
**Aboriginal Intangible Property in Canada:
An Ethnographic Review¹**

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Executive Summary

Aboriginal peoples in Canada have diverse and complex customary protocols regarding a wide range of intangible property. These customary protocols have operated within the distinctive Aboriginal cultures, often being critical aspects of Aboriginal economic, social and ceremonial life. In this paper we describe specific, concrete examples of customary protocols respecting intangible property in four of the major Aboriginal cultural regions of Canada: Northwest Coast (Kwakwaka'wakw and Coast Salish), Subarctic (Carrier), Arctic (Inuit) and Plains (Blackfoot, Blood and Peigan, as well as the nearby Crow and Hidatsa Native American Tribes). In this description, we investigated the published ethnographic literature to attempt to detail the following:

- Purpose of the relevant customary protocols regarding intangible property
- Scope of subject-matter protected by customary protocols
- Scope of rights and responsibilities or obligations with respect to the customary protocols
- Describing which individuals or social groups are generally the holders/ custodians/ owners of rights/ powers and responsibilities
- Procedures for acquiring and sharing rights/ responsibilities
- Term of protection (when applicable)
- Enforcement of rights
- Dispute resolution

While not each one of these lines of enquiry were able to be fully explored from the published literature, and not all customary protocols with respect to intangible property are documented in published ethnographies, a fairly detailed picture has been drawn of current and historic practice in Aboriginal communities throughout Canada.

The Northwest Coast is well known for having the most elaborate systems of material and intangible property of all hunter-gatherer communities in North America. Two examples are drawn on to illustrate the nature and extent of the relevant customary protocols from this region. Customary protocols in Kwakwaka'wakw communities regarding intangible properties have been well described for hereditary titles, associated expressions and prerogatives including myths, histories, songs, dances, performances, designs, ceremonial privileges and certain ritual words. These traditional cultural expressions, while owned by the groups of families descended from a common ancestor, may be performed in certain circumstances by eligible members. There are also family properties, including names, crests and traditional histories which are the exclusive property of families to perform and display. Though the anti-potlatch laws which existed in the *Indian Act* from 1884 to 1951 made exercising and enforcing these customary protocols difficult, they persist and continue to be revived in contemporary contexts.

Coast Salish customary protocols concern private traditional knowledge, ritual intangible property and intangible 'House' property. Private professional, ritual and ecological knowledge is generally held at the family level, and functions in ways similar to trade secrets, enhancing the possessors' ability to effectively interact with the environment and practice profitable skills. Ritual intangible property include the masked dance, rattle ceremony, power words, and certain songs, stories and designs. Exclusive rights to perform or represent this ritual property is held by

families and may be inherited or transferred by marriage. Intangible 'House' properties are similar to those described above for Kwakwaka'wakw communities, and include titles, legends, songs, dances, power words, medicinal knowledge and other ceremonial prerogatives. In a contemporary context, knowledge loss, unwanted publication of detailed secrets and unwanted commercialization of properties have all been challenges to the Coast Salish intangible property system.

The Subarctic is a massive region in Canada, which we have chosen to represent by the Carrier and other closely related groups from the western region. The intangible property system of the Carrier is similar in many ways to those of the Kwakwaka'wakw and Coast Salish communities, in that hereditary titles, clan crests and personal crests, and the stories, songs, dances and other performances associated with them, are their most well recognized property. The potlatch is instrumental in the acquisition and transfer of rights associated with these things, and is the appropriate forum for engaging the economic, social and political issues which this property can become engaged in. Today, Carrier people have brought out their intangible property in litigation and negotiations with the state in order to validate their claims and interests on terms of their own customary protocols and laws. This has proven to be a difficult challenge in the context of legal pluralism in Canada.

Customary protocols with respect to intangible property in Inuit communities are less embedded in issues of social status and structure as they are in the highly specialized, esoteric and private knowledge needed for life in an arctic environment. Certain knowledge relating to the food quest, particular 'magic' words, songs and prayers, shamanic knowledge and clothing design are all aspects of Inuit intangible property. All of these, with the exception of clothing design have been characterized as being held by individuals, and may be inherited or sold. They provide exclusive rights which may enrich families and protect others from harm from the natural and spirit world. Clothing designs, and likely other distinctive material designs, are held by groups and are symbolic of local and regional identity.

The Plains cultural region extends across the centre and south of Alberta through to Manitoba and is the territory of several groups, including the Blackfoot, Stoney, Sarcee, Plains Cree, Gros Ventre, Assiniboine and Plains Ojibwa. Intangible property in these communities are importantly related to spirit power and visions. Sacred bundles have a great configuration of intangible property associated with them, including rituals, songs, myths, medicines, dances, and technical knowledge. There are different rights, obligations and methods of transfer associated with clan bundles and personal bundles. Certain designs for teepees, sacred robes, shields and certain women's art also are held as intangible properties and may have songs and stories associated with them.

We conclude that customary protocols with respect to intangible property are prevalent throughout Aboriginal communities in Canada, and that they have been – and continue to be – important socially, economically and politically. The ethnographers working in these communities have emphasized the critical importance of understanding the relationships between people that intangible property engages. To understand the centrality of property in general, and

intangible property in particular in cross-cultural perspective, it is critical to examine the social relationships that are established and maintained. When the intangible property systems of a particular cultural group are seen in this light, we can better understand the basic principles and objectives underlying their protection within the appropriate customary cultural frameworks. By examining how people practising their cultures have formulated and live by their own customary protocols and laws with respect to intangible property, we suggest that a starting point for important cross-cultural understandings can be built.

