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Intellectual Property and Indigenous Cultural Heritage: Ongoing Research and Issues of Reform

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York Centre for Public Policy & Law

WORKING PAPER SERIES

Intellectual Property & Indigenous Cultural Heritage: Ongoing Research and Issues of Reform

Catherine Bell, Faculty of Law, University of Alberta

Working Paper # 1

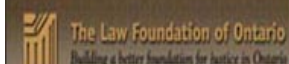
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Intellectual Property & Indigenous Cultural Heritage: Ongoing Research and Issues of Reform

Catherine Bell, Faculty of Law, University of Alberta

Introduction

The goals of this paper are to: (a) discuss intellectual property (IP) issues as part of a broader concept of Indigenous cultural heritage; (b) reflect on what this means in terms of responding effectively to concerns of Aboriginal peoples in Canada through property law research and reform; and (c) introduce three interdisciplinary research collaborations (with which I am involved) that are exploring the potential for increased protection and control of Indigenous cultural heritage through application and reform of national and international law, ethics and policy.

There are several stories I have encountered through my research collaborations that highlight the challenges Aboriginal peoples in Canada face in protecting and controlling cultural heritage (land, objects, information and other forms of tangible and intangible heritage) that is considered by them to be vital to the continuity and survival of their distinctive societies and cultural identities. However, one I have told on several occasions (and which is published in a previous work by me and Robert K. Paterson¹) concerns the export of an Echo Mask alleged in court documents to be the collective property of an Aboriginal community, sold contrary to their laws, and upon the purchaser's application for an export permit, brought to light several problems with Canada's export and import law as it applies to significant Aboriginal ethnographic items, other than archaeological heritage.² However, I begin first with information on the First Nations Cultural Heritage and Law Project (FNCHLP) as the story of the mask was one of many that generated this project.

The FNCHLP was conducted over a period of ten years in collaboration with an international team of scholars in law, archaeology, linguistics, and anthropology and seven First Nation community partners representing approximately 30 communities in western Canada.³ The broad objectives of the research were to:

1. provide First Nation participants with the opportunity to identify, define, and articulate their own concepts of property and laws, and their experiences relating to protection, repatriation, and control of their cultural heritage;
2. facilitate greater understanding and respect for diverse First Nation cultures, perspectives and experiences;

¹ See, Catherine Bell and Robert K. Paterson, 2009, "International Movement of First Nations Cultural Heritage in Canadian Law" in *Protection of First Nations Cultural Heritage: Laws, Policies and Reform*, Catherine Bell and Robert K. Paterson (eds.) (Vancouver: UBC Press), 78-109.

² Ibid.; see also Jennifer Kramer, 2006, *Switchbacks: Art, Ownership and Nuxalk National Identity*. (Vancouver, Canada: UBC Press).

³ For further detail on the project objectives and methodology see Catherine Bell and Val Napoleon, 2008, "Introduction, Methodology & Thematic Overview" in Catherine Bell and Val Napoleon, (eds.), *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver: UBC Press) 1-30.

3. create reflective case study reports with the potential for diverse uses and means of dissemination;
4. assist First Nation partners collect data and develop practical resources on cultural heritage issues that were of concern in their communities;
5. disseminate information about the operation, impact and limits of the existing Canadian legal regime as it applies to First Nations' cultural heritage; and
6. critically analyze domestic law within a broader international, social, political and legal context.

Our research was informed by a range of sources including case studies featuring First Nation concepts of property, laws and heritage protection priorities. Detailed versions of case studies are on the project website and have been published in two books.⁴ An important aspect of this research was First Nation participation at all stages of the research program including: research design and grant applications; conducting the research for, commenting on, and reviewing case studies; and, feedback on academic essays that draw on these reports and other sources for legal and anthropological analysis. Although originally intended to focus on repatriation and trade of material culture and possibilities for law reform, the project was also intended to respond to issues raised in the case studies. As a consequence we quickly shifted to include examination of strategies external to legal frameworks and a wider range of heritage issues (e.g. in relation to cultural landscapes, intangible cultural expressions (e.g. designs, dances, songs)), intellectual property and ancestral remains.

