

Implications of the Evolution of Canada's Three Orders of Government for ABS Implementation

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Abstract

This chapter evaluates the potential for the governance of access and benefit-sharing in Canada through the lens of different layers of government: federal, provincial, territorial and Indigenous. The emphasis of the chapter is on how the nation-to-nation approach could be an effective way to integrate Indigenous peoples' claim to genetic resources (GR) and their traditional knowledge (TK) as aspects of their self-determination. A nation-to-nation approach recognizes Indigenous peoples as stakeholders in access and benefit-sharing (ABS) in ways that advance the pursuit of justice and reconciliation in Canada. With the backdrop of ongoing policy initiatives and multifaceted attempts at renewing Canadian-Indigenous relations, the chapter underscores the federal government's role in driving the charge. It will also require a commitment on the part of provincial governments, and overall political will across Canada, to draw in Indigenous peoples as genuine partners in order to fully integrate their legal traditions. Before Canada can implement the Nagoya Protocol, and any other ABS vision for that matter, all governments need to take the nation-to-nation mantra seriously and to articulate the legal status of GR and TK in Canada.

INTRODUCTION

After 150 years of Confederation, 35 years since the repatriation of the Constitution, and 20 years after the Report of the Royal Commission on Aboriginal Peoples (RCAP), the relationship between Canada's three orders of government – federal, provincial and territorial, and Indigenous – continues to evolve. This has largely occurred through the actions of the judiciary when called upon to adjudicate on the protection of existing Aboriginal and Treaty rights under Section 35 of the

Constitution Act, 1982 (Nichols, Chapter 4). Yet, it has recently become one of the main issues in the political realm as well. In the 2015 Mandate Letter for the Minister of Indigenous and Northern Affairs Canada (INAC) (now divided into the Department of Crown-Indigenous Relations and Northern Affairs, and the Department of Indigenous Services) the Prime Minister called for 'a renewed, nation-to-nation relationship with Indigenous peoples, based on recognition of rights, respect, co-operation, and partnership' (Prime Minister's Office, 2015). In 2016, the Minister announced to the United Nations (UN) that Canada is now an unqualified supporter of the UN Declaration on the Rights of Indigenous peoples (UNDRIP), affirming Canada's commitment to adopt and implement UNDRIP in accordance with the Canadian Constitution. This was followed in 2017 by a second statement at the UN Permanent Forum on Indigenous Issues retracting reservations to the 2014 Outcome Document of the World Conference on Indigenous peoples on free, prior and informed consent (FPIC) (INAC, 2017). On 22 February 2017, the Prime Minister announced the creation of a Working Group of Ministers responsible for the review of relevant federal laws, policies and operational practices to ensure that the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including UNDRIP; and supporting the implementation of the Calls to Action of the Truth and Reconciliation Commission (TRC) (Prime Minister's Office, 2017).

Yet, despite these statements and the celebratory atmosphere surrounding the 150th anniversary of Confederation, Indigenous leaders and intellectuals provide a different narrative of the past 150 years. Perry Bellegarde, the national chief of the Assembly of First Nations (AFN), reminded Canadians that treaties were based on the premise that 'peaceful coexistence and mutual respect would and should guide our relationship forward.' First Nations conceive of the treaty-making process as 'a meeting of two equals, who both negotiate within their own legal systems and traditions. The treaty was not meant to extinguish First Nation rights, but to recognize that First Nations' ways of life, including our legal systems and ways of governance, were protected' (Bellegarde, 2017). Professor John Borrows recounts: 'For us, the history of Canada is one of dispossession, disruption, and coercion. First Peoples have suffered greatly since Confederation, and it is worth asking whether the same will be true of the next 150 years. The [TRC] raises the promise of a new beginning, but what kind of beginning will that be? What would Canada look like if it truly respected Indigenous peoples?' (Borrows, 2017). In Roberta Jamieson's lecture at Ryerson University, 'Canada's Original Promise: Still Waiting to be Realized,' broadcast on CBC Ideas on 30 June 2017, she asserted that 'until Canada decides to be a country in which Indigenous peoples are able to thrive ... in sustainable communities ... the current challenges we've come to associate with Indigenous peoples will not only continue, they will grow, they will complicate, and they will become much more difficult and costly to address' (Jamieson, 2017).

In mid-2017, the Department of Justice (DOJ) released ten principles governing Canada's relationship with Indigenous peoples. Principle 1 states that relations must be based on the recognition and implementation of the right to self-determination, including the inherent right of self-government. Principle 2 notes reconciliation is a fundamental purpose of s. 35 of the Constitution. Principle 3 indicates the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples. Principle 4 recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government. Principle 5 states that treaties, agreements and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect. Principle 6 elaborates that meaningful engagement with Indigenous peoples aims to secure FPIC when Canada proposes to take actions which impact them and their rights on their lands, territories and resources. Principle 7 asserts that respecting and implementing rights is essential, and any infringement of s. 35 rights must meet a high legal threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations. Principle 8 acknowledges that reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, which promotes a mutually supportive climate for economic partnership and resource development. Principle 9 recognizes that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships. Principle 10 concludes by recognizing that a distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented (Department of Justice, 2017).