Map of Cultural Regions and Communities Mentioned

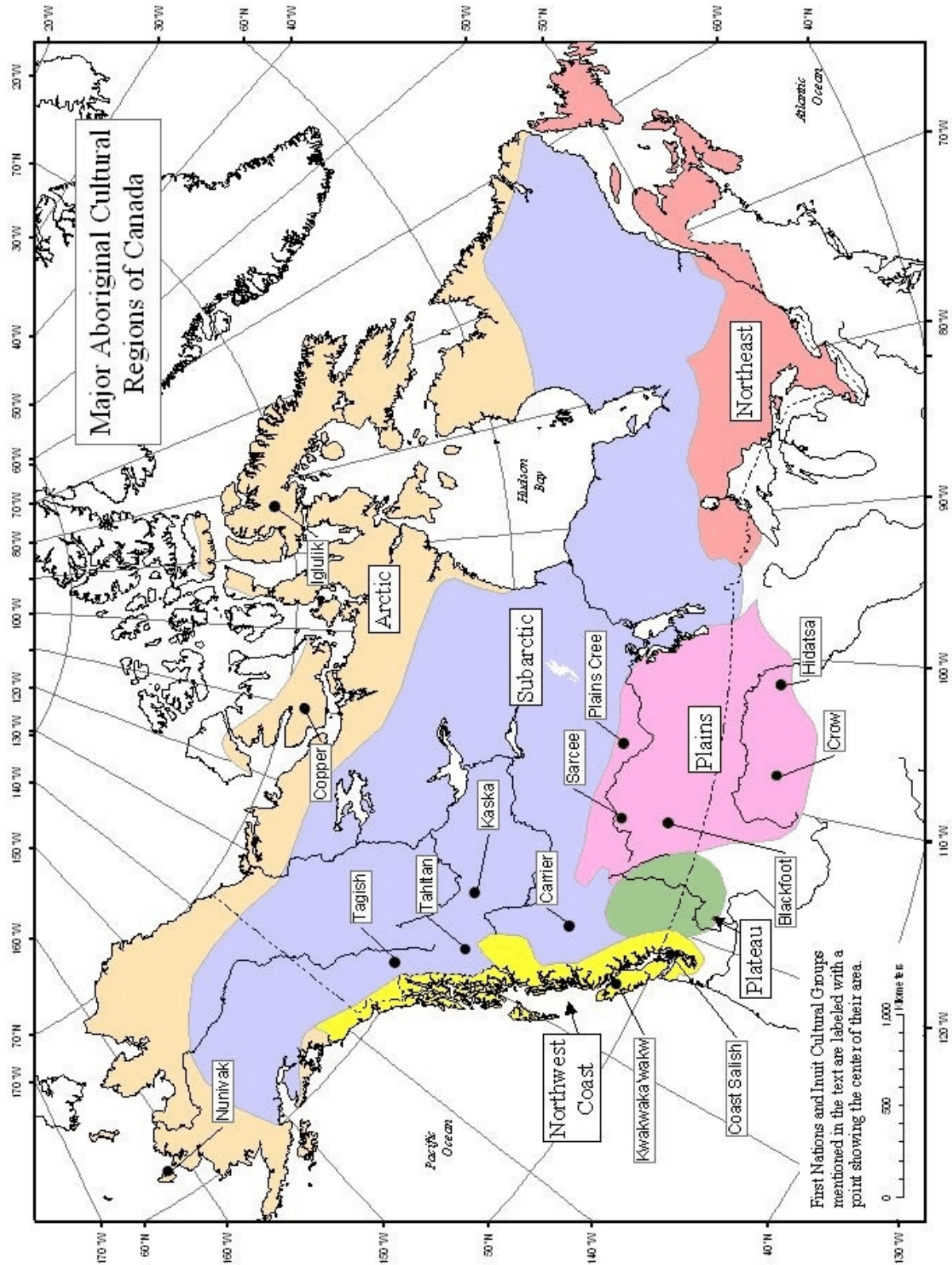


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Introduction

This paper discusses the customary protocols and laws² which operate in Aboriginal cultures regarding certain kinds of traditional knowledge³ and traditional cultural expressions⁴ which are considered ‘property’ within Aboriginal cultures (from an *in situ* cultural perspective). Not all traditional knowledge (TK) or traditional cultural expressions (TCE) is considered ‘intangible property’ within *in situ* Aboriginal cultural contexts. It is these forms of traditional knowledge and traditional cultural expressions which are embedded in local property relations that are investigated here.

In order to provide specific, concrete examples of these property systems, the paper describes customary protocols with respect to traditional knowledge and traditional cultural expressions with the following lines of enquiry in mind:

- Purpose of the relevant customary protocols regarding intangible property
- Scope of subject-matter protected by customary protocols
- Scope of rights and responsibilities or obligations with respect to the customary protocols
- Describing which individuals or social groups are generally the holders/ custodians/ owners of rights/ powers and responsibilities
- Procedures for acquiring and sharing rights/ responsibilities
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By providing specific details on the matters outlined above, we hope to provide examples of the rules and responsibilities within Aboriginal societies regarding the use, protection, divulgence, and ownership of Aboriginal traditional cultural expressions and traditional knowledge in Canada in a context and language that is intended to be accessible to a general audience.

This paper does not focus on the issues and implications of the appropriation of Aboriginal traditional knowledge and traditional cultural expressions by non-Aboriginal people for commercial purposes, or how traditional knowledge and traditional cultural expressions may (or may not adequately) be protected by the western intellectual property system. Rather, Aboriginal customary protocols with respect to intangible property are described in their own right. Indeed these protocols may, we argue, have an important place in the larger fabric of legal

pluralism in Canada.

Upon review of the documents that were consulted, we found that we were not able to answer all of the questions we set out to answer as fully as we had hoped. There is a general lack of published information regarding the enforcement of rights and mechanisms for dispute resolution. Additionally, we found that descriptions of the purposes of these protocols and laws were of varying usefulness, as writers often speculated rather than elicited Aboriginal points of view on the subject. These are matters that further contemporary research and consultations with Aboriginal people would make more clear.

In a 21st century context it may seem somewhat of an anachronism to focus exclusively on in situ cultural protocols and laws regarding intangible property, when the larger public debate has focussed on the appropriation and commercialization of indigenous traditional knowledge and traditional cultural expressions by non-indigenous cultures and the best means to protect them. However, the purely local practices and traditions of Aboriginal cultures in Canada continue to have social, cultural, spiritual and economic relevance and are an important part of their cultural heritage and traditions. Expressions and knowledge that continue to be recognized by communities and practised by the people concerned. Their continued relevance suggest that they are particularly important in a public policy context, as they relate to the ongoing cultural identity and spiritual dignity of Aboriginal communities. A better understanding of intangible property relations in Aboriginal cultures in Canada can provide focus and examples for further policy dialogue and development with respect to broader cultural property issues.

