province cannot legislate extra-territorially, but only "in the Province," which is determined on a "pith and substance" basis: *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 at 328, 332. Furthermore, even if a dispute is properly "in the Province," a judgment against a defendant located outside the province must be enforced by the court in the forum where enforcement is sought, subject to legislative facilitation in that forum.

intellectual property.[4] The process therefore requires both an "up-down" and a "down-up" integration of law and policy concerning culture and heritage.

To some extent, this transsystemic concept is reflected in determining the existence and evidentiary basis for Aboriginal rights, including title, with respect to land.[5] It is seen as a reconciliation of the prior occupation of Indigenous peoples with the assertion of British sovereignty.[6] Artefacts and items of intangible cultural heritage also existed prior to colonization and were subject only to Aboriginal sources of law and custom.

UNDRIP provides that "[s]tates in consultation and cooperation with [I]ndigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."[7]

Although not legally binding in and of itself,[8] the implementation in Canadian and British Columbian law[9] brings *UNDRIP* into effect. The implementing provisions are similar. Importantly, both enactments declare non-abrogation or non-derogation from rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.[10] Both include *UNDRIP* in a schedule to the enactment. Both stipulate that the respective governments — Canada and British Columbia — will "in consultation and cooperation with … Indigenous peoples … take all measures necessary to ensure that the laws … are consistent with [*UNDRIP*]."[11]

---

4 For a description of the international intellectual property treaties applicable to Canada and the process of ratification of treaties, see Canadian Intellectual Property Office, "Canada has joined 5 international intellectual property treaties" (31 October 2019), online: [perma.cc/J3L4-XRZZ]. See also *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972); *Cultural Property Export and Import Act*, RSC 1985, c C-51.

5 *R v Van der Peet*, [1996] 2 SCR 507 at para 68 [*Van der Peet*]; *Delgamuukw*, *supra* note 3 at paras 80–87. Concerning receiving Oral Histories as evidence of historical facts, the Supreme Court notes: "[T]he laws of evidence must be adapted in order that this type of evidence [Oral Histories] can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents." (*Delgamuukw*, *ibid* at para 87). Otherwise, the Oral Histories would violate the "hearsay rule" and be inadmissible as evidence (*Delgamuukw*, *ibid* at para 103). Likewise, the Supreme Court stipulates that both Aboriginal law and common law "be taken into account in establishing the proof of [exclusive] occupancy" for gaining the title (*Delgamuukw, ibid* at para 147). See also *Delgamuukw*, *ibid* at para 114.

6 *Delgamuukw*, *ibid* at para 114.

7 *UNDRIP*, *supra* note 1, art 38.

8 Resolutions of the United Nations Security Council are binding on Member States, but resolutions, declarations, and other instrumentation and proceedings of the General Assembly are not binding: *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, arts 18.2, 25. Furthermore, there must be implementation by constitutionally valid legislation into national (or provincial) law. A court must look to and interpret only the implementing legislation, although the relevant international instrument may be considered to resolve any uncertainty in the interpretation of the implementing legislation: see e.g. *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141 at 172–73.

9 *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*Canada UNDRIP Act*] (formerly Bill C-15; receiving Royal Assent on 21 June 2021); Department of Justice Canada, "Backgrounder: *United Nations Declaration on the Rights of Indigenous Peoples Act*," online: *Government of Canada* [perma.cc/CP2D-AJ8L]; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*BC UNDRIP Act*] (in force by Royal Assent on 28 November 2019).

10 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (section 35 is in Part II: Rights of Aboriginal Peoples of Canada); *Canada UNDRIP Act*, *ibid*, s 2(2); *BC UNDRIP Act*, *ibid*, s 2(3).

11 *Canada UNDRIP Act*, *ibid*, s 5: "The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration"; *BC UNDRIP Act*, *ibid*, s 3: "In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."

To affect the "consultation and cooperation"[12] process, both Canada (federally) and British Columbia are to proceed by developing with Indigenous peoples an "action plan"[13] to "[be completed] as soon as practicable,"[14] with Canada specifying a period of two years from the coming into effect of the federal legislation.[15] Both implementations stipulate an annual reporting mechanism.[16]

Legislative measures would fall under a federal head of power under section 91(24) of the *Constitution Act, 1867* ("Indians, and Lands reserved for the Indians") or the specific heads concerning intellectual property rights under the *Constitution Act, 1867* including section 91(22) ("Patents of Invention and Discovery"), section 91(23) ("Copyrights"), and section 91(2) ("The Regulation of Trade and Commerce") with respect to trademarks and industrial design.[17] Related matters of passing off, misappropriation, and confidential information (trade secrets) are provincial and protectable under common law and equity.

Most contention surrounding the passage of Bill C-15, the federal implementation of *UNDRIP*, appears to have focused on resource development.[18] Recognition and protection of cultural heritage and property may be less contentious politically, but far more complex conceptually. What must be crafted are formulations that will enable features of heritage and culture to be justiciable or capable of being applied or adjudicated by a judicial or court process. First, the subject matter, or the nature and scope of the rights claimed, must be capable of identification. Necessarily, this is relative. The scope of such rights will likely be a contested issue and as such may itself be subject to litigation, but the general perimeter of the subject matter or right must be clear. Second, the holder, owner, or beneficiary of the right must be settled. Third, the type of relief for violation or infringement must be anticipated. These features are necessary, not only for achieving an effective judicial process, but also for all members of society as potential defendants in proceedings to enforce the rights.

With the above principles in mind, this article considers:

1. The nature of culture and heritage and the potential for recognition and protection on a proprietary basis judicially, legislatively, or a combination of both, within the framework of *UNDRIP*. Legislative measures are contemplated, especially for intangible cultural items for which *UNDRIP* utilizes the expression "cultural heritage, traditional knowledge and traditional cultural expressions,"[19] which has been the usage accepted internationally and is utilized in the current draft provisions of the Intergovernmental Committee of the World Intellectual Property Organization (WIPO) that is the basis for international linkage and treaty protection of Traditional Knowledge and traditional cultural expressions on a national

---

12 *Canada UNDRIP Act*, *ibid*, s 5; *BC UNDRIP Act*, *ibid*, s 3.
13 *Canada UNDRIP Act*, *ibid*, s 6(1); *BC UNDRIP Act*, *ibid*, s 4(1).
14 *Canada UNDRIP Act*, *ibid*, s 6(4); *BC UNDRIP Act*, *ibid*, s 4(4).
15 *Canada UNDRIP Act*, *ibid.*
16 *Canada UNDRIP Act*, *ibid*, s 7; *BC UNDRIP Act*, *supra* note 9, s 5.
17 *Constitution Act, 1982*, *supra* note 10, ss 91(24), 91(22), 91(23), 92(2).
18 The Canadian Press, "Senate Approves Bill to Implement UN Declaration on the Rights of Indigenous Peoples," *CBC News* (16 June 2021), online: [perma.cc/FL5P-KM3W].
19 *UNDRIP*, *supra* note 1, art 31(1).

treatment theory.[20] However, the potential of judicial development of cultural property is also considered given the spectrum of cultural heritage. Land, artefacts, human remains, and intangible Traditional Knowledge and expressions of culture are included. Indigenous peoples could quite feasibly proceed to claim at common law interests across this spectrum in the same way as a claim to Aboriginal land title is brought without regard to any ongoing "action plan" under the *UNDRIP* implementation process.

2. A means of linkage between federal and provincial law on the one hand and an Indigenous people's law, custom, or practice on the other. An analogy is made with conflict of laws choice of law theory to take account of the Indigenous perspective in its crucial components within the overall legal process, but in a way that preserves the autonomy of the Indigenous people within its jurisdiction. *UNDRIP* article 4 is directly relevant: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to *their internal and local affairs*, as well as ways and means for financing their autonomous functions."[21] The scope of "internal and local" is, of course, to be determined.

3. Various or ancillary matters that are essential to establishing justiciability in the recognition and protection of heritage and culture of Indigenous peoples.

II. INTERNATIONAL POLITICAL ACCEPTANCE

The General Assembly vote on 13 September 2007 adopting *UNDRIP* was 143 in favour and four against. Australia, Canada, New Zealand, and the United States were the four votes against adopting *UNDRIP*.[22] These countries were among the most significantly affected by *UNDRIP*, given their large Indigenous populations. Each provided a statement in the United Nations Meetings Coverage and Press Release. Concern focused on the process of adoption and the substance of the provisions themselves, and the relationship between the provisions and how they might be incorporated within the constitutional, legal, and political framework of each country, including the existing internal processes within each country that recognize Indigenous rights and interests.

---

20 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPOR, 47th Sess, UN Doc WIPO/GRTKF/IC/47/5 [WIPO Draft Provisions TCE] (these are the draft articles relating to Traditional Cultural Expressions); Intergovernmental Committee on Intellectual Property and Genetic Resources, *The Protection of Traditional Knowledge: Draft Articles*, WIPOR, 47th Sess, UN DOC WIPO/GRTKF/IC/47/4 [WIPO Draft Provisions TK] (these are the draft articles relating to Traditional Knowledge). See also Robert K Paterson, "Canadian and International Traditional Knowledge and Cultural Expressions Systems" (2017) 29:2 IPJ 191 [Paterson, "Cultural Expression Systems"] (having been a report dated 11 May 2015 submitted to the Strategic Policy Sector at Industry Canada); Pierre-Emmanuel Moyse et al, "Report of the Workshop on Indigenous Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property" (30 January 2020), online (pdf): *Centre for Intellectual Property Policy* [perma.cc/ZSK2-9JB8].

21 *UNDRIP*, *supra* note 1, art 4 [emphasis added].

22 United Nations, Press Release, GA/10612, "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President" (13 September 2007), online: *UN Meetings Coverage & Press Releases* [perma.cc/CXJ6-L22M] [UN Press Release].

The terms of *UNDRIP* are drafted in a broad and open-ended manner and, rather than setting out objectives with great specificity, generally direct states toward objectives, but with substantial flexibility as to how this might be achieved.

Canada's immediate response to *UNDRIP* presented concern with the prospect of Indigenous consent being used as a veto, especially in the context of resource development, and "the need to achieve an appropriate balance between the rights and obligations on [I]ndigenous peoples, Member States and third parties."[23]

Difficulty with the wording of the text with respect to "intellectual property" was noted, but not explained. Intellectual property rights, and related areas, are the focus of this article and the writers do address the need for appropriate balance between Indigenous peoples, other members of Canadian society, and federal and provincial governmental interests within the flexibility afforded by *UNDRIP*.[24]

Canada also noted that "[w]hile Canada had a strong consultative process, reinforced by the Courts as a matter of law, the establishment of complete veto power over legislative action for a particular group would be fundamentally incompatible with Canada's parliamentary system."[25]

Canada's opposition to *UNDRIP* was recanted in November 2010 by its formal endorsement of the Declaration. The Minister of Foreign Affairs noted *UNDRIP* "sets out a number of principles that should guide harmonious and cooperative relationships between Indigenous peoples and States, such as equality, partnership, good faith and mutual respect."[26]

Additionally, the Minister stated "[w]hile the Declaration is not legally binding, endorsing it as an important aspirational document is a significant step forward in strengthening relations with Aboriginal peoples."[27] In 2016, Canada's Minister of Indigenous and North Affairs announced that Canada would be "now a full supporter, without qualification, of the United Nations Declaration on the Rights of Indigenous Peoples."[28] *UNDRIP* took legal effect in British Columbia by legislative implementation in 2019 and federally upon

---

23 *Ibid* (Canada's Ambassador Statement by John McNee to the United Nations).

24 For a discussion concerning the need for "user rights" in the context of proprietary exclusivity of cultural intellectual property and traditional expressions of culture, see the text accompanying note 118. See also the text accompanying note 109 (for a discussion concerning the relationship between the *Constitution Act, 1982*, *supra* note 10, s 35 and the *Canadian Charter of Rights and Freedoms*, s 25, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], and the need for a balance with a general public interest). See also the text accompanying note 243 (for discussion concerning the wider community interest in accessing features of Traditional Knowledge).

25 UN Press Release, *supra* note 22. To speak of a "veto" power is inconsistent with Canada's constitutional requirements, as set out by a majority of the Supreme Court of Canada in *Mikisew Cree First Nation v Canada*, 2018 SCC 40 (Justice Abella and Justice Martin agreed with the majority on the result but found that there is a duty to consult that applies to all contemplated government conduct, including by legislation).

26 Indigenous and Northern Affairs Canada, News Release, 2-3429, "Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: *Government of Canada* [perma.cc/MV47-L7UL].

27 *Ibid*.