The story of Echo is one of many that gave birth to the FNCHLP. It began as collaboration between the author and the U'mista Cultural Society ("U'mista"), the First Nations Confederacy of Cultural Education Centres & the First Peoples Cultural Foundation as a consequence of problems encountered by U'mista while seeking to prevent export and return of the Charles J. Nowell button and bead blanket. Also aware of the issues faced by the Nuxalk, U'mista and the 'Namgis Nation identified protection from export and repatriation as an issue of immediate priority for research and reform. The objectives of the original collaboration were to conduct research and draft a position paper on the need for protective legislation for items of spiritual, cultural and historic importance to First Nations (FN) and make recommendations for reform. However, it soon became apparent more First Nation and expert involvement would be required because of the number of issues that were being raised.⁵

Echo is a ceremonial mask, approximately 150 years old. The mask represents Echo, a supernatural being resident on earth, and the transformation of the supernatural to the natural world. Echo carries with it a web of rights and responsibilities including status in ceremonial societies, spirit powers, names, songs, legends, and dances. The process of dancing the mask, singing the songs, and reciting stories at community potlatches (feasts) is not only an expression of cultural knowledge passed from one generation to the next, but is also believed to connect

⁴ Bell and Napoleon, "First Nations Cultural Heritage, 2008; Bell and Paterson, Protection of First Nations, 2009. Online: <http://www.law.ualberta.ca/research/aboriginalculturalheritage>

⁵ Bell and Napoleon, "First Nations Cultural Heritage", 2008 at 2

dancers and observers to original ancestors and supernatural world. Through the dancing of the mask origin stories are also told and family territories affirmed and witnessed.⁶

There are multiple layers of Nuxalk belonging and responsibility connected to Echo. Use of Echo's image as a crest figure, or to tell, sing or dance origin stories associated with it are the collective right of a family. One member of the family, traditionally the eldest male member or chief, has physical possession of the mask but "who would inherit custodial rights in the name of his entire family."⁷ However, the "right to display the Echo Mask" and to dance the mask and "represent ... supernatural power figures" is also a ceremonial (*kusiut*) society privilege "handed down from individual to individual."⁸ Under the laws of the Nuxalk Nation, the mask and the prerogatives associated with it may only be transferred at a potlatch under the witness of the community. The keeper of the mask must care for it and bring it out to be danced for the potlatch. The mask cannot be sold by an individual and is to stay in the community for use in potlatches.

Other Canadian West Coast First Nations have representations of Echo in their mythologies. There are also many West Coast communities that have artisans who carve masks for commercial sale and other purposes. However, ceremonial masks passed down from ancestors through generations of families before witness and intended to be danced, such as Echo, also belong to the community because of the role they play in the educational, spiritual and cultural practices of the Nuxalk.

Until 1950s Canadian law prohibited the potlatch ceremony and other ceremonial structures in which masks, such as the Echo mask, were used (e.g. Indian Acts of 1880, 1884). In some communities the anti-potlatch law was not enforced, in some objects were confiscated and participants were criminally charged, and in some agents and other government employees confiscated and sold potlatch materials for profit. In many communities traditional practices and ceremonial structures in which masks functioned continued until the present day. In others these structures eroded for a period of time during which some individuals transferred cultural items contrary to the traditional laws of their communities. Fear that Indian cultures in Canada were disappearing provided impetus for anthropologists, archaeologists and other collectors to gather and preserve as much as they could. Collection and trade by private dealers also continued and the international demand for west coast masks and other cultural items increased along with their value in the art market. Discrimination, economic hardship, disease and alcohol also created an environment of duress.⁹

In response the Nuxalk passed their own by-law to prevent trespassing and dealing on their land by unlicensed traders. Throughout this history the Echo Mask also continued to be danced, transferred and protected in accordance with the laws of the community. In the late nineteen eighties, an art dealer befriended a poor elderly woman in possession of the Echo Mask. Over the course of several visits to the community, an elderly keeper of the mask was persuaded