In order to present something of the range of customary protocols regarding intangible property, we have highlighted examples from four of the six major cultural regions in Canada: the Northwest Coast, the Subarctic, the Arctic and the Plains (see map)⁵. Within each of these areas studies of particular cultural groups were analysed with respect to these issues. Not all Aboriginal cultures frame the same aspects of traditional knowledge and traditional cultural expressions as 'intangible property'. The types of intangible property documented on the Northwest Coast, for instance, represents a much broader range than those documented in the

Arctic. Certainly the particular configuration of rights and obligations differ across the different cultural settings. However, important similarities do exist in relation to the kinds of property relationships expressed across the communities.

Methodology

The basic methodology of this study was a literature review of published ethnographies detailing customary protocols or laws regarding traditional knowledge and traditional cultural expressions. The field of published information on traditional knowledge and traditional cultural expressions is vast. In order to focus on the research questions posed in this study, the focus is on ethnographic literature that clearly identified certain traditional knowledge or traditional cultural expressions as 'property', 'intangible property', 'incorporeal property', 'ritual property', 'owned', 'personal property', 'inherited', or which is 'bought, sold, bartered, or exchanged'.⁶ In addition to focussing on the published literature, the authors have extensive personal and professional experience in two communities (Thom with the Coast Salish; Bain with Carrier), which has informed the report.

The study does not claim to be a comprehensive recounting of all intangible property from the communities or cultural regions investigated. It is intended to provide illustrative examples from cultures whose intangible property systems have been described in the published literature. This literature has largely shaped and constrained the results reported here. The focus on customary protocols led to ethnographies written based on fieldwork from (in general) prior to 1950, due in large part to the interest of the scholars of the time in 'traditional culture' rather than the more recent focus on 'acculturation' and 'culture change'. The scope of intangible property in any particular community or cultural group is no doubt broader than described here. This paper should be seen as a preliminary framing of these issues and not an exhaustive or conclusive treatment. Undoubtedly current fieldwork or consultations with concerned Aboriginal communities would result in a different configuration of perspectives on this material.

1. NORTHWEST COAST

Introduction

The intangible property systems of Northwest Coast people (the Kwakwaka'wakw and Coast Salish peoples in particular)⁷ have been the most widely drawn on examples in elaborating the nature and extent of such systems in hunter-gatherer societies. This is likely in part due to the detailed ethnographic record of Northwest Coast cultures published by Franz Boas and his students. It is also in part due to the comparative clarity of concepts used in these systems in relation to the subject matter of Western intellectual property regimes.

Aboriginal peoples from the Northwest Coast live in one of the most resource abundant locations in North America. Large salmon runs and a temperate rainforest ecology have provided Northwest Coast communities with a historic abundance of locally available food and resources. Abundant resources and good food storage techniques contributed to the development of highly affluent hunting-gathering-fishing societies, typical among Northwest Coast societies, like the Haida, Coast Salish, Kwakwaka'wakw, Nisga'a, Nuu-chah-nulth, among others.

Though there are some important differences in intangible property systems between the cultural groups on the Northwest Coast, there are some important commonalities. In his important, detailed comparative analysis of First Nations and Native American cultures in western North America Joseph Jorgenson summarizes these features.

Concepts of private property were most highly developed on the Northwest Coast and were extended to... a wide range of incorporeal property, including special dances, heirlooms, crests, songs, spirit possessions and the like... 'Incorporeal property' is intangible and constitutes a right that has no physical existence. Although a Northwest Coast family crest was a tangible object, and a spirit dance was a tangible act, the spirit that each represented had no physical existence, yet the right to claim ownership of the family crest's spiritual being or of a spirit that was embodied in a dance step was recognized, and such property is incorporeal... Private property in many corporeal and incorporeal forms was recognized [elsewhere in western North America], but not to the extent that it was recognized throughout the Northwest Coast culture.⁸

By far most ownership among Northwest Coast tribes was vested in localized, residential kinship groups, not in the individual persons... When one man was selected as the steward of a group's property, all members of that group were co-owners of that property and he was the representative: the highest ranking member of each kinship group was extolled by his kinspeople whom he represented at great ceremonies, but he did not have the right

to dispose of his kinship group's strategic resources or incorporeal property.⁹

Of central unifying importance in Northwest Coast cultures is the institution of the potlatch. Traditional economies in Northwest Coast communities centred around the production of surplus food and resources with labour organized along extended family lines. Traditionally, potlatches were a central part of the economy where wealthy people were able to mark important life passages by hosting large events where surplus wealth (including both material and intangible property) was given away to guests who were there to witness it. While some things distributed at potlatches were outright gifts, most the giver would be able to count on receiving back at a future potlatch of another person. Today, potlatches continue to play an important role, though their economic importance has diminished since the 80-year potlatch ban of the Canadian Government.¹⁰ In this paper, we provide an analysis of Kwakwaka'wakw and Coast Salish cultures to begin to build an understanding of Northwest Coast intangible property systems.

A. Kwakwaka'wakw

The Kwakwaka'wakw are the First Nations people who live on the north end of Vancouver Island and the adjacent mainland. In the 19th century there were approximately 30 groups, often called 'tribes', each which was divided into several important social groups called '*na'mima*'.¹¹ Today, there are around a dozen Kwakwaka'wakw First Nation Indian Bands. The following section provides a broad outline of Kwakwaka'wakw intangible property systems, based in large part on scholarly investigations of the potlatch.

Customary Protocols in Inalienable 'na'mima Property

The '*na'mima*' is a social group which it has been suggested are equivalent social units to medieval European or Japanese houses (such as the Houses of Winchester or Minamoto).¹² The idea of descent from a founding ancestor is used as a basis of succession of property. There are several '*na'mima*' in each Kwakwaka'wakw community, each of which holds hereditary titles (names) and ceremonial privileges which are highly valued property in the economies of the potlatch.¹³ One of the main purposes of the '*na'mima*' is to hold and protect these inalienable '*na'mima*' titles, crests and property from other groups of potential claimants.¹⁴ Intangible

property held by '*na*'*mima* include the following:¹⁵

- certain myths & traditional histories
- personal names or honorific titles
- house names
- certain songs
- dramatic dances
- dramatic presentations
- special ceremonial privileges
- designs (crests) on house fronts, poles, posts and feast dishes

Goldman has argued that the '*na*'*mima* is actually the 'custodian' rather than 'owner' of this intangible property, which is directly connected to ancestral titles.