28 Indigenous and Northern Affairs Canada, News Release, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: *Government of Canada* [perma.cc/HRN5-P6MQ].

legislative implementation by Parliament in 2021.[29] Adoption has also now occurred in the other states that were non-signatories to *UNDRIP* in 2007, being Australia, New Zealand, and the US.[30]

III. AN INTERNATIONAL HUMAN RIGHT

Canadian Parliament identifies a larger purpose of implementation as affirming UNDRIP "as a universal international human rights instrument with application in Canadian law."[31]

This reflects *UNDRIP* article 34,[32] but in domestic terms can also be seen as part of a broad reconciliation and renewal of the relationship between Aboriginal and non-Aboriginal peoples in Canada as stipulated in the Final Report of the Truth and Reconciliation Commission of Canada (TRC) in the context of Canada's Residential Schools.[33] Volume 6 of the TRC recommends reconciliation measures.[34] The TRC "Calls to Action" include expressly the adoption and implementation of *UNDRIP*.[35] The process of reconciliation in the context of culture is fully discussed by Justice Thompson in *Servatius v. Alberni School District No. 70*.[36]

More significantly, the focus on *UNDRIP* as an instrument of universal international human rights necessarily directs attention to the terms or content itself and declaring them applicable in Canada raises the recent decision of the Supreme Court of Canada in *Nevsun Resources Ltd. v. Araya*,[37] where the Supreme Court recognized that international human rights can be civilly remedial in Canadian law. Implementation is discussed later.[38]

IV. AFFIRMATIVE MEASURES

Ensuring *consistency* of federal and provincial laws with *UNDRIP* could be read narrowly to simply mean that federal and provincial laws *must not be contrary* to the provisions in *UNDRIP*. This, however, would likely not be sufficient. Affirmative measures are intended in *UNDRIP*. Article 38, noted earlier, requires implementing measures, including legislative measures, to achieve the ends of *UNDRIP*. Accordingly, the legislative implementation requirement of completing an "action plan to achieve the objectives of [*UNDRIP*]" would

---

29 *BC UNDRIP Act*, *supra* note 9; *Canada UNDRIP Act*, *supra* note 9.

30 Chloe Wood, "Protecting Indigenous Rights at Home: A Comparative Analysis of the Way Forward for Domestic Implementation of the United Nations Declaration on the Rights of Indigenous Peoples" (2020) 27 Austl Intl LJ 77. See also First Nations Studies Program: The University of British Columbia, "UN Declaration on the Rights of Indigenous Peoples," online: *Indigenous Foundations* [perma.cc/B6BM-TG82] (detailing the history of *UNDRIP*).

31 *Canada UNDRIP Act*, *supra* note 9, s 4(a).

32 *UNDRIP*, *supra* note 1, art 34 (codifies the right of Indigenous peoples to develop distinctive customs, traditions, and other aspects of their people "in accordance with international human rights standards").

33 *Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (Montreal: McGill-Queen's University Press for The Truth and Reconciliation Commission, 2015).

34 *Ibid.*

35 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), s 45(ii).

36 2020 BCSC 15 at paras 15–37, aff'd 2022 BCCA 421 [*Servatius*].

37 2020 SCC 5 [*Nevsun*].

38 Part VIII, below.

include measures to meet the affirmative objectives. In addition, other articles in *UNDRIP* portend the taking of affirmative measures:

- Article 11(2) provides: "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with [I]ndigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[39]

- Article 31(2) states: "In conjunction with [I]ndigenous peoples, States shall take effective measures to recognize and protect the exercise of [the rights in Article 31(1)]."[40]

- Article 31(1) is quite expansive, recognizing:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.[41]

Hence, to be consistent with these articles affirmative measures will be required.

UNDRIP itself is detailed as to the nature of inclusions within implementation measures by states, but is open as to the elements and scope of the implementing law. These matters may be addressed in both federal and provincial action plans with Indigenous peoples.

V. THE NATURE AND SCOPE OF CULTURAL HERITAGE AND CULTURAL PROPERTY

These popular expressions seek to describe and encompass customs, practices, items, and objects that can be seen as sufficiently identified with a particular Indigenous people so as to give to that people a legal exclusivity of enjoyment in those features. The expression "heritage" reflects history and tradition. The expression "property" presents the element of exclusivity. It directs a focus on items, objects, or things, tangible or intangible, immovable or movable, that are of value to an owner or possessor. The concept of property creates a relationship between an owner or possessor and the "rest of the world," meaning any person who interferes with that ownership or possession. Ordinarily, such a person is a third party outside of any prior legal relationship with the owner or possessor. The concept of property itself creates the legal obligation and is ordinarily remedial through tort.[42]

---

39 *UNDRIP*, *supra* note 1, art 11(2).
40 *Ibid*, art 31(2).
41 *Ibid*, art 31(1).
42 Ordinarily, these torts are trespass to land, trespass to chattels, conversion, and detinue. Private nuisance can also provide an owner or occupier with relief for interference with the use and enjoyment of land.

A. ABORIGINAL AND COMMON LAW PERSPECTIVES

Not every item of property owned or possessed by an Indigenous people is cultural. While diverse in meaning, here "cultural" is adjectival as "relating to a particular society and its ideas, customs, and art."[43] It is not static. Cultural practices are continuing — current in the present generation and innovative in future generations. Items and practices must, however, be part of the particular society.[44] Being integral to the society's way of life and subject to its customs, laws, traditions, or protocols that constitute the cultural dimensions of that society will likely qualify the subject matter as cultural.[45] An assessment of cultural integrality in this context is familiar in Canadian jurisprudence concerning Aboriginal rights in land. Title itself can be met simply by a sufficient degree of exclusive occupation at the time of the assertion of British sovereignty,[46] but when the intensity of occupation is less, a nexus with custom, practice, and culture is required.[47]

Common law requirements for proprietary recognition in chattels and intangibles were prescribed in the recent recognition of property in a domain name.[48] The key features drawn by the Ontario Court of Appeal to allow a recognition of property required that the subject or item be: definable, identifiable by third parties, capable of being taken or assumed by third parties, and must have some permanence or stability.[49]

Ordinarily, these features would be met in any artefact or chattel of cultural dimension. Ancestral bones or body parts may be more problematic from a common law perspective, but common law has utilized proprietary theory in contexts linked with the human body.[50] *UNDRIP* specifically includes "the right to the repatriation of their human remains."[51]

---

43 *Collins English Dictionary*, 14th ed (Glasgow: HarperCollins, 2023) sub verbo "cultural."

44 "Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)" (2001), online (pdf): *World Intellectual Property Organization* [perma.cc/7AYZ-VFFB] [WIPO Fact-Finding Report] (WIPO looked for protocols for use, presentation and protection of the item or practice); Robert G Howell & Roch Ripley, "The Interconnection of Intellectual Property and Cultural Property (Traditional Knowledge)" in Bell & Paterson, *supra* note 2, 223 at 224–25; *UNDRIP*, *supra* note 1, art 11. See also the text accompanying note 74 (reflects the inclusion of continuing and future innovation).

45 WIPO Fact-Finding Report, *ibid* (this report is a remarkable and voluminous resource; it identifies and records the diversity of Traditional Knowledge and expressions of culture from fact finding missions in nine geographically focused areas of the world as at 1998–99).

46 *Delgamuukw*, *supra* note 3 at para 145.

47 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 37–38 [*Tsilhqot'in*] (custom, practice, and culture is particularly necessary for Indigenous nomadic or semi-nomadic peoples). See also *Van der Peet*, *supra* note 5 (describes the combination of Aboriginal perspectives and common law in the content of land title).

48 *Tucows.com Co v Lojas Renner SA*, 2011 ONCA 548 [*Tucows*], leave to appeal to SCC refused, 34481 (24 May 2012); Teresa Scassa & Michael Deturbide, *Electronic Commerce and Internet Law in Canada*, 2nd ed (Toronto: CCH Canadian Limited, 2012) at 272–73; Robert G Howell, "The Nature and Scope of Property in a Domain Name" in Mistrale Goudreau & Margaret Ann Wilkinson, eds, *New Paradigms in the Protection of Inventiveness, Data and Signs* (Montreal: Thomson Reuters Canada, 2019) 93 [Howell, "Property in a Domain Name"].

49 *Tucows*, *ibid* at para 64, citing Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*, [1965] AC 1175 (HL (Eng)) at 1247–48; Howell, "Property in a Domain Name," *ibid* at 97–98 (provides a summary).

50 *Miner v Canadian Pacific Railway* (1911), 3 Alta LR 408 (CA); *Lam v University of British Columbia*, 2015 BCCA 2; Robert K Paterson, "Protecting *Taonga*: The Cultural Heritage of the New Zealand Maori" (1999) 8:1 Intl J Cult Prop 108 at 126, citing *Williams v Williams* (1882), 20 Ch D 659.

51 *UNDRIP*, *supra* note 1, art 12(1).

Similarly, intangible interests may be difficult to define sufficiently to constitute property. Yet there is significant policy choice in the selection of items that carry a proprietary designation. Conceptual analysis alone does not explain why land and means of production is capable of proprietary recognition in Canada, but was limited in the former Soviet Union.[52] Once the above noted conceptual markers are met, what is in and what is out reflects a policy choice. Similarly, proprietary protection per se does not immediately address the *scope* or *extent* of that designation, or the circumstances in which it will be applied.[53]

Certain cultural situations may be better served by recognition through non-proprietary theory such as human rights,[54] privacy, or confidentiality. The common law is flexible in this respect. An obligation of confidence, for the protection of "confidential information," provides a strong illustration. The Supreme Court of Canada has avoided a singular theory of property as a basis of relief for breach of confidence, preferring *relational* theories that present an "obligation of confidence" focused on the imparting of information.[55] In addition, the Supreme Court has also released the awarding of proprietary remedies (such as the constructive trust) from a requirement of finding underlying substantive property.[56] This removes the need to find a proprietary relationship simply to gain the benefit of a proprietary remedy. Law reform agencies have recommended a broadening to encompass "improper acquisition" of information.[57] This would ensure that a "taking" of information, without it being supplied by an earlier holder, would be more readily remedial. While still distinct from a singular proprietary theory, this formulation would present a move towards a property theory.

B. THE *UNDRIP* PROVISIONS

In the context of intangible cultural heritage, *UNDRIP* uses several key descriptions:

1. Traditional Knowledge and Traditional Cultural Expressions; and

2. Intellectual Property "over such cultural heritage, traditional knowledge, and traditional cultural expressions."[58]

---

52 Peter B Maggs, "The Security of Individually-Owned Property Under Soviet Law" (1961) 1961:4 Duke LJ 525.

53 This is particularly evident when new items or interests are recognized as proprietary. The scope of such recognition is left for development in subsequent proceedings: Howell, "Property in a Domain Name," *supra* note 48 (regarding domain names).

54 See generally *supra* notes 31–38 and accompanying text.

55 *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142 [*Schweppes*].

56 For the seminal case in this respect, see *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 (the majority of the Supreme Court awarded relief by constructive trust upon simply a breach of confidence established by a personal relational obligation; Justice La Forest coined the expression "remedial flexibility" at 671–72).

57 The American Law Institute, *Restatement of the Law: Unfair Competition* (Washington, DC: American Law Institute, 1995) at 454–55, 494 (include instances of "improper acquisition"). The position was left open in Institute of Law Research and Reform, "Trade Secrets: Report No 46" (July 1986) at 70, online (pdf): *Alberta Law Reform Institute* [perma.cc/NF34-WCTU](linking back to 66–67). See also UK, The Law Commission, *Breach of Confidence: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Cmnd 8388, 1981) at 170–71; Barry B Sookman, *Computer, Internet and Electronic Commerce Law*, vol 2 (Toronto: Carswell, 2022) ("In the case of surreptitious acquisition of confidential information … the basis for protecting the confidential information is not yet settled" at 4–15, 4–16).

58 *UNDRIP*, *supra* note 1, art 31(1).

The descriptions "traditional knowledge" and "traditional cultural expressions" have long been used by WIPO[59] so as to include a combination of *industrial* innovations and practices, including medicines, food, agriculture, biodiversity, and signs, symbols, and trade indicia; with those of a more *aesthetic* nature in literary, graphic, artistic, and dramatic expressions, including paintings, sculptures and plastic arts, songs, stories, dances, and ceremonies.[60] Broadly speaking, the former presents a nexus with the regular intellectual property categories of patents, trademarks, and industrial designs; the latter with copyright and was earlier referred to as "folklore," though this expression came to be seen as too narrow, and perhaps, too Eurocentric.[61] This demarcation continues in current proceedings and latest draft provisions of WIPO proposed for international implementation.[62] The United Nations Educational, Scientific and Cultural Organization (UNESCO), on the other hand, focusing on preservation, rather than property per se, uses a related expression "intangible cultural heritage."[63]

Consistent with the above classification between industrial and aesthetic, article 31(1) of *UNDRIP*, quoted above, provides expressly for both to be protected.[64] Similarly, article 24 encompasses the right of "Indigenous peoples … to their traditional medicines and to maintain their health practices, including the conservation of … vital medicinal plants, animals and minerals."[65] Article 11(1) includes "manifestations of … cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."[66] Article 12(1) embraces "spiritual and religious traditions, customs and ceremonies."[67]

A requirement of integrality would ordinarily present some measure of antecedence. Land title claims must reflect exclusive occupation *as at the assertion of British sovereignty*,[68] but this may not be relevant to personal property as this requirement appears to reflect the theory of Aboriginal title being a burden on an underlying Crown title.[69] Furthermore, personal property is more diverse and malleable than land. It can more readily be integral to an Indigenous community in a *modern* context. Intangible Aboriginal rights over land, apart from title, must have existed at *first contact* with European colonizers and settlers. This ensures that the claimed right over land is truly of Aboriginal origin without European

---

59 WIPO was established in 1967 as a United Nations specialized agency coordinating and researching intellectual property globally: Arpad Bogsch, *Brief History of the First 25 Years of the World Intellectual Property Organization* (Geneva: World Intellectual Property Organization, 1992).