The Minister of Justice wrote an editorial indicating that 'the principles establish a clear, transparent foundation for reconciliation based on recognition – something Indigenous leadership have been asking successive governments to do for decades and has been recommended in numerous reports and studies. We took this step so that the future, unlike the past, can be written together. The principles bring a new direction and standard to how government officials must work and act in partnership with Indigenous peoples to respect Indigenous rights and to implement [UNDRIP]' (Wilson-Raybould, 2017). However, it has been observed that they unilaterally modify the language of the UNDRIP relating to FPIC, setting a lower standard by altering text from 'in order to obtain their [FPIC]' to 'with the aim of securing their [FPIC]' (Newman, 2017).

As the Government of Canada moves decisively beyond the status quo, it will be important to openly address imbalances pertaining to ownership of biodiversity, genetic resources (GR) and traditional knowledge (TK). Prior to colonization, North America was not *terra nullius*, it was an actively managed environment in which ecological conditions were shaped by Indigenous management of land and resources according to norms established through Indigenous legal traditions and

worldviews that helped shape the complex ecosystems and biodiversity. The colonial imposition of foreign laws permitted the exploitation of the wealth of the land without regard to the inherent title and authority of these nations (Clogg et al., 2016; *Tsilhqot'in Nation v British Columbia*, 2014). To date, the Government's response to the development and adoption of global norms on access and benefit-sharing (ABS) has built on this colonial mentality, alienating its Indigenous peoples and failing to account for the significance of their knowledge systems (Oguamanam, 2011; Dagne, 2017).

A new approach to ABS under the Convention on Biological Diversity (CBD) could help build confidence, as fair and equitable ABS requires structural changes in relations between the three different orders of government based on establishing a fair and honourable relationship between Indigenous and non-Indigenous peoples in Canada. For many Indigenous peoples, their relationship with biodiversity is a fundamental reality of their lived experience and is a site for the exploration of community knowledge and innovation systems and practical translations of the community's worldview and cultural expressions (Oguamanam, 2011). Political and legal space has opened up for the recognition and exercise of Indigenous governance and environmental management rights (Clogg et al., 2016).

THE CONVENTION ON BIOLOGICAL DIVERSITY AND NAGOYA PROTOCOL

The CBD opened for signature at the Earth Summit in Rio de Janeiro in June 1992 and entered into force in December 1993. It addresses environmental, social and economic aspects of biodiversity. Its objectives are the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of GR. Despite recognizing biodiversity as a common concern of humankind, the CBD situates these objectives in the context of the sovereign right of States to exploit their own resources pursuant to their own environmental policies, while being responsible for conserving their biodiversity and using their biological resources in a sustainable manner. This places much responsibility for biodiversity conservation in the hands of States, which have differing views on the ownership of biological resources and the role of the State in their regulation. The exercise of property rights is central to the reach and effectiveness of implementing measures, but the CBD does not dictate how States should exercise that control in relation to biodiversity, GR, or TK. It leaves considerable space for States to construct different approaches to implementation (Ferreira de Souza Dias and Garforth, 2017; Willmore, 2017; Burelli, Chapter 13).

In Article 8(j), the CBD makes provision relating to the traditional knowledge, innovations and practices (TKIP) of Indigenous peoples and local communities relevant to *in situ* conservation. It requires Parties to, as far as possible and as appropriate, and subject to national legislation, 'respect, preserve and maintain

knowledge, innovations and practices of indigenous and local communities (ILC) embodying traditional lifestyles relevant for the conservation and sustainable use of [biodiversity] and promote their wider application with the approval and involvement of the holders of [TKIP] and encourage the equitable sharing of the benefits arising from the utilization of [TKIP].’ Article 10(c) further provides for sustainable use, requiring Parties to, as far as possible and appropriate, ‘protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.’ Article 15 lays the foundation for ABS by providing some direction for implementing fair and equitable access to GR and the sharing of benefits resulting from their use (Oguamanam, 2011; Greiber et al., 2012).

