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Résumé de l'article

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# Engaging Respectfully with Indigenous Knowledges: Copyright, Customary Law, and Cultural Memory Institutions in Canada

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This paper contributes to building respectful relationships between Indigenous (First Nations, Métis, and Inuit) peoples and Canada's cultural memory institutions, such as libraries, archives and museums, and applies to knowledge repositories that hold tangible and intangible traditional knowledge. The central goal of the paper is to advance understandings to allow cultural memory institutions to respect, affirm, and recognize Indigenous ownership of their traditional and living Indigenous knowledges and to respect the protocols for their use. This paper honours the spirit of reconciliation through the joint authorship of people from Indigenous, immigrant, and Canadian heritages. The authors outline the traditional and living importance of Indigenous knowledges; describe the legal framework in Canada, both as it establishes a system of enforceable copyright and as it recognizes Indigenous rights, self-determination, and the constitutional protections accorded to Indigenous peoples; and recommend an approach for cultural memory institutions to adopt and recognize Indigenous ownership of their knowledges, languages, cultures, and histories by developing protocols with each unique Indigenous nation.

**Keywords:** Indigenous; Indigenous Knowledge; copyright; copyright review; Indigenous ownership; libraries; archives; cultural memory

## Introduction

Many, if not all, Canadian cultural memory institutions<sup>1</sup> have holdings that are attributed to non-Indigenous authors or creators but are, in truth, Indigenous knowledges.<sup>2</sup> These institutions play a central role in the preservation of Indigenous knowledge by gathering written and recorded oral knowledge and languages and digitizing Indigenous knowledge, history, culture, and language (Callison 2014). However, these holdings are often in the name of the scholar who interpreted the knowledge, the researcher who documented it, or the collector who obtained and shared the knowledge with the cultural

<sup>1</sup>For the purpose of this article, cultural memory institutions include, but are not limited to, libraries, archives, museums, and other types of culture and/or knowledge repositories where traditional knowledge, both tangible and intangible, is held.

<sup>2</sup>*Indigenous knowledges* is a widely used phrase in global literature in reference to the multiplicities of Indigenous knowledge systems or cultural knowledge systems of different peoples Indigenous to local lands. See, e.g., Kyle Whyte, "Factors that Support Indigenous Involvement in Multi-Actor Environmental Stewardship" (2017, 62, 66); George J. Sefa Dei, "Rethinking the Role of Indigenous Knowledges in the Academy" (2000, 114); Anders Breidlid and Roy Krovel, eds., *Indigenous Knowledges and the Sustainable Development Agenda* (2020, 2–3).

memory institution. Some holdings of Indigenous knowledge have been unethically appropriated, as early ethnographers, missionaries, or allies raced to save the histories and artifacts of a “vanishing race.” In other cases, Indigenous peoples from whom the knowledge originated have not been acknowledged. In any case, the traditional outcome has been that authorship or ownership status, under Canadian copyright law, was conferred on that scholar, researcher, or collector. This concept of ownership is contrary to traditional laws that surround Indigenous ownership and govern the sharing of knowledge. Only in the proper cultural context in which knowledge is owned by the originating peoples can the true expression of that knowledge or cultural expression be found (Callison, Roy, and LeCheminant 2016). This is notwithstanding that, under its own laws, the Indigenous community from which that knowledge originated might have a different conception or expectation of authorship or ownership, resulting in barriers to access by even those very Indigenous community members (Callison 2014).

This paper outlines the challenge of protecting Indigenous knowledge in cultural memory institutions in the context of Canadian copyright law and reviews best practices among practitioners to respect, affirm, and recognize Indigenous ownership of their traditional and living Indigenous knowledges and to respect the protocols for their use. We first define and discuss Indigenous knowledge, then we examine legal framings of knowledge intellectual property rights in Canada, including how conflicts occur within the intersection of legal systems. Next, building upon the work of Indigenous Elders, leaders, and academics and allies that have come before us, we review the current use of protocols in cultural memory institutions to embed Indigenous epistemologies, honour Indigenous voices, and engage in respectful relationships, thereby engaging with Indigenous knowledges while respecting Indigenous laws. We conclude by recommending that libraries, archives, museums, and other cultural memory institutions implement an indigenized cultural memory praxis and adopt certain protocols for use of Indigenous knowledge.

## What Is Indigenous Knowledge?

Terminology about Indigenous knowledges requires clarity. Each nation's or community's respective language, cultural landscape, and distinct worldview contribute to its unique understanding of what terms mean. In this paper, *Indigenous* refers to First Nations, Métis, and Inuit peoples, whom the Canadian government recognizes as distinct nations of originating peoples of the country now known as Canada.<sup>3</sup> The term *Indigenous knowledge* encompasses traditional knowledge, traditional ecological knowledge, and traditional cultural expressions. *Indigenous knowledges* contemplate multiple knowledge systems that exist within the many languages, cultural landscapes, and worldviews of Indigenous peoples.

In many cases, Indigenous knowledge has been orally transmitted for generations for specific cultural use, and it can encompass knowledges such as traditional technologies and sacred knowledge. Indigenous knowledges and cultural expressions include tangible and intangible expressions: oral traditions, ceremony, songs, dance, storytelling, anecdotes, place names, various forms of art, clothing, hereditary names, and many other forms (Callison, Roy, and LeCheminant 2016). One can also witness Indigenous knowledges taking new forms such as Indigenous comics, musical fusions, blog posts, or Twitter essays. Through cultural practices and ceremony, Indigenous knowledge is shared via multiple forms of transmission, during specific occasions and seasons, by specific individuals who have the right to share and pass on these knowledges. Indigenous knowledge can be gendered, family-based, clan-based, and/or owned by a specific Indigenous nation or people. In addition, Indigenous knowledge is dynamic: as it is sustained, it is also transformational, and the essence of the original remains intact during the production and expression of “new” knowledge. Knowledge can be created or transformed in new media formats and transferred using new vehicles in an intergenerational transfer of often ancient knowledges that Indigenous people have held, cared for, and transmitted to the next generation in culturally appropriate methods for millennia. Modern technology facilitates understanding and regenerative memory as traditional Indigenous knowledges are reclaimed, reimagined, and reconstituted to their original position of importance, then conveyed to a larger audience, connecting Indigenous peoples globally.

