

Indigenous and Local Communities: Community-level Prior Informed Consent for Accessing Traditional Knowledge and Genetic Resources

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This paper will consider various questions regarding access to genetic resources and related traditional knowledge with an effort to reflect common issues of concern raised by various First Nations peoples in Canada. The comments contained in this paper are only my own observations and should not be considered authoritative of anything other than my personal opinion.

It is my perception that what we are struggling with is a difference in philosophies. While participants at this conference may have expected concrete proposals for resolving what at first blush may be posed as simply an issue of process, I would argue that without understanding the underlying philosophical differences it will be impossible to address the technical elements of the discussion in a manner that will result in harmony rather than further conflict. In examining the philosophical tenets at play we may be able to devise systems that can resolve conflict for the benefit of all humanity and reflect our collective responsibility to the earth.

The philosophical difference to which I refer is that between a paradigm associated with individualism and the commodification of the earth, and a paradigm that respects the sacred in all things, that acknowledges collective responsibility both for each other and for the world outside of human beings. While this has been ascribed to as a clash of cultures between European and First Nations' world views, the reality is that these views are not necessarily related to racial heritage. For the purposes of this paper I shall use the shorthand of referring to these conflicting philosophies as the modern paradigm and the other as the traditional paradigm. The modern paradigm is focused on trade, commodification of knowledge, and enhancing opportunities for economic gain. It is secular, individualistic, and presupposes human dominance over nature. The traditional paradigm is concerned with sustainability, responsibility and relationships. It is spiritual, communistic, and seeks human harmony with nature. It is generally antithetical to notions of personal property.

The creation of an international regime for access to genetic resources and associated traditional knowledge pits these two paradigms squarely against each other. This is not a new conflict; merely a new battleground. The modern and traditional paradigms have been in conflict in the Americas since 1492, and began with arguments over land and souls. The ABS regime is the latest volley.

To create a prior informed consent system that meets the demands of the modern and traditional paradigms is the struggle to which we must turn our attention. Note that in the case of Canada, prior informed consent models must address not only traditional knowledge, but also access to genetic resources as there are constitutionally protected Treaties that acknowledge First Nations' exclusive jurisdiction over the genetic resources held within their

territories. Outlined below are some questions, as posed by the organizers of this conference, and answers that reflect my perceptions of the traditional paradigm.

Question: How is traditional knowledge held by indigenous and local communities in the different regions of the world?

In Canada, the knowledge of the Cree, Ojibway, Blood or Dene, so-called traditional knowledge, is held both privately and collectively. Some information is held privately and shared only in accordance with very strict laws or only with those that demonstrate a particular capacity. This might include knowledge of particular sacred practices or particular skills. Other information is held collectively, to be shared freely and widely. This might include, for example, knowledge of foods, social dances, or art work. Yet other knowledge, though widely known, can be used only by certain individuals or only at certain times. Examples might include a chiefs' song that describes his or her territory that would be sung at particular public events (thus widely known). As the song represents the authority of the chief, however, it can only be sung by that chief. Furthermore, these songs are only the property of the individual chief during the course of his or her time in that capacity and then pass to the exclusive use of his or her successor.

Question: What is the process for obtaining community level prior informed consent in different countries depending on how traditional knowledge is held?

The process for obtaining community level prior informed consent varies from community to community. There are over 50 nations of indigenous peoples in Canada, and it is a disservice to the uniqueness of these nations to impose a homogeneous view.

If I were to suggest there was a common characteristic I would point to the common demand for respect. Many First Nations peoples I have spoken with or have heard speak, talk about the need for respect. Respect for their cultures, for their communities, for their needs, for their humanity. If one is respectful of communities, individuals, of traditions, one will simply have to inquire about what the process is in that community and one will be informed.

Some communities have crafted specific processes that one can read about on the internet (See Appendix). Others would struggle with the request, wishing to discuss the matter internally, perhaps at great length over long periods of time. Yet others may test the inquirer, judging his or her intentions, suitability, or sincerity. Some may refuse to ever offer the information and successive attempts to obtain the information will be rebuffed as disrespectful.