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (NP) entered into force in 2014. It has 111 ratifications as the date of writing, and it is becoming a global standard. It aims to facilitate the implementation of ABS by providing a strong basis for greater legal certainty and transparency in arrangements for access to GR, in exchange for benefit-sharing derived from their use. Unlike most environmental treaties, the NP has a number of provisions that are directly relevant to Indigenous peoples. The most important are found in Articles 5, 6, 7 and 12. Article 6(2) requires Parties to take measures, in accordance with domestic law, and as appropriate, with the aim of ensuring that the prior informed consent (PIC) or approval and involvement of ILCs is obtained for access to GR where they have the established right to grant access. Article 7 requires Parties to take measures in accordance with domestic law and as appropriate, with the aim of ensuring that TK associated with GR that is held by ILCs is accessed with their PIC or approval and involvement, and that mutually agreed terms (MAT) have been established. Article 5(2) obliges Parties to take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of GR that are held by ILCs, in accordance with domestic legislation regarding the established rights of these ILCs over these GR, are shared in a fair and equitable way, based on MAT. Article 5(5) requires Parties to take legislative, administrative or policy measures, as appropriate, so that the benefits arising from the utilization of TK associated with GR are shared in a fair and equitable way with ILCs based on MAT. Lastly, Article 12 directs Parties to take the customary laws, community protocols and procedures of ILC into consideration in the ABS process.

Clearly, there are significant implications for Indigenous peoples in the adoption of a domestic ABS regime in Canada. Given the expanded scope of the NP and the significant developments in Aboriginal rights jurisprudence over the past decade, existing policies and prior consultations on ABS have lost much of their relevance. Earlier discussions largely focused on the roles of the federal, provincial and territorial governments. Given the content of the NP, the importance of Aboriginal

rights and role of Aboriginal self-government must be considered on the path forward to Canada's ratification and implementation of the NP or the adoption of any other ABS regime. The ongoing consideration of ABS measures in Canada under the CBD, and possible ratification of the NP, affirm the pressing need to reconstitute and support Indigenous legal and organizational structures to effectively participate in ABS as a matter of capacity building and capacity development (Oguamanam & Hunka, Chapter 3).

The federal, provincial and territorial governments designed a Canadian Biodiversity Strategy and Outcomes Framework with goals and targets in 2016. The aspirational goals and targets recognize that CBD implementation will rely on meaningful, full and effective participation of Aboriginal peoples, and that the TKIP of Aboriginal communities are relevant for implementing the goals and targets, as is protecting and encouraging customary use of biological resources. In the context of Goal B on direct and indirect pressures on biodiversity/sustainable production and consumption, Target 12 is that 'By 2020, customary use of Aboriginal peoples of biological resources is maintained, compatible with their conservation and sustainable use.' In the context of Goal C on information about biodiversity and ecosystem services, Target 15 is that 'By 2020, Aboriginal [TK] is promoted and, where made available by Aboriginal peoples, regularly, meaningfully and effectively informing biodiversity conservation and management decision-making' (Environment and Climate Change Canada, 2016). Yet, no targets are set on ABS, protection of TK associated with GR, or the ratification of the NP. Similarly, the 2016 initiative of the federal government to review Canada's environment assessment and regulatory processes¹ is silent on integration of ABS considerations into environmental impact assessments (EIA) (Oguamanam, Koziol, Lesperance & Morales, 2017).

CANADA'S CONSTITUTIONAL FRAMEWORK:
CONSTITUTION ACT, 1867 AND CONSTITUTION ACT, 1982

Under Section 91(24) of the *Constitution Act, 1867* (formerly BNA), Parliament has exclusive authority to make laws in relation to "Indians, and lands reserved for the Indians" (Wilkins, 2013). This authority comprises the power to deal with matters unique to and characteristic of Canada's First Nations, non-status Indians, the Métis and the Inuit, as such (Wilkins, 2013). The *Indian Act* was adopted under this head of power, but with Section 35(1) of the *Constitution Act, 1982* as a guide, it is open to more democratic interpretations that do not justify domination (Borrows, 2016). In *Campbell v. British Columbia*, 2000 BCSC 1123, at para 81 Williamson J found that '[A]boriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten 'underlying values' of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue

and was a division internal to the Crown' (*Campbell v. BC*, 2000). For the RCAP, cited with approval by Binnie J at paras 129–130 in his concurring opinion in *Mitchell v. Minister of National Revenue*, 2001 SCC 33, '[Aboriginal] governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government' (RCAP, 1996, 240–1; *Mitchell v. MNR*, 2001).