Indigenous Knowledge is, therefore, not located only in the past. It is a key element of the right to self-determination. Terms like *Traditional Knowledge* (TK) or *traditional cultural expression* (TCE) do not capture the dynamic nature of the knowledge. While the terms are sometimes used interchangeably, *Traditional Knowledge* differs from *Indigenous Knowledge* in that the latter can be used to refer to contemporary Indigenous knowledge and knowledge developed from a combination of traditional and contemporary knowledge, but it is important to note that the contextualization of traditional knowledge as solely “relatively old data” is seen by some as part of “Eurocentric thought” processes (Battiste 2005, 6). Battiste notes the importance of these definitions coming from Indigenous peoples themselves: “The recognition and

<sup>3</sup> Global Indigenous knowledges, of knowledge systems of peoples Indigenous to other lands, are beyond the scope of this paper.

intellectual activation of Indigenous knowledge today is an act of empowerment by Indigenous people” (Battiste 2005, 1). Certain voices in the discourse prefer the term *Indigenous Knowledge* because *Traditional Knowledge* can be interpreted to imply stasis and compared to Indigenous knowledge does not evolve and adapt (Battiste and Henderson 2002, 42). However, *Traditional Knowledge* is indeed used in most national discourses and in virtually all the international forums (Younging 2016, 67).

## Legal Structures: Canadian Legal Framework and Indigenous Laws

### Canadian Law and Indigenous Rights

Two of the most significant documents that proclaim the rights of Indigenous peoples under Canadian law, including the right to self-determination, are the Royal Proclamation of 1763 and section 35 of Canada's *Constitution Act*. The Royal Proclamation unequivocally states that Aboriginal title existed and continues to exist, and that all land not ceded or purchased by the Crown is considered Aboriginal land and reserved for “the said Indians, or any of them” and “for the use of the said Indians.”

In section 35, the *Constitution Act* recognizes existing aboriginal and treaty rights:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

On numerous occasions the courts have noted the continuous occupation of the land by Indigenous peoples “since time immemorial”<sup>4</sup> and their special legal and constitutional status.<sup>5</sup>

Applying and interpreting Canadian law, courts recognize that both distinct culture and Indigenous title deriving from occupation inform section 35 rights.<sup>6</sup> Further, section 35 rights are *sui generis*: they do not fit into any statutory or common law category of rights recognized in Canadian law. Indigenous rights reside in their knowledge and cultural expressions. They can “range from title to tobacco use and touch all aspects of life from the adoption of children to honouring burial sites of community ancestors” (*Newfoundland and Labrador v Uashaunnuat [Innu]* 2020). Recognition of Aboriginal rights inherent in “both historic occupation and distinctive cultures . . . [and in] the diverse histories and realities of Aboriginal societies” will enable the identification and meaning of their rights (*Newfoundland and Labrador v Uashaunnuat [Innu]* 2020). Aboriginal rights are intrinsic. They spring from the continuous occupation and use of the land, the integration of the cultural customs arising from activities of land occupation and resource use. As legal scholar Deborah McGregor states, “distinct legal orders informed by Indigenous Knowledge systems” had “*already existed* on Turtle Island for thousands of years prior to the arrival of Europeans” (2018, 279).

### Copyright and Customary Laws

Cultural and heritage institutions reuse, reproduce, represent, and sell Indigenous knowledge—whether in oral or written stories, art, objects, or other works—in numerous ways, often without asking permission, properly acknowledging, or compensating the Indigenous peoples from whom the knowledge originated. Institutions typically use Canadian copyright law to determine access, use, and preservation of knowledge. Under that law, appropriation may not be seen as an unauthorized reproduction. Therefore, to understand the challenges posed to the protection of Indigenous knowledges or respectful engagement with Indigenous knowledge in cultural heritage institutions, one must understand the scope of copyright laws in Canada.

In Canada, copyright rules are a creature of statute. The *Copyright Act*, RSC 1985, C-42 governs which expressions of knowledge fall within the scope of copyright protection, and courts interpret and give the rules further meaning. Copyright in Canadian law is a mechanism of qualified protection and limited rights of reproduction of works: exceptions create users' limited rights of use, sitting in balance with the copyright holder's right to prevent unauthorized reproduction. Under current Canadian law, who holds copyright to Indigenous Traditional Knowledge (TK) or Traditional Cultural Expression (TCE) is determined by analysis of

<sup>4</sup>For example, in *Calder v Attorney-General of British Columbia* Justice Judson stated, “The appellants are members of the Nishga Nation. . . . They are descendants of the Indians who have inhabited since time immemorial the territory in question.”

<sup>5</sup>In *R. v Van der Peet*, writing for the majority, Chief Justice Lamer declared that Aboriginal rights exist “because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.”

<sup>6</sup>In 2020, in *Newfoundland and Labrador v Uashaunnuat (Innu)*, a transboundary case, the majority of the Supreme Court of Canada cited *Van der Peet*, stressing the *sui generis* nature of Indigenous rights—also known as *Aboriginal rights* in their interface with Canadian law.

the *Copyright Act* and jurisprudence of courts and tribunals. The copyrights may belong to an identified owner—a donor, a researcher, a cultural heritage institution perhaps.