60 WIPO Fact-Finding Report, *supra* note 44 at 211–12; "'Intangible Cultural Heritage': Working Definitions" (14–17 March 2001), online (pdf): *UNESCO* [perma.cc/Y2DK-Z676]. See also Rosemary J Coombe, "First Nations Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law" in Bell & Paterson, *supra* note 2, 247 at 260; Howell & Ripley, *supra* note 44 at 223–25.

61 Howell & Ripley, *ibid* at 224–25.

62 WIPO Draft Provisions TCE, *supra* note 20; WIPO Draft Provisions TK, *supra* note 20. See also the text accompanying notes 221–32.

63 *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006) (UNESCO is a specialized agency of the United Nations founded in 1946 to promote world peace and security through international co-operation within the noted fields).

64 *UNDRIP*, *supra* note 1, art 31(1) (for the full quoted provision, see the text accompanying note 41).

65 *Ibid*, art 24.

66 *Ibid*, art 11(1).

67 *Ibid*, art 12(1).

68 *Delgamuukw*, *supra* note 3. See also the text accompanying note 46.

69 *Delgamuukw*, *ibid* at para 143. Also, the origin of the law of Aboriginal title is the common law, now protected by the *Constitution Act, 1982*, *supra* note 10, s 35.

influence.[70] Such precise demarcation may be more difficult to draw in the context of art and expressions. Both reflect the experience of a people expressed in a manner traditional to that people. The experience may be post contact, but the *manner* of expression may still be traditional.

UNDRIP encompasses such an outcome by the inclusion in the provisions addressing "cultural heritage,"[71] "traditional knowledge,"[72] and "cultural expressions"[73]: "the right to maintain, protect and develop the *past, present and future* manifestations of … cultures."[74] These include the potential of a cultural item or practice that is entirely new, if still integral to the culture.

VI. THE RELATIONSHIP WITH INTELLECTUAL PROPERTY

UNDRIP article 31, quoted in full earlier, has two features. First, a right to "cultural heritage, traditional knowledge and traditional cultural expressions"[75] and various enumerated items; and second a right expressed as: "[Indigenous peoples] *also* have the right to maintain, control, protect and develop their *intellectual property* over such cultural heritage, traditional knowledge, and traditional cultural expressions."[76]

The reference to intellectual property would appear to confirm a right to develop and commercially exploit innovations and creativities based on the underlying Cultural and Traditional Knowledge. The question, however, is how to interpret the expression "intellectual property" when it is juxtaposed with references to Cultural and Traditional Knowledge and expression. Do these expressions mean the same thing? If so, a too stringent use of the expression "intellectual property" may prove to be restrictive by driving Traditional Knowledge into the concepts and definitions of the categories of existing intellectual property law. These may fall short of meeting cultural dimensions that likely can be protected only through *sui generis* formulation.[77] Many commentators have, nevertheless, utilized concepts of regular intellectual property as a resource.[78] Reform organizations and agencies have likewise provided draft treaty and legislative measures[79] that draw upon regular intellectual property. A singular misappropriation tort theory at common law has similarly been suggested.[80]

---

70 *Delgamuukw*, *ibid* at para 144.
71 *UNDRIP*, *supra* note 1, art 31(1).
72 *Ibid.*
73 *Ibid.*
74 *Ibid*, art 11(1) [emphasis added]. See also the text accompanying note 41.
75 *UNDRIP*, *ibid,* art 31(1).
76 *Ibid* [emphasis added].
77 Howell & Ripley, *supra* note 44 at 236–38.
78 See e.g. Graham Dutfield, "TRIPS-Related Aspects of Traditional Knowledge" (2001) 33:2 Case W Res J Intl L; Michael Halewood, "Indigenous and Local Knowledge in International Law: A Preface to *Sui Generis* Intellectual Property Protection" (1999) 44:4 McGill LJ 953.
79 See e.g. *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity*, 29 October 2010, 3008 UNTS 3 (entered into force 12 October 2014) [*Nagoya Protocol*]; *Convention on the Protection and Promotion of the Diversity of Cultural Expression*, 20 October 2005, 2440 UNTS 311 (entered into force on 18 March 2007); WIPO Draft Provisions TCE, *supra* note 20; WIPO Draft Provisions TK, *supra* note 20.
80 Robert K Paterson & Dennis S Karjala, "Looking Beyond Intellectual Property in Resolving Protection of Intangible Cultural Heritage of Indigenous Peoples" (2003) 11:2 Cardozo J Intl & Comp L 633.

Article 31 of *UNDRIP* may be interpreted as giving two distinct rights. First, there is the underlying Cultural and Traditional Knowledge that may be protected as a *sui generis* interest, just as Aboriginal title to land is so recognized.[81] Second, artistic and marketplace products may be *developed from* this underlying Cultural Knowledge. Perhaps such *derivative products* should ordinarily comply with regular federal and provincial intellectual property laws.[82] This is not stipulated in article 31. Possibly, it is implicit. Intellectual property rights involve product participation in a competitive market with a balance of protection between holder and user.[83] The underlying *sui generis* right to the Traditional Knowledge and Traditional Expression is likely to be in perpetuity with a *conservation* focus.[84]

However, some derivative products or usages may be more difficult than others in demarcating between Traditional Knowledge and Expression on the one hand and modern intellectual property interests on the other. An example of easy demarcation might be the use of a cultural petroglyph as an Official Mark by an Indigenous people. Such usage can, and should in the broader public interest, be done in compliance with the *Trademarks Act*,[85] given that the Indigenous people is using the petroglyph wholly in a derivative manner and as an indicia of origin or source. On the other hand, a modern artwork derived from Traditional Cultural Expression may be difficult to distinguish from the underlying Traditional Expression. It would likely be protected, as a whole, as a *sui generis* cultural item. The position might be more difficult, however, if the cultural component can be readily demarcated. For example, a painting might include a culturally protected totem pole, but only as a 25 percent component in a 75 percent non-cultural presentation. Would the law recognize a split in ownership as between the two rights of *sui generis* and federal copyright? What if the painting is made by a third party person?

In addition, care must be taken to distinguish when an innovative creation is simply an item encompassed within non-Aboriginal intellectual property but held by an individual who happens to be an Indigenous person and who has presented an expression or an innovation that does not infringe any underlying *sui generis* property. Such a work is not a derivative work, but is entirely unrelated to any cultural element.

A. PROPRIETARY AND HUMAN RIGHTS AND THE PUBLIC INTEREST

Within regular intellectual property rights, patent, and copyright exclusivities are upheld in their encouragement of innovation and the advancement of science, competition, and the arts. Seemingly to create monopolies or exclusivities, intellectual property rights are now accepted as capable of enhancing competition through innovation and therefore not

---

81 *Delgamuukw*, *supra* note 3.
82 Howell & Ripley, *supra* note 44 at 241–42.
83 The balance is met with requirements of limited term protection, application of a utilitarian or "social contract" theory, invention/originality, and some user focused defences: *ibid* at 226–29.
84 *Ibid* at 236–37.
85 RSC 1985, c T-13, s 9(1)(n)(iii).

inherently in conflict with the free competition or competitive market theories.[86] The elemental limits of intellectual property rights set an inherent balance enabling eventual public utilization of the relevant innovation or expression. Patent protection requires *novelty*, utility, and inventiveness.[87] The term of exclusivity is limited to 20 years,[88] with specifications in the patent that will enable a person skilled in the particular art to make the disclosed invention upon the expiry of the term of exclusivity.[89] This reflects a utilitarian legal theory of ultimate public interest postponed for only a short period. In copyright, the less stringent requirement of *originality*[90] potentially gives a broader scope of protection, but is limited strictly to *expression*, and not ideas, facts, or other non-copyrightable matters,[91] together with an increasingly robust "user's right" in fair dealing.[92] In trademark law, a mark or other indicia must be *distinctive* of the origin or source of the product or the business to which it relates. Should a mark or indicia cease to be seen by the public as such, for example when the mark or indicia becomes understood as *describing* the particular product,[93] the mark ceases to be valid, whether under the *Trademarks Act*[94] or at common law passing off.[95] The primary essence of trademark law is, therefore, *confusion* of the public or a relevant sector

---

86 Competition Bureau Canada, "Intellectual Property Enforcement Guidelines," (11 August 2023), online: *Government of Canada* [perma.cc/X5E9-8MXR] (these guidelines reconcile the provisions of intellectual property rights and competition law).

87 *Patent Act*, RSC 1985, c P-4, s 2 (definition of "invention" requires that the claimed invention be "any new and useful art, process, machine, manufacture or composition of matter"). The *Patent Act* also creates a year of grace after a disclosure to the public by the applicant (*ibid*, s 28.2(1)(a)). As to "inventiveness," the *Patent Act* requires that the claimed invention must not be "obvious" to a person skilled in the applicable art or science (*ibid*, s 28.3).

88 *Ibid* ("the duration of the patent is twenty years from the filing date," s 44).

89 Canadian Intellectual Property Office, "A Guide to Patents" (2008) at 10, online (pdf): *Government of Canada* [perma.cc/QB84-WMWG] (the guide notes, under that "[t]he description [in the specification of a patent application] is addressed to persons skilled in the art or science to which the invention pertains and must be so written that those persons would be able to put the invention to the same successful use as had the inventor").

90 *Copyright Act*, RSC 1985, c C-42, s 5(1): "every *original* literary, dramatic, musical and artistic work" [emphasis added]. Originality was redefined in *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at paras 16, 25 [*CCH*] as requiring "skill and judgment" that involves some "intellectual effort" rather than "a purely mechanical exercise" that merely requires "sweat of the brow." The Supreme Court rejected the US expression "creativity," and defined the terms "skill" and "judgment" (*ibid* at paras 14–25).

91 *Cinar Corporation v Robinson*, 2013 SCC 73: the Supreme Court applies a "qualitative [substantially] and holistic" test for infringement (*ibid* at para 35), allowing for "an appropriate balance between giving protection to the skill and judgment exercised by [the plaintiff] authors in the expression of their ideas … and leaving ideas and elements from the public domain free for all to draw upon" (*ibid* at para 28). See also notes 233–35 and accompanying text.

92 *CCH*, *supra* note 90 at paras 47–84 restructured fair dealing, describing it as "a user's right" that should not be interpreted narrowly. The user's right was described as an integral part of the act rather than simply a defence. The Supreme Court stipulated factors of "fairness" after a user activity can be brought within one of the "purposes" specified in the *Copyright Act*, *supra* note 90, ss 29, 29.1, 29.2. The Supreme Court's description in *CCH* is consistent with an earlier policy and theoretical stipulation of copyright in *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34 at paras 30–33 (the Supreme Court describes an incentive theory of copyright to achieve "the public interest in the encouragement and dissemination of works of the arts and intellect" and maintaining a balance between owner and user interests). These ideas are also discussed respectively in *CCH*, *ibid* at paras 23, 48.

93 Megan Garber, "'Kleenex is a Registered Trademark' (and Other Desperate Appeals)," *The Atlantic* (25 September 2014), online: [perma.cc/K45P-QKQW] (examples that have been offered of marks losing their distinctiveness in this way, at least in some jurisdictions, include: videotapes, aspirin, dry ice, cellophane, linoleum, thermos, heroin, escalators, kerosene, and laundromats).

94 *Trademarks Act*, *supra* note 85, ss 12–15, 18(1)(a)–(b) (ss 12–15 concern the registrability of trademarks and ss 18(1)(a)–(b) concerns the invalidity of trademark registration).

95 For a description of the tort of passing off, see the text accompanying notes 162–64.

of the public,[96] subject to statutory divergences, including *dilution* or deprecation theory under section 22 of the *Trademarks Act*.[97]

These self-limiting features of intellectual property rights may be seen as affording an appropriate demarcation between proprietary exclusivity and wider dimensions of freedom of expression, especially with the addition of "parody," "satire," and "education" within the purposes of fair dealing from 2012.[98] Other enumerated user rights, defences, or exemptions similarly exist.[99] Yet, the interests of even wider freedom of expression continue to be urged.[100]

A more widely drawn *sui generis* right over a cultural intangible interest will not necessarily have similar limits to those of the principal categories of intellectual property rights. Traditional Knowledge may have exclusivity in perpetuity; and Traditional Expression may not be required to adhere to an expression or idea demarcation. For example, a dispute in May 2017 involved a non-Indigenous artist utilizing a style of an Indigenous art — "Woodland Art." It was resolved politically in news media and the exhibiting gallery cancelled the exhibition.[101] However, the situation would not likely have infringed regular copyright if only the *style* was utilized, as style is idea, not expression. Only particular depictions of that style would be protectable expression.[102] Yet, the Indigenous nature of this style is likely to be seen as distinctive in Indigenous culture.[103] If there were to be a *sui generis* protection of Indigenous *style* of art, would this interfere with a public interest of use and free expression?[104]

---

96 *Trademarks Act*, *ibid*, s 7(b).

