

Control of information originating from Aboriginal communities: Legal and ethical contexts
Contextes légaux et éthiques du contrôle de l'information provenant de communautés autochtones

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Volume 35, numéro 1-2, 2011

URI : <https://id.erudit.org/iderudit/1012834ar>

DOI : <https://doi.org/10.7202/1012834ar>

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Éditeur(s)

Association Inuksiitiit Katimajit Inc.
Centre interuniversitaire d'études et de recherches autochtones (CIÉRA)

ISSN

0701-1008 (imprimé)
1708-5268 (numérique)

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Citer cet article

Bell, C. & Shier, C. (2011). Control of information originating from Aboriginal communities: Legal and ethical contexts. *Études/Inuit/Studies*, 35(1-2), 35–56.
<https://doi.org/10.7202/1012834ar>

Résumé de l'article

De multiples cadres juridiques, éthiques et politiques bornent l'accès aux données et aux produits de la recherche effectuée par ou au sujet des peuples autochtones du Canada et leur contrôle. Cet article se penche sur trois domaines fréquemment sollicités au Canada: la propriété intellectuelle, l'accès à l'information et les lois et politiques juridiques. Une revue de chacun de ces domaines démontre que pour répondre effectivement aux préoccupations des peuples autochtones du Canada, il est nécessaire d'examiner un grand éventail de lois relatives au patrimoine culturel matériel et immatériel des Inuit, des Premières nations et des Métis. On y souligne également l'importance actuelle des contrats de confidentialité et de la négociation de cadres éthiques et politiques afin de répondre plus significativement au contrôle de l'information.

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Abstract: Control of information originating from Aboriginal communities: Legal and ethical contexts

Access to and control over data and products of research originating from, or about, Aboriginal peoples in Canada arises in multiple legal, ethical, and political contexts. This article addresses three areas frequently implicated in Canada: intellectual property, access to information, and tribunal law and policy. A review of each area demonstrates that effective responses to concerns of Aboriginal peoples in Canada require examination of a wide range of laws implicating Inuit, First Nation, and Métis intangible and tangible cultural heritage. It also underscores the present importance of contracted confidentiality and negotiated ethical and policy frameworks to secure more meaningful control over information.

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Introduction

Access to, and control over, information originating from indigenous communities can become an issue in numerous local, national, and international contexts. These contexts include: ownership and use of data and products of research; repatriation and trade of material culture; increased control over information, cultural expressions, and material culture held by museums, archives, universities, and other public and private institutions; resource development and its impact on archaeological and other cultural sites and landscapes; and protection of information gathered and shared for the purpose of participating in legal and administrative processes (e.g., environmental impact assessments) or for legally mandated consultation processes (e.g., Bell and Napoleon 2008; WIPO 2001). As such, there is no single process, policy, or area of domestic or international law that is most important or effective for tackling this issue. Rather, ownership and control of information is caught in a complex legal web: intellectual property (IP), trade, parks, cultural heritage, and environmental laws; access to information and privacy laws; Aboriginal legal orders; Aboriginal constitutional rights; human rights; contract and administrative law; and international laws and agreements. Access and control are also increasingly addressed both directly and indirectly through modern Canadian land claim, treaty and self-government agreements. Examples include: jurisdiction over heritage resources and research within settlement, reserve, and other designated lands;¹ creation of decision-making and regulatory bodies with majority or increased Indigenous participation that are expressly directed, or considered more likely, to treat traditional ecological knowledge as confidential;² and control over access to and business conducted on settlement or other designated lands.

As access to and control over information has yet to be raised directly before Canadian courts as a question of Aboriginal constitutional rights, there are no judicial decisions that directly address the rights of First Nation, Inuit, or Métis peoples to information intimately connected to their lands and cultural identities and/or considered sacred or sensitive by them. Such rights, however, can be recognised by means of various arguments. Section 35(1) of the *Constitution Act, 1982* “recognizes and affirms [...] existing Aboriginal and treaty rights” that have not been terminated by legislation, treaty or other means considered valid by Canadian courts prior to 1982. A fundamental purpose of this section is to “provide cultural continuity and security” for Aboriginal societies (*R v Sappier*, para. 22). S. 35, and judicial trends in its interpretation, supports recognition of a general Aboriginal right to cultural integrity, which Brian Slattery (2007: 600) defines as “the right of Aboriginal people to maintain and develop the central and significant elements of their ancestral culture.” This general right may take a range of more specific forms such as access to ceremonial items and landscapes or respect for particular customary laws (e.g., concerning transfer of ceremonial property and information rights) where they were historically and still are

¹ E.g., *Nisga’a Final Agreement*, Ch. 17, s. 36; *Yukon Land Claim Agreement*, Ch. 13. In addition the government of Nunavut has jurisdiction over cultural heritage within Nunavut.