Section 35 of the *Constitution Act*, 1982 recognizes and affirms existing Aboriginal rights and rights preserved or conferred in treaties between the Crown and Indigenous peoples or communities, including land claims agreements (Wilkins, 2013; *Daniels v. Canada*, 2016). The word 'existing' indicates that these are only those that were not extinguished prior to the adoption of the *Constitution Act*, 1982. These rights do not depend on formal legal recognition by Canada for their existence (Nichols, Chapter 4). In the majority opinion in *R v. Adams*, [1996] 3 SCR 101, at para 33 Lamer C.J.C. noted that 'Section 35(1) would fail to achieve its noble purpose . . . if it only protected those rights which were fortunate enough to have received the legal approval of British and French colonizers' (*R v. Adams*, 1996). In *R v. Van der Peet*, [1996] 2 SCR 507, at para 31 Lamer CJ further indicated that s. 35 provides 'the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose . . . the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown' (*R v. Van der Peet*, 1996). As Binnie J held at para 1 in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, the fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions (*Mikisew Cree Nation v. Canada*, 2005). The phrase 'existing Aboriginal rights' must thus be interpreted flexibly so as to permit their evolution over time (Wilkins, 2013).

Furthermore, the burden of proving that a treaty or Aboriginal right has been extinguished lies upon the Crown or on the party alleging extinguishment (Wilkins, 2013), while rights claimants, where necessary, may seek the affirmation of the rights via a declaratory order (Nichols, Chapter 4). These rights do not only pertain to titled lands. In the concurring opinion of L'Heureux-Dubé J in *R v. Adams*, at paras 64–65 she notes that '[t]he doctrine of aboriginal rights . . . covers all aboriginal interests arising out of the native peoples' historic occupation and use of ancestral lands. Aboriginal rights can be incidental to title but need not be: they are severable from and can exist independently of aboriginal title' (*R v. Adams*, 1996). But, as Joshua Nichols (Chapter 4) observes, the pathway to realizing this interpretation has proven burdensome for Aboriginal peoples.

ROYAL COMMISSION ON ABORIGINAL PEOPLES (RCAP)

The RCAP found that, apart from s. 35, international legal norms impose positive obligations on governments to recognize and protect the rights of Aboriginal peoples with respect to lands and resources and self-governance. Under this approach, the right to self-government is not merely grounded in s. 35, but also in the emerging rights under international law of self-determination and of the cultural and political autonomy of Indigenous peoples. Parliament and the legislatures could take significant guidance from RCAP and see Indigenous peoples as nations that have a right to pursue objectives that may differ (Borrows, 2001). The RCAP recognized that the principle of sharing is central to the treaties signed between the Crown and Aboriginal peoples, and is central to establishing real equality among the peoples of Canada in the future. In *Mitchell v. MNR*, Binnie J confirms at para 129 that the RCAP recommendations regarding self-government and shared sovereignty are gaining acceptance with time. In a concurring judgment, he reflected on the nature of Aboriginal sovereignty, remarking that:

The modern embodiment of the “two-row” wampum concept, modified to reflect some of the realities of a modern state, is the idea of a “merged” or “shared” sovereignty”, recognizing that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners . . . If the principle of merged sovereignty is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled.

THE TRUTH AND RECONCILIATION COMMISSION

In order to redress the legacy of residential schools and advance the process of Canadian reconciliation, the TRC issued 94 Calls to Action. Five are of particular relevance to the issue of ABS. First, in Recommendation 43, the TRC calls on upon federal, provincial, territorial, and municipal governments to fully adopt and implement the UNDRIP as the framework for reconciliation (Truth and Reconciliation Commission of Canada, 2015). The TRC then calls upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the UNDRIP in Recommendation 44 (Ibid.). In Recommendation 45, the TRC calls for a renewal of the relationship between the Government of Canada and Aboriginal peoples, on behalf of all Canadians, by jointly developing a Royal Proclamation of Reconciliation, issued by the Crown, to build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764 and reaffirm the nation-to-nation relationship. The content would include, but not be limited to, four

commitments: '(i) Repudiate concepts used to justify European sovereignty over indigenous lands and peoples such as the Doctrine of Discovery and *terra nullius*; (ii) Adopt and implement UNDRIP as the framework for reconciliation; (iii) Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future and (iv) Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements' (Ibid.). Challenging the basis of the sovereignty of the Canadian State over Indigenous lands and resources, Recommendation 47 calls upon 'federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts' (Ibid.). Engaging the private sector directly, Recommendation 92 calls upon 'the corporate sector in Canada to adopt the UNDRIP as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources' (Ibid.).

A NATION-TO-NATION ROADMAP FOR INDIGENOUS PEOPLES' INTERESTS IN ABS

Some Indigenous participants in the ABS Canada-organized focus groups queried the basis for prioritization of ABS amidst significant socio-economic challenges that bedevil Indigenous peoples in Canada (Oguamanam, Chapter 1). Other participants were quick to counter that the need for ABS over GR and associated TK is an integral component of Indigenous peoples' holistic and historic struggle for equity, fairness and justice. There is a consensus that the current momentum for ABS is opportune, to the extent that it opens a critical new opportunity for strategic policy making that would address the problematic federating order in Canada that pays lip service to Indigenous nations through a nation-to-nation relationship.

