

## Canada and the Nagoya Protocol

### *Towards Implementation, In Support of Reconciliation*

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#### Abstract

Canada, individual Canadians and Indigenous representatives from Canada all played pivotal roles in developing international ABS policy and governance instruments. As a result, the Nagoya Protocol clearly reflects the participation of Indigenous negotiators and embodies a significant number of operative provisions of direct and meaningful relevance to Indigenous peoples in Canada and around the globe. While recent years witnessed an apparent hiatus of work on ABS within the Canadian government, efforts in policy and position development, together with consultations by federal, provincial and territorial governments made over the preceding decade represent a firm foundation for advancing ABS governance in Canada, now. The context for ABS in Canada has changed dramatically in recent years. Canada dropped its objections to the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP) and the country is now seized with moving forward on reconciliation. ABS is at the confluence of the two powerful streams of the rights of Indigenous peoples and reconciliation. Implementing the Protocol will support UNDRIP and reconciliation. It is time to seize the opportunities inherent in ABS through the exercise of leadership at all levels – beginning with the Prime Minister of Canada and Indigenous peoples.

#### INTRODUCTION

After years of effort, in the early morning hours of 30 October 2010, a protocol on access to genetic resources and benefit-sharing (ABS) was adopted by consensus in Nagoya, Japan, by Canada and some 192 other Parties to the United Nations Convention on Biological Diversity (CBD). In the years preceding adoption, the

Canadian delegation played a central role in shaping the instrument. Yet despite its significant role in making the Protocol a reality, Canada now finds itself as a non-Party, and a laggard on domestic implementation of ABS. In stark contrast to countries around the globe that are now implementing their ABS obligations under the CBD and the Nagoya Protocol (NP), the ABS policy process in Canada has seemingly ground to a halt. The reasons are many – including complexity, political disinterest, entrenched interests, senior bureaucratic inertia and a fundamental failure to see Canada as both a user and provider of genetic resources (GRs) and traditional knowledge (TK) (Oguamanam, 2011). These impediments are not, however, beyond Canada's ability to overcome.

With this history in mind, we will use this chapter to argue that genuine opportunity exists to renew investments in ABS governance in Canada. Compelling new imperatives have arisen in the context of reconciliation and the adoption of the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP) (Perron-Welch & Oguamanam, Chapter 6). We offer an analysis of implications of the ABS negotiations and the Protocol for Indigenous peoples from the perspective of our experiences as former Canadian officials engaged in domestic and international ABS policy development and, in the case of Timothy Hodges, as one of the two permanent co-chairs of the ABS negotiations. We describe some of the decisions and actions taken at the co-chairs' level to elevate Indigenous participation in the treaty talks and empower Indigenous voices. Finally, we pave the way for the important first steps towards ABS implementation in Canada by proposing a roadmap to 2020.<sup>1</sup>

#### STRENGTHENING INDIGENOUS PARTICIPATION IN THE ABS NEGOTIATIONS: THE ROLE OF THE ABS CO-CHAIRS

Fernando Casas of Colombia and Timothy Hodges of Canada were elected as co-chairs of the Open-ended Working Group on Access and Benefit Sharing at the closing plenary of the eighth meeting of the Conference of the Parties to the CBD (UNEP CBD, 2006, 2). The election of two dedicated and functionally permanent chairpersons marked a shift in the process of negotiating a global ABS regime, which had previously lacked continuity and even-handedness in leadership and was marked by deep distrust among its many stakeholders. The election of co-chairs would have significant implications for the participation of Indigenous representatives in the ABS negotiations.

From the outset, the co-chairs operated with transparency, inclusiveness and fairness. The co-chairs engaged throughout the negotiations with a range of Indigenous representatives and with stakeholders (i.e. both providers and users) many of whom would ultimately find themselves implementing the eventual instrument on the ground (Hodges, personal notes for COP 8 Bureau meeting, Brasilia, May 2006).

Throughout their five-year tenure through to the Protocol's adoption, the co-chairs expended considerable time and political capital to promote the participation of Indigenous representatives in the negotiations. In relative terms, the CBD has rightly been considered an innovator among international fora in facilitating the participation and influence of Indigenous and local community representatives in its various subsidiary bodies. CBD Parties (including Canada) have volunteered significant monies to support such participation. However, in practice, all States jealously guard their prerogatives – limiting their willingness to accept Indigenous representatives as equals either on a Party's delegation or sitting independently at the negotiating table.<sup>2</sup>

The co-chairs were aware of this dynamic but equally aware of the central role Indigenous peoples play in protecting and sustainably using GRs and TK. The co-chairs understood that in order for the Protocol to be successfully implemented at the local level, the views and understanding of Indigenous peoples would need to inform government negotiators and be accounted for in the Protocol (Hodges, 2009). A key to facilitating meaningful and effective participation and influence of Indigenous representatives was developing close respectful relations with Indigenous participants. This was a major investment in time and effort but led to frank and constructive discussions.

One approach employed by the co-chairs to facilitate effective participation of Indigenous representatives, as well as stakeholder representatives, was the use of smaller, informal meetings. In 2010 alone, the co-chairs convened several such meetings in Montreal, Cali and Nagoya (Hodges, personal notes, 2010).