Properties other than land are, strictly speaking, attributes of a name and in that sense the name – an ancestral incarnation – is the true owner. The names, however, belong more broadly to the line of the founding ancestor of the *numema*, and they can not go out of the line of descent. Even though they may be bequeathed by their individual owner, the *numema* fellows' approval is customary... The name, itself an ancestral emblem and sources of all related emblems, which may be physical properties (boxes, dishes, carved columns, house), and nonmaterial properties (songs, dances, exclamatory sounds, and a variety of other ritual privileges), is in the custody of the lineage as a corporate body.¹⁶

Thus there is an important relationship between the ultimate corporate holder of the property and the individual who exercises a strong licence to use or transfer it. Individual members of '*na*'*mima*, have the right to claim and use their property and vigorously defend their rights to use them against rival claimants.¹⁷

Individual members who carry these hereditary names are able to exercise ceremonial privileges and recall '*na*'*mima* origin myths at potlatches. Ownership of hereditary intangible property "must be constantly validated... by the distribution and destruction of wealth" at potlatches, where wealth is given away, frequently to others who may be rivals in competition for status and prestige in the community.¹⁸

Through these potlatches, Harrison has suggested how intangible property is central in the whole political and ritual life in Kwakwaka'wakw society:

...a system of property in religious symbolism seems actually to have formed the whole sphere of political relations in the society, in the sense that all political competition was consciously oriented towards gaining ownership of special functions and privileges in ritual and cosmology. Rather than ritual relationships serving to legitimise political and economic ones, it was arguably the reverse: the distribution of sheer economic power, as

measured publicly in the Potlatch contests, function to legitimise the contestants' *ritual* statuses and relationships... This was a political system in which ritual privileges were the prizes at stake, while economic action played, in the logic of political means and ends, the subordinate role of legitimising the ownership of these privileges.¹⁹

Customary Protocols in relation to Family Intangible Property

Goldman has pointed out the distinction between designated '*na'mima*' names and other names which may flow out of the '*na'mima*' by being transferred to in-laws through marriage. These other names also have associated "emblematic property" that are transferred with them, that is similar in nature to the '*na'mima*' intangible property previously listed.

Some family owned intangible property may be acquired by marriage, inheritance or other means. Notable among these are certain other crests and ceremonial privileges such as winter ceremonial dances.²⁰ Crests are images related to mythology which are associated with a particular family or '*na'mima*'. This type of intangible property is often exchanged between families at marriages,²¹ generally following "from father-in-law to son-in-law, or to members of the son-in-law's family".²² In the 19th century, there was a great interest among Kwakwaka'wakw title holders to keep this form of intangible property within the titled families. Arranged marriages were the rule in these times.

In former times, warfare was another valid way to acquire titles, where "the way to get a coveted name which one cannot inherit or acquire through marriage is to kill the owner and appropriate the name and prerogatives".²³ The famous *Hamatsa* dance has been discussed as having come from Heltsiuk to Kwakwaka'wakw communities this way.²⁴ The dance and other ceremonies were often well known by all, but such killings were sometimes the only way to obtain them.²⁵ Harrison points out that "there was a complete consensus over the *value* of these entitlements, but the lethal conflict was over their *social distribution*".²⁶

Lawyer David Robbins has worked with Kwakwaka'wakw member Lou-ann Neel in exploring the customary rights and obligations associated with the use of intangible property in general, and in particular with crest design.²⁷ Robbins has characterized the rights associated with

owning a crest as including "the unlimited right to use the crest, including the right to produce a version of it",²⁸ though the holders themselves do not necessarily have to be the artists that produce the particular version. Robbins goes on to characterize the right as "generally, if not always non-transferable" with "strict limitations, such as a prohibition on use for commercial purposes or outside certain potlatches hosted by the nation".²⁹ Robbins has arguably characterized these rights and obligations rather narrowly. Though these crests may not be transferable in the commercial sense, there are clear rules for the transfer of these privileges at marriage between father-in-law and son-in-law, validated by a potlatch. A *'na'mima* intangible property may appear non-transferrable between members of different *'na'mima*, but the accounts provided of the historic capturing of these privileges through warfare show that it is conceivable that even these have the potential to be transferred (though there may be heavy sanctions against doing so voluntarily).

Robbins may also have slightly mis-characterized the obligations of the property holder as a "prohibition on use for commercial purposes". Kwakwaka'wakw crests are widespread in commercial art galleries throughout Canada and the US, with master carvers Kwakwaka'wakw artists fully engaged in the production of this art. It is not the commercial use of the crests that is prohibited, rather it is the commercialization of the right to produce these crests that is restricted. Artists from outside the *'na'mima* who own these intangible rights and who execute these proprietary designs for sale or for use by non-owners in a potlatch context would clearly be over-reaching their creative licence from the view of Kwakwaka'wakw customary protocol and law.³⁰

Despite anti-potlatch laws that persisted in Canada from 1884 until 1951³¹, potlatching is still an important, if not central feature of Kwakwaka'wakw social and ceremonial life. Rank and status are still recognized within a *'na'mima*, and hereditary privileges are still exercised and passed on during potlatch ceremonies. These things are central in defining personal and community identity. Intangible property are still at the heart of this potlatch system.

Gloria Cramner-Webster, Kwakwaka'wakw scholar and curator, wrote in 1991 that since 1963

potlatches have been held every year in Kwakwaka'wakw communities, being held for the same kinds of reasons as they were in the past "naming children, mourning the dead, transferring rights and privileges, and less frequently, marriages or the raising of memorial totem poles".³² She accounts how intangible property such as names and dances continue to be transferred and rights to perform them are exercised.³³ She recounts a typical flow of dances and ceremonial prerogatives which are exercised at a contemporary Kwakwaka'wakw potlatch, acknowledging the family or *'na'mima* holders.³⁴