In the current constitutional order, the provinces and territories have the lion's share of jurisdiction over natural resources, while the federal government has near exclusive jurisdiction over Aboriginal peoples. Historically, this federating order was rooted in colonial visions of Eurocentric capture, subjugation, and assimilation of Aboriginal peoples and their worldviews, as eloquently recalled in the TRC Report. Even though attempts by Aboriginal peoples to assert their 'existing rights' and 'treaty rights' have received significant judicial sanction, there is a glaring failure to translate those rights in a manner that enables the nation-to-nation relationship between Indigenous peoples and Canada in a fashion that fully recognizes

Indigenous political and legal traditions as a component federating order of government in Canada. That form of recognition, and its operationalization, is key to further empowering of the Indigenous epistemic order, jurisprudence, worldviews and, ultimately, Indigenous peoples as stakeholders in the management of their natural resources, specifically, in this case, GR and associated TK.

The coalescence of various developments within Canada and internationally clears the pathway towards Indigenous peoples' right to self-determination, which is a foundational basis for a nation-to-nation relationship. It also provides the impetus for Indigenous peoples to exercise other kinds of rights, including the right to GR and associated TK. Firstly; we have mentioned the progressive Canadian jurisprudence on s. 35 of the Charter and ensuing case law. The second development is the new architecture of international law on Indigenous peoples, Indigenous rights, including their rights to TK, pursuant to a number of international legal initiatives and regimes including the ILO Convention 169 of 1989 (a precursor to UNDRIP), the WIPO Development Agenda, the UNESCO cultural heritage regime, the FAO *International Treaty on Plant Genetic Resources for Food and Agriculture* (IT), and the CBD and its NP (which are key drivers of ABS). These provide a strong basis for active participation of Indigenous peoples in decision-making, while recognizing Indigenous peoples' rights to their natural resources and cultural heritage.

Third, and deserving of separate mention, is the UNDRIP – which has been buttressed by the *American Declaration on the Rights of Indigenous peoples* of the Organization of American States (OAS). Fourth is the TRC Report, which was instrumental to the fifth factor, namely, Canada's endorsement of UNDRIP after a decade of opposition. Sixth is Canada's acceptance of the necessity for FPIC. Seventh is the Canadian Biodiversity Strategy, its goals and targets. Eighth are the various recent and ongoing policy initiatives in Canada that have made reconciliation with Indigenous peoples official government policy, and the resultant programs of work and statements of principles and policies. In that regard, for example, we have mentioned the Federal government's ten principles of engagement with Indigenous peoples and the Ministers' Working Group that are putting into effect Canada's commitment to Aboriginal treaty rights and other international obligations relating to Indigenous peoples. Ninth are the progressive developments in the research ethics landscape in Canada and internationally in which Indigenous peoples' attention and active participation in research concerning them and their interest in data sovereignty is affirmed (Oguamanam, Chapter 11; Burelli, Chapter 13). Tenth, the UN Committee on the Elimination of Racial Discrimination is ramping up pressure on Canada to live up to its many commitments to Indigenous peoples and notably on the need for the adoption of a legislative framework to implement the International Convention on Elimination of Racial Discrimination (CERD) (CERD, 2017).

Appraising the real and potential impacts of the outlined initiatives at implementation levels from the perspective of enhancing Indigenous peoples' nation-to-nation relationship with federal and provincial and territorial governments is necessary. Such an outlook requires departing from the colonial approach that considers Indigenous peoples as occupiers as opposed to owners of their lands and natural resources. As well, the new thinking should reflect a further and deliberate shift from the colonial mindset in which Indigenous worldviews and epistemic orientations are regarded as outside the fringes of 'civilization' (Oguamanam, 2008). These and similar colonial predispositions have been the foundation of cultural genocide via assimilation and other destructive tactics as symbolized in the legacy and tragedy of the Canadian residential school system. Rather, stronger autonomy for Indigenous peoples as an aspect of self-determination and self-government is required to propel the integration of their legal systems and traditions and worldviews in matters relating to their natural resources, including GR and associated TK.

ABS BEYOND AN ECONOMIC FOCUS

One of the important issues that a nation-to-nation framework for the participation of Indigenous peoples in the control and governance of GR would unravel is the economic focus of ABS in the NP, which is the extension of the market economic orientation of the CBD. As mentioned earlier, global norms on ABS reflect aspects of the colonial legacy of fixation on the economic value of raw materials, with the risk of alienating Indigenous peoples who are historically perceived as mere suppliers of natural resources with no credible sense of innovation or knowledge systems (Oguamanam, 2008, 2011). It bears recalling that ABS is essentially an economic incentivizing policy aimed at encouraging the use and protection of traditional knowledge innovation and practices that are conservation friendly, and that there is neither a direct reference to TK nor to Indigenous peoples or to local communities in Article 1 of the Protocol which articulates its core objective.