For example, during the first part of the ninth meeting of the ABS negotiating group (ABSWG9) in Cali, Colombia, the co-chairs deliberately placed the Indigenous representatives directly across from them at the centre of the negotiating table – a prime position in any negotiation and one very ably used by the Indigenous representatives (Hodges to Casas email, 10 March 2010). Further, the meeting witnessed the unprecedented nomination by the co-chairs of an Indigenous Canadian representative to co-lead an informal consultation on a key issue (Hodges, personal notes for ABSWG9, Cali, 27 March 2010). This reflected the co-chairs' deliberate strategy of moving past the understandable frustrations of Indigenous participants, who were emphatic in signalling their concern over the ability of the ABS protocol to advance Indigenous rights while ensuring the continuing active participation of Indigenous negotiators in the ensuing talks.

The co-chairs also promoted the influence of Indigenous and local communities (ILCs). At ABSWG9, for example, it became clear that the Parties did not support the human rights proposals from the International Indigenous Forum on Biodiversity (IIFB). The IIFB, in turn, placed priority on the protection of GRs of ILCs. Respecting the IIFB members' position, the co-chairs steered the negotiation towards the successful inclusion of Article 6.2 concerning access to GRs.

KEY PROVISIONS OF THE NAGOYA PROTOCOL RELEVANT  
TO INDIGENOUS PEOPLES

ABS, in particular, the benefit-sharing component of ABS, has been justified through analysis of various principles of justice (Schroeder, 2009; Dauda, 2016). Yet despite the ethics-based language framing ABS, CBD Parties negotiating the ABS regime rarely employed a human rights-based approach to the negotiations. Indeed, despite consistent urgings of the co-chairs and relentless appeals from ILCs representatives and civil society organizations, negotiators from both the ‘user’ and ‘provider’ countries often appeared transfixed by GRs and monetary issues (Perron-Welch & Oguamanam, Chapter 6). Human rights and a broader search for justice often appeared of secondary concern during the talks. This is somewhat ironic; the very need for an international ABS regime was framed as a response to growing instances of biopiracy where alleged unethical or illegal behaviour was resulting in injustices to Indigenous holders of GRs and TK. Given the centrality of ethical concerns related to the fundamental questions surrounding benefit-sharing, the continuing paucity of ethical perspectives is noteworthy and troubling (De Jonge, 2009, 16). Despite these issues, the Protocol text ultimately adopted can clearly be viewed as a rights instrument – promoting equitable outcomes, the pursuit of justice, respect for human rights, and the achievement of fair and sustainable outcomes.

While largely eschewing ethics-based language in its final form, and failing to meet the expectations and needs of a number of Indigenous representatives involved in its negotiation, the NP contains a significant number of operative elements directly related to Indigenous interests – and as a whole empowers Indigenous peoples in the stewardship and governance of their GRs and TK. The brief review of the Nagoya text, outlined in Table 2.1, supports this point.

While of discounted importance to some negotiators during the ABS talks, it was clear from the co-chairs’ numerous in-country discussions with Indigenous peoples and stakeholder groups across all major regions that without substantive capacity-building provisions, Protocol implementation was unlikely to occur where it was most needed to assure sustainable development outcomes. Article 22 places particular emphasis on the need for Parties to facilitate the involvement of communities and requires ‘Parties to support the capacity needs and priorities of ILCs and relevant stakeholders, as identified by them, emphasizing the capacity needs and priorities of women (UNEP CBD, 2011, 16). While the specific mention of women is desirable, Indigenous peoples have also called for similar attention to be paid to the needs and priorities of Elders and youth (Oguamanam & Hunka, Chapter 3).

In addition to the specific articles mapped above, the Preamble of the Protocol is noteworthy for the substantive and strong paragraphs related to Indigenous peoples, their profound relationship with GRs and TK, and their existing rights (UNEP CBD, 2011, 2–3). Particularly significant is the reference to the relevance of UNDRIP.

TABLE 2.1 Nagoya Protocol Provisions Related to Indigenous Interests

<i>Article</i>	<i>Regarding</i>	<i>Obligations of Parties Related to Indigenous Rights</i>
5	Benefit-sharing  For GRs and TK associated with GRs	5.2. Measures to ensure benefits arising from the use of GRs held by ILCs based on MAT  5.5. Measures to ensure benefits arising from the use of TK associated with GRs are equitably shared with ILCs based on MAT
6	Access to Genetic Resources	6.2. Measures to ensure that PIC of ILCs is obtained for access to their genetic resources
7	Access to TK associated with GRs	Measures, to ensure TK associated with GRs is accessed with PIC of ILCs and MAT is established
12	Traditional knowledge associated with genetic resources	12.1 Obligations to take into consideration ILC's customary laws, community protocols and procedures, as applicable with respect to TK associated with GRs  12.3 Support (a) the development by ILCs, including women, of community TK protocols, (b) minimum requirements for MAT to ensure equitable sharing of benefits for the use of TK associated with GRs  12.4 In implementing the Protocol, not restrict the customary use and exchange of GRs and associated TK of ILCs
16	Compliance	16.1 Measures to provide that TK associated GRs has been accessed in accordance with PIC and MAT  16.2. Measures to address situations of non-compliance
21	Awareness-raising	Measures to raise awareness of the importance of GRs and TK associated with GRs and related ABS issues such as: (b) Organization of meetings of ILCs and relevant stakeholders; (c) Establishment of help desk for ILCs; (h) Involvement of ILCs in Protocol implementation; and (i) Awareness-raising of ILC's community protocols and procedures

*Note:* The obligations in the Protocol have qualifiers such as the term 'as appropriate' – allowing Parties to decide on an obligation's appropriateness.