⁶ Much of this is taken from court documents filed on behalf of Nuxalk Nation (also known as the Bella Coola Band of Indians) and Chief Snuxaltwa (also known as Archie Pootlas) against Howard Roloff and Ate-Goo-Goosh Holdings Ltd. seeking a declaration upholding Nuxalk customary law prohibiting the sale of the Echo Mask. See, Kramer 2006 at note 2 and Bell and Paterson 2008 at note 4 for more details).

⁷ Kramer, *Switchbacks*, 2006 at 91

⁸ Ibid.

⁹ Catherine Bell, Heather Raven and Heather McCuaig, 2008, "Recovering From Colonization: Perspectives of Community Members on Protection and Repatriation of Kwakwaka'wakw Cultural Heritage" in Catherine Bell and Val Napoleon (eds.), *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver, UBC Press) 33-91 at 53- 69.

to sell it for C\$35,000. In 1995, the dealer applied for an export permit under the *Cultural Property Export and Import Act* (1978) (“CPEI”) to sell the mask outside of Canada for \$US 250,000. The permit was denied.

In Canada, the export of certain categories of cultural property is controlled by the CPEI. The Act seeks to balance the right of persons to freely sell and trade in privately owned property with the desire to keep cultural objects of national importance in Canada. It does this through a system of export permits and tax benefits that encourage donations to Canadian institutions and public authorities defined in the Act. Cultural property is described as moveable property over 50 years old and made by someone no longer living. Such property can be put on the *Canadian Cultural Property Export Control List*. The Act describes a wide range of material that can go on the Control List so one has to consult the list itself to determine which items are subject to export controls. Currently the list includes archaeological material (aboriginal and non-aboriginal of any value) and non-archaeological Canadian aboriginal artifacts of a fair market value of more than \$3,000.¹⁰

The dealer appealed the permit refusal to the Canadian Cultural Property Expert Review Board that has the ability to delay, but not prohibit sale of controlled objects, for a maximum of six months. The purpose of this delay is to allow the Board to notify certain Canadian institutions (mostly museums, including some First Nations cultural centres) so that they have an opportunity to purchase objects of national cultural importance and prevent export. Luckily for the Nuxalk an employee of Simon Fraser University Museum of Archaeology and Anthropology received notice and the head of the Archaeology Department recognized the mask and notified Snuxaltwa. A delegation from the Nuxalk Nation subsequently met with representatives of the Royal British Columbia Museum (RBCM) Simon Fraser University, and others to develop a strategy to bring the Echo Mask back home to Bella Coola. Initial requests to see the mask and title documents were refused. Litigation ensued with the Nuxalk asserting among other things, an unjustifiable interference with their constitutionally protected Aboriginal right to control cultural property in accordance with Nuxalk traditional law. After a year of negotiations, the matter was settled out of court and the dealer agreed to sell the Echo Mask back to the Nuxalk for \$C 200,000.

Under the CPEI, Canadian institutions can apply for grants and loans to help them pay for cultural objects for which export permits have been denied.¹¹ The Act itself places no conditions on funding but as a matter of policy usually requires half to be paid by the organization applying for the grant (in the case of a small organization will accept a smaller contribution and it can be waived). Conditions, common to private repatriation negotiations, were also placed on the grant including the requirement that the mask be kept in a secure, public facility under museum like conditions. The mask is now in a secure display area of a Credit Union next to the reserve until funding for more adequate facilities can be obtained. Care of the object is no longer governed by traditional laws concerning use and disposition, but museum conservation standards.

Of particular concern is the ability of dealers to manipulate the legislation to inflate prices. Also important is the absence of any express obligation in law or policy to notify communities of origin. Notification is currently at discretion of Minister and is only given to organizations that meet accreditation criteria. Very few FN communities have facilities that meet these criteria. Further, there is no mechanism under the CPEI for the Review Board to investigate

¹⁰ Permits may be denied where an examiner determines an object to be of “outstanding significance by reason of its close affiliation with Canadian history or national life, its aesthetic qualities, or its value in the study of arts and sciences.” In this case, the permit was denied.