| Summary Table Showing Examples of Kwakwaka'wakw Customary Intangible Property Protocols | | | | |
|--|---|---|---|---|
| Scope | Purpose | Rights & Obligations | Mechanism of Transfer | Term |
| 'na'mima titles - personal titles - house titles | - to provide exclusive right - to provide clarity with respect to the individual owner of the status and property associated with the title | - inalienable right of association with founding <i>'na'mima</i> - exclusive use right held by individual - right to be afforded status/rank associated with the title at potlatches - right to transfer titles between individuals within <i>'na'mima</i> | - use claimed by descent from founding ancestor - claim to use may be challenged in potlatch context | - indefinite term associated with <i>'na'mima</i> ownership - life term associated with individual holder, subject to validation at potlatches |
| 'na'mima property associated w/ titles - certain myths - traditional histories - certain songs - exclamatory sounds - dramatic dances - dramatic presentations - ceremonial privileges - designs (crests) | - to provide an exclusive right - provides clear rights and obligations for participation in important aspects of ceremonial and potlatch life and economies | - exclusive right to display, publically perform, have representation of commissioned held by name/title holder - right to exclude others from using this property | - marriage (usually through daughters to sons-in-law) - inheritance - formerly by capture through warfare | - rights are held as long as individual is in valid possession of <i>'na'mima</i> title |
| family property - family names - family crests - traditional histories | - to provide an exclusive right - to define clear social and spiritual links with ancestors | - exclusive use right held by individual - right to exclude others from using this property | - marriage - inheritance | - life term associated with individual holder - indefinite term associated with family ownership |

B. Coast Salish

The centre of Coast Salish territory is the area around Vancouver and Victoria, British Columbia, extending south into Puget Sound of Washington State and north along the waterways of the Strait of Georgia. The Coast Salish First Nations communities in Canada include the Cowichan, Squamish, Musqueam, Chilliwack, Nanaimo, Sechelt, Stó:lō and others. In Washington State, they include the Lummi, Skagit, Tulalip, Swinomish and among others.

One thing that distinguishes Coast Salish life is the organization of their communities and society. The most important social and political group in Coast Salish society is the extended family. Coast Salish people live in villages and speak languages in common with other villages in a region, but political and economic realities focus around these extended family networks. Family heads are the main leaders in the community with no village or community chiefs outside of the current Indian Act system. Many of the leading families can trace their descent from a notable ancestor, and have property, both material and intangible, that has been inherited over the generations within the family. These notable families are called *xwnets'álewem* in several Salishan languages, and have been referred to as a 'House' in the sense of European nobility in the ethnographic literature.³⁵

Ritual plays a central role in Coast Salish culture. In the winter Coast Salish longhouses are filled with hundreds of people every weekend night, participating in the winter dance *seyewen*. Other ritual functions continue in the Coast Salish way. Major life events are marked with appropriate ritual acts, from traditional marriages, to namings, funerals and changes in social status. This ritual life is steeped deeply in Coast Salish cultural tradition and customary law.³⁶ As discussed above for the Northwest Coast generally, the potlatch is also an important element of social, cultural, ritual and economic life.

This brief descriptions shows that wealth has been important in the traditional economies of these communities and that there are social and cultural institutions in place to deal with the production and distribution of the wealth and the relationships between people in the community.

Three main categories of intangible property has been identified with rights and responsibilities varying within each category. These categories, we argue, follow Coast Salish ways of understanding property, as informed by the indigenous language terms they use for them. The first category of rights relates to family-owned property called *snew* in several of the Central Coast Salish languages. The second is the class of property with a more limited range of family ownership called *ts'exwtén* in these languages. The third type we will call intangible 'House' property of which hereditary names or titles, hereditary songs and legends are a part³⁷. Though there are undoubtedly other types of intangible property in Coast Salish culture, these three classes are among the most well described in the published Coast Salish ethnographic literature.

Snew or Family Knowledge

The most immediately familiar kinds of intangible property among the Coast Salish are the professional lore, ritual knowledge, and certain moral advice that are often referred to in Salishan languages as *snew*.³⁸ *Snew* has been defined as private intangible property in the context of secret knowledge.³⁹ Specialized technical skills for harvesting resources or doing a craft or trade well is derived from knowledge developed by ancestors and held privately in families.⁴⁰ This information may not even be widely known within a family, but rather is taught selectively to individuals with certain aptitudes and community standing, from one generation to the next.

Some of the traditional knowledge about food-getting sites, including practical and ritual knowledge for the successful operation of these places are held privately by families.⁴¹ Private ritual knowledge can include special songs or words that can be used to engage one's guardian-spirit helper in these locations. Other songs were held in secret by families and sung in preparing for fishing or hunting. Though in the past everyone fished and hunted, those who were 'professionals' were considered supernaturally favoured and were generally owners of *snew* that fostered these special relationships.⁴²

Private knowledge also relates to the specialized skills needed to make certain things, such as canoes, baskets, traditional clothing and regalia, certain food-getting tools and implements, and so on. The canoe-maker is a good example. A canoe-maker holds the tools and tricks of the

trade as guarded secrets. He or she will often work alone, sometimes in secret where such techniques can not be observed by others. The canoe-maker will have certain songs that is held privately and which are learned in order to aid in the felling, splitting, excavating and steaming of a canoe. Anthropologist Homer Barnett reported from his observations in the 1930s that “it was a serious personal offense for anyone to try to” watch the canoe-maker at work and try to learn the secrets of the trade.⁴³

Another type of *snew* is the esoteric information concerning the approach of guardian spirits.⁴⁴ In the Coast Salish world-view, guardian spirits are required to be successful in life’s endeavours. They are called upon to aid in everything from basic economic production, to overcoming personal life challenges. It is usually assumed in Coast Salish life that if someone is successful in what they do, that they ‘must have something’, meaning have a guardian spirit. While the spirits themselves were not property in any way, careful instruction on how to obtain one - through fasting, seclusion and other means, was held in private by families as a part of their *snew*.

It is worth mentioning briefly some internal and *ex situ* challenges that Coast Salish intangible property has faced in recent years. For *snew* one of the biggest challenges has been language loss. Salishan languages along the coast are highly threatened with only a few speakers remaining in some communities. With this loss comes a loss of some of the detailed traditional knowledge that is held privately. The proprietary nature of some of this knowledge has made it even more at risk of being lost, as the older generation is sometimes hesitant to pass it on. This is a serious challenge in Coast Salish communities, and one that is being faced today by some Elders, leaders and youth with positive initial results. A dramatic shift in the centre of Coast Salish economies from potlatching to mainstream labour and market economies has also impacted on the relative everyday value of certain intangible property related to resources. Intellectual property such as traditional ecological and technical knowledge, which may continue to have value in market economies, may be able to be afforded protection through the current Canadian legal intellectual property regime.