As legal scholars have noted, while not considered to be 'operative clauses,' preambles are not legally powerless (Hume, 2016). Indeed, the Protocol's preambular language provides powerful and compelling context informing the entire instrument and its interpretation and implementation.

CONSULTATIONS ON ABS WITH INDIGENOUS PEOPLES  
IN CANADA: A BRIEF REVIEW

The ABS-related consultations held in Canada in the lead-up to Nagoya negotiations were atypical for their relative depth and diversity, and considerable effort was expended over the better part of a decade to inform and be informed on core ABS issues. One significant part of these efforts was Canada's capacity-building and engagement with Indigenous peoples, especially during the development of a Federal/Provincial/Territorial (F/P/T) National ABS Policy in 2009.<sup>3</sup>

*Bonn Guidelines on Access and Benefit-Sharing (2000–2)*

As the Bonn Guidelines were intended to be voluntary, the nature of the federal government engagement with Indigenous peoples in the Guidelines' development and negotiation reflected this fact (UNEP, 2002). Three National Aboriginal Organizations (NAOs) – Assembly of First Nations (AFN), the Inuit Circumpolar Council (ICC) and the Métis National Council (MNC) – were engaged directly and were all invited to participate on the Canadian delegation to Bonn in October 2001. While the NAOs chose not to attend the Bonn negotiations due to post-9/11 fears of flying, a respected elder (of the Okanagan First Nation) and holder of TK participated in the delegation. Her participation was helpful and valued, but hardly reflective of the broad and diverse views held by Indigenous communities across Canada. And while Canada was notably active in negotiations regarding GRs and TK of Indigenous peoples and local communities, Canada did not speak for the inclusion or reflection of Indigenous laws, customs, and perspectives in the resulting final text.

*Post-Bonn Period (2001–3)*

The period following adoption of the Bonn Guidelines witnessed several ad hoc regional workshops/meetings held on Article 8(j) and on the Guidelines (held with Yukon First Nations, the Nisga'a Nation, Saskatchewan Federation of Indian Nations, Cree of Quebec). During this period, representatives for the AFN, ICC and MNC actively participated before and during the negotiations of the CBD Working Groups on Article 8(j) and ABS (Langford, personal notes, 2001–2003).

*Building Awareness and Scoping ABS (2003–6)*

This was a very active period in which a number of sectoral workshops were held, a discussion paper and reports were issued and visits by Environment Canada officials were made to provincial/territorial capitals to engage these governments with responsibilities over public lands. In many capitals, discussions were held with

Indigenous representatives from within the province/territory. In 2004, an ABS workshop co-hosted by Council of Yukon First Nations was held in Whitehorse (Government of Canada, 2005). This workshop was attended by elders from the 14 Yukon First Nations, who called for a moratorium on access to GRs and associated TK (Langford, personal notes, 2004). In this same period, a scoping paper, *ABS Policies in Canada: Scoping the Questions and Issues*, was published for comment (F/P/T Working Group on ABS, 2005).

This period also saw the formation of a federal Interdepartmental Committee on ABS (ICABS), whose membership comprised all relevant federal departments, and the F/P/T Committee on ABS (F/P/T Committee on ABS), co-chaired by officials from Environment Canada and the Government of British Columbia. To our knowledge, this is the only period in Canadian ABS policy development in which governments made ABS documents public.

During this same period, Environment Canada's ABS Unit and Biodiversity Convention Office organized with the AFN the Tsleil-Watuth International Gathering on the Protection of Traditional Knowledge. The Gathering included a range of Indigenous participants from across the globe. A resulting statement, drafted by Elders, was presented by a delegation from Tsleil-Watuth First Nation at CBD COP8 in Curitiba (2006). A full report of the Gathering was not prepared by Environment Canada, as per the wishes of the Tsleil-Watuth First Nation.

A noteworthy report was prepared, however, during the same period by Environment Canada's ABS Unit on an international experts workshop co-hosted by Canada and Mexico in Cuernavaca, October 2004 (CONABIO and Environment Canada, 2005). The meeting convened a number of lead ABS negotiators and thinkers, including a good number of Canadian experts. Notably, the sole Indigenous participant at Cuernavaca was a representative from the AFN.

#### *Developing a National ABS Policy (2006–9)*

In this period, the federal Interdepartmental Committee on ABS (ICABS) frequently met. ICABS was established and chaired by Environment Canada, and included, *inter alia*, officials from Foreign Affairs and International Trade, the Department of Justice, Agriculture and Agri-Food Canada, Industry Canada and the Canadian Forest Service. The F/P/T Committee on ABS also met regularly. However, the NAOs who requested to participate on this committee were ultimately not included (due to a lack of consensus among the levels of government on allowing such participation). The NAOs did attend one F/P/T Committee on ABS in order to brief the Committee on their issues of interest, but the overall inclusion of Indigenous perspectives in the federal government's deliberations was clearly lacking.