¹¹ See Bell and Paterson, “Protecting First Nations”, 2009 at 81.

legitimacy of title or for a FN to make a case for prohibiting export of a particular item or requirement for FN representation on the Review Board. However, recently an Inuk was appointed to the Board which will help bring an Indigenous perspective to the table.

There is also very little that can be done once a mask like Echo leaves the country, even if it was stolen or in violation of Canada's export laws. Canadian cultural property law has provisions intended to implement Canada's obligations under the 1970 UNESCO *Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* that enable foreign state signatories to the Convention to request the Attorney General of Canada to bring an action for recovery of goods brought to Canada (s. 37). However, many countries, including large market countries like France and the United States, do not have legislation or agreements in place to enforce much of Canadian export law. Success of recovery depends largely on the laws of the country where the mask is located. Apart from how they implement international treaties or conventions, national law may also limit possible responses to claims. Although customary international law concerning human rights norms of cultural integrity including enjoyment of culture, practice of religion, use of language and self-determination of indigenous people may be considered; these laws do not bind nation states. However, they may have persuasive value in litigated or negotiated resolutions.

Understanding First Nation Concepts of Property

One's immediate reactions to these stories might be "Why are we talking about masks and cultural property law in a paper concerned with traditional knowledge and intellectual property rights?" Actually every time I think about Echo I learn more lessons, but also have more questions.

I will speak to a few themes here that relate to the question of whether indigenous peoples should seek protection of traditional knowledge in intellectual property protection that are evident in the Echo story and resonated throughout our research. These are:

1. Intellectual property in the form of traditional knowledge often can not be separated from material manifestations of that knowledge.
2. Protection and recovery of traditional knowledge in its various forms is considered an issue of human rights (including religious rights and respect for First Nations' laws and practices). It is not simply a matter of reforming property law.
3. Intellectual property law may be of some assistance to respond to indigenous concerns where economic values and transferability of rights inherent in IP are consistent with indigenous understandings of rights and rationales for seeking greater control over traditional knowledge.
4. Outside of this context, focus on IP responses to the exclusion of other areas of Western property law does not effectively respond to a wide range of indigenous concerns relating to their intangible cultural heritage.

An obvious, but fundamental, lesson from the Echo story is that FN concepts of property and legal orders do not situate easily within western industrialized cultural and property rights

frameworks that distinguish between tangible, intangible, sacred, secular, land, moveable objects, cultural, personal, intellectual, private, public domain or other forms or categories of property. There are many instances in which attempts to categorize or reduce FN cultural heritage issues to familiar national and international legal categories are incomprehensible, inappropriate or inadequate from an indigenous perspective. For example, among the Gitksan, there is no separation of certain forms of property from self. With respect to many of what we call intangibles (story, song, dance, design) the relationship is not so much “I own this” as “I am this”, or perhaps more accurately, “we are this.”¹²

Take, for example, hereditary family crest images. Under Gitksan law, each House (matrilineal family lineage group) evidences its territory and maintains its history through a sophisticated interweaving of song, verbal record, and image. A unique set of crest images on blankets, rattles, poles and other regalia, as well as hereditary names of honoured ancestors, legends, songs, dances, secret words, ceremonial prerogatives and other intangibles belong to each House and are held by the Chief on their behalf. Family origin stories are associated with these crest images. As Godfrey Good, a Gitksan elder explains: “No one should be able to take this crest that belongs to another chief and wear it. It is not done. That is Gitksan law... These are very important property; our great grandfathers treasured these.”¹³

Given the emphasis in Gitksan culture on intangible information and expressions, one might think that some reform to IP law enabling perpetual monopolies over certain images would address Gitksan concerns. Although some protections may lie in IP law, equally important to protecting Gitksan traditional knowledge and respecting their legal order, is control over, and if necessary, return of objects with crest images on them that continue to be used without proper authorization and in inappropriate contexts. That takes us into entirely different realms of law including repatriation, museum law and policy, and trade in cultural heritage.