² E.g., *YESEAA*, s. 121(a); *Nisga’a Final Agreement*, Ch. 10, s. 7(b); *Nunavut Land Claims Agreement*, Articles 10-13.

integral to the distinctive cultural identity of a particular Aboriginal group (e.g., Battiste and Henderson 2000: 201-205; Bell 2008: 25-33; Slattery 2007: 599).

This article will cover neither the many potential legal responses to Indigenous concerns nor the areas of national and international law implicated by increased access and control. Rather our focus will be on three areas of Canadian law: intellectual property law, access to information law, and tribunal law and policy. In reviewing each area, we will demonstrate that the concerns of Aboriginal peoples in Canada should be addressed by examining a wide range of laws implicating Inuit, First Nation, and Métis intangible and tangible cultural heritage. Such review will also underscore the present importance of contracted confidentiality and negotiated ethical and policy frameworks to secure more meaningful control over information.

Traditional knowledge and rationales for control

Indigenous people seek to protect and control information that is often labelled as “traditional knowledge” or “Indigenous knowledge.” Such knowledge has no official Canadian legal definition. It is defined broadly in various institutional, national, and international reports and policies as an amalgam of historical and contemporary influences that include knowledge, values, beliefs, customs, practices, and traditions intimately connected to a people’s land and culture, arising from intergenerational experience, and passed down from generation to generation (e.g., Howell and Ripley 2008: 223-225; RCAP 1996 vol. 3: 454; DCH 2008: 4-5; WIPO 2001). Although there may be general similarities, Indigenous knowledge is context-specific and local, i.e. associated with a particular culture or society and territory. The word “tradition” does not mean old or static. It refers to intangible heritage whose “creation and use are part of the cultural traditions of a community” and which may be governed by prescribed laws or protocols (Howell and Ripley 2008: 225; WIPO 2001: 212, 213). As an “expression of the vibrant relationships between people, their ecosystems, and the other living beings and spirits that share their lands,” it is cumulative and evolves as people interact with their natural environment and each other (Battiste and Henderson 2000: 42). It may be known generally or selectively within a community. This broad definition also includes aspects of intangible heritage that national and international law treats as the product of creative human thought, including intangible cultural expressions such as music, songs, words, graphics, designs, signs, images, dance forms, knowledge, artworks, symbols, and patterns.

There are a variety of rationales for increased access to and control over research data and products that draw on Indigenous knowledge. These rationales vary between and among Aboriginal peoples and the type of information or product in question. In asserting greater control, Aboriginal people in Canada have not sought to prevent access to, or block sharing of, excessively vague categories of cultural information or all forms of traditional knowledge. But they do have some concerns: protection of what was (and is or has become) sensitive cultural information (e.g., confidential, sacred, ceremonial, or other forms of knowledge intended to be transmitted in certain ways or

only to certain people); respect for Indigenous jurisdictions, laws, processes or protocols considered fundamental to cultural identity or legal, social, or spiritual orders; control of information considered central to restoring spirit, human dignity, and/or well being; prevention of uses that are inappropriate or illegal within Indigenous contexts; access by research participants and the wider community to products or benefits of participation in research and information and, where appropriate, to the knowledge in question; and, where research is for commercial use or can no longer be protected, equal sharing of the economic proceeds of information (e.g., Battiste and Henderson 2000: 70; Bell and Napoleon 2008; Bird 2001; DCH 2008; RCAP 1996: 596-98; Thom and Bain 2004). Concerns also arise over information recorded by others that does not draw on Indigenous knowledge but is dated and discriminatory or inaccurately portrays the culture and values of a group.

For many colonised Indigenous peoples, control is not just about competing proprietary interests but also more fundamentally about respect for human dignity and the rights of peoples. The need for increased control is connected to reparation of past injustice, survival of cultural identity, and respect for Indigenous legal and social orders that continue to be integral to their cultural practices and identity. However, most international and national governments and institutions have been unwilling, or unable within their limited mandates, to approach issues of access and control as a matter of jurisdiction or recognition of Indigenous law and the collective human rights of political or cultural self-determination. This is so despite the clear articulation of this perspective in international instruments such as the *United Nations Declaration on the Rights of Indigenous Peoples*. When Canada endorsed this declaration on November 12, 2010, it did so because of the values it aspires toward and its “potential to contribute positively to the promotion and respect of the rights of Indigenous peoples around the world” (Government of Canada 2010). However, Canada also made it clear at the time that it does not view the declaration as legally binding or as altering Canadian or customary international law. It is therefore not surprising that even where there is some understanding of Indigenous knowledge as a distinct knowledge system, and the sometimes inextricable connection between the tangible and intangible, Canadian governments and others try to make legal responses fit within existing legal and cognitive categories for understanding and regulating knowledge.