Canadian copyright law is not the only mechanism by which Indigenous peoples can protect knowledges and rights of use. Indigenous peoples have lived on this land for millennia and have their own principles of law. Distinct Indigenous legal orders previously existed for thousands of years (McGregor 2018, 279), including laws determining ownership of knowledge and governing its usage and dissemination. A community—a First Nation, a band, a people indigenous to a particular place—has its own principles that govern how Indigenous knowledges are used and shared, its own legal orders or laws that protect knowledges in ways distinct from the principles of colonial intellectual property laws (Nayyer 2021, 193). Disregarding those principles of Indigenous knowledge protection can result in an appropriation of Indigenous knowledge (Nayyer 2002).

The co-existing legal systems create a situation in which the cultural or heritage institution faces a conflict of laws,<sup>7</sup> rather than simply an application of Canadian copyright law (Nayyer 2021, 197). The tension between Canadian law and Indigenous laws on this subject is between different conceptions of knowledge protection, the interests that may reside or subsist in that knowledge, and whose interests those might be. This tension underlies many collections of Indigenous knowledge in Canadian cultural memory institutions, which are often collections that comprise published research (and unpublished research notes) by an “author” who documented Indigenous knowledge rather than the Indigenous owner or keeper who shared it. The fact that Indigenous knowledge can be dynamic, constantly being created and adapted to meet current conditions, can make Canadian copyright law’s “fixation” requirement (that the work be “fixed” in a tangible medium) difficult to satisfy. Fixation at a specific time often is contrary to the laws of the peoples from whom that knowledge grew. For instance, a sacred story that is told in restricted circumstances under a strict protocol and is never written down may not meet the Canadian legal definition of a “work” in which copyright may subsist under Canadian law. It may not even have an identifiable author but is owned by a family, clan, secret society, or nation (Younging, 2016, 70). Under Canadian law, no “inherent” right of copyright exists; copyright can only exist if the *Copyright Act* conditions are met. However, in an Indigenous people’s view, the sacred nature of the story and the very existence of the strict protocol for its telling demonstrate a knowledge that is intended to be protected.

Cultural memory institutions bear an ethical responsibility to respect and protect Indigenous knowledge, irrespective of whether Canadian copyright questions are answered or answerable or whether the pertinent Indigenous systems of laws are yet elucidated (Nayyer 2021, 199). Much Indigenous knowledge is shared via intergenerational transfer, and often Elders are reluctant to share for fear of Indigenous laws of ownership not being respected. This reality underlies Indigenous desires for governance over their own knowledges because it is critical for Indigenous people to determine how, when, where, and by whom Indigenous knowledge is used. Cultural memory institutions need to develop protocols to respect such rights, particularly in the context of both the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which articulates what “constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world” (United Nations General Assembly 2007) and includes multiples articles on the protection of Indigenous knowledge,<sup>8</sup> and the Truth and Reconciliation Commission’s (TRC) Calls to Action.<sup>9</sup> The TRC Final Report and Calls to Action specify some of the ways that cultural memory institutions have historically played a role, deliberately or otherwise, in undermining Indigenous knowledges, traditional laws, and protocols around ownership of knowledge, and they include recommendations to address Indigenous knowledge held across Canada in cultural memory institutions. Cultural memory institutions must accept the onus of responsibility for reconciliation and take concrete actions that demonstrate a change in behaviour by supporting Indigenous cultural revitalization and recognizing knowledge systems, oral histories, and protocols (Truth and Reconciliation Commission of Canada 2015).

<sup>7</sup> A conflict of laws is a difference between the legal rules of jurisdictions that each have a connection to a matter: See “conflict or law,” *Canadian Online Legal Dictionary*, Irwin Law (<https://irwinlaw.com/cold/conflict-of-laws/>); “conflict of law,” *Wex Legal Encyclopedia* ([https://www.law.cornell.edu/wex/conflict\\_of\\_laws](https://www.law.cornell.edu/wex/conflict_of_laws)).

<sup>8</sup> Articles in UNDRIP concerning Indigenous knowledge include Articles 12, 14, and 31 (United Nations General Assembly 2007).

<sup>9</sup> The full adoption of UNDRIP was the central framework of the TRC and the process of reconciliation (Truth and Reconciliation Commission of Canada 2015, 4). Actions #43 and #44 call for the Canadian government to fully and completely adopt and implement UNDRIP to achieve the TRC’s goals (Truth and Reconciliation Commission of Canada 2015, 4). The Province of British Columbia enacted the first legislation incorporating UNDRIP in Canada with Bill-41, the *Declaration on the Rights of Indigenous Peoples Act* (2019). This legislation is among the first in the world to enshrine the full text of UNDRIP into legislation (Kung 2019). While noteworthy, qualifying statements about Bill-41 indicate that it was not envisioned to make significant change to aboriginal law in the province (O’Callaghan and Grist 2019).



## Developing Protocols to Engage Respectfully

For cultural memory institutions, protecting what the World Intellectual Property Organization (WIPO) defines as traditional knowledge, which includes “traditional cultural expressions” and “genetic resources,” should be a core objective (WIPO n.d.a, WIPO, n.d.b). To work toward decolonization and support Indigenous resurgence, institutions must ensure that the collections, staff, and spaces are responsive to the needs of Indigenous communities’ unique intellectual property concerns, issues, and opportunities. In Canada, the First Nations Principles of OCAP™ (1998), which stands for Ownership, Control, Access, and Possession, lay out some general principles for First Nations to control data collection processes, ownership, protection, and use. These principles explain how First Nations’ rights are fundamentally tied to self-determination; they also facilitate community-driven decision-making under appropriate protocols, with clarity as to why the information is collected, how it is used, and who has the right to collect, preserve, use, and share Indigenous knowledge. Central to Indigenous worldviews is the understanding that knowledge should be transferred only in the proper cultural context with owner(s) from the originating people and only through the method of transmission that allows the true articulation of that cultural expression. Parallel to the western intellectual property regime, multiple Indigenous peoples have multiple systems of knowledge protection, and some regard unauthorized use of their cultural expressions as theft. Indigenous people want to adhere to their own historical intellectual property regimes. As Dr. E. Richard Atleo “Umeek,” Nuuchah Nulth Elder and hereditary Chief, remarks, “Indigenous people are not asking for anything more than others already have. They want ownership over their own knowledge and want it attributed appropriately” (personal communication, 2014). Callison echoes this point: “Indigenous people’s valuing and understanding of Indigenous knowledge is often vastly different from the Eurocentric paradigm; therefore, Indigenous voices need to be acknowledged and respected” (2014, 143). Indigenous people need to regain ownership, according to their cultural protocols, of colonized knowledges that reside in cultural heritage institutions.