There is no one size fits all approach. Efforts by the non-indigenous community to create a system without the involvement of the First Nations will be rejected with scorn. Efforts to impose such a system will most likely be resisted. The best I can offer is that those that want access to genetic resources and associated traditional knowledge should respectfully inquire of the community whether they are interested in sharing the resource or information.

Question: How can awareness and transparency of community-level prior informed consent processes be fostered?

First Nations have lost a great deal over the years since contact with European settlers, not the least of which is knowledge of their own legal systems. The sharing of traditional knowledge was often governed by highly complex rules. The intervening years of community disruption have created disorder and interfered with the intergenerational transference of knowledge about traditional law, including laws about how knowledge is held and shared. These are oral cultures and thus there is no record other than what the Elders hold in their heads.

Building awareness of community-level prior informed consent processes can best be achieved by facilitating opportunities for the Elders to share their knowledge of the traditional laws, amongst themselves first, and then with increasingly wider circles as they feel comfortable. This will allow the traditional laws to be recollected, examined, discarded if they are not beneficial to modern life, or kept and potentially adopted by others that see the value in the approach.

The issue of transparency is another matter altogether. Just as there is no transparency in Cabinet decision-making, the selection of the next Pope or the price Shell Oil sets for its products there should be no expectation that First Nations should be required to make their decision-making processes public. There is no reason why States and commercial interests should expect otherwise. Although some may choose to allow outsiders to observe some decision-making processes, it is likely that other processes will remain forever closed, as the knowledge under consideration is sensitive and subject to exclusive First Nations jurisdiction.

Question: How can community-level prior informed consent systems be incorporated into national ABS laws and the International Regime?

These systems, once settled upon by the community, can be incorporated into national ABS laws and the International Regime. Whether the systems are incorporated, however, depends on the degree to which others respect the laws by which the First Nations choose to govern themselves. This requires first a sharing of information, as discussed above, understanding the intent of the laws, and then adapting national and international laws to respect the community-level process.

Question: Under a national ABS regime and/or the International Regime what are the potential options for redress if community level prior informed consent is not obtained when accessing genetic resources and associated traditional knowledge?

As any damage done will be damage to the First Nations, it should be First Nations approaches that should be respected in developing systems of redress. Among the concerns that First Nations might raise are ease of access to systems for redress; whether the systems have a logical connection between their processes and desired outcomes; and whether the systems put First Nations interests at the centre of the discussion. The fundamental concern will be with restoring harmony within the community following the wrong done.

Question: What capacity building needs to be undertaken at the community level to develop prior informed consent processes and to ensure benefit sharing through mutually agreed terms?

Capacity building is a two way street. Just as First Nations have a great deal to learn about the modern paradigm, so do those that subscribe to the modern paradigm have a great deal to learn about the traditional one.

First Nations need to learn about intellectual property rights regimes as currently conceived, about the nature of commercial interests, and about the operation of commercial enterprises. They need to understand the processes for developing treaties in the United Nations system and to be able to understand the potential impact on their present interests and opportunities. They also need an opportunity to rebuild their own legal systems as they apply intellectual property regimes.

The non-aboriginal community needs to respect First Nations peoples. The best way to come to respect something or someone is to know more about it. First Nations people need to participate in the discussion about the International Regime, to be involved at the national level in the development of national systems, to share their views and to have those views listened to and treated with respect.

Conclusion

It is only through mutual understanding that there can be a meeting of the minds. A treaty, like any other contract, must reflect a common understanding and agreement. A treaty developed by one side and imposed upon another is a guarantee of future conflict. We have seen the results of an oppressive approach in treaty making for land held by First Nations. Let us not repeat the mistakes of centuries past.

APPENDIX

Below are examples of processes or principles established by some First Nations in Canada to guide those who would seek to work with the First Nation. Some are specific to particular issues, others are very broad and general. All of these examples are available publicly but may have changed since they were first adopted and cannot be considered authoritative by their inclusion here.