On the capacity-building side, Environment Canada provided some funding for NAOs to develop their positions as the ABS regime negotiations progressed in

parallel with the domestic discussion. However, as noted in the ABS Canada focus groups, there remains a great deal of tension and mistrust between the NAOs and grassroots Indigenous communities and organizations. Government officials turned to the NAOs as a matter of efficiency, wishing to consult with Indigenous groups but clearly not too broadly or deeply – as this risked delay and had the potential to cause Canada bureaucratic and diplomatic headaches, as the Protocol talks accelerated.

Given the failings outlined above, one bright spot in the record remains; the 2009 consultations by the F/P/T working group, which included 19 regional meetings held coast to coast to coast with Inuit, Métis and First Nations. These meetings were held to receive a range of Indigenous views which would be taken into consideration when developing a F/P/T National ABS Plan. Participation was diverse – participants included knowledge holders (hereditary chiefs and elders), chiefs, provincial executives, lawyers and resource managers. There was widespread support among participants for the PIC/MAT obligation with a strong preference for legal ABS protection over a voluntary regime. However, many elders were more concerned about ensuring continued access to and use of medicinal plants, and protection for these plants from pollution and harvesting by others (Langford, personal notes, 2009).

The F/P/T National ABS Strategy was adopted at the Deputy Minister level but not at the Ministerial level, given that the mechanism for doing so (the F/P/T Council of Resource Ministers) was eliminated. During this period, no ABS documents were published or released publicly by the governments.

### *Nagoya Negotiations (2009–10)*

The focus of international ABS negotiating strategy was developed by the federal government's ICABS with input from provinces and territories. Canada based its negotiating positions to be consistent with the F/P/T National ABS Strategy so one view within the governments was that consultations with Indigenous peoples on the Strategy was sufficient for negotiating the Protocol. The engagement was primarily with NAOs, which were provided with funds to develop positions and to participate on Canadian delegations. The Canadian delegation met periodically with IIFB members (including from Canada) during 2010 negotiations – in particular on human rights issues (Langford, personal notes, Cali 2010).

In final talks in Nagoya, as anticipated, the drafting group on Indigenous-related articles was regrettably closed to all but Parties – effectively disbaring IIFB participation. However, Indigenous representatives on the Canadian delegation were present through to the adoption of the Protocol. A Regional Chief of the AFN and a former Vice President International of the ICC participated at all the negotiating sessions in 2010. It is our view that the NAOs had a constructive influence over the delegation on a number of issues, for example, their opposition to the



disclosure of TK through the monitoring system. Nevertheless, as already borne out from the ABS Canada focus groups, limiting consultations to NAOs was clearly insufficient.

Canada's failure to broaden the spectrum of Indigenous voices at the negotiating table is reflected in the dismay voiced by many Indigenous participants in ABS Canada's focus groups. The general sense that representation amounted to little more than tokenism, and that the final outcome was more or less preordained, was a common refrain across communities and regions. These sentiments reflect important lessons for Canada as it participates in other international negotiations where Indigenous rights and interests are engaged.

#### *Post-Nagoya Protocol (2010–17)*

To move forward with implementation after the adoption of the NP, Canada should have consolidated its resources and turned its efforts to capacity-building. Instead, the federal government began to dismantle its ABS policy capacity. Following the Protocol's adoption and during the one-year period to sign the Protocol, budgets and human resources were significantly diminished. The result was a beclouding of earlier and genuine efforts by governments to develop ABS policy in Canada in consultation with Indigenous peoples and stakeholders. It may also, in part, serve to explain the current skepticism in many Indigenous quarters about Canada's ABS preparedness and engagement over the years.

Engagement with Indigenous peoples during the development of the national ABS Plan and NP negotiations involved considerable effort and financial resources. One could say that these efforts were progressive at the time, both within the Canadian government and among Parties to the CBD.

While these early efforts are notable, Canada appears to have subsequently lost interest in pursuing them seriously; after an initial burst of activity, Canada ceased significant consultations, postponed a final determination on whether or not to sign and ratify the NP, and effectively relegated the ABS issue to the margins as other issues and priorities diverted staff, material resources, and political attention.

#### *Canadian Indigenous peoples' Views on ABS*

As noted above, for many Indigenous peoples there was no opportunity to engage in policy decision-making or to be formally consulted by Canada, which tainted the process while further driving a wedge of misunderstanding and mistrust between Indigenous communities who hold TK and the government agencies and officials ostensibly acting in their best interests.

While impossible to fully characterize the wide-ranging views expressed over many years by Indigenous peoples and stakeholders on ABS and the Protocol, it is useful to note that a number of recurring themes have emerged. Not generally

opposed to ABS in principle, some Indigenous peoples noted that the various engagements/consultations undertaken were at odds with the government's obligations regarding consultation and accommodation. At the regional meetings, there was widespread support for PIC/MAT and legal protection. A starting point for ABS governance in Canada must be the adequate recognition of the rights of Indigenous peoples over GRs and TK. Capacity challenges were of central concern. Canadian governments were reminded that GRs and TK have significance beyond mere economic value. Several years later, Indigenous peoples have reinforced these views, with renewed intensity, while expressing even greater reservations as captured in the three reports of the ABS Canada focus groups (2015, 2016, 2017).

#### THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP) AND ABS IN CANADA

It is important to recall that at COP9 (Bonn, 2008), Canada entered the critical final two years of ABS negotiations as one of only three CBD Parties that had not endorsed UNDRIP. While Canada ended the negotiations in 2010, having endorsed the UNDRIP with certain reservations,<sup>4</sup> it was not until 2016 that the Prime Minister announced Canada's endorsement of the UNDRIP without reservations – consistent with Canada's commitment to reconciliation with First Nations, Inuit and Métis. The recent endorsement of UNDRIP without reservations was a significant commitment in itself. Furthermore, it has significant implications for NP implementation in Canada.

UNDRIP is an aspirational document, without the same international legal force as legally-binding trade and environmental agreements. In our view, it has not yet attained the status of customary international law. Nevertheless, significant potential for demonstrating adherence and support for UNDRIP lies in implementing UNDRIP under national law to operationalize these Indigenous rights. In this context, national implementation of the Protocol provides a unique opportunity to make progress and thus support Indigenous rights to GRs on their traditional lands and waters and their associated TK (Oguamanam, Chapter 14).

UNDRIP Articles 31, 29 and 24 are most relevant to the implementation of the NP in Canada. These articles call for:

- (1) the protection of TK including GR, seeds, medicines and knowledge of the properties of fauna and flora whereby States shall take effective measures to recognize and protect the exercise of these rights (UNGA 2008, 11–12);
- (2) the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources (i.e. sustainable use) including Canada's obligation to establish and implement assistance programs for Indigenous peoples for such conservation and

protection including taking effective measures to recognize and protect the exercise of these rights (UNGA, 2008, 11); and

- (3) the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals including taking effective measures to recognize and protect the exercise of these rights (UNGA, 2008, 9).

Article 28 also provides that Indigenous peoples have the right to redress by just, fair and equitable compensation, for resources that they have traditionally owned or otherwise occupied or used, and which have been taken or used without their free, prior and informed consent (UNGA, 2008, 11–12). Article 38 requires states to take effective measures to recognize and protect the exercise of these rights (UNGA 2008, 13). It follows that Canada should provide effective mechanisms for prevention of, and redress for, any action that has the aim or effect of dispossessing First Nations, Inuit and Métis peoples of their lands, territories or resources, which of course would include their GR. While policy and administrative measures may be effective in most cases (especially as they relate to research conducted by public research institutes and universities) for implementing the Protocol in Canada (Oguamanam, Chapter 11; Bannister, Chapter 12; Bureli, Chapter 13) we believe such measures are insufficient for obtaining redress in Canada or other Parties to the Protocol.

While Canada currently has legal duties to consult the First Nations, Inuit and Métis, UNDRIP also states that Canada and other subscriber countries must consult and cooperate in good faith in order to obtain free, prior and informed consent of Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them. The challenge for Canada is to consult efficiently and effectively as required by the SCC in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017-SCC 40 and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (Oguamanam & Hunka, Chapter 3) to develop a draft NP implementation strategy that recognizes the practical and very real constraints posed by consultations.

Article 18 is also particularly relevant to the implementation of the Protocol in Canada. This article expresses the principle that Indigenous peoples have the right to participate in decision-making in matters that would affect their rights, through representatives chosen by themselves. This obligation has relevance at the local level, whereby First Nations, Inuit and Métis should determine the contact person/institution and process by which access to GRs and/or associated TK shall be granted. Users need only know the PIC/MAT contact and procedures, whereas the local community can follow their customary laws and community decision-making. Development of such customary laws and cognate requirements such as biocultural community protocols are aspects of community preparedness and competence and incidental organizational capacity-building and development for ABS (Oguamanam & Hunka, Chapter 3).

GOVERNMENT OF CANADA'S PRINCIPLES ON ITS RELATIONSHIP  
WITH INDIGENOUS PEOPLES AND IMPLICATIONS FOR  
IMPLEMENTING THE NAGOYA PROTOCOL

On 19 July 2017, the Government of Canada made public its *Principles respecting the Government of Canada's relationship with Indigenous peoples* (Government of Canada, 2017; Perron-Welch & Oguamanam, Chapter 6). These principles have profound implications for the implementation of the NP and for the advancement of reconciliation. The Government of Canada has committed 'to achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change.' In addition to committing to implement UNDRIP through a review of laws and policies, Canada has further committed to respect the inherent rights of Indigenous peoples including 'the rights that derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories, laws, and philosophies, especially their rights to their lands, territories and resources.' Through these Principles, the government 'recognizes the reality that Indigenous peoples' ancestors owned and governed the lands which now constitute Canada, prior to the Crown's assertion of sovereignty' (Government of Canada, 2017). These commitments clearly have implications for ABS (Nichols, Chapter 4).

Relevant to implementing the Protocol, the government has indicated that in upholding the honour of the Crown, it requires 'the federal government and its departments, agencies, and officials to act with honour, integrity, good faith, and fairness in all of its dealings with Indigenous peoples including through fulfillment of its fiduciary obligations' (ibid.). The Principles, informed by UNDRIP, state that 'Indigenous peoples have a unique connection to and constitutionally protected interest in their lands, including decision-making, governance, jurisdiction, legal traditions, and fiscal relations associated with those lands.' Through the Principles, the government has committed to ensuring 'that Indigenous peoples and their governments have a role in public decision-making as part of Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making' (ibid.). Importantly, the Principles state that Canada's commitments to a new relationship build on and go 'beyond the legal duty to consult' (ibid.).