Intellectual property law and control over information

Reconciliation of intellectual property rights and Indigenous ways of knowing

Intellectual property (IP) law is concerned with legal rights that arise from intellectual activity as distinct from the tangible objects in which knowledge is associated or “a creation is manifest” (e.g., IP law speaks to the design on a coat and not the coat itself) (Scafaldi 2005: 14). Indigenous concepts of property do not always fit neatly into legal approaches that distinguish between intellectual creations and the tangible and intangible world or translate easily from one legal system to another.

Indigenous peoples do not necessarily view IP rights as the best means to increase access to and control over all forms of intangible heritage, as this approach may distort the very laws they are seeking to enforce (Coombe 2008: 255). There are numerous examples. We will share one from the 2001 report by the World Intellectual Property Association (WIPO)—an international intergovernmental committee of the United Nations mandated to report on forms of property and practices relating to traditional knowledge in Indigenous communities and steps available or needed to achieve greater recognition and protection of Indigenous priorities in IP law (WIPO 2001). WIPO has done much to raise awareness of Indigenous issues, to explore possibilities for law reform, to develop tool kits for recommended protection strategies within existing IP regimes, and to facilitate research on *sui generis* (unique) Indigenous rights regimes. WIPO’s report compares Blackfoot mechanisms for transferring rights to painted tipi designs to concepts of transfer and purchase in IP law. Subsequent research commissioned by Industry Canada breaks comparable rights and practices down into production, reproduction, and rights to display, to construct, to transfer, to instruct, to guide ceremonial care, to repair, and to commission a work. Transfer practices include the ability to separate rights to the object from the design, and various forms of alienation such as sale, loan, gift, inheritance, and others (Thom and Bain 2004: 41).

Although this approach commendably gives equal consideration to Indigenous laws and creates a common or legally pluralistic landscape, anthropologist Brian Noble (2007) states it is also harmful if applied in the abstract and outside the Blackfoot legal context, where it undermines the very cultural systems it was intended to assist. He argues that acquisition of rights and transfer practices pertaining to Blackfoot painted tipis are not about acquiring and transferring exclusive rights, nor do they enable the severance and transfer of designs, images, and symbols. Rather, Blackfoot tipi transfers increase connections between intangibles, the material world, and the people in it (Noble 2007). “[T]he design and tipi are invariably transferred together in ceremony within the very tipi on which the image is painted. There is a material integration of the design and the thing [...]” (Noble 2007: 342). The design is transferred with a bundle that contains “objects specifically associated with the design, its story, and attendant protocols” as well as other intangibles such as songs that “are a specific means of connecting people with both the tangible and intangible dimensions of the story or origin vision informing the [painted] imagery, the animals or beings in the story, and all the powers that accrue to these elements” (*ibid.*). Although there is a payment for the transfer (*siikapistaan*), there is no “sale” or purchase of exclusive rights analogous to Western intellectual property law (*ibid.*). The transferring person becomes a “grandparent” or elder to that tipi and is expected to be honoured in future activities. The design and tipi are always attached through rights and responsibilities to the lineage of previous and current holders (*ibid.*: 343).

Blackfoot painted tipis can be contrasted to other forms of Indigenous heritage where application of IP laws and concepts may be consistent with laws, practices, and/or contemporary economic goals. An example is in the work of the Pauktuutit Inuit Women’s Association to protect and control use of *amauti* designs. The *amauti* is a unique Inuit women’s garment common throughout the Arctic region and characterised

by “a large hood and pouch in which to carry a child, [...] a large loose shoulder [that] enables a mother to bring the child around from her back for nursing, [...] [and] a flap in the front and back to help protect the child from the cold” (Bird 2001: 14). Like Blackfoot painted tipis, the cultural value of the *amauti* as a garment or “thing” is measured not just in the necessity and utility of its use, but also in the cultural knowledge it represents including as an embodiment of “a link to the past and the skill set and roles of Inuit women” (*ibid.*: 15). However, contemporary Inuit proprietary relationships allow for the design, symbols, and patterns to be conceptualised as forms of intellectual property that can be separated from the garment itself.

Inuit women have become concerned about increased interest in its design by southern designers without prior informed consent (*ibid.*: 51) and about the wider implications this appropriation could have on the ability of Inuit women to make a living from traditional skills, including potential participation by Inuit women in southern and international fashion markets (*ibid.*: 14). Also of concern is the practice of taking apart an *amauti*, which has been made by hand measuring techniques passed down from ancestors, to develop patterns to be sold for profit. Traditional laws on use and ownership of regional and family designs are sometimes unclear and not uniformly agreed upon (*ibid.*: 29-31).

Intellectual property rights, data, and products of research

Even where it is culturally appropriate to seek protection for such knowledge through IP rights, many hurdles and inefficiencies are present in the application of IP law to data and products of research derived from Indigenous traditional knowledge and research participants. An example is the attempt of the U'mista Cultural Society and 'Namgis First Nation to recover language data from an academic who visited Kwakwaka'wakw communities (approximately 25 years ago) and gathered information from Kwak'wala speakers, many of whom have passed away. There are many challenges in teaching Kwak'wala language including lack of a common orthography, lack of teaching materials, the decline of Kwak'wala speakers, the death of elders, and the need for more teachers. For this reason, the information is considered vital to community language retention and renewal. The researcher maintains the right not to share the information in the compiled database until he is satisfied with it (U'mista Cultural Society 1999: 53 in Bell et al. 2008: 45-46).