In some instances, separation from an item may also mean removal of associated knowledge and intangible cultural expressions from the community. Sometimes this problem can be addressed through site visits, travelling exhibits, digital or other means of three dimensional access by Aboriginal communities. However, in some instances songs, ceremonies, dances and other forms of cultural expression or special knowledge (e.g. medicinal) cannot be performed, communicated, transmitted or be made available to proper recipients of that knowledge under Indigenous laws without the physical item itself being present. An example often given is Blackfoot medicine bundles. When bundles are removed the societies charged with keeping the knowledge and performing the songs, dances and stories associated with them are unable to perform complete ceremonies, train new members in specific areas, and are themselves jeopardized.¹⁴ Like Echo, Bundles do not fall easily into the categories we create for organising our property rights. This is underscored in the Blood submissions to the World Intellectual Property fact finding mission in Calgary concerning indigenous intellectual property (1998). Although the submissions include recommendations for mandatory research protocols to prevent

¹² Susan Marsden, 2008, “Northwest Coast *Adawx* Study” in Catherine Bell and Val Napoleon (eds.), *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver: Canada: UBC Press):114-149 at 114.

¹³ Richard Overstall, 2008, “The Law is Opened: The Constitutional Role of Tangible and Intangible Property in *Gitanyow*” in Catherine Bell and Val Napoleon (eds.), *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver: Canada: UBC Press): 92-113 at 98.

¹⁴ Catherine Bell, Graham Statt and the Mookakin Cultural Society, 2008, “Repatriation and Heritage Protection: Reflections on the Kainai Experience” in Catherine Bell and Val Napoleon (eds.), *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver: Canada: UBC Press): 203-257 at 207.

continued exploitation of cultural and intellectual property, the submission is largely on the need to bring bundles and the knowledge associated with them home.

For these and many other reasons, effective legal responses to indigenous concerns about protection and control of First Nation intangible heritage requires a comprehensive review of a wide range of property relations that include, but extend beyond IP rights.¹⁵ Examples include:

1. Heritage conservation laws that enable the destruction of cultural sites and that often vest ownership of newly acquired archaeological material found on public (and sometimes private land) in the Crown;
2. Cultural property export and import laws as described above;
3. Parks and historic sites legislation;
4. Repatriation laws; and,
5. Access to information and privacy legislation

The Echo story also demonstrates that protection and control over cultural heritage is fundamentally about human rights. It forms part of a broader movement of decolonization, reparation for past injustice, survival and retention of cultural identity, and political self-determination. At the heart of many indigenous movements for protection of traditional knowledge are experiences of exploitation and/or conflict of laws.

Application of IP Law

There are many other lessons and questions about using IP law to protect traditional knowledge raised by the examples I have shared. However, this does not mean that IP law is an ineffective avenue for change. Rather, it means we have to step outside the IP box and take an integrated approach across many areas of national and international law. For example, an area of IP law that has been manipulated successfully to increase indigenous control over images has been trademark law. Registration is maintained by fees and there is no limit on how long a trademark can be held. However if a trademark is not used by affixing it to a product or service, it can be lost. Also no one else can be using it for a similar use at the time of registration.