Ts'exwtén (Ritual Intangible Property)

There are a number of important ritual prerogatives in Coast Salish culture associated with cleansing, a type of ritual performance that is “used to ‘wash’ persons undergoing life crises, changes in status, or removal of some source of shame.”⁴⁵ These prerogatives are called *ts'exwtén* in several Salishan languages. These rituals include the *sxwayxwey* mask dance, a goat horn rattle ritual *shelmuxwtse*, and several others that are not as well documented in the published ethnographic literature.⁴⁶ Wayne Suttles, the preeminent ethnographer of Coast Salish culture has observed that *ts'exwtén* “form an important class of inherited privileges”, and that the paraphernalia and ritual knowledge associated with the ceremony “were restricted by primogeniture or other means to certain members of a lineage [family members tracing descent from a common ancestor]”.⁴⁷

The paraphernalia associated with *ts'exwtén* and the images associated with them, including the *sxwayxwey* mask and the goat horn rattle, are carefully guarded. The person who possesses them (who is not always the owner) stores them in private locations in the house so that not even other family members may disturb them. Additional rights related to the paraphernalia include a ritualist’s own “hereditary set of designs that varied with different functions, such as healing the ghost-struck, and recovering lost ‘vitalities’ as well as performing puberty rites”.⁴⁸ Ritual knowledge would include certain words or acts that are need to successfully perform the cleansing rite.

While these rights may be restricted to certain individuals within the lineage, they may be “performed by the owner for any member of the lineage”.⁴⁹ During the performance, the host will hire an orator “to announce the purpose of the gathering and to explain his inherited right to use the particular type of” *ts'exwtén*.⁵⁰ Though the lineage may have owned the rights to a *ts'exwtén* for generations, over time many of these rights have spread widely among Coast Salish communities through the mechanism of intervillage intermarriage.⁵¹ A good example is the *sxwayxwey* mask. There are several different styles of *sxwayxwey* masks, each associated with a different origin story.⁵² In one story, the mask emerges from the water near Chilliwack (an area about 100 kilometers up the Fraser River) and is presented to a young girl. She and her female

descendants own the mask and may pass it and associated ritual prerogatives along to male members in their families to dance. The male members who possess it have performative rights, but do not in most cases have similar ownership rights of inheritance or granting performance licence.⁵³

Current conflicts demonstrate that this intangible property still holds an important place in the community. For *ts'exwtén*, the challenges have come from the outside, with museums having masks and regalia that was obtained long ago under very different cultural and political circumstances.⁵⁴ Recently, owners of masks and the rights to carry masks have negotiated with several museums such as the UBC Museum of Anthropology and the McCord Museum at McGill so that those old masks in collections are not displayed or otherwise inappropriately revealed.⁵⁵ As Kew has observed, this proprietary relationship to *ts'exwtén* has been a major factor in Coast Salish art not becoming a large commercial industry, unlike many other Northwest Coast and Native American art traditions.⁵⁶ For the Coast Salish, these important *ts'exwtén* prerogatives can not be commodified or sold, though they have immeasurable continuing value for 'cleansing' these communities. Anthropologists have also caused problems by publishing and discussing details of *ts'exwtén* that were shared with them with little knowledge of how widely the material once printed would be circulated (both within and outside of the Coast Salish communities from where they came).⁵⁷ Here, the ideas of public domain and academic freedom come up against local concepts of intellectual property.

Intangible Property of the 'House'

Certain notable extended-family groups (*xwnets'álewem* or 'House' as mentioned earlier) collectively own 'property of privilege' including hereditary names, legends, songs, dances, secret words, medicinal remedies, and ceremonial prerogatives.⁵⁸

Individuals who are members of these noble families are able to claim rights to these properties, but must validate their claims through public events, such as a potlatch or family gathering. New intangible House property can be created, provided that the right gets ratified at a public gathering. Typically, this is at a potlatch where the public generally hears "the statement of

claim without demur and accept[ed] the gifts that follow[ed] the statement”.⁵⁹

Individuals with no legitimate claim to this property may know some of their details, but they are not able to “recite them in public or depict them on any carving”.⁶⁰ An excellent example of this was given by Homer Barnett in his 1955 ethnography on the Coast Salish of British Columbia, where a House story and related ceremonial prerogatives was told to him. The informant was very aware of his transgression in revealing these intangible House property to someone who was not eligible to know them. Barnett reports:

Tommy Paul’s [intangible House property] were the hollow wooden rattle, the *sxaihwe* performance, and the story of the Sanetch first man, *kwalakwanthat*. A variant of the dog-husband story was localized at *skaihai* (Mill Bay) and was the [intangible House property] there. Mrs. Paul’s grandfather knew *siwin* [secret words] for the winter-dance initiation, and the ‘story’ of that belonged to her [*sic*]. Paul was fully conscious of his violation of rights in talking about his wife’s story or about any other person’s privileges. Even the right to tell about a privilege belonged to the owner. He would ‘be jealous’ if he knew that someone else had been talking; he would ‘want something’. Paul told me about his wife’s grandfather’s *siwin* only so that I would ‘be thinking what to do for her’. Anciently, nothing whatever would have been devolved. Any outside knowledge of the esoteric particulars was, of course, guarded against by the secrecy surrounding the instruction. However, as far as real theft was concerned, caution was ordinarily unnecessary, for one would not think of publicly claiming another’s [intangible House property]. He would be ridiculed unmercifully unless he could show a legitimate blood connection with its owners and could back-up his claim with a property distribution.⁶¹

That these kinds of intangible property have additional economic value is clear from the example of certain inherited songs *seye’wenem*. Suttles has reported how “if the amount of wealth required [to pay someone] were very very great” the person owing might ‘pay for it with a song’. When such a song is sung at a potlatch, the person to whom something is owed “might then feel obliged to thank him for his performance with a gift of wealth, or treat him in the same fashion when the situation was reversed”.⁶² These inherited wealth songs belong to a family and are transmitted from father to son.⁶³

The final and perhaps most important type of intangible House property to be considered here is hereditary names. In Coast Salish society, there are several different types of names held by an individual during their life. Traditionally, everyone was given what we might call a nickname as a child.⁶⁴ Today, Christian names are the universal practice. Held within Houses, however, are

honoured hereditary names which are bestowed on an individual later in life.⁶⁵ Each House has a pool of hereditary names which are passed on between generations. Some of these names date back to mythological times, having been held exclusively by these families for centuries.⁶⁶ As a rule, only one living person should hold a hereditary name at a time, though exceptions are occasionally made to this rule.⁶⁷