This story illustrates the use of research protocols, contracts, and other partnership tools, as well as various concerns: utility, harm, and inaccuracy of research data in its raw form; incentive for and integrity of academic research; and IP laws regulating information recorded on tape or analogous fixed media. Application of IP law would most likely favour the researcher and the university because: 1) language is not owned by anyone, it is common property; 2) subject to a few common law exceptions, there are no property rights to information; and 3) once the researcher had recorded the Kwak'wala words and sounds, unless a contractual agreement existed to the contrary, he thereby acquired the right under Canadian copyright legislation to control access,

communication to the public, and reproduction of recordings, notes, and any other form of language data compiled (*Copyright Act*, s. 18[1]). This monopoly is vested in the creator of the work for his or her life plus 50 years (*Copyright Act*, s. 23[1][b]). Once this time has expired, the researcher's database, notes, and other forms of information are no longer protected by copyright and are in the public domain, although access and use of the information may continue to be blocked by those in physical possession of the tape, notes, or computer software through the application of other property laws.

This story is frequently cited to demonstrate the need for IP reform and the limited nature of available protections for Indigenous knowledge. Such problematic aspects of copyright law, also found in patent law, include the concepts of common property and public domain, emphasis on individual acts of creativity and originality, and the attribution of rights only when information is reduced to a fixed form. Some forms of Indigenous property do not have an equivalent concept of common property (as contrasted with the communal or collective interests of a community) or public domain. The Blackfoot painted tipi transfer and the *amauti* are two examples. Songs are another one that is common to many Indigenous cultures. Under Indigenous laws, songs belong to an individual, family, or group. Even where permission is granted to use a song, it may create new and ongoing responsibilities for the transferor, the composer, his family, a group within the community, or the community as a whole (e.g., maintaining the integrity of the song, giving proper acknowledgement, and using it in the proper context). This concept of ongoing relationship, some academics suggest, is analogous to relationships that we try to protect through "moral rights" in copyright (e.g., Howell and Ripley 2008: 231; Young-Ing 2005: 62).

Preventative legal and extralegal strategies

Wherever IP law is a potentially useful tool, it may remain unused because communities misunderstand the nature and extent of IP rights and lack information or capacity to engage in preventative legal strategies. In response, Canadian and Indigenous government institutions and agencies have created information tool kits to help communities use existing IP laws and enter contractual relations to manage their IP rights (e.g., Brascoupé 2001; WIPO 2001). Also, many professionals, researchers, and institutions have undertaken reform of ethical guidelines and policies. In several communities, an important step has been to create research protocols and to rely on the law of contract or jurisdiction over access to their land as a means to regulate development or research protocols (e.g., Bannister 2008). For example, U'mista and the 'Namgis Nation now have in place research protocols that apply to all researchers who work in collaboration with them or on lands of people represented in their collections. Such joint endeavours include entering into contractual relationships that address ownership and use of data and products of research. An example in northern Canada is Nipingit, the National Inuit Committee on Ethics, a joint initiative of the Inuit Tuttarvingat of the National Aboriginal Health Organization and Inuit Tapiriit

Kanatami.³ Typical research contracts include confidentiality and non-disclosure agreements, agreements to comply with research protocols, data ownership, and licensing agreements, and agreements setting out requirements for prior free and informed consent. However, many Aboriginal communities in Canada do not have the same capacity or resources to create or enforce such instruments.

The current focus on IP management has had the benefit of introducing requirements that comply with Indigenous concepts of property, laws, and processes, e.g., through Indigenous research protocols governing research on reserve land. There are nonetheless several problems, such as the cost of developing and negotiating research contracts and licences, the cost of enforcement, and their limited scope (e.g., inability to address information already in the public domain or information, objects, or people outside the territorial jurisdiction of a First Nation or Inuit government). Although agreements should be in writing, the law may recognise an implicit agreement to comply with research protocols and conditions imposed by research participants. In the Australian case *Foster v Mountford* (1976), the sale of a book was banned because it contained knowledge shared by elders in confidence. It was argued that the researcher was aware of the restricted nature of the information because of his years of research with the community (Battiste 2000: 141).