The Government of Canada has stated that it will look for 'opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration [and] consensus.' NP implementation clearly provides one such opportunity. These Principles have significant implications for developing a post-Nagoya national ABS policy, since there is now a higher standard for the inclusion of Indigenous peoples in consultations and decision-making than there was during past developments of a national

ABS policy, of Canada's strategy and positions for the negotiation of the NP and for ABS discussions on whether or not to sign the Protocol.

The Government of Canada now recognizes 'that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources' and 'extends beyond title lands' (*ibid.*). During the early period of Protocol talks (2008–9) Canada had not endorsed the UNDRIP. However, Canada endorsed the Declaration with reservations during the final stages of Protocol negotiations in 2010. Canada would not agree to the language of Free, Prior, and Informed Consent (FPIC) during the negotiations, instead only agreeing to the 'approval and involvement' of 'Indigenous and local communities.' Relatedly, Canada expressed little to no flexibility in defining the relationship between the NP and UNDRIP. Canada ultimately dropped its objections to a reference to UNDRIP in the NP's preamble near the end of the negotiations (ENB, 2010).<sup>5</sup> As Canada accepts FPIC in its endorsement of UNDRIP, it follows that Canada could now employ 'free, prior and informed consent' rather than 'approval and involvement' when implementing the Protocol.

Finally, it is noteworthy that the Government supports a renewed fiscal relationship that will 'enable Indigenous peoples to have fair and ongoing access to their lands, territories, and resources to support their traditional economies and to share in the wealth generated from those lands and resources as part of the broader Canadian economy and these new approaches. . . include the negotiation of resource revenue sharing agreements' (*ibid.*). This commitment is relevant to Protocol implementation regarding benefit-sharing from the utilization of GRs in Canada.

#### A ROADMAP FROM NAGOYA TO OTTAWA BY 2020

Canada's ABS policy development experience to date has yet to bear fruit. ABS at the national/federal level appears to be suffering from a form of paralysis, despite significantly increasing efforts and resulting progress effected across the globe at national, sub-national and community levels. Retrospectively, it appears that the drivers of action or determinants of inaction in Canada on ABS over the past decade have predominantly been those related to concerns of certain industry and research sectors over implications for intellectual property rights and the transaction costs of introducing ABS governance in Canada. Such concerns have been amplified by the enduring misperception of Canada as solely a user of GRs (Oguamanam, 2011). As well, we see no concrete evidence that key federal government departments consider accession to and implementation of the Protocol as priorities.

We perceive an important shift in Canada regarding the relevance and significance of ABS. The principles and aims of reconciliation, together with the implementation of Canada's Principles and UNDRIP, compellingly argue for

broadening Canada's approach to ABS – moving beyond a focus on a narrow set of (sector-specific) economic interests towards a strategy that also seeks to advance Indigenous rights and interests. Furthermore, there is scope for viewing ABS in the context of implementing the 2030 Sustainable Development Goals. (The ABS Capacity Development Initiative, 2016).

Throughout the following section, we offer recommendations for five key components to ensure substantive progress: leadership within Canada; timely action; international leadership; consultation; and community-level action.

### *Leadership*

The first step, albeit a large one, is for the Prime Minister to lead in *initiating* the implementation of UNDRIP in Canada by committing to implement the NP. His leadership and that of the Cabinet is needed to overcome the inherent inertia of the bureaucracy and the apparent reluctance of some industry sectors to respect Indigenous peoples' rights, in a manner appropriate within a nation-to-nation relationship. If implementing the NP were deemed a Prime Ministerial priority, the resulting positive political energy would mobilize action and capacity required for legislative, administrative and policy development, voluntary measures, meaningful consultations and community-level implementation.

Such leadership could come in the form of a commitment to legal protection (i.e. not just voluntary approaches), for access and benefit-sharing from the use of GRs on traditional lands and waters of Indigenous peoples and the protection of their associated TK, taking into consideration customary protocols and laws. This strategy was supported by most Indigenous participants in regional meetings prior to NP negotiations.

Leadership could also be demonstrated through the development of a new model for sharing resources on traditional territories (i.e. Crown lands and private lands) under an ABS regime. Indigenous peoples in Canada want control over access to and use of their GRs and associated TK. We propose that control over access be co-decided by Canadian governments and Indigenous peoples. With respect to negotiating MAT, we propose that Indigenous peoples have majority control over use and property rights issues and that a significant portion of scientific and monetary benefit-sharing flow to Indigenous peoples. Co-management of GRs in a nation-to-nation relationship would aid Indigenous peoples in that F/P/T governments, with more resources and capacity, would lead in ABS-related litigation in civil courts on behalf of Indigenous peoples. Granted, this arrangement would be a significant derogation from the historical (and contemporary) trend of the governments' spending large amounts of money to fight Indigenous nations' legal claims through litigation. We assume, based on the government's commitment to reconciliation, that they will rethink this position in the future, as they move towards true reconciliation that recognizes and respects UNDRIP rights.