There are also provisions for registering official marks of governments and public institutions in most countries. So, for example, trade mark law has been used in Canada to prevent use of petroglyph images (carvings on rocks) closely associated with the Snuneymuxw (Nanaimo) First Nation to promote festivals and reproduced on items such as mugs, T-shirts, and hats. Trademark protection was possible because no one had previously obtained a trade mark to these images. However, the requirement of use as a prerequisite for trademark validity does not

¹⁵ Traditional knowledge is an amalgam of historical and contemporary influences and is used here to describe values, beliefs, customs, practices and traditions that form part of a First Nations identity past down from generation to generation. The word “traditional” does not mean “old” or static. Rather, it refers to “the extent that its creation and use are part of the cultural traditions of a community” and for which the community may have prescribed protocols and normative justifications for controlling use, protection and preservation.” (Howell 2009: 225)

help if there are issues around public access to images.¹⁶ Another example is the combination of a public awareness campaign with trademark registration. As Brascoupe and Mann explain:

The livelihoods and intellectual property of the Cowichan knitters of Vancouver Island, British Columbia, were threatened by fakes on the market. The knitters successfully protected their products through an awareness campaign and by registering a trademark. The awareness campaign drew attention to the problem of fakes and it also gathered support for the knitters from the public and from arts institutions. The knitters also registered a trademark, which identifies an authentic Cowichan product, that can only be put on authentic Cowichan knitted products.¹⁷

Cowichan sweaters were in the spotlight again in 2009 when the Hudson's Bay Company (HBC) announced a design for Canadian Olympic wear which the Cowichan knitters alleged violated their trademark. Although the HBC countered saying the sweaters it was having made were its own unique design, letters from lawyers, media attention and pressure from First Nations resulted in HBC eventually ordering sweaters to be made by the Cowichan knitters themselves.¹⁸

In New Zealand laws have been proposed and amended to respond to concerns about misuse and appropriation of traditional knowledge. For example, defensive measures incorporated into the 2002 *Trade Mark Act in New Zealand*¹⁹ enable prohibition of a mark likely to "offend a significant section of the community, including the Maori" (s. 73(1)). A registered mark may also be invalidated upon hearing an application of a person who is "culturally aggrieved" even if the mark is distinctive of the registered owner. An advisory committee exists to advise the Commissioner on marks offensive to the Maori. Members of the committee must be qualified in Maori culture and protocol. The defensive nature of these provisions presents a narrow focus. The legislation does not prevent use of an image, word or other "mark" as an unregistered mark or officially recognize Maori systems. However, application for and refusal of a mark does have the indirect effect of providing some notice to the Maori community of a potential appropriation making it possible to take political or legal action to stop its use.²⁰

There are some other examples in developing former colonized countries of more extensive proposed modifications to IP law. For example, s. 28(1) of the *Nigerian Copyright Act* offers protection to indigenous folklore "when such expressions are made either for commercial purposes or outside their traditional or customary context."²¹ The impetus for these changes arose from a concern over exploitation of intangible heritage by leisure industries of tourism and entertainment. Folklore is defined in s.28(5) as including "group oriented tradition based" tales, poetry, riddles, songs, instrumental music, dances, plays, and products of folk art (e.g. drawing,

¹⁶ Simon Brascoupe and Howard Mann, 2001, *A Community Guide to Protecting Indigenous Knowledge* Ottawa, Canada: Indian Affairs & Northern Development at 29.

¹⁷ Brascoupe and Mann, "A Community Guide", 2001 at 40.

¹⁸ "Cowichan Tribes Reach Olympic Sweater Deal," CBC News, October 28, 2009. Online: <http://www.cbc.ca/canada/britishcolumbia/story/2009/10/28/bc-cowichan-tribes-olympic-sweater.html>.

¹⁹ *Trade Marks Act* 2002 (N.Z.), 2002/49

²⁰ Robert Howell and Roch Ripley, 2009, "The Interconnection of Intellectual Property and Cultural Property (Traditional Knowledge)" in *Protection of First Nations Cultural Heritage: Laws, Policies and Reform*, Catherine Bell and Robert K. Paterson (eds.) (Vancouver: UBC Press): 223-246 at 233-234.