If legislation required compliance with local research codes and if government actively litigated to enforce compliance (in contrast to reliance on breach of contract litigation), First Nations, Métis, and Inuit would have much more control over future acquired information. State enforcement through fines or other means would take the cost of enforcing contracts away from these communities, which in some instances are too poor to engage in litigation and in others may have many other priorities for their limited financial resources. Territorial and Inuit governments have such mechanisms. In both the Yukon and the Northwest Territories, there is legislation prohibiting archaeological and palaeontological research without a permit (*Scientists and Explorers Act*, s. 3; *Scientists Act*, s. 2; *NWT Archaeological Sites Regulations*). This includes social science research (such as interviewing elders). Further, Yukon First Nations and Inuit governments can determine for themselves the need for legislative measures and enact them. Where research is conducted on land claim settlement land or self-government agreements are in place, compliance with applicable Inuit or First Nation laws or policies and prior informed consent are required before licences or permits will be issued.

Other important initiatives are reforms of ethical guidelines and professional codes of conduct that concern research involving human participants and First Nation, Inuit, and Métis cultural heritage. These codes seek to strike a balance between, on the one hand, the integrity and autonomy of research and, on the other, the individual and collective welfare, concerns, and interests of participant communities. Major academic

³ Inuit Tapiriit Kanatami (ITK) is the national Inuit organisation in Canada. It represents four Inuit regions: Nunatsiavut (Labrador), Nunavik (northern Quebec), Nunavut, and the Inuvialuit Settlement Region in the Northwest Territories.

funding agencies and universities in Canada have reexamined research guidelines for conducting research with Aboriginal participants and/or on Aboriginal territory or sites to include prior informed consent of appropriate authorities within a community, consideration of collective interests of Aboriginal communities, community benefit, compliance with community research protocols, and sharing of the products of research (e.g., ACUNS 2003; CIHR et al. 2010). However, there are no requirements in law for research or professional codes of conduct to go this far. Further, terms of funding agreements and university policy may continue to demand ownership and control of data, or at least some products of research.

Information in museums, archives, universities, and other institutions

If the information comes from Aboriginal communities in Canada, if the copyright on it has expired, and if it is in the hands of a museum, archive, university, or other public institution or corporation, the ability to control access will depend on whether the information is in the process of acquisition or is already within institutional control. In the first case, limits can be placed in contracts with the researcher and/or the repository of the information. In the second case, the institution as a general rule has control over disclosure, access, and use regardless of the form that the information takes (book, tapes, computer program, notes, maps, pictures, or other products of research). This control may nonetheless be restricted by conditions imposed by original donors, negotiated agreements, institutional policy, or legislation.

Access to information and privacy legislation

Many public bodies must comply with access to information and privacy legislation. Public bodies are defined by legislation and typically include universities, government agencies and departments, tribunals, municipal governments, and many other public institutions that are repositories of information. Such legislation applies to some, but not all, public museums and archives, and generally sets a default rule that all records held are to be accessible to the public. Privacy legislation, such as the federal *Privacy Act*, regulates the way that public bodies may collect, use, and disclose personal information. Such laws also typically exempt from mandatory disclosure court records that contain confidential information that could harm intergovernmental relations, including relations with Aboriginal governments (e.g., *CAIA*, s. 13(1)(e); Quebec *AAD*, s. 19; NWT *ATIPP*, s. 16; Yukon *ATIPP*, s. 20).

Such exemptions may dictate the content of specific terms and restrictions that First Nation and Inuit organisations negotiate with researchers or how far a government institution will go in negotiating or accepting donations that restrict public access or impose other protections on data and information products of research. Contracts may be worded to invoke exemptions in the legislation or, conversely, a governmental institution may decide that information already within its control is not exempt from disclosure. Some of these exemptions are mandatory while others are at the discretion

of the public body. Under the *Canadian Access to Information Act (CAIA)*, applicable to federal “government institutions” (including administrative boards and tribunals, such as the National Energy Board)⁴, there are several exemptions to the general rule of public access to records. Given the purpose of the legislation, these exemptions are supposed to be strictly construed, as is the case in application of exemptions found in territorial and provincial legislation.⁵

Under the *CAIA*, if information is obtained in confidence from recognised Aboriginal governments, it is protected from disclosure without consent unless it has already been made public (*CAIA*, s. 13[1][e], 13[3]). The purpose of this exemption is to “recognize that there will be circumstances where the information that is received from third party governments is, in fact, the proprietary information of that third party government” (Government of Canada 2006: 13). The concern is that “other governments might be considerably less willing to provide the Canadian government with information in confidence if the Canadian government were obliged to say that the sensitive information would be protected from an access requester only at the discretion of the head of the government institution” (*ibid.*: 13).

The *CAIA* also exempts financial, commercial, scientific, or technical information that is “confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party” (*CAIA*, s. 20[1][b]). This section could potentially cover sensitive financial, land, medicinal, plant, or other environmental or ecological knowledge provided to government institutions (e.g., *Timiskaming Indian Band v Canada*; *Montana Band of Indians v Canada*). To fall within this exemption the information must be “‘confidential’ by some objective standard” (Government of Canada 2006: 16; *Sawridge Band v Canada*). “[O]bservations about a third party by a government official” are not included and “information must have been treated consistently in a confidential manner by the third party” (Government of Canada 2006: 16; *Maislin Industries Ltd. v Canada*). In light of these types of exemptions, First Nations and Inuit governments are increasingly asking researchers to enter into agreements that provide for confidentiality of some or all data and information provided, and in some instances, greater control over other products of research and copyright. Such agreements also may help Indigenous governments to maintain some control over data or other information that may end up in the hands of federal government departments, tribunals, and institutions. A similar exemption from disclosure, or rationale for restriction, relates to “information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party” (*CAIA* s. 20[1][d]). If an Aboriginal group has ongoing negotiations with a governmental body, this exemption could potentially provide sensitive Indigenous knowledge with temporary protection from disclosure.