### *Urgency*

Speed in the exercise of leadership and policy development is of utmost importance. The year 2020 marks the culmination of the CBD's Aichi Biodiversity Targets 2010–20 initiative. Implementation of the Protocol is one of the Aichi Targets. Again, if Protocol implementation was judged a priority for the Prime Minister, it is not untenable that elements of a domestic framework ABS regime (including policy, administrative and legislative measures) could be in place by 2020. Such a possibility is increasingly slipping by as 2020 fast approaches.

There is also an urgent need to act: the longer Canada takes to implement a legal regime, the longer that Canada will remain at a disadvantage in the ongoing global ABS policy-making debates. There are three notable implications of Canada not acceding quickly to the NP. Perhaps most important is that there will not be legal protection in other countries for the PIC/MAT of Canadian providers or users of GRs and associated TK. This lacuna is becoming increasingly significant now that Canada's wealth of GRs is being unravelled in an unprecedented scale through the effects of climate change especially in the Arctic, which is the focus of intense economic activity (Oguamanam & Koziol, Chapter 7). Second, as a non-Party, Canada would continue to be absent from the decision-making table where NP Parties exercise the exclusive privilege of determining the further development of the international ABS governance regime, including concerns of Indigenous peoples. Third, there is a risk that Canadian science and industry sectors will lose opportunities to access and utilize the GRs of other countries, in the absence of Canadian measures to enforce compliance with those countries' ABS laws.

An important potential benefit of Canada's speedy progress on ABS implementation is the political capital and goodwill it would generate among the 195 other CBD Parties. As leading proponent of the CBD and host to the CBD Secretariat in Montreal, the advantages of Canada becoming Party to at least one of the CBD's protocols are patently obvious to all concerned.<sup>6</sup>

### *International Leadership*

Once committed to a legal ABS regime in Canada, leadership could, in turn, be demonstrated internationally by developing an exemplary national system for implementing the NP. While legislation would form the core of legal protection and compliance measures, administrative, policy and funding measures would be necessary for effective implementation of the Protocol as a whole. The Canadian regime could involve regulatory, civil, customary law and perhaps criminal law in extreme cases. The goal could be to develop an effective and pragmatic national model that other countries could follow, especially in the context of implementing UNDRIP through ABS policy. The Protocol is the minimum standard for enforcing PIC/MAT; Canada could decide to have a policy with broader policy scope than the

Protocol. Indeed, this proposal is one of the outcomes from ABS Canada's nationwide focus groups on an Indigenous-sensitive ABS policy.

### *Consultations and Engagement*

Given that the implementation of the Protocol will directly affect Indigenous rights, consultations should allow for consensus on a national ABS strategy. While the views of stakeholders will be important in developing a national ABS strategy, Indigenous peoples are rights holders and therefore there are associated legal obligations that need to be respected.

First Nations, Métis and Inuit should be included at the Ministerial level of a Federal/Provincial/Territorial/Indigenous peoples Resource Council to approve a national ABS strategy. Indigenous participation would also occur at the working level and senior executive committees. The National Aboriginal Organizations should also receive funding to participate in the NP implementation process, including in consultations. Measures should be undertaken to ensure that Indigenous women, elders and youths are well represented. Appointment of an Indigenous co-chair could be considered.

Consultations must necessarily include, but go beyond, the engagement of NAOs. Extra effort should be made to consult hereditary chiefs, knowledge keepers and other elders with TK of their biodiversity and plant-based medicine because they hold the TK associated with GR. The federal government would also be responsible for consulting more broadly, through a multi-pronged regional strategy, in order to seek out the range of available ABS expertise (i.e. among hereditary chiefs and elders, chiefs and band managers; national, provincial and territorial Indigenous leaders; Inuit regions; environment and resource managers; academics and sustainable development lawyers; science and industry sectors; and civil society representatives).

Given the significant effort needed to raise awareness and develop a working knowledge of ABS, consultations could best be focused on organizations and individuals who have been active or want to be active on ABS issues in the years to come. This is one of the lessons from the ABS Canada initiative. While there has been a void in ABS consultations in recent years, current Indigenous capacity for consultation can be found, for example, through members of the Social Sciences and Humanities Research Council (SSHRC) sponsored research program 'Intellectual Property in Cultural Heritage (IPinCH)'<sup>7</sup> and the ABS Canada initiative.<sup>8</sup>

In implementing UNDRIP and the Government of Canada's Principles via ABS, we would advocate the establishment of an independent Indigenous body to promote Indigenous biodiversity-related issues (regarding the CBD's Articles 8(j) and 10(c) and NP). This 'Indigenous Council on Biodiversity' should be reflective of elders' concerns about access to and protection for medicinal plants, as well as the need to respect traditional Indigenous protocols governing the use of traditional



medicines. Some elders at the 2017 spring session of the ABS Canada Focus Group held in Saskatoon expressed similar sentiments.<sup>9</sup> Main roles of the Council could include: leading on ABS capacity-building at the community level (e.g. development of codes of conduct, community protocols); administering a UN-like financial mechanism for local capacity-building for respecting, maintaining and protecting TK; providing for the protection of medicinal plants; and supporting sustainable use/development and ecosystem approach to management on traditional lands and waters.