Strong Indigenous participation on nation-to-nation basis would equally place on the same, if not an even higher pedestal, several culturally significant considerations touching on a wide range of factors in which Indigenous peoples' relationship with the land, various natural resources, their knowledge systems, ecological worldviews, etc. constitute a universe of factors for self-determination beyond the economic purview of ABS. In a nation-to-nation relationship, Indigenous people are better able to elaborate alternative and complementary epistemic valorizations of their complex relationship with natural resources, including GR and TK, which was part of the target of colonial suppression. Therefore, as mentioned by Bannister (Chapter 12) and Burelli (Chapter 13) in this volume, the NP provides an option or framework, albeit a limited one, amidst other possibilities, for Indigenous peoples to pursue justice and equity, which constitutes the fulcrum of reconciliation.

ADVANCING ABORIGINAL SELF-DETERMINATION THROUGH ABS

To its credit, the NP represents an important step forward for the concrete integration of IPLCs as practical stakeholders in the control and governance of GR in ways that open doors for further exploration or realization of Aboriginal rights to self-governance and self-determination. From Article 8(j) of the parent Convention, the CBD, down to the preamble of the NP² and its substantive provisions, including but not limited to Articles 5, 6, 7, 11, 12, 16 and 21, the Protocol makes references to ILCs and diverse categories of rights in relation to: GR and associated TK; FPIC; involvement in decision-making; etc. The NP also recognizes the transboundary nature of both GR and TK, a fact that indirectly recognizes natural or internal differentiation among nations of Indigenous peoples, as well as the arbitrary colonial balkanization of historically unified and cohesive Indigenous peoples across colonial boundaries.

Perhaps most significantly, in Article 12, the NP strongly mandates Parties³ to take into consideration customary laws, community protocols and procedures applicable to TK and associated GR when implementing related obligations. Furthermore, Protocol Parties are required to support the development of community protocols, involve ILCs, including women, and to support the development of model contractual templates on ABS. As mentioned by Oguamanam (Chapter 11) flexible use of contractual instruments such as proposed by the Geomatic and Cartographic Research Centre (GCRC) research group pursuant to the open licensing scheme for TK enables Indigenous peoples to specify and negotiate their expectations and other sensitivities with users of their GR and associated TK in ways that reflect Indigenous cultural values. The association or juxtaposition of Parties' domestic laws with the customary laws, community protocols and procedures of ILC is instructive of the expected role of Aboriginal self-determination and self-government within an Aboriginal empowered and recognized order of government for equitable ABS and other issues that touch on Aboriginal justice in the Canadian federation. Aboriginal participants in the ABS Canada focus groups insist that that negotiation of Canadian federation has yet to crystallize as it remains a work in progress for as long as the 73 Aboriginal nations have yet to assume their rightful place in Canada on nation-to-nation basis as envisaged by their Aboriginal forbearers during the colonial encounter (ABS Canada Focus Group, 2015).

As we have demonstrated, so far, there is no dearth of vision or policy statements and proclaimed pathways in Canada for recognition of Aboriginal nation-to-nation relationship. A broad political space has been opened up, or so it appears, for Indigenous exercise of self-governance in environmental and kindred matters which are the sites for entrenching and understanding Indigenous peoples' ways of life, the preservation of which is at the core of nation-to-nation relationship as symbolized in the treaties. The federal government through the Department of Justice is now unequivocal about the legitimacy of Indigenous peoples' right to self-determination,

their inherent right to self-government, and the importance of partnership in resource development. Recently these initiatives encompass renewed activism in extractive industries and other new frontiers of opportunities made possible by climate change (Dylan, Chapter 5; Oguamanam & Koziol, Chapter 7).

Collectively, these progressive dispositions are an exercise in self-interest and self-preservation on the part of Canada. As mentioned earlier in the chapter, pre-colonial North America's environmental profile was enviable. It reflected historically sustainable ecological conditions and robust biodiversity thanks to millennia of Indigenous and ecological legal traditions and knowledge systems. Today, amidst global biodiversity loss and overall environmental crisis and climate change, the federal, provincial and territorial, and municipal governments have stated their resolve to promote and support TK and Aboriginal customary use of biological resources as part of Canada's Biodiversity Strategy. An important cultural practice or principle that animates Aboriginal peoples' relationship with the environment and nature's abundant resources, which also underlies the treaties, is the principle of sharing. The RCAP is unmistakable on the centrality of the principle of sharing in treaty-making and in the future of organizing relationships in Canada. In essence, sharing and exchange of insights in various ways including natural resources, lands, knowledge, technology and worldviews are recognized as the basis for equity among the component peoples of Canada (Larry Chartrand et al., Chapter 8). ABS represents a very important context for giving that vision a practical effect.