⁴ In Quebec, the legislation applies to the Kativik Regional Government (Quebec *AAD*, s. 3 and 5[1]).

⁵ *CAIA*, s. 2 outlining the purpose of the legislation makes this clear: “[...] necessary exceptions to the right of access should be limited and specific.”

Territorial and provincial governments have information and privacy legislation similar to the *CAIA* but with some differences. In the Yukon, Nunavut, and the NWT, temporal restrictions narrow the intergovernmental confidential information exemptions. Under the NWT *ATIPP*, these exemptions do not apply to information in records that have existed for 15 or more years (NWT *ATIPP*, s. 16[3]). Under the Yukon *ATIPP*, the same time limit applies except with respect to “information in a record in respect of unfinished negotiations relating to aboriginal self government or land claims settlements” (Yukon *ATIPP*, s. 20[3]).

Importantly, federal access to information legislation often does not override other legislation that affects federal or territorial institutions and that may contain other restrictions on disclosure (*CAIA* s. 24 and Schedule II). This is of greater relevance in northern Canada, where Inuit and First Nations have obtained greater control over traditional knowledge through legislation. Looking again to the Yukon, Nunavut, and NWT, we see additional protections being given to information pertaining to heritage sites. Access to information can be restricted if disclosure may reasonably be expected to damage or interfere with the conservation of: a) fossil sites or natural sites; b) sites having an anthropological or heritage value or Aboriginal cultural significance; or c) any rare, endangered, threatened, or vulnerable form of life (NWT *ATIPPI*, s. 19; Yukon *ATIPPI*, s. 21). Notably, not all analogous provincial legislation provides this exemption.

In some instances, First Nations and Inuit may also invoke privacy provisions to prevent disclosure of sensitive information. They may seek such provisions when negotiating restrictions on ownership and use of research data such as tapes and transcripts of elder interviews that contain identifying information on living people. Under Yukon and NWT legislation, public bodies must determine whether disclosure would be an unreasonable invasion of a third party’s privacy, while considering “all the relevant circumstances” including, among other things whether the third party “will be exposed unfairly to financial or other harm” (NWT *ATIPP*, s. 23[3][e]; Yukon *ATIPP*, s. 25[4][a]), and whether the personal information “has been supplied in confidence” (NWT *ATIPP*, s. 23[3][f]; Yukon *ATIPP*, s. 25[4][c]). In the NWT, another relevant factor is whether “disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people” (NWT *ATIPP*, s. 23[3][d]). Disclosure of personal information is not considered an unreasonable invasion of a third party’s personal privacy where it is for research purposes in either territory, so long as certain criteria are met, including compliance with “conditions, policies and procedures concerning confidentiality,” lack of harm to the individuals the information is about, and derived benefits “in the public interest” (NWT *ATIPP*, s. 23[4][d], 49; Yukon *ATIPP*, s. 25[3][d], 38).

This paper will not review all of the ways whereby government institutions can restrict access to their holdings of Indigenous knowledge, data, and informational products of research under access to information and privacy legislation. What this review underscores is the ongoing importance of contractual confidentiality for control. It also demonstrates: variations in law and other potential avenues for restricting access

(e.g., to heritage sites); the express inclusion of Aboriginal governments in protections aimed at intergovernmental relations; the need to prove or not either potential harm from disclosure or objective confidentiality of information.

Very few statutes on access to information and privacy contain express exemptions for First Nation, Inuit, or Métis traditional knowledge. One exemption is in enabling legislation for the Yukon Environmental and Socio-economic Assessment Board, which explicitly allows the Board to refuse to disclose “traditional knowledge that is determined to be confidential under the applicable rules and that is provided in confidence to them for the purposes of this Act” (*YESEAA*, s. 121[a]). We come back to tribunals in the final section of this paper.

Other relevant laws and policy

Records pertaining to Aboriginal peoples of Canada in government, museum, archive and other collections have been created for a variety of reasons and by a range of people, including museum professionals, community members, government agencies, churches, missionaries, anthropologists, and academics. This research material has given rise to a variety of concerns. The most common ones are inaccuracy and derogatory nature of information,⁶ failure to preserve integrity of information, and wrongful removal or restricted access to significant cultural information (e.g., because of distance or cost to reproduce), and failure to follow Indigenous laws for access, use, and control (e.g., to pictures of ceremonies or recordings of songs).