97 *Ibid*, s 9(1)(n) (concerning Official Marks). See especially *ibid*, s 9(1)(n)(iii) (provides for any "badge, crest, emblem or mark … (iii) adopted and used by any public authority, in Canada as an official mark for goods or services"). For a reference to this provision in an Indigenous context see *Trademarks Act*, *supra* note 85 and accompanying text. See also *ibid*, s 19 (grants an "exclusive right to the use" of a registered mark with respect to particular goods or services). Violation of section 19 does not require a confusion analysis. Relief by way of dilution or depreciation was sanctioned by the Supreme Court of Canada in *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 38.

98 *Copyright Modernization Act*, SC 2012, c 20, s 21. These categories were inserted in *Copyright Act*, *supra* note 90, s 29.

99 *Copyright Act*, *ibid*, ss 29.1–29.2 (provide respectively for "criticism or review "and "news reporting"; these sections, unlike section 29, prescribe that any dealing for these purposes set out the source of the dealing and "if given in the source, the name of the [creator]").

100 See e.g. Graham Reynolds, "Moving Past *Michelin*: Towards Judicial Reconsideration of the Intersection of Copyright and the *Charter* Right to Freedom of Expression" (2017) 30:1 IPJ 25.

101 Shanifa Nasser, "Toronto Gallery Cancels Show After Concerns Artist 'Bastardizes' Indigenous Art," *CBC News* (28 April 2017), online: [perma.cc/6HY5-JERZ].

102 This is demonstrated in two recent cases involving claims (denied) for copyright in styles of artistic presentation: *Rains v Molea*, 2013 ONSC 5016; *Pyrrha Design Inc v Plum and Posey Inc*, 2019 FC 129, aff'd 2022 FCA 7. The detailed factual analysis by Justice Phelan in *Pyrrha*, *ibid* at trial is instructive as between style or idea (not protected) and expression (protected and subject to an infringement analysis). Justice Phelan noted that no copyright would subsist "in the method of lost wax casting or in the idea of creating jewellery from certain wax seals" (*Pyrrha*, *ibid* at para 94) nor in the selection of seals, as these features were "idea" and in the public domain (*Pyrrha*, *ibid* at para 108). However, the *finishing* of the jewellery by selecting and applying an amount of "oxidizing with blackening chemicals and polishing" involved originality and was considered to fall within expression, but was not infringed (*Pyrrha*, *ibid* at para 107).

103 "What is Woodland Art?" (1 October 2018), online: *Cedar Hill Long House* [perma.cc/DS5H-UDDZ]; "Woodland Art: Three Major Schools of Native Art in Canada," online: *Native Art in Canada* [perma.cc/S8LG-UNR6].

104 *Charter*, *supra* note 24, s 2(b) (which may be relevant in this context, but a common law public interest in use and expression may similarly exist).

Neither federal nor British Columbia legislation implementing *UNDRIP* refer to the relationship between *UNDRIP* implementation and the *Charter*. This may reflect section 25 of the *Charter* that stipulates that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."[105]

A claim of *Charter* infringement was made, but failed on the merits in *Servatius v. Alberni School District No. 70*.[106] The petitioner had claimed a public school program involving Indigenous culture and spirituality infringed her children's right to religious freedom under section 2(a) of the *Charter*. The purpose of a public school program met the requirement of *governmental action*, a necessary prerequisite for a direct application of a *Charter* right. A common law right of exclusivity would not meet this requirement, but common law might still present a "public interest" in free expression invoking "Charter values."[107] Furthermore, *UNDRIP* is implemented in federal and provincial legislation and does contemplate further legislative measures specifically directed to the recognition of cultural rights and exclusivities. These will be "governmental measures" in the same way as copyright is a governmental measure challenged by a relational "free expression" dimension.[108]

The scope of section 25 of the *Charter* has not been determined.[109] It could be interpreted to restrain third party *Charter* rights, in conflict with "treaty or other rights or freedoms" of Aboriginal peoples, or may be focused on reconciling *Charter* rights and section 35 Aboriginal rights with respect to Indigenous persons.[110] Without embarking on this issue, the writers note these potential interpretations as well as the structural requirement of "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[111] Indigenous culture may be seen within such proscription, either generally or upon a balancing of a particular cultural feature with a particular exercise of a *Charter* right.

Indeed, should Indigenous rights in personal property be gained by way of analogy with Aboriginal title to land, the very limited scope for governmental activity with respect to Aboriginal land title[112] might be transposed to personal property encompassed within section 35 of the *Charter*. The impact may be of limited consequence with respect to artefacts or chattels, but knowledge and expressions would present significant issues of free expression

---

105 *Ibid*, s 25.

106 *Servatius*, *supra* note 36.

107 For an analysis of "public interest" in this context, see the text accompanying notes 174–76.

108 See the text accompanying notes 98–99.

109 The scope of section 25 of the *Charter*, *supra* note 24, is unclear. It presents constitutional dimensions arising in contexts that include, but also go well beyond, the current context of Indigenous cultural protection. The Federal Department of Justice notes the absence of direct judicial analysis, and discusses *obiter dicta* and other incidental comments suggest alternative interpretations from immunizing Aboriginal rights from *Charter* challenge, to finding section 25 to be merely an interpretative tool: Department of Justice Canada, "Section 25: Aboriginal and Treaty Rights," online: *Government of Canada Charterpedia* [perma.cc/99KL-2A2F].

110 Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2021, release 1), ch 28, s 28:41.

111 *Charter*, *supra* note 24, s 1.

112 *Tsilhqot'in*, *supra* note 47 at para 76: the Supreme Court notes:

> The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion … is justified under s. 35 of the *Constitution Act, 1982*.

between all parts of society, Indigenous, and non-Indigenous, in Canada. This would be especially so when Traditional Knowledge and expressions of culture are perceived as proprietary interests rather than human rights. Knowledge and expressions are simply not as well defined, identified, or contained as is land or artefacts. User interests could exist in Indigenous Law or might be negotiated in the ongoing consultation process.

While *UNDRIP* and the implementing legislation are silent in this context, should user rights and interests be considered, these may be by way of a fair dealing provision similar to that in copyright as noted earlier,[113] but with a choice of "purposes" more appropriate to, and sensitive of, an Indigenous cultural context,[114] or, an enumeration of detailed exceptions as illustrated in the European Copyright Directive concerning copyright in a digitized information society.[115] The essential difference is the scope of authority given to a court interpreting the exclusion. A fair dealing assessment gives a broad discretion to the court upon an application of factors of "fairness" for the purposes specified. An enumerated list of exceptions on the other hand allows for the inclusion of greater detail in the exception itself, narrowing the scope of judicial interpretation. The latter would be a better option in a context of culture, where any exceptions will likely be narrow and confined. This may be less significant for items (tangible or intangible) commoditized in the marketplace,[116] but most important for all else, especially when intangible usurpation is possible.[117] If cultural protection is afforded upon a human right theory, user interests may be entirely negated.[118]

B. SECTION 35 OF THE *CONSTITUTION ACT, 1982*

Both federal and British Columbia implementations[119] preserve Aboriginal rights under section 35 of the *Constitution Act, 1982*. However, note that section 35 is limited to *recognizing* and affirming "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada."[120]

---

113 See the text accompanying notes 98–99.

114 For example, the purposes of "parody" and "satire" would be inappropriate for inclusion.

115 EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, [2001] OJ, L 167/10, art 5.

116 Howell & Ripley, *supra* note 44: noting that "some aspects of [Traditional Knowledge] may be seen to be commercially based and to be suitably protected under a 'social contract' incentive analysis," (*ibid* at 227) and recommending that "products that are predominantly marketplace or commercial commodities" be subject to a "formulation consistent with market economic theories, but structured to recognize communal ownership and oral traditions" (*ibid* at 237). This would be fair to all market participants.

117 Ordinarily, a tangible cultural artefact that is not commodified can be constrained physically from entering public usage. It is the *intangible* dimension (visual, aural, or digitized) of a cultural feature that cannot be so readily constrained. Furthermore, it is the intangible dimension that gives rise to claims of freedom of expression or a public interest in expression that may infringe the cultural interest.

118 User interests ordinarily follow as a quid pro quo of a proprietary exclusivity and reflect a public interest in defined contexts by way of exemption. A human right is a personal right of an individual or community. User interests are simply not relevant and ordinarily cannot exist: see e.g. George P Nicholas, "Policies and Protocols for Archeological Sites and Associated Cultural and Intellectual Property" in Bell & Paterson, *supra* note 2, 203 at 214 (for example, even "archaeologists today generally work on ancestral human remains only with the permission of the descendant Native community").

119 *Canada UNDRIP Act*, *supra* note 9, s 2(2); *BC UNDRIP Act*, *supra* note 9, s 1(3).

120 *Constitution Act, 1982*, *supra* note 10, s 35(1).

The creation of *modern* cultural heritage, Traditional Knowledge, or Traditional Cultural Expression could accordingly fall outside of section 35, as not existing at the time of section 35 coming into effect in April of 1982.

C. WASTE AND FUTURE GENERATIONS

A *communal* ownership, that is, ownership by an Indigenous people as a whole, may present a need to protect the interest of future generations of that people. By comparison, Aboriginal land title includes a principle described as an "inherent limit" on the scope of utilization by a present generation.[121] Such a limit is conceptually inherent in the scope of a communally held interest. In *Delgamuukw*, Chief Justice Lamer, while emphasizing the *sui generis* nature of Aboriginal land title, analogized the inherent limit to the doctrine of equitable waste, describing the test as acts of "wanton or extravagant acts of destruction."[122]

Communal ownership has no equivalence at common law or in equity. However, future interests and the recognition and protection of future recipients, or potential recipients, of a property interest is well established. Protection of future holders is provided by the doctrine of waste developed at common law between holders of successive interests in property. Equitable waste has broader application. It can apply to other relationships where one party has exclusive possession, but other parties have legal or equitable interests.[123] Hence, the suggested application of this doctrine to the inherent limit on the scope of Aboriginal title to land is compelling and could be equally applied to chattels (artefacts) and intangible interests. However, the scope of intergenerational protection of personal property could also be dealt with under Indigenous Law.[124] Support for this may be found in article 4 of *UNDRIP* which grants Indigenous peoples a "right to autonomy or self-government *in matters relating to their internal and local affairs*, as well as ways and means for financing their autonomous functions."[125]

Such protection is likely, but if it is not, the application of common law (and equity) alongside Indigenous Law[126] could involve the fiduciary duty owed by the Crown to Indigenous people in Canada,[127] in this context *the future generations* of the particular people. Indeed, article 7 of the UNESCO *Declaration on the Responsibilities of the Present Generations Towards Future Generations* concerning cultural diversity and cultural heritage

---

121 *Delgamuukw*, *supra* note 3 at paras 125–30; *Tsilhqot'in*, *supra* note 47 at para 15.

122 *Delgamuukw*, *ibid* at para 130 citing EH Burn & GC Cheshire, *Cheshire and Burn's Modern Law of Real Property*, 14th ed (London: Butterworths, 1988) at 264.

123 Holders in co-ownership ("joint" or "in common") and between mortgagees and mortgagors are common examples. An early British Columbia case provides a useful list of relevant relationships: *New Westminster (City of) v Kennedy*, [1918] 1 WWR 489 at 491 (BCSC) (the Court noted: "[In instances of two] persons being … interested in the title will not equity interfere to prevent him who happens to be in possession from so acting as to injure the other"). The principle can apply to chattels and to intangible interests: see e.g. *Weist v Smith* (1926), [1927] 1 DLR 448 (Sask KB) (a buyer of land had been given possession but was subject to a covenant to crop the land and provide the vendor of the land with payment by way of half of the crop; a failure by the buyer to apply "good husbandry" led to equitable waste being applied).

124 See the text accompanying notes 2, 236 (concerning means of preserving the autonomy of Indigenous legal sources while also enabling that law, customs, and practices to be recognized in federal and provincial law).

125 *UNDRIP*, *supra* note 1, art 4 [emphasis added].

126 See the text accompanying notes 43–49.

127 *Guerin v R*, [1984] 2 SCR 335 (seminal case where the Supreme Court of Canada recognized the fiduciary duty).

stipulates: "The present generations have the responsibility to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations."[128]

Article 12 calls for implementation by states and in effect all entities, including individuals. It therefore ought to guide not only the Crown but also Indigenous peoples.[129] *UNDRIP* itself is silent, except with respect to the spiritual relationship of Indigenous peoples and "lands, territories, waters and coastal seas" for which the protection of future generations is specifically stipulated.[130]

Finally, while Aboriginal land title is inalienable, subject only to surrender to the Crown,[131] personal property has no similar restraint, but an attempted sale or other disposal of a cultural item to a recipient outside of Canada could invoke procedures under the *Cultural Property Export and Import Act*.[132] A primary purpose of this legislation is to protect and preserve within Canada an object "of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences; and … the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage."[133]

This legislation implements, in accordance with the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, provisions to control the export and import of cultural objects to prevent illicit traffic in these objects.[134]

VII. APPROACHES TO IMPLEMENTING CULTURAL PROPERTY AND HERITAGE

UNDRIP articles 11(2) and 31(2) require states to provide "effective mechanisms" or "effective measures" to recognize and protect cultural items[135] and article 38 requires "appropriate measures, including legislative measures, to achieve the ends of this Declaration."[136] Such implementation can be achieved within a federal and provincial framework in the following ways, each presenting particular features:[137]

1. By common law formulation that affords proprietary status to the Indigenous people's Traditional Knowledge and expressions of culture and gives common law

---

128 *Declaration on the Responsibilities of the Present Generations Towards Future Generations*, 29 C/Res 31, UNESCOR, 29th Sess, UN Doc 29 C Resolutions + CORR (1997) 69 at 71.