A formal ceremony is held when a name is being given, and the bestowal is often validated with a potlatch. Although the specific practices for a naming ceremony vary between families, generally, when the guests are assembled, and any ritual performance such as a *sxwayxwey* mask dance is complete, the family spokes-person who is giving the name announces the name and calls on the older generation present to witness the giving. They are given gifts to mark their witnessing of the event. If there came to be a conflict over who has the right to hold these prestigious titles, this older generation would be called on to “affirm the owners right to the name”.⁶⁸

The names in themselves hold prestige for the bearer, as they are the names of honoured ancestors. They also hold the privileges accorded to the bearers of the name in the past.⁶⁹ The Houses which held these names generally lived in the same area from *time immemorial*, linking the names to these ancestral territories and resource sites.⁷⁰ A name is generally connected with the village which that ancestor came from. Even if the bearer of the name resides in a different village than that ancestor, holding the name “was sufficient to establish rights for his descendant to use the resources of the village” of that honoured ancestor.⁷¹

Naming is a practice that is taken very seriously by Coast Salish peoples. It is a serious offence to take a name from a House or extended-family to which a person does not belong. Disputes over the taking of a name are resolved through the potlatch system, with ‘speakers’ being hired to explain the family prerogative in the name and gifts distributed to offended people.⁷²

Of the intangible House property, hereditary names have provided some of the biggest challenges in the contemporary context. There is a constant dialogue and debate in these post-

residential school communities about who has rights to hold these names. Outsiders have also taken an interest in some of these names. The *Swaneset* for a golf course near Vancouver has caused great concern for the Katzie First Nations' community whose original ancestor held that most prestigious name. Political attempts by the band to change the name were not successful and it stands as a very public, stolen House property.

| Summary Table Showing Examples of Coast Salish Customary Intangible Property Protocols | | | | |
|--|--|--|---|--|
| Scope | Purpose | Rights & Obligations | Mechanism of Transfer | Term |
| <i>snew</i> (private knowledge) | | | | |
| - professional lore - secrets of trades | - provide protection to artisans, crafts-people and other skilled workers - to provide family knowledge holders exclusive rights which have potential to enrich that family | - right to protect special or esoteric knowledge from wide circulation | - selected family members or apprentices taught this knowledge | - life term for those entrusted as stewards of the knowledge - indefinite term form 'corporate' family knowledge holder |
| - ritual knowledge - certain practices - songs - 'power' words - moral advice | - to provide family knowledge holders exclusive rights which have potential to enrich that family | - right to protect special or esoteric knowledge from wide circulation | - selected family members taught this knowledge | - life term for those entrusted as stewards of the knowledge - indefinite term form 'corporate' family knowledge holder |
| - trad. ecological knowledge, inc. location, techniques for harvesting certain limited resources | - to provide additional effectiveness of control over owned resource harvesting locations through limited knowledge - to provide family knowledge holders exclusive rights which have potential to enrich that family | - right to protect knowledge from wide circulation - right to licence others to use this knowledge when sharing resources - rights to this knowledge are often intangible aspects of tangible or corporeal property rights | - selected family members taught this knowledge - family leader may elect to give non-exclusive licence to others to use the knowledge | - life term for those entrusted as stewards of the knowledge - indefinite term form 'corporate' family knowledge holder |

| Summary Table Showing Examples of Coast Salish Customary Intangible Property Protocols | | | | |
|---|---|---|--|---|
| Scope | Purpose | Rights & Obligations | Mechanism of Transfer | Term |
| <p><i>ts'exwtén</i> (ritual intangible property)</p> <ul style="list-style-type: none"> - ritual prerogatives <ul style="list-style-type: none"> - mask dance - rattle ceremony - 'power words' - certain songs - associated origin stories - certain designs | <ul style="list-style-type: none"> - to ensure that people of appropriate ritual status or lineage perform sacred rites - to protect sacred rites from being desecrated or disrespected | <ul style="list-style-type: none"> - the name/title holder holds exclusive right to display, publically perform, or have commissioned a representation of the property - right to exclude others from using this property - rights to assign others to perform - neighbouring rights for performers include expectation of compensation for their performance - owner has obligation not to display images or recount - owner obliged to publically announce source of right when performed | <ul style="list-style-type: none"> - some <i>ts'exwtén</i> are inherited through primogenitor - with respect to mask dance, certain women are <i>ts'exwtén</i> owners and assign closely related men limited performance rights - some <i>ts'exwtén</i> may be transferred between families through intermarriage | <ul style="list-style-type: none"> - life term associated with individual holder - indefinite term association with family ownership |
| <p>intangible 'House' property</p> <ul style="list-style-type: none"> - hereditary names - legends - songs - dances - 'power' words - medical knowledge - ceremonial prerogatives | <ul style="list-style-type: none"> - to provide 'House' knowledge holders exclusive rights which have potential to enrich that 'House' | <ul style="list-style-type: none"> - exclusive right to recite, depict, portray, perform, tell about 'House' property - right of members of 'House' to use this property against members of other 'Houses' - right to expect compensation for performance | <ul style="list-style-type: none"> - all 'House' members may claim rights, but claim must be publicly validated - transfer of rights within 'House' is typically done through inheritance - transfer between 'Houses' is not common, but would have to be validated (and accepted by other 'House' members) at a potlatch | <ul style="list-style-type: none"> - life term associated with individual holder - indefinite term association with 'House' ownership |

2. SUBARCTIC REGION

The vast area which has been described as the Subarctic region of Aboriginal cultures in North America is the largest in Canada. There are many cultural groups from south to north, west to east living in this region that speak a diversity of languages and practice their own cultural traditions. Long histories of interactions across and between cultural regions (Subarctic and Northwest Coast, Subarctic and Plains, or Subarctic and Arctic, for instance) have influenced the dynamics of cultural expression within the Subarctic region, as have the unique adaptations to the diverse local subarctic environments.

It is in this broad cultural context that our example of intangible property in Carrier culture is engaged.⁷³ Carrier is a particular manifestation of the subarctic cultural way of life, with clear parallels to the neighbouring Northwest Coast area. The two main forms of intangible property reported for the Carrier are hereditary titles and personal, clan crests and the various prerogatives associated with these things. Though all other Subarctic groups may not share these particular expressions of intangible property, many of the social elements upon which they are built resonate throughout the Subarctic region.