There is a need for Indigenous knowledge protocols to be developed so that professional practitioners in the cultural memory sector can facilitate reconciliation. Cultural memory institutions need to engage in developing written protocols with communities that have Indigenous knowledge located in their holdings. As Kimberley L. Lawson explains, Indigenous people have their own protocols: “Protocols are critical elements of First Nations knowledge systems that relate to ownership, sacredness and authenticity of ideas, crests and other intellectual property” (2004, vii). Indigenous protocols are often not written, however, and working with cultural memory institutions who aid in documenting the traditional protocols around aspects of knowledge empowers the Indigenous communities. The act of documenting traditional governance, its embodiment of the protocol, empowers the communities. Indeed, Indigenous peoples, minorities in their own traditional territories, are leaders in developing their own protocols. Some examples include:

- Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSILIRN). Protocols were first published in 1995 and updated in 2012 to include digital materials and the ATSILIRN Guide to Ethical Research in Australia.
- The Mataatua Declaration on Cultural and Intellectual Property Rights of the Indigenous Peoples, signed in Wakatane, New Zealand, in 1993. It states that “Indigenous people of the world have a right to self-determination and in exercising that right must be recognized as the exclusive owners of their cultural and intellectual property” (Smith 1999, 119).
- The *Protocols for Native American Archival Materials*, which are based on the premise that “Native American communities are sovereign governments. Tribes had their own traditional governments prior to European invasion. These governments maintain their own territories, their own laws, and their own legal restrictions surrounding cultural issues” (First Archivist Circle 2007). The Native American *Protocols* were created for Turtle Island, now known as North America, as a guide to recognizing Indigenous rights and issues related to knowledge ownership and organization as well as the importance of relationships and including Indigenous perspectives in the information profession.

These strong statements on Indigenous sovereignty and ownership follow decades of Indigenous self-determination and advocacy in which cultural memory institutions were put on notice that change was needed. In 1988, the Lubicon Cree boycotted an exhibit called *The Spirit Sings* at the Glenbow Museum in Calgary, part of the Olympic Arts Festival, because it displayed a Mohawk sacred mask that, according to customary law, only certain people within the Mohawk community had the right to see. In 1990, south of the medicine line, the *Native American Graves Protections and Repatriation Act* (NAGPRA) was signed into law. Around this time, the late Dr. Michael Ames, then Director of the Museum of

Anthropology at the University of British Columbia (UBC), published *Cannibal Tours and Glass Boxes: The Anthropology of Museums*, challenging anthropologists in museums to speak up and come to terms with “multicultural and multivocal realities - discordant realities, one might even say - of contemporary society” (1992,185). Originating with the advocacy of the Lubicon Cree, who were joined by numerous other First Nations, the *Task Force Report on Museums and First Peoples* was first released in 1992 (Assembly of First Nations and Canadian Museums Association). During this period, the UBC Museum of Anthropology began to work closely with Indigenous communities, and they applied together for a grant to consult and collaborate on Northwest Coast research and formed the Reciprocal Research Network (RRN). The RRN is a virtual collaboration that began with Musqueam people, the Stó:lō Nation, and the U'mista Cultural Society. The UBC Museum of Anthropology established relationships with these communities that were unique and specific, and data about holdings originating from these communities was later added by an additional twelve cultural memory institutions (Rowley 2013). The RRN laid formative groundwork on how Indigenous peoples could work together to discuss methodology to protect Indigenous knowledge:

The transformation of discussions from concerns over lack of inclusion at the first workshop to engaged discussions on culturally sensitive heritage and its inclusion on the RRN at the final workshop demonstrate the value of process and dialogue in building relationships and developing the network. (Rowley 2013, 38)

The RRN is an example of establishing ongoing respectful relationships and a model of how cultural memory institutions can develop research protocols specific to nations or tribes regarding tangible and intangible Indigenous knowledges in their collections.

During this time, the abuses committed in Canada's Indian Residential School (IRS) system were exposed through a court case brought by residential school Survivors determined to hold the government accountable (Indian Residential Schools Settlement Agreement 2006). In 2008, the TRC began its work to collect, document, and preserve Survivors' testimonies. The TRC archives form the basis of the holdings at the National Centre for Truth and Reconciliation (NCTR) and are “a rich source of Indigenous knowledge pertaining to one of the darkest objectives of Canadian policy” (Lougheed 2015). The NCTR regards preserving the records as an important and “sacred obligation” (National Centre for Truth and Reconciliation n.d). As part of giving their testimony, each residential school Survivor would fill out a TRC consent form to govern the conditions of access to their testimony: public, redacted, or restricted. It is commendable that the NCTR has a special act, for which they had to petition the Manitoba government, to allow for the privacy protocol. These forms and permissions are the foundation of the access protocols in place on the Survivor testimonies. Manitoba's Bill 6, the *National Research Centre for Truth and Reconciliation Act*, governs the records at the NCTR (Bill 6 2016). The development of these protocols illustrates how Canadian legal understandings and Indigenous community knowledge can be in conflict, and how the different perspectives require respectful processes (Nayyer 2021, 199).