OVERCOMING THE TRUST DEFICIT AND PUSHING THE SELF-GOVERNMENT ENVELOPE

Most Indigenous peoples, including those who participated in the ABS Canada focus groups, have taken a welcome but suspicious notice of these progressive statements, especially on the part of the federal government. The deficit of trust in the troubled historical relationship continues to drive palpable but justifiable skepticism. The Final Report of the TRC captures the sentiments in this way:

Many Aboriginal people have a deep and abiding distrust of Canada's political and legal systems because of the damage they have caused. They often see Canada's legal system as being an arm of a Canadian governing structure that has been diametrically opposed to their interests . . . This is the case despite the recognition that courts have begun to show that justice has historically been denied and that such denial should not continue. Given these circumstances, it should come as no surprise that formal Canadian law and Canada's legal institutions are still viewed with suspicion within many Aboriginal communities.

(TRC Report, 2015, 202)

Not many would disagree that the cumulative weight or potential of these reforms to retract, retrace, reverse and recompense for centuries of 'cultural genocide,' as the

TRC calls it, that resulted from the acts and omissions of colonial Canada would be the measure of their success. Areas of redress, and anticipated impact, include the historical prohibition of cultural practices, especially native languages, protocols and rituals. Others are forced relocations that have resulted in loss of TK related to land, plants, foods and medicines, animals and the management of GR and other life forms. In that list, we must highlight the *Indian Act* system which ruptured First Nations socio-political relations and aimed to forcibly absorb individual nation members within broader Canadian society by narrowly defining and heavily regulating Indigenous peoples' citizenship, land rights, succession rules, political organization, economic opportunities, fiscal management, educational patterns and attainment, and subjecting Indigenous peoples to provincial legislation and regulation without their consent (Borrows, 2016). First Nations were separated from their ancestral lands and controlled under a reserve regime that resulted in racial discrimination, a low quality of life, the loss of cultural heritage, the disruption of social associations and family ties, and a racialized educational system typified by residential schools. These policies have done immense damage to the sustainability and vibrancy of Indigenous worldviews, ways of life and robust curation of GR and associated TK.

Without necessarily depending on the government, many Indigenous peoples recognize that they must be proactively involved in the changes they seek (Jamieson, 2017; Burelli, Chapter 13). For example, in what Professor Kirsten Anker described as 'pushing the self-government envelope,' in 2016 the Mohawk Band Council of Akwesasne, which lies within the borders of the two Canadian Provinces of Quebec and Ontario and New York State in the United States, launched the first Indigenous legal system in Canada outside of the *Indian Act*. With all the accoutrements of prosecution, advocacy and adjudication, but rooted in Mohawk values and principles, the new community-initiated court system is an admixture of Canadian judicial system and the Mohawk traditional scheme of justice designed to administer 32 laws on civil causes ranging from sanitation, property, tobacco regulations and elections, to the conservation of wildlife (Valiante, 2016). While other Indigenous peoples are inspired by the Akwesasne initiative, it is hoped that as the federal government reviews the program it will find it to be consistent with all the recent proclamations and policies on Indigenous peoples' rights to self-determination and self-government within the framework of reconciliation and nation-to-nation relations. The TRC Report supports this with its call for a revitalization of Indigenous law and legal traditions as an element of reconciliation (Anker, 2016).

In addition to the practical recognition of Aboriginal legal thoughts and legal systems into Canadian jurisprudence, another aspect of the anticipated cumulative effect of the progressive policies and proclamations on Aboriginal relations is reflected in Aboriginal unity of purpose in insisting that, in view of the residential school legacy, culturally sensitive and restorative education is important for both Indigenous peoples and other Canadians. In multiple ordinary and not so ordinary

encounters, the degree of ignorance of other Canadians regarding Aboriginal history and experience with colonial Canada is simply astonishing. With such a great degree of national ignorance, the TRC's observation that 'New policies can easily be based on a lack of understanding of Aboriginal people, similar to that which motivated the [residential] schools' is instructive (TRC Report, 2015 at 137).

In sum, political and legal empowerment of Indigenous self-determination through self-government in furtherance of a nation-to-nation relationship within the Canadian federation is necessary for Indigenous peoples to effectively participate in initiating and implementing this litany of changes and realizing the enumerated expectations. Beyond recent policy statements and proclamations, all tiers of government need to push for more legal and political action in the direction of self-determination. We recall yet again Jamieson's remark that Aboriginal peoples should take charge and act and not wait for the government to fail in its promises again and then complain in a historically cyclic fashion. In that vision, ABS – like all other things concerning the interests of Indigenous peoples – would be fully expressed and integrated into the holistic framework of Indigenous peoples' historic struggle for fairness, equity and justice.