This link between identity, culture, and access to knowledge has policy and practical implications for archives and libraries. Little currently exists in law to limit the discretion of custodial institutions with respect to data and products of research currently in their possession and to which copyright or other legal restrictions have expired. Some museums, libraries, and archives do not give access to sensitive Aboriginal knowledge or material because of policy or agreement. The *CAIA* does not apply to published material, material available for purchase by the public, library or museum material preserved solely for public reference or exhibition purposes, or “material placed in the Library and Archives of Canada, the National Gallery of Canada, the Canadian Museum of Civilization, the Canadian Museum of Nature, the National Museum of Science and Technology, the Canadian Museum for Human Rights [...] by or on behalf of persons or organizations other than government institutions” (*CAIA*, s. 68). Similarly, territorial legislation exempts material placed in the Yukon, NWT, and Nunavut Archives by or for a person other than a public body (NWT *ATIPP*, s. 3[1][e]; Yukon *ATIPP*, s. 2[1][e]).

Access to data and information in exempted collections is governed by archival and museum law and policy. Canadian legislation on public museums and archives largely contains few restrictions on the exercise of discretion for negotiating access to,

⁶ E.g., many old records written by outsiders may be derogatory and discriminatory in their presentation of information (Katon 2002).

or co-management of, archival and other information in their collections. For this reason, it is possible to negotiate restrictions and terms of use on an ongoing basis. The extent to which this occurs is guided largely by institutional interpretations of public mandates, codified policies and, where applicable, modern land claim, self-government and land claim agreements (Bell and Solowan: 2004). In 2004, the National Archives of Canada and the National Library of Canada amalgamated under the *Library and Archives of Canada Act*. This amalgamation generated a review of existing policies and procedures, including a process to consult with Aboriginal people. To date, there is no official Aboriginal policy in place (e.g., with respect to co-management, access, restriction on access, participation on the Advisory Council, or other forms of Aboriginal participation or protection of documentary heritage originating from or about them) (Bell and Solowan 2004: 35). Museum policy also covers some archival and other forms of documentary heritage, such as “[r]ecords illustrating and illuminating the history of human remains or objects, including collectors’ notes, catalogue records, photographs and audio-visual records, and research notes and reports” (CMC 2001).

These issues are also increasing in complexity as museums and archives digitise collections and records to make them more accessible to national and worldwide audiences on the Internet. At the heart of the matter for some Indigenous peoples is a balance between the benefits of sharing accurate information about their culture and the need to protect their culture. This balance is the aim of the Reciprocal Research Network (RRN). The RRN is an online tool co-developed by the Musqueam Indian Band, the Stó:lō Nation/Tribal Council, the U’mista Cultural Society, and MOA (Museum of Anthropology at the University of British Columbia) “to facilitate reciprocal and collaborative research about cultural heritage from the Northwest Coast of British Columbia” (MOA 2010). It contains records, photographs, images of items in collections, and other information from 15 institutions in Canada, thus enabling users to “build their own collections, collaborate on shared projects, record stories, upload files, hold discussions, research museum collections, and create social networks” (*ibid.*). It differs from some other digital collections in its collaborative nature and its respect for Indigenous laws and protocols on access to and control over information. From the start, First Nation collaborators have been engaged in operational decisions, including development of guidelines for different levels of access by user groups (i.e. families, community members, researchers, other institutions).

Many custodians of Indigenous information, or historical information about Indigenous groups, are sympathetic to requests for both special and restricted access. Others, however, interpret their mandates strictly, particularly in relation to historical or secular material. So again, because of this environment, there is increasing interest in legislation as a means to control use of future acquired data and information that may eventually end up in museums or archives through donation, sale, or their own research programs.

Research and administrative justice

Because of commercial and scientific interest in traditional knowledge and legal and political pressure to consult Inuit, Métis, and First Nations on the impact of resource and development projects that affect their lands, there has been increased demand and necessity for sharing of traditional knowledge, such as locations of archaeological, ceremonial, or other important sites (*Lefthand*, Canada 2007 at para. 43). This sharing has generated concerns, such as when the information is shared with industry and government departments or submitted to proceedings of administrative tribunals (e.g., in the form of environmental, historical, or other impact assessments). No set body of rules covers protection of sensitive Indigenous knowledge in tribunal settings, and few Canadian tribunals have express procedural rules to protect sensitive traditional knowledge that may be revealed through tribunal processes. One exception is the Yukon Environmental and Socio-economic Assessment Board's right to refuse to disclose "traditional knowledge that is determined to be confidential under the applicable rules and that is provided in confidence to them for the purposes of this Act" (*YESEAA*, s. 121[a]).