The Canadian Federation of Library Associations (CFLA) was founded in 2016 and, in an effort to answer the TRC Calls to Action, its first committee, the Truth and Reconciliation Committee, was formed. The CFLA Truth and Reconciliation Committee was chaired by Camille Callison (Tahltan Nation) and included forty-five professionals, with representatives from every province and territory, who came together to recommend a way forward on the issues facing Indigenous people and libraries, archives, and cultural memory institutions (Smith 2017). The CFLA *Truth and Reconciliation Report*, released in 2017, presented ten key recommendations for cultural memory institutions across Canada to implement the pertinent TRC Calls to Actions.<sup>10</sup> The eighth recommendation specifically addressed Indigenous Knowledge Protection, recommending that institutions implement protocols for protection as well as agreements “to respect the Indigenous cultural concept of copyright with regard to Indigenous history or heritage” and that “CFLA-FCAB actively participate in reforming the Canadian *Copyright Act* to include protection of Indigenous knowledges and languages” (CFLA-FCAB 2017). The report also included specific Indigenous Knowledge Chapter Recommendations of a more granular nature, which are summarized in Figure 1 below. The recommendations were endorsed across Canada and laid the ground for a commitment from cultural memory institutions to start engaging respectfully with Indigenous peoples. As we discuss in more detail below, two CFLA committees, Copyright and Indigenous Matters, recognized the importance of Indigenous ownership of their traditional and living knowledges and collaborated to implement the pertinent TRC Calls to Action

<sup>10</sup> The CFLA-FCAB *Truth and Reconciliation Committee Report* made ten key recommendations. Recommendation #8 dealt specifically with Indigenous Knowledge. See CFLA-FCAB, 2017, *Truth and Reconciliation Report and Recommendations*, <http://cfla-fcab.ca/wp-content/uploads/2017/04/Truth-and-Reconciliation-Committee-Report-and-Recommendations.pdf>.

Protect/Preserve	Support Indigenous Language	Seek direction from Indigenous Communities	Respect & Advocate for Change to Intellectual Property Right laws
Protect and preserve Indigenous knowledge(s) in a variety of mediums for use by current and future generations in a respectful and sensitive manner while also actively engage in digitizing Indigenous knowledge, with guidance and control resting with Indigenous communities for the use and access of these materials	Support Indigenous language revitalization by seeking out language activists in their communities to provide space for programming, share their language materials, and collect relevant materials, particularly for local Indigenous languages;	Seek direction from communities on proper cultural protocols regarding access and care of their culturally sensitive knowledge and materials; developing specific protocols for dealing with Indigenous knowledge/materials with by developing policies that reflects and integrates Indigenous values in collaboration with Indigenous knowledge owners	Respect the Indigenous cultural concept of copyright with regard to Indigenous history or heritage, which is often located in but not limited to oral traditions, songs, dance, storytelling, anecdotes, place names, hereditary names and other forms of Indigenous knowledges; Advocate for change to Canadian Intellectual property law recognizing Indigenous ownership laws
Acknowledge	Be	Seek out	Engage in
Acknowledge that timelines for outreach are different when dealing with Indigenous cultural protocols and be flexible in staffing, opening hours, and programming capacities.	Be active allies in Indigenous resurgence: the recognition of Indigenous legal orders and kinship ties.	Actively seek out the work of Indigenous creators for inclusion in their collections; conversely, they should have a robust deselection system that recognizes cultural appropriation, historical inaccuracy.	Engage in professional development and training that connects to the traditional territory where they work through land-based education and other forms of traditional knowledge.

Indigenous Knowledge Protection Recommendation #8 summary  
[CFLA-FCAB Truth & Reconciliation Committee Report](#)

**Figure 1:** Camille Callison, Indigenous Knowledge Protection Recommendation #8 Summary. Adapted from the *Truth and Reconciliation Committee Report* – Recommendation #8 (CFLA–FCAB 2017).

and the CFLA–FCAB *Truth and Reconciliation Committee Report's* Recommendation #8, which specifically addressed intellectual property concerns.

In addition to the work being done by professionals in the cultural memory sector, there is also a recognition of the need to overhaul governmental policy at the federal level. When the Standing Committee on Industry, Science and Technology commenced its work on the statutory review of the *Copyright Act* in 2017, Chair Dan Ruimy received the following direction from the Ministers responsible for the *Copyright Act*: “we invite you to pay special attention to the needs and interests of Indigenous peoples as part of Canada’s cross-cutting efforts at reconciliation” (Bains and Joly 2017). Presented in 2019, the Report of the Standing Committee on Industry, Science and Technology then recognized “that, in many cases, the Act fails to meet the expectations of Indigenous peoples with respect to the protection, preservation, and dissemination of their cultural expressions” and addressed “the need to effectively protect traditional arts and cultural expressions in a manner that empowers Indigenous communities, and to ensure that individual Indigenous creators have the same opportunities to fully participate in the Canadian economy as non-Indigenous creators” (House of Commons).

In response to the 2017 review, the CFLA Copyright Committee and the Indigenous Matters Committee wrote the *Position Statement: Indigenous Knowledge in Canada’s Copyright Act*, which recommended “that the Copyright Act respect, affirm and recognize Indigenous peoples’ ownership of their traditional and living respective Indigenous knowledge” (2018).<sup>11</sup> The statement, which positioned UNDRIP’s Articles 31.1 and 31.2 as the underlying principles for copyright reform (CFLA–FCAB 2018), implored the Government of Canada to deliver on its acceptance of the TRC report and work with Indigenous peoples in Canada to explore mechanisms that would enable the originating community to actively protect their knowledge. This statement speaks to the need for legislative protection of Indigenous knowledge, such as ensuring that contracts and licenses cannot override Indigenous rights. For works in the public domain that include Indigenous knowledge, the statement recommends that users respect that knowledge by acknowledging the community and knowledge origin. In select cases regarding, for example, sacred or private information, the statement asserts that legislation may need to include the right of communities to regain ownership of some Indigenous knowledge even if the work containing it has lapsed into the public domain. Overall, the focus of the CFLA–FCAB *Indigenous Knowledge and Canada’s Copyright Act* recommendations was that concerns about the use of Indigenous knowledge must be addressed through protocol agreements with Indigenous communities on care of collections and contested items.