### *Community-Level Actions*

The PIC/MAT obligations of the Protocol provide that users of GRs and associated TKs held by ILCs follow the community process for their access and use. In this manner, customary protocols of the community are recognized. Of course, this means that communities need to take measures to prevent unauthorized disclosure by individual community members. By designating a community ABS focal point, the procedure for users would be clear. Users do not need to know details of the community decision-making processes (i.e. customary laws) except that time is necessary for communities to make their decisions.

The PIC/MAT process also means that communities that want a moratorium on accessing TK have that option. Furthermore, communities wishing to prevent access to sacred medicines and medicinal plants have the option to deny access to those outside the community (Oguamanam, 2003). To support community control over access and use of GRs and associated TK, Indigenous peoples will need the capacity and tools to negotiate PIC/MAT on fair terms (Oguamanam & Hunka, Chapter 3).

Consistent with Protocol Article 12, the government could immediately begin the work of developing documents with model language for adaptation by each community. Communities will likely need first to negotiate a confidentiality agreement at the outset of research (Burelli, Chapter 13). So, a model confidentiality agreement would be desirable. There are many existing examples of ABS model contract provisions for benefit-sharing that could be adapted for Indigenous peoples; for example, clauses that set out allowed uses and ownership of GRs and associated TK provide important legal clarity in MAT (ABS Capacity Development Initiative, 2017)<sup>10</sup>.

A National ABS Focal Point should lead in coordinating the development of these model clauses; however, these initiatives also need to be complemented by awareness-raising and capacity-building. Given that most communities are unlikely ever to have users request access to GRs and associated TK, it could be most efficient for the National ABS Focal Point to provide resources for expert legal capacity at the time users request access.

While it has been noted that Canada is lagging behind much of the rest of the world in genetic resource and TK governance development at the national level

(i.e. in the context of implementing the current global benchmarks established by the NP), instructive experiences exist in community-level ABS development in other parts of the world. There are also successful local examples in Canada (Oguamanam & Koziol, Chapter 7). Canada can and must learn from these experiences. One could envision the establishment of a pilot project among Canadian and overseas partners to support a South-North or North-North capacity-building initiative designed to support ‘Indigenous community-to-Indigenous community’ collaboration to jump-start concrete work on ABS at the local level in Canada. Indeed, there is nothing to disallow the establishment of such collaboration, even in the current absence of full national ABS leadership (Oguamanam & Hunka, Chapter 3).

#### CONCLUSION

Canada and Indigenous peoples in Canada have played pivotal roles in developing international ABS policy and governance instruments. While there has been an apparent hiatus on ABS within the federal government post-Nagoya, previous wide-ranging efforts at policy development and engagement conducted by the federal, provincial and territorial governments represent a firm, substantive foundation still valuable for advancing ABS governance in Canada.

Now that it has dropped its objections to UNDRIP, and with its population seized by the need to move forward on reconciliation, Canada has reached a historic juncture. The NP, when understood as a rights instrument supporting justice and fairness, offers a tool to promote UNDRIP and reconciliation. It is time for a fundamental shift in perspective on ABS in Canada – away from a narrow, user-based view towards a deeper and more inclusive rights-based understanding of the Protocol.

The rationale for implementing the NP has never been stronger and the need never greater. The opportunities inherent in ABS must now be pursued, and Canada should re-join the global ABS push. Our roadmap highlights the critical need for leadership at many levels – beginning with the Prime Minister of Canada and including Canada’s Indigenous peoples.

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## NOTES

- 1 2020 is the terminal date of the 2010–2020 Aichi Biodiversity Targets which include the implementation of the Nagoya Protocol as one of the key targets.
- 2 The International Indigenous Forum on Biodiversity (IIFB) was formed during third Conference of the Parties of the Convention on Biological Diversity in Buenos Aires, Argentina, in November 1996. It is a collection of representatives from Indigenous governments, NGOs, scholars and activists that organize around the CBD and other international environmental meetings to coordinate Indigenous participation at these meetings.
- 3 This summary is based largely on co-author Langford's involvement in developing national ABS policy and related consultations, as well as his experience developing negotiating strategy and negotiating ABS instruments from the voluntary Bonn Guidelines in 2001 through to the adoption of the Nagoya Protocol.
- 4 Canada's volte face in endorsing UNDRIP albeit with reservations was in a way done under the pressure of the backlash from its intransigence in opposing the reference to UNDRIP in the text of the Nagoya Protocol.
- 5 Canada's conduct expectedly generated ill-feelings across Indigenous peoples world-wide. As a consequence, it undermined previous attempts to engage Indigenous peoples in the lead-up to the Nagoya negotiation and created the impression among Indigenous people that they were neither involved nor were their interests represented by Canada at Nagoya. Such an impression has continued to linger posing a challenge to prospective attempt to domesticate and implement the Protocol in Canada.
- 6 Canada also played a leading and vocal role in the negotiation of the Cartagena Protocol on Biosafety (which it signed but failed to ratify).
- 7 [www.sfu.ca/ipinch/](http://www.sfu.ca/ipinch/)
- 8 [www.abs-canada.org/](http://www.abs-canada.org/)
- 9 One the chapter's authors, Timothy Hodges, attended this session and had the opportunity to interact with the elders, including a very prominent Aboriginal elder and medicine man.
- 10 Since 2006, the German-based ABS Capacity Development initiative been engaged with development and implementation of national regulations on ABS across Africa.