129 No formal implementation has been affected in Canada to date.

130 *UNDRIP*, *supra* note 1, art 25.

131 *Delgamuukw*, *supra* note 3 at para 113.

132 RSC 1985, c C-51.

133 *Ibid*, ss 11(1)(a)–(b); *Canada (AG) v Heffel Gallery Limited*, 2019 FCA 82 (for a recent analysis of these provisions).

134 *Supra* note 4; Robert K Paterson, "The 1970 UNESCO Convention: The Canadian Experience" in Jorge A Sànchez Cordero, ed, *The 1970 UNESCO Convention: New Challenges* (Mexico: Universidad Nacional Autónoma de México, 2013) 229 (for a discussion of the implementation of the 1970 UNESCO Convention in Canada and the *Cultural Property Export and Import Act*).

135 Part IV, above; *UNDRIP*, *supra* note 1, arts 11(2), 31(2).

136 *UNDRIP*, *ibid*, art 38.

137 Part VII.A, below (for common law tort); Part VII.B, below (for option 1(b), Canada, s 4(a), and *Nevsun*); Part VII.C, below (for legislative measures).

relief through tort liability for infringement by third parties. This may be predicated on:

a. Simply a common law formulation implementing a policy need as has occurred in other contexts and in a manner similar to a claim for Aboriginal title to land,[138] or

b. The express recognition by Parliament that *UNDRIP*, as an instrument, constitutes an international human right with application in Canadian law, thereby enabling an application of the principles stipulated by the Supreme Court in *Nevsun*.[139]

2. By Parliament, in consultation with Indigenous peoples, enacting comprehensive legislation in the manner of current federal intellectual property, but tailored to Indigenous intellectual property, Traditional Knowledge, and expressions of culture, while also enabling compliance with the developing international recognition and protection of Traditional Knowledge and expressions of culture.

3. By common law application of a principle analogous to a "choice of law" theory found in conflict of laws (private international law) to bring the Indigenous Law to application in the courts.

In all the options, care must be taken to preserve the jurisdictional component for Indigenous Law which must be recognized by, but not assimilated into, federal or provincial law. This reflects *UNDRIP*, article 4, providing Indigenous peoples with a "right to autonomy or self-government in matters relating to their internal and local affairs."[140]

A. OPTION 1(A): COMMON LAW TORT

As noted, this option could involve a claim for common law proprietary protection for an artefact (chattel) or an intangible interest quite apart from any specific objective of implementing *UNDRIP*, although the latter would certainly strengthen a claimant's position. The common law process has to respond in particular litigation on the facts and claim presented and *UNDRIP* implementing legislation is to be construed "not as abrogating or derogating from [rights recognized under section 35 of the *Constitution Act, 1982*]."[141] Substantial judicial authority already exists in this context with respect to land title.[142]

Common law might also be seen as an appropriate component of implementation of *UNDRIP*. It may be another tool, especially for artefacts (chattels), but also for intangibles,

---

138 See the text accompanying notes 46–47; Catherine Bell, "Ownership and Trade of Aboriginal Cultural Heritage in Canada" in Christoph B Graber, Karolina Kuprecht & Jessica C Lai, eds, *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Cheltenham: Edward Elgar, 2012) 362 at 362, 373–77 (cultural connection with land presents a broad topic developed by Catherine Bell).

139 *Nevsun*, *supra* note 37. See also text accompanying notes 31–42.

140 *UNDRIP*, *supra* note 1, art 4.

141 *Canada UNDRIP Act*, *supra* note 9, s 2(2); *BC UNDRIP Act*, *supra* note 9, s 1(3) (to the same effect as the *Canada UNDRIP Act*).

142 See generally the text accompanying notes 46–47, 112, 121–22, 131.

although legislation must surely be needed to achieve international integration of protective measures.[143] For example, common law and legislative measures have a long history of integration in providing relief in the context of federal trademark law and common law passing off[144] and in protection of trade secrets through confidential information.[145] Of course, a court would need to be alert to the broad consultative process of the stipulated action plan.[146]

In the normal case, recognition of property or an exclusivity of enjoyment requires recognition of a tort to provide relief for violation of the property interest. For interference with land relief flows through the tort of trespass to land. The existing torts of conversion and trespass to chattels are available for an interference with a tangible artefact or item of culture or heritage. Conversion is difficult to define,[147] but in essence is an intentional taking to deny an owner's right of ownership and possession or to intentionally and substantially destroy the item.[148] Ownership per se can be protected only if the owner has possession or "an immediate right to possession."[149] Ordinarily, quantum of damage is the replacement cost of the chattel ("full market value") at the time of the conversion when theoretically an owner would have replaced the lost item.[150] Trespass to chattels addresses a lesser level of interference than that required to establish conversion. Today this would include direct interferences such as touching, using, moving, or causing some damage to the chattel.[151] The origin in the form of action for trespass means the wrong is actionable per se or without proof of damage,[152] but protects only a holder's possessory right.[153] Accidental touching is not actionable as trespass, but may constitute negligence.

Remedies in trespass and conversion would ordinarily be limited by statutes of limitation, which could present issues in relation to property that has been removed in earlier times from Indigenous peoples and may cause the courts to consider whether rights under section 35 of the *Constitution Act, 1982*[154] could override limitation periods. The scope of section 35 in

---

143 Part VII.C, below.

144 *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65.

145 *Schweppes*, *supra* note 55.

146 *Canada UNDRIP Act*, *supra* note 9, s 5 (implementation measures); *BC UNDRIP Act*, *supra* note 9, s 3 (stipulates consultation and co-operation with Indigenous peoples).

147 William L Prosser, "The Nature of Conversion" (1957) 42:2 Cornell LQ 168 (provides many examples).

148 The origin of the tort of conversion was trespass on the case for Trover for which the originating writ recited that an owner had "casually lost the goods and chattels out of his possession" and "afterwards [the taker] *converted* and disposed of the goods and chattels for his … own use": FW Maitland, *The Forms of Action at Common Law: A Course of Lectures*, ed by AH Chaytor & WJ Whittaker (Cambridge: Cambridge University Press, 1954) at 92 [emphasis added]. In Canada: Lewis N Klar et al, *Remedies in Tort*, vol 3 (Toronto: Thomson Reuters, 1987) (looseleaf updated 2018, release 7), ch 4 (in chapter 4, titled "Conversion and Detinue," Janet M Ames provides a comprehensive coverage).

149 Klar, *ibid* at 4-27.

150 *Steiman v Steiman* (1982), 18 Man R (2d) 203 (CA), leave to appeal to SCC granted (1983), 52 NR 236 (the appeal was not pursued; the Manitoba Court of Appeal distinguishes quantum for the tort of detinue (the refusal without justification to return an item) being the full market value at the time of the judgment).

151 The position concerning "intent" in the five "intentional" torts, including trespass to chattels, arising from the historical originating writ of trespass (as opposed to proceedings flowing from action on the case) is different from the modern position in the United Kingdom. Canadian common law reflects more accurately the historical or original formulation. All that need be established by a plaintiff is a direct contact. A prima facie action is then established. The burden of proof is then on the defendant to establish an absence of intent, in effect by way of a defence: Allen M Linden & Lewis N Klar, *Canadian Tort Law*, 11th ed (Toronto: LexisNexis Canada, 2018) at 35–37, 81, n 1.

152 In the absence of actual damage only a nominal amount is likely. See also Klar, *supra* note 148 at 4-13.

153 *Ibid*.

154 See the text accompanying note 10.

this respect is a matter for future analysis. Furthermore, neither tort provides relief for interference with an *intangible* interest.[155] In another context — digital media and digital products — one of the writers has urged the encompassment of some intangible commodities within both torts in Canada.[156] This has not yet happened, but specific instances do exist where discrete formulations have recognized property in novel intangible interests. Specifically, the tort of appropriation of personality formulated by the Ontario Court of Appeal in *Krouse v. Chrysler Canada Ltd.* provided an exclusivity to exploit one's personality by use of "image, voice or otherwise,"[157] as a commercial advantage, derived specifically from "an action for trover or conversion in its modern form."[158]

The subsequent application of this tort has encompassed both property[159] and privacy[160] interests. Importantly, the relief provided is the same as that proposed for cultural interests — the exclusivity of use of protected indicia or intangible commodities against usurpation by third parties. The key element is a significant *taking*, *usurpation*, or *misappropriation* of the persona (in the sense of character or identity) of another person. Ordinarily, the damage to the plaintiff is proprietary being the loss of the plaintiff's exclusive right to market the plaintiff's persona, or if a privacy violation, injured feelings because of an intrusive taking or the public association or linkage presented by the defendant.[161]

The tort of appropriation of personality, should be distinguished from the tort of passing off. The latter requires an element of *confusion* in the sector of the public to which the

---

155 Klar, *supra* note 148, s 11.1; *Century 21 Canada Limited Partnership v Rogers Communications Inc*, 2011 BCSC 1196 at paras 283–99 (recent British Columbia case discussing trespass to chattels in the context of websites and electronic signals — has a physical object entered upon something sufficiently tangible?).

156 Robert G Howell, *Canadian Telecommunications Law* (Toronto: Irwin Law, 2011) at 164–68 [Howell, "Telecommunications Law"] (some developments in this direction in the USA are discussed in this reference source). See also Klar, *ibid*.

157 (1973), 40 DLR (3d) 15 (Ont CA) at 31.

158 *Ibid* at 23, 24, 27. See also Robert G Howell, "The Common Law Appropriation of Personality Tort" (1986) 2 IPJ 149 at 168–71; Andrea Slane, "Mixed Means for Mixed Motives: The Role of Unfair Profit in Cases Involving Privacy Invasion and Identity Misuse" in Goudreau & Wilkinson, *supra* note 48, 183. See generally Huw Beverley-Smith, *The Commercial Appropriation of Personality* (Cambridge: Cambridge University Press, 2004) (on English, Canadian, and Australian law).

159 *Athans v Canadian Adventure Camps Ltd* (1977), 80 DLR (3d) 583 at 595 (Ont (H Ct J)) (noting that the taking had impaired the defendants "exclusive right" to "[market] … his personality"); *Joseph v Daniels* (1986), 11 CPR (3d) 544 at 549 (BCSC) (noting: "The cause of action is proprietary in nature and the interest protected is that of the individual in the exclusive use of his own identity"); *Gould Estate v Stoddart Publishing Co Ltd* (1996), 74 CPR (3d) 206 at 210 (Ont Ct J (Gen Div)), aff'd on other grounds (1998), 80 CPR (3d) 161 (Ont CA), leave to appeal to SCC refused (1999), 82 CPR (3d) vi [*Gould Estate*] (the trial judge wrote: "Did Gould in fact have any proprietary rights in his image, likeness or personality"; the proprietary nature of the common law proceeding is confirmed by the acceptance of the descendability of the common law right). See also *Horton v Tim Donut Ltd* (1997), 75 CPR (3d) 451 (Ont Ct J (Gen Div)), aff'd (1997), 75 CPR (3d) 467 (Ont CA).

160 *Dowell v Mengen Institute* (1983), 72 CPR (2d) 238 (Ont H Ct J) (although no express reference was made to privacy and a factual finding of consent negated relief, the reasoning under appropriation of personality proceeded on the defendant having taken the persona of the defendant for its benefit, though not necessarily a commercial benefit); Howell, "Telecommunications Law," *supra* note 156 at 197; *Gould Estate*, *ibid* (although there expressed to be proprietary, was contextually more of a privacy nature, being essentially a biography). See also *Privacy Act*, RSBC 1996, c 373, s 3(2): "It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services [subject to consent]." Section 5 provides that the privacy nature of this statutory proceeding might be seen as confirmed by the action being extinguished by the death of the person so usurped.

161 Klar, *supra* note 148, ch 24 (refers to appropriation of personality as involving "elements of both privacy and property, often simultaneously" at 24-40). See also Amy M Conroy, "Protecting Your Personality Rights in Canada: A Matter of Property or Privacy?" (2012) 1:1 Western J Leg Studies.

product relates, even if that confusion is sometimes quite minimal in content.[162] Although some of the analysis in *Krouse* could tend towards appropriation of personality being a broad version of passing off,[163] the Court did not seek any public confusion and as noted, analogized the new tort directly with conversion, involving no element of confusion.