<sup>11</sup> *Indigenous* refers to First Nations, Métis and Inuit peoples of Canada (CFLA-FCAB 2018).



In addition, the Steering Committee on Canada's Archives' Response to the Report of the Truth and Reconciliation Commission Taskforce reviewed archival policies and identified barriers to access for Indigenous people. In June 2020, the committee presented their findings and recommendations in "A Reconciliation Framework for Canadian Archives," which included objectives on "Ownership, Control and Possession" and "Access." Of the former, the framework states that "the Canadian archival Community shall recognize and respect Indigenous Peoples' intellectual sovereignty over archival material created by or about them"; of the latter, it confirms that "the Canadian archival community shall support Indigenous Peoples' right to know about and control access to archival materials created by or about them" (Response to the Report of the Truth and Reconciliation Commission Taskforce 2020). In addition to supporting Indigenous peoples' ownership, control, and possession of Indigenous knowledge, recognizing Indigenous peoples' intellectual sovereignty over archival materials created by or about them means defending their right to know about these materials, as well as ensuring that they have complete control over who has access to these materials (Members of the Response to the Report of the Truth and Reconciliation Commission Taskforce 2020).

Cultural memory institutions have become very important in reclamation and intergenerational transfer of (Indigenous) knowledges, languages, and culture. Therefore, cultural memory institutions need to ensure that those working in these areas understand Indigenous peoples' worldviews, and they need to provide funding to empower Indigenous people to create respectful relationships and define their protocols with cultural institutions. Indigenous peoples have the right to their own tangible and intangible knowledges because "access to and assistance with tribal archives for Native Americans is an inherent human right," as Jennifer R. O'Neal (2015, 3) points out in an article inspired by Vine Deloria Jr.'s 1978 paper "A Right to Know." Deloria Jr. had emphasized that Indigenous peoples had the "need to know; to know the past, to know the traditional alternatives advocated by their ancestors, to know the specific experiences of their communities, and to know about the world that surrounds them (Deloria Jr. 1978, 13). Within "the larger goal of decolonizing Native American archives, which applies and builds upon the methodological framework presented by Linda Tuhiwai Smith regarding decolonizing research," there are extremely crucial areas where education is needed, such as collection practices, curation, and preservation of Indigenous knowledge, to "replac[e] Western ways of managing tribal archives with those rooted in the indigenous epistemological traditional ways of knowing and stewarding collections" (O'Neal 2015, 2).

## Protocols in Use

There are several examples of agreements between cultural memory institutions and Indigenous people that respect and incorporate Indigenous protocols for stewardship. A recent example of a well-developed protocol involves the Canadian Museum of Human Rights (CMHR) and artist Carey Newman. They entered into an agreement in October 2019 called "An Agreement Concerning the Stewardship of the *Witness Blanket* – A National Monument to Recognize the Atrocities of Indian Residential Schools," which outlined a protocol for the *Witness Blanket* to reside and be respectfully cared for at the CMHR in Winnipeg (Johnson 2020). This innovative and groundbreaking agreement allowed for the syncretism of Kwakwaka'wakw law and governance and Canadian contract law to facilitate a long-term relationship based on a protocol agreement or memorandum of understanding for joint stewardship and caretaking of the *Witness Blanket*. This powerful agreement lays out the CMHR's roles and responsibilities for physical caretaking and preservation as well as integrating spiritual components into the care of the *Witness Blanket*.<sup>12</sup>

Another example of an overarching protocol or framework was agreed to and celebrated on October 25, 2019, when the International Council on Archives (ICA) and the National Archives of Australia held the first Indigenous Summit, "See us, Hear us, Walk with us: Challenging and Decolonising the Archive," led by the ICA's new Expert Group on Indigenous Matters (EGIM) at the Tandanya National Aboriginal Cultural Centre in Adelaide. At the summit conclusion, the EGIM presented the Tandanya Declaration, the first international archives declaration on Indigenous matters. The Declaration calls on the archival community to adopt its themes for immediate action to reimagine the meaning of archives as an engaging model of social memory, to embrace Indigenous worldviews and methods of creating, sharing, and preserving valued knowledge. The goal of the declaration is to decolonize archives with Indigenous knowledge methods and to be open to

<sup>12</sup>The agreement is accessible via the Johnson article, but to begin to realize the true magnificence of the *Witness Blanket*, the significance of the agreement, and the ceremony and feasting that was part of establishing the relationship and responsibilities for continued care and preservation of the meaning behind the *Witness Blanket*, the authors recommend viewing the film about the cross-country journey that the *Witness Blanket* undertook, *Picking Up the Pieces: The Making of the Witness Blanket*. This national monument will stand as a symbol of remembrance of the residential school legacy, honouring the Survivors and symbolizing lasting reconciliation. See Canadian Museum of Human Rights, n.d., *Picking Up the Pieces: The Making of the Witness Blanket* (<https://humanrights.ca/story/picking-up-the-pieces-the-making-of-the-witness-blanket>) and Witness Blanket, n.d., "Witness Blanket - A National Monument to recognize the atrocities of Indian Residential Schools" (<http://witnessblanket.ca/>).

Indigenous interpretation: “The result will be a new model of public archives as an ethical space of encounter, respect, negotiation and collaboration without the dominance or judgement of distant and enveloping authority” (Expert Group on Indigenous Matters 2019).