²¹ *Copyright Act, Laws of the Federation of Nigeria* 1990, c. 68.

painting, sculpture).²² The stated policy objectives of the legislation are to protect expressions of folklore from unauthorized use, ensure the honour, dignity, or cultural interests of the source community, and acknowledge the source while not unnecessarily inhibiting public access to resources. Protections include protection from reproduction, communication to the public, adaptations, translations and other transformations made for commercial purposes or outside their traditional customary context. However, the legislation puts the power to control the moral and economic rights of folklore in the Nigerian Copyright Council (“NCC”). Although theoretically the NCC operates on behalf of the originating communities, it is not answerable to source communities or bound to obey their directives.

Ongoing Research on IP in Cultural Heritage

The First Nations Cultural Heritage and Law Project was completed in 2009. However, it brought to light many areas in need of further research. Participating in the FNCHLP and other research collaborations with First Nations prompted Kelly Bannister and George Nicholas, together with Julie Hollowell, to explore in greater detail how archaeologically-derived information fits with Indigenous perspectives on cultural heritage and Intellectual Property law. This gave birth to the Intellectual Property in Cultural Heritage (IPINCH) – a seven year project under the direction of Dr. Nicholas (Archaeology Simon Fraser University, British Columbia). It is described on the project website as follows:

This project represents an international, interdisciplinary collaboration among more than 50 scholars and 25 partnering organizations embarking on an unprecedented and timely investigation of intellectual property (IP) issues in cultural heritage that represent emergent local and global interpretations of culture, rights, and knowledge. Our objectives are:

- to document the diversity of principles, interpretations, and actions arising in response to IP issues in cultural heritage worldwide;
- to analyze the many implications of these situations;
- to generate more robust theoretical understandings as well as exemplars of good practice; and
- to make these findings available to stakeholders—from Aboriginal communities to professional organizations to government agencies—to develop and refine their own theories, principles, policies and practices.²³

There are three main components to IPINCH: working groups, community based research initiatives (CBI) and creation of a knowledge base. Working group activities include background research, topical research, student training, analysis of CBI results, meta-analysis and dissemination of results in eight topic areas: Collaboration, Relationship, and Case Studies; IP and Research Ethics, Bioarchaeology, Genetics and IP; Cultural Tourism; Commodification of the Past; Open Access Information Systems; Customary, Vernacular and Legal Forms; and IP & Cultural Heritage Community Sourcebook. The knowledge base is a digital repository of work

²² Ibid.

²³ Online: www.sfu.ca/ipinch

done through IPINCH but also done by others in related areas. The third component is the CBI component. This is to ensure that the theoretical work of IPINCH is locally grounded but also to provide opportunity for indigenous communities to identify issues and co-develop research programs in those areas with academic partners. However, the studies are designed to meet the needs of the communities within the broad topic areas covered by the IPINCH working groups. Information about the work of IPINCH and opportunities it provides for student, community and other support are constantly updated on the IPINCH website.

My involvement with IPINCH is on several levels. I am a co-investigator and also sit on the Steering Committee which is responsible for guiding project priorities and planning, coordinating IPINCH workshops and other initiatives, developing community research funding and reporting guidelines, and providing expertise to project researchers and participants. I am also involved in three CBIs. I will speak to two of these by way of example. However, there are several others including projects Inuit and Inuvialuit of Canada, Native American tribes in the United States, the Moriori of New Zealand and the Ainu of Japan.

The first project is with the Piikani Nation and Blood Tribe of the Blackfoot Confederacy. It is concerned with incorporation and protection of Blackfoot knowledge in legally mandated government consultation policies and guidelines. Traditional Use Studies, for example, can be a useful participation tool and contribute to the documentation of indigenous knowledge. But along with their benefits and opportunities, there are also limits and detriments. The fundamental question is how do we employ Blackfoot traditional knowledge in the consultation process to make it more meaningful and at the same time protect the knowledge that is being shared from public access or improper use? I am also participating in a CBI with case study proposal with three Yukon First Nations: the Champagne and Aishik First Nations, the Carcross-Tagish First Nation, and the Ta'an Kwach'an Council. That study proposes to explore how First Nations values and culture are considered in cultural management decisions - both on their own lands and under their own control, and by the provincial and federal governments, where mainstream values generally prevail. Another project involves working with the Atavaq Cultural Institute to explore issues behind cultural tourism in Nunavik. In particular the study will examine the role Inuit play, and whether the responsible development they envisioned for cultural tourism is being realized.