While passing off might be available should an artefact or service be falsely presented or advertised so as to confuse purchasers that it is genuinely crafted by an Indigenous person with authority to do so,[164] a disclaimer by a seller can avoid the misrepresentation[165] while still constituting a usurpation of the cultural heritage. Accordingly, a tort drawing upon appropriation of personality, but termed "Appropriation of Traditional Knowledge and Expression of Culture" would be a more effective remedy for an Indigenous people.

Such a formulation is a narrowed and focused version of a general misappropriation tort usefully recommended by Paterson and Karjala[166] with reference to the decision of the US Supreme Court in *International News Service v. Associated Press.*[167] This case recognized a "quasi property"[168] in news gathered and brought to the US from the 1914–1918 war in Europe.

The difficulty, as Robert Paterson and Dennis Karjala note, is the lack of detailed formulation for this broad proceeding and a consequent reluctance to utilize it.[169] Indeed, such a proceeding has been rejected by the Privy Council on appeal from New South

---

162 The key elements of the tort of passing off are: (1) the establishing of business goodwill in the plaintiff; (2) the presence of a misrepresentation by the defendant so as to cause public confusion as to the source of the product or business; and (3) damage or the likelihood of damage to the plaintiff. This seminal modern formulation of three principle elements was given in *Ciba-Geigy Canada Ltd v Apotex Inc*, [1992] 3 SCR 120.

163 Robert G Howell, "Publicity Rights in the Common Law Provinces of Canada" (1998) 18:3 Loyola Los Angeles Entertainment L Rev 487 at 493:

> Arguably, the formulation of the appropriation tort in *Krouse* was a hybrid of the passing off tort and the right of publicity .... [h]owever, the court did not adhere to the passing off analysis, which required an express reference to an element of misrepresentation or to a likelihood of public confusion. Instead, the court's reference to an "endorsement" factor may be seen as part of a factual element constituting the "sufficiency" of a "taking."

164 The tort of passing off includes misrepresentations as to the essential elements of a product: *Warnink v Townend & Sons (Hull) Ltd*, [1979] AC 731 (HL (Eng)) (being the final case in a line of "alcoholic beverage" cases and the ingredients in those beverages). In Canada: *Institut National des Appellations d'Origine des vins et Eaux-de-Vie v Andres Wines Ltd* (1990), 30 CPR (3d) 279 (Ont CA), leave to appeal to SCC refused, [1990] 33 CPR (3d) v. The issue of authenticity of Indigenous art products and tourism services has given rise to systems of branding and other initiatives in an industry worth millions of dollars. On the west coast, a scheme of certifying by sticker or tag Indigenous art and other products measured on a three-tier criteria system was commenced in 2014 by Shain Jackson, a Coast Salish artist: "Authenticity Tags: Authentic Indigenous," online: *Authentic Indigenous* [perma.cc/PQ2C-UX39]; "About Us: Authentic Indigenous," online: [perma.cc/7Z5U-FSCK]. The movement is reported on in the Vancouver Sun: Kevin Griffin "Authentic Indigenous: New Program Helps Ensure Artists are Fairly Paid," *Vancouver Sun* (7 October 2014), online: [perma.cc/23S4-PE5A]. See also Aboriginal Tourism Association of BC, "Guide to Applying to the Aboriginal Cultural Tourism Authenticity Program," online (pdf): *Indigenous Tourism BC Corporate* [perma.cc/KRN9-RGKU]; "National Guidelines: Indigenous Cultural Experiences," online: *Indigenous Tourism Association of Canada* [perma.cc/2MF6-A9Y5].

165 *National Hockey League v Pepsi-Cola Canada Ltd* (1992), 70 BCLR (2d) 27 at 45 (BCSC), aff'd (1995), 2 BCLR (3d) 3 (BCCA) [*NHL*].

166 Paterson & Karjala, *supra* note 80 at 658–59.

167 248 US 215 (1918) [*International News Service*].

168 *Ibid* at 236.

169 Paterson & Karjala, *supra* note 80 at 659.

Wales,[170] and in British Columbia.[171] Also, the Supreme Court of Canada found a formulation in the nature of *International News Service* to be within the then section 7(e), *Trademarks Act*, and was struck by the Supreme Court as outside federal legislative jurisdiction given the breadth of purported application of section 7(e).[172] It could literally encompass all business values and intellectual property rights.

However, this is not the position if the formulation is narrowed in the style similar to the tort of appropriation of personality or the equivalent US proceeding, the right of publicity,[173] but with a focus on cultural interests. Both are narrowly defined, encompass only human related interests, and have public interest limitations.[174] Indeed, a common law public interest in communication of depictions and information has been linked directly with a freedom of expression principle.[175] This can be seen as reflective of the principle that the *Charter* can apply directly only to governmental actions, yet developments at common law ought to be consistent with "Charter values."[176]

The right of publicity proceeding is a common law right in the US. It has been described by the United States Supreme Court (interpreting Ohio common law) as a "discrete kind of 'appropriation'"[177] that is "analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavours."[178] The Court further endorsed relief by unjust enrichment for violation by a defendant.[179]

The US right of publicity is still, however, a business-based tort with an economic incentive to invest to the ultimate benefit of the public.[180] By itself, any purely business focused formulation would be a useful comparison, but not sufficient in protecting cultural interests.[181] Yet, as noted, the Canadian formulation and subsequent development in appropriation of personality is different. It has succeeded in encompassing non-economic interests.[182] Recent support is afforded by the recognition in Ontario in *Jones v. Tsige* of a

---

170 *Cadbury Schweppes Pty Ltd and others v Pub Squash Co Pty Ltd*, [1981] 1 All ER 213.

171 *Westfair Foods Ltd v Jim Pattison Industries Ltd* (1989), 26 CPR (3d) 28 (BCSC), aff'd (1990), 68 DLR (4th) 481 (BCCA); *NHL*, *supra* note 165.

172 *Trademarks Act*, *supra* note 85 (section 7(e) was repealed in 2014 by the *Combating Counterfeit Products Act*, SC 2014, c 32, s 10); section 7(e) was held ultra vires Parliament by the Supreme Court of Canada in *MacDonald v Vapor Canada Ltd*, [1977] 2 SCR 134 at 156 (section 7(e) had provided: "7. No person shall … (e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada" at 141).

173 The seminal US case identifying a proprietary right in personality and its related marketing potential was *Haelan Laboratories Inc v Topps Chewing Gum Inc*, 202 F (2d) 866 (2nd Cir 1953). Today, the topic supports a two-volume treatise: J Thomas McCarthy & Roger E Schechter, *The Rights of Publicity and Privacy* (Thomson Reuters, 2021).

174 *Krouse*, *supra* note 157 at 30.

175 *Gould Estate*, *supra* note 159 at 213: referring to *Krouse*, *ibid*, the Court notes:

> While Canada does not have a constitutional provision akin to the [USA] First Amendment which is applicable to the private law, no principled argument has been advanced to suggest that freedom of expression considerations should not animate Canadian courts in identifying the public interest and placing limits on the tort … freedom of expression would seem to be a compelling and reasonably coherent [for this].

176 Hogg & Wright, *supra* note 110, ch 37, s 37.12 (for a full discussion of this principle).

177 *Zacchini v Scripps-Howard Broadcasting Co* (1977), 433 US 562 at 572.

178 *Ibid* at 573.

179 *Ibid* at 576.

180 *Ibid* at 576–77.

181 Paterson & Karjala, *supra* note 80 at 659 (reaches a similar conclusion with respect to relief based on *International News Service*, *supra* note 167).

182 See the text accompanying notes 161–62.

common law privacy tort inclusive of infringement by "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness."[183]

The proceeding involved intrusion rather than appropriation, but the Ontario Court of Appeal recognized all four categories or privacy torts, including appropriation, from William Prosser's well-known formulation in 1960.[184]

As noted,[185] the essential advantage of both publicity (property) and privacy in this context is the narrow focus upon the taking or usurpation of a human persona. As such, a tort of this nature, styled "Appropriation of Traditional Knowledge and Expressions of Culture," providing relief in most contexts of usurping an intangible cultural interest, must be equally narrowed and focused in a definitional sense with respect to the cultural feature that is appropriated.[186]

B. OPTION 1(B): CANADA, SECTION 4(A), AND *NEVSUN*

As noted earlier,[187] Parliament has affirmed *UNDRIP* as "a universal international human rights instrument with application in Canadian law."[188] This provision and *Nevsun*,[189] decided in February 2020, may afford a further vehicle of relief.

A closely divided Supreme Court in this interlocutory decision found *customary* international law to be part of Canadian common law enabling the Supreme Court to deny a defendant's motion to strike the plaintiffs' proceedings on the basis that the claim had no reasonable prospect of success. The Eritrean government had forced the plaintiffs, by indefinite conscription to Eritrean military service, to work in a mine owned by the Canadian corporate defendant in Eritrea. The conscription may have violated the plaintiffs' human rights recognized in international law. The majority (five Justices) found such rights to potentially enable a civil cause of action against the Canadian defendant under Canadian common law including any relevant customary international law. Customary public international law was held to be "automatically incorporating customary international law into domestic law."[190]

The Supreme Court found international human rights to have developed from "a state-centric to a human-centric conception"[191] making "the individual an integral part of this legal domain"[192] with "discrete legal entitlements, held by individuals" and respected by all other

---

183 2012 ONCA 32 at para 18.

184 William L Prosser, "Privacy" (1960) 48:3 Cal L Rev 383. See also Linden, *supra* note 151 at 64–68.

185 See the text accompanying notes 161–63.

186 See note 145 and accompanying text.

187 *Canada UNDRIP Act*, *supra* note 9, s 4(a).

188 *Ibid*; should jurisprudence surrounding *UNDRIP* develop significantly within a human rights context, it may well be that *UNDRIP* could be recognized in a universal manner similar to the recognition that has been given to the *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, in which case, the principles developed under the 1948 declaration could be drawn upon in the interpretation of the provisions of *UNDRIP*. Going forward, this could be an issue to monitor and upon which future research and analysis could be directed.

189 *Nevsun*, *supra* note 37.

190 *Ibid* at para 90.

191 *Ibid* at para 108 citing Payam Akhavan, "Canada and International Human Rights Law: Is the Romance Over?" (2016) 22:3 Can Foreign Policy J 331 at 332.

192 *Ibid* at para 107.

persons.[193] The common law principle "for every wrong, the law provides a remedy"[194] enabled a court to "extend existing principles to cover the situation or to apply an existing remedy to redress the injustice."[195]

Importantly, the Supreme Court found that while a remedy could be a private law tort action, the violation of customary international law may require "different and stronger responses" than simply a tort claim having regard to gravity, impact, and deterrence.[196] Indeed, a *direct remedy* was contemplated as the creation of a new tort could "dilute" the particular rights.[197] Ultimately, the remedy was left to the trial judge to determine.[198]

In the present situation there is no need to find customary international law, nor to determine if the *UNDRIP* provisions are within Canadian law. The implementing legislation has expressly recognized *UNDRIP* as an "international human rights instrument with application in Canada."[199] Describing *UNDRIP* as "a human rights instrument" suggests all provisions contained in the Declaration are remedial — directly, perhaps. This also meets the principal objection of the dissenting Justices in *Nevsun* that adoption of norms of international law ought to be left to Parliament.[200]

Overall, therefore, the key issue is whether there should be a *direct remedy* or a remedy channeled through an existing or new tort proceeding. If the latter is needed, the analysis provided earlier[201] may provide some guidance. A direct remedy may be preferred given the determination of the Supreme Court in *Nevsun* to not dilute the particular features of such international human rights as may be applicable.[202]

Such a policy is similar to that found by the Supreme Court in *Vancouver (City) v. Ward*[203] when recognizing monetary damages for violation of section 8 of the *Charter* concerning unreasonable search or seizure.[204] The award was given directly for the *Charter* violation under section 24 of the *Charter* which enables a court to award "such remedy as the court considers appropriate and just in the circumstances."[205]

The Supreme Court set out a number of steps and criteria. These may provide guidance should direct relief be granted.

There are differences. First, an infringement of a *Charter* right involves governmental action, not that of a private entity.[206] This may render some of these steps or criteria

---

193 *Ibid* at para 110.
194 *Ibid* at para 118, citing *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*, [1985] 1 AC 871 at 884 (HL (Eng)) (in Latin: *ubi jus ibi remedium*).
195 *Ibid*.
196 *Ibid* at para 129.
197 *Ibid* at para 128.
198 *Ibid* at para 131.
199 *Canada UNDRIP Act*, *supra* note 9, s 4(a). See also the text accompanying notes 31, 187.
200 *Nevsun*, *supra* note 37 at paras 294–305.
201 Part VII.A, above.
202 See the text accompanying notes 189–98.
203 2010 SCC 27 [*Ward*]; Linden, *supra* note 151 at 73–74 (for a succinct commentary).
204 *Charter*, *supra* note 24, s 8.
205 *Ibid*, s 24(1).
206 *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573; for a discussion of this principle in other contexts see the text accompanying notes 107, 176.

inappropriate, or may engage different criteria. Second, *Charter* section 24 directly stipulates remedial measures. Such measures are not addressed in the *UNDRIP* implementation. However, as noted earlier,[207] the Supreme Court in *Nevsun* found common law to provide a remedy for every wrong. The nature of the remedy was left open in *Nevsun*.[208] Nevertheless, the contexts of *Charter* rights and human rights under *UNDRIP* are sufficiently close contextually to benefit from comparison.