Such confidentiality may be protected by procedural rules in general administrative procedure statutes or under common law rules of procedural fairness. Common law principles are designed to address the level of procedural protection for parties to an administrative proceeding (*Baker*, Canada 1999). One principle is that parties must fully know the case to be made against them (*May v Ferndale Institution*, Canada 2005). The rationale is the need to disclose records that are before the decision-maker in order to rebut evidence prejudicial to one's case and to bring evidence to support one's own position (*ibid.*). The affected party is often entitled to disclosure of those records that the decision-maker will rely on (*ibid.*).

Consider one party who seeks to keep the exact location of a site confidential because of a past history of desecration. In such circumstances, disclosure is influenced by a number of factors: 1) importance of the decision to individuals affected (i.e. professional reputation generally requires a high level of disclosure) (*Baker*, Canada 1999); 2) closeness of the administrative proceeding to the judicial model (*Charkaoui*, Canada 2008); and 3) choice of procedure by the tribunal, particularly where it has expertise in determining appropriate procedures (*Baker*, Canada 2008). This list is not exhaustive. In some cases, protection of the public and individuals has taken precedence over fairness to the party seeking to limit disclosure. Even in these situations, the test is not whether there are good grounds for withholding information, but rather whether enough information has been revealed to allow the party to answer the case against him (*Demaria*, Canada 1986).

For certain tribunals, an administrative proceeding must be held in "public." Section 41 of the British Columbia *Administrative Tribunals Act* makes open proceedings the default rule, providing limited exceptions where a decision-maker may exclude the public for the sake of the "public interest." The courts have upheld the

requirement of a certain level of public disclosure, similar to the duty of disclosure owed to a party under the principles of procedural fairness (*CRTC v London Cable*, Canada 1976). Here, disclosure includes sufficient information to permit meaningful participation and a reasonable opportunity to know the fundamental basic facts of an application. If there are no specific provisions or guidelines on traditional knowledge to the contrary, such provisions lean in favour of disclosure of records before a decision-maker in an administrative proceeding.

These general rules of party and public disclosure, at first glance, appear to work against the ability of Aboriginal peoples to maintain the confidentiality of sensitive Indigenous knowledge used in tribunal decision-making processes. Thus, if a tribunal wishes to rely on sensitive Indigenous knowledge as evidence, default rules favour disclosure to all parties involved and possibly to the public unless legislation has allowed specific exemptions. When actually applied, however, these rules may be sufficiently flexible to enable administrative decision-makers to provide confidentiality. The duty of procedural fairness is fact-specific and varies widely depending on the circumstances. Also, the level of disclosure required is higher for administrative proceedings that more closely resemble a criminal trial than others (*Charkaoui*, Canada 2008). Traditional knowledge largely requires protection in civil regulatory settings where administrative proceedings do not resemble a criminal trial. Furthermore, the well-established principle that administrative bodies are “masters of their own procedures” (*Knight*, Canada 1990) means that, absent legislated direction to the contrary, the tribunal may have discretion to adopt its own procedures for confidentiality of records before it. Consequently, it may be possible to protect sensitive Indigenous knowledge from public and party disclosure in certain fact-specific contexts.

Confidentiality also depends on the extent to which a tribunal is obligated to provide written reasons. The duty of procedural fairness may require a tribunal to provide written reasons for a decision (*Baker*, Canada 1999). A tribunal may also be statutorily obligated to provide written reasons, either through its enabling legislation or under general administrative procedure statutes.⁷ Even then, there is still room for flexibility. Generally, reasons will be considered adequate so long as they “show why or how or on what evidence the delegate reached the conclusion” (*Lor-Al Springs v Ponoka*, Alberta 2000).

Recent years have seen increasing concern about public dissemination of tribunal decisions due to the growing trend of publishing them on the Internet (Loukidelis 2009). This trend also has very important implications for the protection of sensitive Indigenous knowledge. With tribunal decisions now being regularly posted on the Internet, the risk of widespread dissemination of sensitive traditional knowledge through the medium of written tribunal decisions is much greater than when such decisions were kept only in paper form. Along with the developing concept of the duty

⁷ E.g., Alberta’s *Administrative Procedures and Jurisdiction Act*, s. 7.

to give written reasons, these trends pose significant risks for Aboriginal groups who seek to protect sensitive Indigenous knowledge that comes before tribunals.

Conclusion

There is a need to protect sensitive traditional knowledge and to control data and other products of research that draw on such knowledge. This need arises in a wide variety of Canadian legal contexts, including three that we have focused on: intellectual property law; access to information law; and tribunal law and policy. This article has shown the complexity of the legal and ethical environment surrounding access to and control over information from or about Aboriginal communities in Canada. Although Aboriginal peoples have some tools to achieve greater control within the existing legal environment, the laws are far behind contemporary ethical understandings of rights and obligations that arise when research involves Indigenous knowledge and cultural heritage.

Acknowledgments

Some of the research for this paper was supported through collaboration with the Intellectual Property in Cultural Heritage Project, funded by the Social Sciences and Humanities Research Council of Canada (see www.sfu.ca/ipinch).

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