Mi'kmaw Grand Council/ Mi'kmaq College Institute, 2000

Principles and Guidelines for Researchers Conducting Research With and/or Among Mi'kmaq People

Principles:

- Mi'kmaw people are the guardians and interpreters of their culture and knowledge system- past, present and future;
- Mi'kmaw knowledge, culture, and arts are inextricably connected with their traditional lands, districts, and territories;
- Mi'kmaw people have the right and obligation to exercise control to protect their cultural and intellectual properties and knowledge;
- Mi'kmaw knowledge is collectively owned, discovered, used, and taught and so also must be collectively guarded by appropriate delegated or appointed collective(s) who will oversee these guidelines and process research proposals;
- Each community shall have knowledge and control over their own community knowledge and shall negotiate locally respecting levels of authority;
- Mi'kmaw knowledge may have traditional owners involving individuals, families, clans, association and society which must be determined in accordance with these peoples own customs, laws and procedures;
- Any research/study or inquiry into collective Mi'kmaw knowledge, culture, arts, or spirituality which involves partnerships in research shall be reviewed by the Mi'kmaw Ethics Watch (Partnerships shall include any of the following: the researchers, members of a research team, research subjects, sources of information, users of completed research, clients, funders, or licence holders);
- The Grand Council is the authorized body of the Mi'kmaw people and thus has the right to delegate authority for the Mi'kmaw Ethics Watch;
- All research, study or inquiry into Mi'kmaw knowledge, culture, traditions involving any research partners belongs to the community and must be returned to that community; and
- The Mi'kmaw Ethics Watch shall conduct a fair and timely review of all research conducted among Mi'kmaw people and assess all research processes conducted among and with Mi'kmaw people.

The Selkirk First Nation Self-Government Agreement

The Selkirk First Nation and Her Majesty the Queen in Right of Canada and the Government of the Yukon, 1997

"Consult" or "Consultation" means to provide:

- to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
- a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
- full and fair consideration by the party obliged to consult of any views presented.

Clayoquot Sound Scientific Panel

First Nations' Perspectives Relating to Forest Practices Standards in Clayoquot Sound March 1995

6.1.4 Recommendations about Inclusion of First Nations

In its second report, the Panel made the following recommendations to incorporate First Nations' perspectives into standards and practices for Clayoquot Sound (Scientific Panel for Sustainable Forest Practices in Clayoquot Sound 1994b:55):

- Include First Nations representatives at the onset of planning processes for Clayoquot Sound;
- Respect traditional values, spirituality, and *h a h uulhi*, and provide for the traditional resource use and subsistence needs of the Nuu-Chah-Nulth in forest planning and management;
- Incorporate First Nations' forest management practices, which are founded in traditional values and ecological knowledge, and which arise as a result of treaty negotiations, in forest inventory, planning, and management;
- Conduct comprehensive consultation with the Nuu-Chah-Nulth about land use practices as specified in the *Interim Measures Agreement*;
- Define cultural sites more comprehensively according to First Nations' understanding (e.g., including a variety of sacred sites, berry-picking sites, medicine-gathering sites). Use Nuu-Chah-Nulth guidance to undertake research, inventory, and identification of culturally relevant places and resources;
- Recognize the importance and potential of concepts of tribal parks and sacred site reserves in land use planning;
- Restore traditional sites that have been altered or degraded by logging practices ... in consultation with the Nuu-Chah-Nulth;

III. Specific Issues for consideration in the elaboration of the IR:
Indigenous Peoples-community-level PIC for accessing TK and genetic resources

- Provide for training, education, and meaningful employment of Nuu-Chah-Nulth people in both research and forestry activities to ensure that they benefit from commercial use of resources in Clayoquot Sound;
- Give precedence to traditional Nuu-Chah-Nulth needs for sustenance (the definition of which should be agreed upon by governments and First Nations) over sport fishery, commercial, or other interests outside Clayoquot Sound. Provide for the well-being of wild fisheries before the needs of fish Farming;
- Develop standards that recognize, respect, implement, and enforce the maintenance of cultural and biological diversity recognized in *Agenda 21* and *Guiding Principles on Forests*, in forest management practices; and
- Recognize and take steps to minimize the impact of forest practices on marine ecosystems.