Establishing a breach is the first step.[209] The second is directed in *Ward* to the appropriateness of damages, having regard to *compensation, vindication,* and *deterrence*.[210] The focus in *Ward* was on damages and compensation, but a principle of remedial flexibility noted earlier,[211] could enable these criteria to be weighed with respect to *any relief* as may be "'appropriate and just.'"[212] The third step considers "countervailing considerations," but is largely left for future development.[213] Additionally, *Ward* expressly includes injured feelings, physical, psychological ("distress, humiliation, embarrassment, and anxiety"[214]), and pecuniary loss.[215] Perhaps, however, proprietary protection against third party usurpation is not included under a *Charter* analysis, given the absence from the *Charter* of direct protection of property. Step four involves accessing quantum.[216]

The above steps and test of "appropriate and just" emphasizing compensation, vindication, and deterrence are relevant, at least to affording a broad framework of relief for a human rights infringement under *UNDRIP* implementation.[217] The Supreme Court in *Ward* utilizes this framework within a functional interpretation of section 24 of the *Charter* to ensuring proper constitutional governance by the state as a matter of public law relief against the state, "not against individual actors," which was left to "existing causes of action."[218] Relief for infringements of *UNDRIP* (as implemented) must include individual actors and ought to encompass injury and loss as well as proprietary relief in a manner similar to infringement of intellectual property rights in federal and provincial law.[219] Indirectly, this would achieve an immediate governmental or public law functional objective of contributing to the reconciliation and renewal of the relationship between Indigenous and non-Indigenous peoples in Canada.[220]

---

207 *Nevsun*, *supra* note 37 at para 118. See also the text accompanying notes 194–95.

208 *Nevsun* returned the matter to the trial judge to determine an actual approach to be taken in implementing the judgment of the Supreme Court: *Nevsun*, *ibid* at para 131. See also the text accompanying note 186.

209 *Ward*, *supra* note 203 at para 23.

210 *Ibid* at para 25.

211 See the text accompanying note 56.

212 *Ward*, *supra* note 203 at para 24, citing *Charter*, *supra* note 24, s 24(1).

213 *Ibid* at paras 32–33.

214 *Ibid* at para 27 [citations omitted].

215 *Ibid* at para 27.

216 *Ibid* at paras 46–57.

217 *Canada UNDRIP Act*, *supra* note 9, s 4(a).

218 *Ward*, *supra* note 203 at paras 22, 24.

219 David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks*, 2nd ed (Toronto: Irwin Law, 2011) (for discussion of relief for infringement of intellectual property rights in federal and provincial law).

220 See the text accompanying notes 31–36.

C. OPTION 2: LEGISLATIVE MEASURES

Legislative measures have many advantages, particularly with respect to *intangible* cultural items that resemble existing intellectual property rights. There are earlier recommended measures.[221] Robert Paterson provides a recent comprehensive analysis from a Canadian perspective.[222] The Intergovernmental Committee of the WIPO has developed sets of draft provisions (WIPO Draft Provisions) in three categories of protection:

(i) Traditional Cultural Expressions;

(ii) Traditional Knowledge; and

(iii) Genetic Resources.[223]

The WIPO Draft Provisions are text based "model laws" that provide options or alternative formulations for national states to consider for adoption. The objective is a global framework that can facilitate global protection, so important for intangible commodities in an age of instant global communication media. They are consistent with the provision of *UNDRIP*, and implementing legislation, subject to the consultation and co-operation requirements.[224] Indeed, the WIPO Draft Provisions are expressed as not "diminishing or extinguishing"[225] rights given now or acquired in the future under national law (which in a Canadian context would appear to capture, for example, section 35, *Constitution Act, 1982*),[226] or "enshrined in the United Nations Declaration on the Rights of Indigenous Peoples,"[227] which is expressed to prevail in the event of conflict.[228]

As noted earlier, implementation of *UNDRIP* defers to section 35 of the *Constitution Act, 1982*[229] so any judicial determination at common law and section 35 with respect to land, chattels, and tangibles would likely continue.

International enforcement is facilitated in the WIPO Draft Provisions by the inclusion of a "national treatment" requirement on participating states, which would provide that the same rights and benefits recognized in relation to Traditional Knowledge, or Traditional Cultural

---

221 Secretariat for the Pacific Community, "Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture" (2002), online (pdf): *World Intellectual Property Organization* [perma.cc/4RH9-V2Q3]; Rodrigo de la Cruz I, "Regional Study in the Andean Countries: 'Customary Law in the Protection of Traditional Knowledge'" (November 2006), online (pdf): *World Intellectual Property Organization* [perma.cc/E74H-7SN4]; *Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore within the Framework of the African Regional Intellectual Property Organization*, 9 August 2010, (entered into force 11 May 2015, amended 6 December 2016).

222 Paterson, "Cultural Expression Systems," *supra* note 20.

223 WIPO Draft Provisions TCE, *supra* note 20; WIPO Draft Provisions TK, *supra* note 20.

224 See the text accompanying notes 9, 127.

225 WIPO Draft Provisions TCE, *supra* note 20, art 12.2; WIPO Draft Provisions TK, *supra* note 20, art 14.

226 *Constitution Act, 1982*, *supra* note 10, s 35.

227 WIPO Draft Provisions TCE, *supra* note 20, art 12.2 (the quoted passages are square-bracketed in the original source to indicate that they are subject to revision; alternative draft provisions are provided); WIPO Draft Provisions TK, *supra* note 20, art 13.2 (the quoted passages are square-bracketed in the original source to indicate that they are subject to revision; alternative draft provisions are provided).

228 WIPO Draft Provisions TCE, *ibid*, art 12.3 (the quoted passages are square-bracketed in the original source to indicate that they are subject to revision); WIPO Draft Provisions TK, *ibid*, art 13.3 (the quoted passages are square-bracketed in the original source to indicate that they are subject to revision).

229 See the text accompanying note 10.

Expressions, as applicable, by a Member State or Contracting Party for beneficiaries who are its nationals would extend to foreign beneficiaries in its territory.[230]

A comprehensive analysis of each of these draft model provisions would support distinct and substantial commentary in each instance. Yet, some highlighting is useful at this stage in the process of "consultation and cooperation" between Canada, British Columbia, and Indigenous peoples in developing an "action plan" to achieve implementation of *UNDRIP*.[231] Such a process has already been described as requiring a "down up" and an "up down" integration of law and policy concerning culture and heritage.[232] A highlighting of key features of the WIPO Draft Provisions will demonstrate expectations as well as limitations.

1. TRADITIONAL CULTURAL EXPRESSIONS

This category is related to copyright. The other categories are related more to the traditional industrial properties, especially in a patent related context.[233] Traditional Cultural Expressions may be static or dynamic, verbal, musical or dramatic, and tangible or intangible.[234] While the focus is on the form of expression, the model laws do not expressly stipulate an application of copyright jurisprudence, demarcating protectable "expression" from unprotectable "idea," that would exclude particular styles or systems of expression.[235]

Yet, a distinct "public domain" as well as exceptions, or user interests, are contemplated.[236] The scope of these will likely be determined by national legislation.[237] Of significance, the scope of "public domain" might be said to include Indigenous subject matter that has become generic or stock knowledge within the wider community.[238] The context or nature of Traditional Cultural Expressions provides consistent options of accord with Indigenous Laws, Customs and Protocols, and communal ownership and an integrality with the Indigenous people's cultural identity.[239] Finally, the objectives concern overall an exclusivity of use and enjoyment by the Indigenous people and the promotion of innovation and sustainability community development.[240]

2. TRADITIONAL KNOWLEDGE

The focus in this category is simply *knowledge* itself, being contextually related to patent and confidential information.[241] It refers to knowledge originating from Indigenous peoples within a traditional context as described above and will include secret and sacred knowledge,

---

230 WIPO Draft Provisions TCE, *supra* note 20, art 13 (alternative draft provisions are provided for art 13); WIPO Draft Provisions TK, *supra* note 20, art 15 (alternative draft provisions are provided for art 15).
231 See the text accompanying note 13.
232 See the text accompanying notes 4–6.
233 See Howell & Ripley, *supra* note 44 at 224–25 (concerning the choice of "traditional knowledge and expressions of culture" as descriptions by WIPO of the interests encompassed within cultural heritage).
234 WIPO Draft Provisions TCE, *supra* note 20, art 1.
235 See the text accompanying notes 101–104.
236 WIPO Draft Provisions TCE, *supra* note 20, Preambular para 12, art 7.
237 Part VI.A, above (options and approaches for user interests are discussed).
238 WIPO Draft Provisions TCE, *supra* note 20, arts 1, 5.2; Howell & Ripley, *supra* note 44 at 235, 242.
239 WIPO Draft Provisions TCE, *ibid*, art 3; Part V.A–V.B, above.
240 WIPO Draft Provisions TCE, *ibid,* art 2.
241 WIPO Draft Provisions TK, *supra* note 20.

but may be traditional skills, know-how, innovations, practices, or learning.[242] The scope and objectives are similar to that of Traditional Cultural Expressions, but in addition to unauthorized *use* by third parties, there is a component of *access*.[243] Indigenous Knowledge is of benefit to the wider community, but access is a prerequisite to use and without protective measures concerning use, access may be denied. As emphasis is, therefore, on "free, prior and informed consent," perhaps a joint *involvement* in the access given that should comply with Indigenous Law customs and practices.[244] The WIPO Draft Provisions seek to acknowledge and account for use of Traditional Knowledge within a patent of a third party who has had access to the knowledge and may involve attribution of the source and fair and equitable benefit sharing.[245] Omissions in this context may lead to a refusal to process the patent application. As with Traditional Cultural Expressions, the model laws provide for exceptions and user interests.[246] Traditional Knowledge may involve Genetic Resources, but these are dealt with separately.

3. GENETIC RESOURCES

Genetic Resources are the biodiversity of plants, animals, fungi, algae, and bacteria of value in the context of biological innovation for which a patent may be obtained by a third party who had access to a genetic resource and other Traditional Knowledge afforded by an Indigenous people.[247] In this category regard must also be directed to the 1992 *Convention on Biological Diversity*, article 1, that provides for "the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."[248]

This objective is implemented in the *Nagoya Protocol on Access and Benefits Sharing*.[249] Canada is a party to the *Convention on Biological Diversity* but is not a party to the protocol. Canada reports, however, to be engaging in this matter with stakeholders.[250]

D. OPTION 3: AN ANALOGY WITH CHOICE OF LAW THEORY

Adoption of a process *analogous* to choice of law in conflict of laws (private international law) will enable any common law formulations under Option 1, or a statutory formulation in Option 2, to proceed while securing an Indigenous jurisdiction. Without such a theory the Indigenous Laws that: (1) identify and define (in scope, content, and context) an item, tangible or intangible, of Indigenous culture or heritage of that people; or (2) constitute self-governmental provisions for which the people has jurisdiction either reflecting article 4 of

---

242 *Ibid*, art 1.
243 *Ibid*.
244 *Ibid*.
245 *Ibid*, art 5.
246 *Ibid*, art 9.
247 *Ibid*; *The Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2*, WIPOR, 42nd Sess, UN Doc WIPO/GRTKF/IC/42/4 (2022).
248 *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 at 146 (entered into force 29 December 1993); Konstantia Koutouki & Hasrat Arjjumend, "Intellectual Property Rights, Biopiracy and the Implementation of the *Nagoya Protocol*" in Goudreau & Wilkinson, *supra* note 48, 69.
249 *Nagoya Protocol*, *supra* note 79.
250 Environment and Climate Change Canada, "Compendium of Canada's Engagement in International Environmental Agreements and Instruments: *Nagoya Protocol* on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (*Nagoya Protocol*)" (2022), online (pdf): *Government of Canada* [perma.cc/SV8Q-FY8Z].

UNDRIP[251] or otherwise, would be "absorbed" into common law or statutory measures. This would not facilitate reconciliation with the Indigenous peoples in Canada,[252] nor would such prove to be practical given the presence of more than 630 First Nations communities, together with Inuit and Métis communities "with unique histories, languages, cultural practices and spiritual beliefs."[253] Even if many such communities have the same or similar legal orders, the diversity is still substantial.[254] A more astute conceptual tool is needed to achieve a requisite linkage of Indigenous, federal, and provincial sources. A court might simply consider all such components, weighing one or the other in the particular circumstances, as has been done in New Zealand[255] and Australia,[256] and is similar to the balancing of Aboriginal and common law perspectives in Aboriginal land title claims.[257]

Reconciliation, however, may be more readily achieved in a cultural context by affording greater weight to Indigenous Law. Applying a concept of choice of law achieves this. Of course, conflict of laws per se exists only between sovereign governments, including federal, provincial, or state, but an *analogous* formulation might be made. While the Ontario Court of Appeal in *Beaver v. Hill*[258] reversed Justice Chappel who had contemplated a choice of law analysis in the context of a family law dispute between Indigenous persons,[259] the context of cultural protection is quite different. The object in a cultural context is to connect or link Indigenous Law with an implementation in federal or provincial law while preserving an autonomy of the Indigenous jurisdiction to identify and describe their cultural features. To be clear, such Indigenous Law, custom, or practice is *not* foreign law.[260] It is part of Canadian law applied directly by a federal or provincial court, but it is not common law, nor federal or provincial law per se.