PROVINCIAL GOVERNMENTS: CRUCIAL BUT UNFELT PARTNERS

Perhaps the most troubling dimension of the expected nation-to-nation Aboriginal engagement is the not-so-proactive involvement of provincial and territorial governments in comparison to federal government's visibility on the Aboriginal and, by vicarious and potential extension, the ABS file. While the federal government's initiative has an inspirational significance on all other tiers of government, it is important to note that the bulk of its jurisdictional leverage on Aboriginal matters is political and is radically constrained by the *Indian Act*. In relation to control and ownership of natural resources, the provinces and territories wield stronger jurisdictional influence due to s. 92A of the *Constitution Act, 1867* and thus constitute the strongest site for heavy lifting on an Aboriginal-sensitive ABS policy.

Until the provinces come on board, the evolution of ABS policy across Canada's three orders of government in a way that concretely recognizes Indigenous peoples as actors on a nation-to-nation basis will remain a mirage. Moreover, as a dualist state, the federal government will require unequivocal buy-in by provincial and territorial governments to breathe life to the UNDRIP and other relevant international instruments, including the NP, that promote integral elements or aspects of Indigenous self-determination to varying degrees. Since some of these agreements involve GR and, of course, other natural resources, provincial and territorial governments have significant stakes which are not highlighted in recent policy statements and proclamations.

On an adjacent note, even the federal government's leadership in opening up the legal and policy space for Indigenous self-determination does not seem to go far

enough into critical areas of its jurisdictional leverage. For example, it has yet to identify the gaps or gulf between Canada's colonial intellectual property (IP) regime, which is largely under federal jurisdiction pursuant to s. 91 of the Constitution (de Beer, 2011; Paterson, 2017), and Indigenous TK. As in many colonial states, under Canada's IP laws, there is little or no recognition for TK. The latter, as we have seen, is a serious aspect of the NP and many international instruments crucial to ABS and Indigenous self-determination, not least of which is the UNDRIP. ABS presents a clear opportunity to respond to the clarion calls for recalibration of the philosophy and architecture of Canada's IP system to accommodate Aboriginal creativity and knowledge production (Dagne, 2017; Oguamanam, 2017).

CONCLUSION

Many challenges exist for multi-level governance of ABS in Canada. These include a profound lack of trust on the part of Indigenous peoples (TRC Report, 2015); the *Indian Act*, which was designed to reconstitute Indigenous governance in subordination to others and usurps Indigenous authority and responsibility to deal with their own problems in an effective way (Borrows, 2016); continued reliance on the Doctrine of Discovery to support Crown sovereignty and perpetuate the current colonial order (Gunn, 2007; Hoehn, 2016; Nichols, Chapter 4); the lack of provincial and territorial engagement with Indigenous peoples on a nation-to-nation basis, including FPIC for natural resource use; and lack of legal clarity on the status of GR and TK. TRC Recommendation 47 speaks directly to many of these issues, calling upon federal, provincial, territorial and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, and to reform the laws, government policies and litigation strategies that rely on such concepts.

The federal government enunciated principles provide a constructive starting point for dialogue with the Indigenous peoples on an ABS framework for Canada. As argued in this chapter, a just ABS arrangement must be based on the recognition and implementation of the right to self-determination and inherent right of self-government, as well as recognizing self-government as part of cooperative federalism and distinct orders of government. Reconciliation must be at the heart of any such dialogue, as a fundamental purpose of s. 35, the basis for treaties, agreements and other constructive arrangements, and as an ongoing process in the context of evolving Indigenous-Crown relationships, based on the honour of the Crown. Respecting and implementing s. 35 rights requires meeting a high legal threshold for infringement, ensuring FPIC for actions that impact rights over lands, territories and resources, and recognizing distinctions to ensure that the unique rights, interests and circumstances of the First Nations, Métis and Inuit are acknowledged, affirmed and implemented. With adequate consultation, ABS can help create the renewed fiscal relationship needed to promote a mutually supportive climate for

economic partnership and resource development. Developing Aboriginal-sensitive ABS in Canada will be an arduous and lengthy task, but it can help set an important precedent that moves Canada concretely past its colonial legacy and advance the high demands required of reconciliation and a true nation-to-nation relationship with its Indigenous peoples.

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NOTES

- 1 The Liberal Government of Justin Trudeau embarked on a review of environmental assessment and regulatory process in response to the perceived impression that over 10 years of extremely business-friendly Conservative Government liberalized the process at the expense of striking a required balance across competing interests.
- 2 Preamble, at paras 22–25.
- 3 The Language of the Protocol is 'Parties shall.'