## Indigenous Protocol Tools: Traditional Knowledge Labels and Data Protection Protocols

Tools that support the articulation of local Indigenous protocols have been developed in the last ten years, including Local Contexts' Traditional Knowledge (TK) Labels and data protection protocols such as the Equity for Indigenous Research and Innovative Coordinating Hub's (ENRICH) Biocultural Labels and the CARE Principles for Indigenous Data Governance. Indigenous Data sovereignty is the right of a group or nation to reclaim and govern the collection, organization, and use of its own data, and as part of the process of reclamation it “is essential to recognise that, before contact with imperial powers, Indigenous peoples had their own vibrant, meaningful bodies of data” which only they controlled (Pool 2016).

In 2013, Jane Anderson and Kim Christen, one of the founders of Mukurtu CMS, developed Local Contexts and the TK Labels schema. This collaboration came about because Anderson and Christen recognized the complex licensing requirements of the Indigenous communities that they worked with, where traditional copyright rules did not apply well to the needs of the communities or Indigenous materials (Anderson and Christen 2013). The Local Contexts model offers a series of legal licenses and educative labels to mark cultural objects and cultural information clearly, allowing a nuanced approach towards rules for sacred objects, protocols relying on gender, and material with rules for access (limited to clan, for example) (Anderson and Christen 2012). Local Contexts has also created various TK Labels with clear illustrative pictographs that can be used in conjunction with other knowledge management platforms like Mukurtu CMS to make more explicit the exact nature of access and reuse allowed of Indigenous materials (Local Contexts n.d.b). The labels are also viewed as iterative in that they can be flexible and responsive to local community needs, to encourage conversation within the community and to acknowledge community-based views of allowable reuse (Anderson and Christen 2012).

The TK Labels are envisioned as working within the goals of UNDRIP because they enable Indigenous peoples' self-determination when it comes to their Indigenous knowledge and can assist with reconciliation efforts between Indigenous communities and libraries, archives, and museums (Anderson and Christen 2012). TK Labels can include a notice that makes clear if the Indigenous material can be used for non-commercial or commercial purposes and makes clear reuse restrictions. The labels also offer an opportunity to restore knowledge “gaps” for items that have been removed from their communities and restore information that should have stayed with the cultural material, which in turn helps “prevent or limit misuse and derogatory treatment of traditional cultural expressions” (Anderson and Christen 2012). For example, the TK Culturally Sensitive label can be used to indicate that material has cultural and/or historical sensitivities. The label asks for care to be taken when this material is accessed, used, and circulated, especially when materials are first returned or reunited with communities of origin. In some instances, this label will indicate that there are specific permissions for use of this material required directly from the community itself (Anderson and Christen 2012).

At present there are eighteen labels available that can be used solo or in combination as necessary (Local Contexts n.d.b). Several Canadian Indigenous communities are currently using TK labels for describing their traditional knowledge material, including Musqueam First Nation, the Sto:lo First Nation archives, and Sq'ewlets (Scowlitz) Community (Sto:lo First Nation) (Local Contexts n.d.c). The application of TK labels takes considerable consultation with community, as Christen outlines in her work with the Musqueam First Nations, “when at every stage they followed the local protocols for decision-making” (Christen 2015). The customizable nature of the licensing was key to the work; for example, out of the work with the Musqueam one of the TK Labels, the Family Label, was developed to reflect a key way that Elders defined the community (Christen 2015). The TK labelling also allowed specific Musqueam text to be added to labels, making them more specific and better outreach tools for communicating details about the Musqueam First Nation's cultural materials to those outside of their community (Christen 2015). Museums and archives are given two notices of their own in Local Contexts. These Cultural Institution (CI) Notices can be used to show that organizations are receptive to applying TK Labels and are not adaptable by organizations that adopt them (Russo Carroll et al. 2020). The Open to Collaboration Notice signals that institutions are open to new ways of collaborating with Indigenous communities, and the Attribution Incomplete Notice applies to collections or items that have incomplete, inaccurate, or missing attribution (Local Contexts n.d.a).

The Biocultural Label Initiative, led by Jane Anderson and Māui Hudson, furthers the TK Label initiative and specifically allows for inclusion “to genetic resources and within the biological and genomic data sciences” (ENRICH n.d.). The Indigenous Data Sovereignty Tools for Transparency, from ENRICH, have

developed label protocols that help Indigenous peoples reclaim ownership of and maintain control over their own data. They introduced the Biocultural (BC) Labels with six labels in 2020:

1. Provenance (BC P)
2. Consent Verified (BC CV)
3. Open to Collaboration (BC OC)
4. Open to Commercialization (BC C)
5. Multiple Community (BC MC)
6. Research Use (BC R) (Russo Carroll et al. 2020)

These BC Labels, again dependent on input from local Indigenous communities, denote protocols that apply to genetic resources available on Indigenous lands and will be available to be used by biological and genomic data sciences (ENRICH n.d.). The ENRICH model also has notices that can be added by researchers and cultural institutions that act as a placeholder, waiting for appropriate Indigenous community input (Russo Carroll et al. 2020).

Finally, the CARE Principles for Indigenous Data Governance were published in 2019 by the Global Indigenous Data Alliance (GIDA). These principles define a potential way forward for the care of Indigenous peoples' data about their lands and knowledge. The CARE Principles outline four key areas where data use should be scrutinized and evaluated through an ethical lens that considers impact on Indigenous peoples and place an alphanumeric code on three distinctions that should be considered under each of the four key areas. The four key areas identified are Collective Benefit, Authority to Control, Responsibility, and Ethics (Global Indigenous Data Alliance 2019). The principles offer guidance on how those that engage with data should approach, consult, collect, use, and share data about Indigenous peoples and their lands, to help safeguard Indigenous peoples' rights and ownership over data about them.