Setting aside for present purposes any issue of a potential section 35, *Constitution Act, 1982* right to self-governance,[261] a theory *analogous* to choice of law is a useful way of both preserving the autonomy of Indigenous Law and bringing that law within a process at common law or under federal legislature measures in a cultural context.

A similar principle is illustrated in Ghanaian law and has received commentary and academic analysis in the US.[262] Being a member of the Commonwealth and a former colony of Britain, English common law and equity was "received" in Ghana in a manner similar to that in the common law provinces of Canada.[263] Yet, the societies in Ghana, like the Indigenous peoples of Canada, had their laws and customs prior to the assertion of British

---

251 *UNDRIP*, *supra* note 1, art 4.
252 See the text accompanying note 34.
253 Crown-Indigenous Relations and Northern Affairs Canada, "Indigenous Peoples and Communities," online: *Government of Canada* [perma.cc/XHA5-MVCM].
254 Michael Coyle, "Indigenous Legal Orders in Canada: A Literature Review (Updated to August 2022)" (2022), online (pdf): *Western Law: Law Publications* [perma.cc/39XZ-Y6RC].
255 *Takamore v Clarke*, [2012] NZSC 116.
256 *Jones v Dodd*, [1999] SASC 125.
257 See e.g. *Van der Peet*, *supra* note 5 at paras 63–64.
258 2018 ONCA 816 at paras 17, 18 [*Beaver*].
259 *Beaver v Hill*, 2017 ONSC 7245 at paras 53–55.
260 *Beaver*, *supra* note 258 at para 17.
261 *Constitution Act, 1982*, *supra* note 10, s 35.
262 Julie A Davies & Dominic N Dagbanja, "The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective" (2009) 26:2 Ariz J Intl & Comp L 303.
263 See e.g. *Law and Equity Act*, RSBC 1996, c 253, ss 2, 3 (the effective date being 19 November 1858).

sovereignty. Both sources are reflected in current Ghanaian law where Article 11(2) and 11(3) of the constitution provide:

> (2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity *and the rules of customary law* including those determined by the Superior Court of Judicature.[264]
>
> (3) For the purposes of [Article 11], 'customary law' means the rules of law which by custom are applicable to the particular communities in Ghana.[265]

Though the Ghanaian approach includes defining the Indigenous Customary Law within the expression "common law," and utilizes a constitutional imperative, the result is the same as the use of a choice of law theory. Julie Davies and Dominic Dagbanja comment that during the colonial years there was a dual court system, one administering received common law and equity, and the other "primarily customary law."[266] Today, a single court would apply one or the other as appropriate — essentially choice of law.

Within Canadian common law conflict of laws, a party seeking to apply a "foreign" law must first plead that law and secondly prove that law as a matter of fact by expert evidence.[267] Civil law systems generally allow for judicial notice of foreign law as well as for an interpretation of that law.[268] The province of Quebec is in between, requiring that an extra-territorial law be first pleaded, *then allowing for judicial notice to be taken of that law*, with a discretion to require proof as needed.[269] As Indigenous Law is essentially *internal law* within Canada to which a choice of law theory is suggested to be applied by analogy, the approach applied in Quebec is preferable. Indeed, between provinces and territories various legislative measures provide for judicial notice, or proof, of the law of other provinces and territories.[270] The option of required proof may be sensible, at least in the beginning of implementation of cultural perspectives. Of course, an initial question of law for the court would be whether an application of Indigenous Law is properly applicable in the particular proceeding.

Use of a choice of law theory analogously might likewise be usefully applicable in disputes involving interests arising under laws of two or more Indigenous people.

---

264 *Constitution of the Republic of Ghana*, 1992, s 11(2) [emphasis added].
265 *Ibid*, s 11(3).
266 Davies & Dagbanja, *supra* note 262 at 305–306.
267 *Old North State Brewing Company Inc v Newlands Services Inc* (1998), 58 BCLR (3d) 144 at para 39; Janet Walker, *Canadian Conflict of Laws*, 6th ed, vol 1 (Toronto: LexisNexis, 2005) (loose-leaf updated 2017), ch 7 at para 7.1.
268 Stephen GA Pitel et al, eds, *Private International Law in Common Law Canada: Cases, Text and Materials*, 4th ed (Toronto: Emond Montgomery Publications, 2016) at 548 (noting: "In most European and Latin American legal systems foreign law is treated as law; and it is applied *ex officio* by the court whether or not it is invoked by the parties").
269 Art 2809 CCQ.
270 Walker, *supra* note 267, ch 7 at para 7.1.

VIII. SUMMATION

This article has analyzed how Canadian Indigenous peoples' cultural heritage, Traditional Knowledge, and expressions of culture might be afforded legal recognition in the context of the legislative implementation of *UNDRIP* federally by Canada and the province of British Columbia. Options include:

(a) Judicial recognition either at common law *simpliciter* as has already occurred with respect to Aboriginal title to land;[271]

(b) Judicial recognition in reliance on the designation by Parliament in section 4 (a) of the implementation that *UNDRIP* is "a universal international human rights instrument with application in Canada." In this context the analysis of the Supreme Court of Canada in *Nevsun* and *Ward* has been drawn upon;[272] and

(c) Legislative enactment, particularly concerning *intangible* cultural items that resemble existing intellectual property rights and may be in accord with the latest recommended globally applicable provisions of the Intergovernmental Committee of WIPO. The WIPO Draft Provisions are designed to provide a measure of international consistency with international enforcement by "national treatment" between member states.[273]

In all options Indigenous Law, custom, and practice of the particular people is the only source for identifying and defining the scope of the cultural item, tangible or intangible. However, options (a) and (b) involving judicial recognition and definition, the Indigenous source will need to be directly included in the formulation of the nature and scope of the particular cultural right. Yet, it ought not to be characterized as simply "common law," despite this having been done seemingly successfully by constitutional stipulation in Ghana.[274] To date, in Canada, Indigenous Law is *sui generis* or distinct from common law. It predates the assertion of British sovereignty. A court today would be simply *applying* a particular Indigenous Law. A choice of law theory, analogous to that in conflict of laws, has been suggested as an appropriate vehicle to achieve this end and allow flexibility given the significant diversity of Indigenous cultures in Canada.

Such flexibility is paramount in a cultural context, particularly concerning intangible cultural interests. This differs from Aboriginal land title jurisprudence where the focus is on *exclusive occupation* that may be established by actual occupation or an integrality with Indigenous Cultural Laws, practices, and customs. It is established largely as a question of fact as determined at trial. A similar approach might apply beyond land to items of personal property, but only with respect to an *exclusivity of possession* by the particular Indigenous people as a cultural item. The nature and scope of cultural dimensions attaching to artefacts or intangible interests will, however, present a much wider interpretation of the cultural elements and features in usage and performance that will extend beyond the fact of

---

271 Part VII.A, above.
272 Part VII.B, above.
273 Part VII.C, above.
274 See the text accompanying notes 262–70.

exclusivity of possession. The source of this is Indigenous *sui generis* laws and customs. Some autonomy in such is contemplated and is expressly provided for in *UNDRIP*.[275]

Yet some tempering of scope and application of cultural rights may be necessary in the wider contexts of provincial, federal, and international law to reflect the public interest of these wider communities and to acknowledge some public domain with respect to cultural related matters. Such wider interests may reflect a freedom of expression component, whether *Charter* based or not. Or may simply acknowledge an Indigenous cultural dimension to be no longer distinctive, within the wider community, of its origin.[276] Additionally, no people can exist in isolation from the wider community of which it is part. This may lead directly to limitations, exemptions, and user interests. These may be significant for a proprietary exclusivity, but less so for an exclusivity predicated on a human rights dimension.

Judicial recognition of Indigenous cultural interests may be effective within Canada, but will be of limited import internationally. A legislative framework structured to accommodate international treaties and conventions should be pursued. This, of course, is already the position within other intellectual property and human rights. The WIPO Draft Provisions provide conceptual principles designed to encompass all protectable cultural features and to afford international enforceability through the principle of "national treatment." This presents the "up down" dimension to meet with the "down up" application of local Indigenous Laws and customs. Between these ends, some merging of the nature and scope of cultural interests will occur. The WIPO Draft Provisions, though still in draft format and currently expressing alternative formulations, are sufficiently broad to encompass this objective. The *Nagoya Protocol* on benefit sharing with respect to genetic resources, though not yet acceded to by Canada, is also significant, given that *UNDRIP*, now legislatively implemented by Canada, includes Indigenous interests in these resources.[277]

IX. PROVINCIAL HERITAGE CONSERVATION LEGISLATION

This article has focused on cultural heritage and cultural property, principally in a context of *intangible* interests of broad comparison with intellectual property law. As noted earlier, legislative measures would fall under a federal head of power under section 91(24) ("Indians, and Lands reserved for the Indians"), or the specific heads concerning intellectual property rights: section 91(22) ("Patents of Invention and Discovery"), 91(23) ("Copyrights"), or 91(2) ("The Regulation of Trade and Commerce") with respect to trademarks and industrial design. Related matters of passing off, misappropriation, and confidential information (trade secrets) are provincial and protectable under common law. A potential of common law implementation of principle found in *UNDRIP* has been discussed.[278]

---

275 See the text accompanying notes 135–40.

276 Garber, *supra* note 93 and accompanying text (explaining such a situation and giving examples). The assessment would be one of fact for the court. If an Indigenous item were involved, submissions would almost certainly be sought from the source community.

277 *UNDRIP*, *supra* note 1, art 31(1) (discussed in the text accompanying note 41).

278 Part VII.A, above.

Provincial heritage conservation is legislative. It concerns tangible heritage sites and objects including sites and objects of Indigenous culture. The implementation of *UNDRIP* in British Columbia will therefore require the application and scope of the province's *Heritage Conservation Act*[279] to be considered in consultation and co-operation with Indigenous peoples to ensure that the provisions and policy objectives of such legislation is consistent with *UNDRIP*.[280]

The Supreme Court of Canada has recognized a valid provincial head of power under section 92 (13) ("Property and Civil Rights in the province") to regulate Indigenous heritage sites and objects,[281] including the power "to make exceptions where economic development or other values outweigh the heritage value of the objects."[282] While not finding the situation in this case to involve a core federal power,[283] the potential of this occurring and affecting the applicability of provincial legislation was noted.[284]

While the application and scope of heritage legislation concerning Indigenous sites and objects is within the consultation process in British Columbia, a judicial finding that tangible heritage objects did invoke core federal power would be equally applicable in other provinces even without those provinces implementing *UNDRIP*.

X. CONCLUSION

The implementation of *UNDRIP* in Canada is an enterprise of huge dimension. It provides a means of effecting a reconciliation of the governments and peoples of Canada with Indigenous peoples in Canada and their prior presence and occupation. Additionally, it will present many intergovernmental issues, as well as relational issues between Indigenous peoples. It will certainly involve issues concerning the application and scope of Indigenous Laws, customs, and practices in a plurality of jurisdiction and governance.

The diversity of indigeneity in Canada will present a diversity of heritage and culture. Yet, diversity does not mean that features of heritage and culture will be entirely distinct and compartmentalized exclusively in each people. Cultural features will be shared across two or more peoples. Certainly, some foundational core will be commonly possessed or will blend and merge. Such commonality will moderate the allocation of exclusivity to specific peoples.

Additionally, with reference to Indigenous Laws, there is a question of identification of a juristic or juridical entity that will constitute an entity enabled to hold property, sue and be sued, and be responsible for the maintenance and protection of the cultural item, tangible or intangible. Such an entity must be known or identifiable to wider provincial and federal communities of which the Indigenous people is part. This will provide transparency and efficiency.

---

279 RSBC 1996, c 187.
280 See the text accompanying notes 1–16.
281 *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31.
282 *Ibid* at para 76.
283 *Ibid* at para 77.
284 *Ibid* at paras 66, 74, 78.

Transparency may also require that the wider community be able to identify (in the absence of confidentiality) the item of culture that is subject to an exclusivity under Indigenous Law. A registration system is not favoured. It is suggestive of a grant by the Crown. The absence of a means of notification will cause uncertainty. Yet, copyright itself does not require registration of a protected work, nor a notice of the subsistence of copyright in that work. Comparatively, nor should the Indigenous interest require notification. However, a user who does not reasonably know of the Indigenous people's exclusivity in an item, ought, perhaps, to be subject only to injunction as an "innocent infringer," comparatively with the position prevailing for copyright infringement.[285]

UNDRIP and related measures require substantial work to be done not only by governments, but also by Indigenous peoples. Assistance in structuring and financing this will need to be provided. Reconciliation, plurality, and transparency are dependent upon Indigenous peoples being able to engage meaningfully and collaboratively with federal and provincial sources in the implementation process.

[285] *Cf Copyright Act*, *supra* note 90, s 39.