A third research project exploring international trade and intellectual property issues in cultural heritage is being undertaken under the direction of Christoph Beat-Graber, Professor of Law and Head of the *i-call* research centre (International Communications and Art Law Lucerne) and Director of *lucernauris*, the Institute for Research in the Fundamentals of Law at Faculty of Law at the University of Lucerne, Switzerland.²⁴ Specifically, this project examines how international trade law might be adjusted to better contribute to the economic development of Indigenous peoples, while at the same time addressing unique interests and rights of Indigenous peoples with respect to their cultural heritage. To this end the project will be exploring options for interfacing global trade and IP law with indigenous legal orders including through investigating national and international law in the relevant fields of trade, human rights, cultural heritage, intellectual property, indigenous rights and cultural property.

Graber proposes that disputes concerning international trade in traditional knowledge and cultural expressions be resolved through a procedural approach that has preferential rules for spiritually or communally significant "indigenous cultural goods (or services) originating in WTO members that respect the rights of the cultural self-determination and self-governance of

²⁴ Online: http://www.unilu.ch/deu/research_projects_135765.html

their indigenous peoples.”²⁵ As part of this approach Members must agree to look to indigenous communities of origin to distinguish what cultural expressions can be traded from others. The proposal has three component parts (1) *prima facie* assumptions of Indigenous ownership where certain criteria are met; (2) Indigenous laws and processes determining ownership and nature of, or whether a particular traditional cultural expression can be traded; and (3) formal confirmation by a special WTO commission that would notify and take into consideration rights and arguments of dissenting claimants. As Graber points out, there are advantages to procedural approaches that will be explored in greater detail through this project.

My involvement in the Graber project is to provide information on the situation in Canada and context to reflect on the extent to which Canadian law recognizes and respects the right of the Aboriginal peoples of Canada “to freely determine their ...cultural development” and exercise “autonomy or self-government” in matters relating to cultural heritage.²⁶ To this end I am exploring ongoing areas of societal tension and uncertainty in Canadian cultural heritage, intellectual property and trade law generated by the application of Canadian law, Aboriginal constitutional rights, Aboriginal concepts of property and contemporary ethical norms.

Concluding Remarks

Over the last 15 years there has been increasing attention paid to IP as a potential mechanism to both increase the economic power of indigenous peoples and to protect some forms of knowledge from uses considered contrary to laws and values of source communities. IP has become a focus of attention for several reasons including: (1) pressure from what are identified in international forums as “developing nations” to participate in the economic benefits of exploitation of resources by within their borders (especially biological material and cultural expressions); (2) increased political pressure and organization by indigenous movements, as well as increasing power within some nation states; and (3) influence of external pressures including policy makers and researchers encouraging indigenous peoples to “rethink” their relations to each other and the world in the language of property rights. Information campaigns and tool kits for recommended strategies have been developed to help indigenous peoples take advantage of the existing IP regime. These are important initiatives. However, little IP law reform has emerged in response to indigenous concerns has occurred at the state level. Further, to the extent that property law is to be utilized as a mechanism to address a diverse array of indigenous concerns, focusing on IP is woefully inadequate and can be dangerous if IP reform is the end goal.

²⁵ Christoph Beat-Graber, 2010, “Institutionalization of Creativity in Traditional Societies and International Trade Law”, i-call Working Paper No 2 forthcoming in Shubha Ghosh (ed.), *Creativity, Law and Entrepreneurship* (Cheltenham U.K.: Edward Elgar) and online: www.unilu.ch/files/i-call_Working_Paper01_Graber.pdf at 14.

²⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 295, UN GAOR, 651st Sess., UN Doc. A/RES/61/295 (2007). Online: <http://www.Ohchr.org/English/issues/indigenous/declaration/htm>, art. 3 & 4.