Of the protocols we mentioned in this paper, the majority have been led and developed by Indigenous people and allies in a model of reconciliation. The success of Local Contexts, for example, relies on Indigenous peoples in their local communities adding meaning and description to the labels. Cultural institutions' role in implementing Indigenous protocols should be that of collaborators that are open to input, who recognize that their records are missing crucial information. Indigenous peoples often carry the heavy relational burden associated with developing these protocols; therefore, their voices must be privileged when discussing matters related to research, relationship-building, and creating protocols. Respectful protocols are an attempt to guide cultural memory institutions in entering respectfully into relationships with Indigenous communities and in facilitating the discussion of matters of importance related to ownership and description of Indigenous tangible and intangible knowledges.



**Figure 2:** Care Principles for Indigenous Data Governance (<https://www.gida-global.org/care>).

## Conclusion

Cultural memory institutions must first ask to hold and use Indigenous knowledges and works. Once collaboration begins and the recognition of legal plurality takes place, then describing and respectfully providing access to the holdings of Indigenous knowledge can commence. When considering legal structures, Justice Murray Sinclair notes that on the path of reconciliation “the decision to use Indigenous laws, protocols, and ceremonies to pursue reconciliation *must* rest with each Indigenous nation as self-determining peoples. Neither the Commission, nor the federal government, nor any other body has authority to initiate these proceedings” (Truth and Reconciliation Commission of Canada 2015).

As Indigenous knowledges have historically been silenced by dominant knowledge organization systems and practices, including western intellectual property regimes, cultural memory institutions must purposefully protect, respectfully care for, and support the recognition of these ways of knowing. Cultural memory institutions are also well positioned to enable restitution of stolen intellectual property through research, repatriation, and community support. Canada has committed to the implementation of UNDRIP and the TRC’s Calls to Actions. The Canadian intellectual property rights regime must acknowledge the rights of Indigenous people over their traditional and living knowledges and cultural expressions. Indigenous people in their knowledge systems have developed a wealth of traditional and living knowledges as well as a rich and vibrant culture, which they rightly wish to protect and promote under their Canadian constitutional rights and their inherent rights to self-determination.

Cultural memory institutions must attend to this issue: stark contrasts exist between principles of domestic copyright law systems that they regularly work within and the Indigenous laws of communities whose knowledge they wish to work with. An expression of Indigenous knowledge may be seen to attract no protection at all under a country’s domestic copyright law, whereas it may be sacred or subject to strict protocols under the Indigenous community’s law. Rather than asserting efforts to merge the legal systems, an ethical approach calls for the situation to be framed in a way that recognizes legal systems that conflict.

Indigenous knowledge systems and laws dictate who can access certain works as well as if and how works can be used, copied, articulated, etc. Recognizing and integrating two legal approaches to works is a non-linear undertaking, but Indigenous legal norms and processes need to be preserved. As John Borrows puts it:

Lines can be parallel, but they can also weave, cross and entwine with one another. Indigenous peoples do not want to see their own legal norms and decision-making processes obscured or extinguished through their interaction with other legal systems. The threads of Indigenous law must be vibrant, strong and recognizably distinct when they interact, affect and are influenced by other legal traditions. (Borrows 2019, 1–2)

Cultural memory institutions must first ask to hold and use Indigenous knowledges and works. Then, in collaboration with communities and in recognition of the different legal systems at play, they can begin to describe and respectfully provide access to the holdings of Indigenous knowledge.

The foregoing best practices and protocols serve as workable solutions and direction for the future. Indigenous knowledges and cultural expressions include traditional types of tangible and intangible expressions that have been sustained, transformed, and remain dynamic. Therefore, relationships with both Indigenous ways of knowing and the communities who are the owners of that knowledge need to be respectfully developed and maintained continuously so that culturally appropriate access to Indigenous knowledge can occur within the proper cultural context (Kirkness and Barnhardt 1991). Only when relationships occur within the proper cultural context with the originating people can the true expression of that cultural expression be found, understood, and accurately preserved.

Creating respectful relationships with Indigenous peoples, creating appropriate policies, and supporting the development of unique nation- or tribe-specific protocols is now essential for cultural memory institutions holding Indigenous knowledges in their collections. As stated, it is only in relationship with the originating Indigenous community and using the appropriate Indigenous and traditional law that govern this intangible knowledge that these institutions will contribute to Indigenous knowledge recovery, revitalization, and reactivation in a meaningful manner. Thereby, the support of existing practices in the development of protocols, along with the continual advice and guidance from the Elders, traditional teachers, and community leaders, reactivates the Indigenous law governing this knowledge and avoids any glimmer of cultural appropriation.

Therefore, the ethical way of working with Indigenous communities is for cultural memory institutions to create relationships and work with Indigenous peoples to develop culturally appropriate access protocols and to commit to an ongoing respectful relationship to care for that living document, which will evolve and change over time. One Indigenous people’s protocols will be different from another’s, as each people or



nation is unique. There is no one-size-fits-all approach, but developing respectful relationships and acknowledging Indigenous ownership over their own knowledge are some avenues towards reconciliation. As Jessica Hernandez and Sandy Littletree note in their work on diversity in libraries, “The future of our profession depends on our ability to rethink existing paradigms and practices; recast traditional roles; and re-image the face of our profession. This will only be achieved by purposefully growing a diverse workforce and fostering cultural fluency across the profession” (2011).

The TRC Calls to Action specify some of the ways that mainstream cultural memory institutions have historically played a role—deliberately or otherwise—in undermining Indigenous knowledges, traditional laws, and protocols around ownership of knowledge. A community of practice that privileges Indigenous voices and communities and engages with Indigenous people is critically needed to actively restore Indigenous laws and governance around the sharing, teaching, and intergenerational transfer of knowledge in cultural memory institutions. In developing respectful protocols with Indigenous peoples, cultural memory institutions can embed Indigenous epistemologies, honour Indigenous voices, and begin to engage in respectful, reciprocal, and enduring relationships, thereby beginning the journey towards reconciliation and indigenizing cultural memory praxis.

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