Carrier

The Carrier people speak a northern Athapaskan language and live in the mountainous north-central interior of British Columbia between the Rocky Mountains and the Coastal Range. Reserve communities are primarily located along the numerous rivers and lakes of the upper Skeena River and Fraser River systems. The Carrier are organized into fourteen distinct named groups (historically referred to as ‘subtribes’,⁷⁴) which share a common dialect⁷⁵ and occupy and use their own territories,⁷⁶ drawing on the connection that individuals and extended families have to their respective communities, territories and ancestors.⁷⁷ All members, regardless of which of these communities they live in, are born into their mother’s clan. Clan membership is important in establishing marriage rules (marrying someone from another clan), and inheritance rules for material and intangible property. The main kinds of intangible clan property are titles and crests. Within clans, there are various status positions, which may be aspired to by individuals during their life. Clan titles and crests reflect these social positions.

Titles

Tobey has provided an excellent, concise review of Carrier intangible property in titles and crests, and provides the basis for this section.⁷⁸ Each clan in Carrier society has a stock of titles which, when carried by an individual, are associated with high social rank and privilege. Inheritance and succession of these titles follow strict cultural protocols. Titles are inherited frequently passing from a man to his sister's son or daughter. If it is not possible to pass hereditary titles on to such a close heir, more distant family members can be selected. However, property must pass along clan lines, thus limiting the distribution of this property to one's mother's family line.⁷⁹

These hereditary titles are confirmed when a person is able to give a potlatch. At such a potlatch, stories, song and dances and other ceremonial prerogatives that come with the title could be told. These prerogatives, in addition to the title itself, form the core elements of intangible property in Carrier society. Proper validation of titles at potlatches is key to the Carrier intangible property system. If a person who had inherited a title or hoped to pass a title on was unable for some reason to hold a potlatch, the validation or transfer was unable to occur.⁸⁰

Other Aboriginal communities living in the western Subarctic region, including for instance the Tahltan,⁸¹ Kaska⁸² and the Tagish⁸³ also follow similar customary protocols with respect to intangible property in clan titles. Tahltan, for instance "alertly defended exclusive rights" such as the performance of clan song, stories and dances associated with hereditary titles. To assume a hereditary title, symbolic and economic goods are distributed and consumed in recognition of the validity of the property claim.⁸⁴

Crests

Not all intangible property is associated with titles. Clan and personal crests are similarly respected as property in Carrier culture. Clans frequently have multiple crests that are associated with mythical stories recounting the origins of humans in the Carrier world. These sacred stories are highly regarded by all, and abuse, misuse or disrespect of a clan crest is not tolerated.

The designs and figures illustrated in crests symbolize the clan, and can be represented on such places as houses, grave boxes, ceremonial hats, blankets, or even embodied on a person in a tattoo. Like clan titles, there are ceremonial prerogatives associated with clan crests, including songs, dances, house styles and other special privileges.⁸⁵ Any member may perform or represent the prerogatives associated with clan crests, but only those people with high social standing (as sometimes reflected by holding a title) could do so during a potlatch.⁸⁶

Title holders and other high ranking individuals within the clan frequently own one or more personal crests. Crests associated with titles are “the inalienable property of the clan”, while those which are not may be bought sold or traded by the owner. Like titles, personal crests are inherited through the mother's line. There are similar customary protocols with respect to the display and performance of the stories associated with personal crests at potlatches as those for clan crests. Only the crest owner may perform the story, and doing so is considered necessary to validate and have recognized personal crest ownership.⁸⁷

Potlatch

The potlatch or feasting system is the economic centre of the Carrier people.⁸⁸ It is the central institution for exercising, asserting, recognizing and regulating the customary protocols and laws related to clan intangible property. During these potlatches ceremonial prerogatives such as dances, designs, songs and stories, that are associated with clan intangible property (titles and crests) are performed or displayed.⁸⁹ Such opportunities allowed the sponsor of the potlatch to gain public recognition and endorsement of ownership. The right to publicly display the crest's motif is maintained and is witnessed by those in attendance as being the property of the holder.

These Carrier people have continued to use and recognize their intangible property. During the trial in *Delgamuukw v. R* (a landmark Aboriginal title case ruled on in 1997 by the Supreme Court of Canada), the Wet'suwet'en (one of the western Carrier groups) demonstrated the important links between the intangible properties held by clans and individuals and their relationships to the land. They told and performed their ceremonial prerogatives in the courtroom, laying out their customary laws as evidence of the various threads of property

relationships that wind their way through their culture.⁹⁰ In particular, the Wet'suwet'en entered as evidence, a "kungax" which Chief Justice Lamer characterized as:

...a spiritual song or dance or performance which ties them to their land...The most significant evidence of spiritual connection between the Houses and their territory was a feast hall where the Gitksan and Wet'suwet'en people tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose but is also used for making important decisions.⁹¹

Such customary laws, as Fiske and Patrick have characterized them, are also at the heart of the way the Lake Babine First Nation, another Carrier group, have displayed and defined their community interests in treaty negotiations and assertions of Aboriginal self-government.⁹² These interactions with the state have shown the difficulty, and potential promise with respect to ideas of legal pluralism, of the interaction between property systems in different cultures that are predicated on fundamentally different social organisations and economies.

| Summary Table Showing Examples of Carrier Customary Intangible Property Protocols | | | | |
|--|---|---|--|--|
| Scope | Purpose | Rights & Obligations | Mechanism of Transfer | Term |
| Clan titles - names - stories - songs - dances | - to provide exclusive use right - to provide clarity with respect to the individual owner, through which associated prerogatives may be performed | - inalienable right in association with the clan - exclusive right to use held by individual - right to be afforded status/rank - right to transfer titles between individuals within clan | - matrilineal inheritance within clan - bestowal of title must be validated at potlatch | - life term associated with individual holder, subject to validation at potlatch |
| Clan crests - crest image - associated songs - associated dances - associated house styles - associated ceremonial dress | - to provide clan members exclusive rights to display and perform associated prerogatives - to provide ranking clan members exclusive rights to display and perform associated prerogatives at potlaches | - inalienable right in association with the clan- exclusive rights to display and perform associated prerogatives - respect must be afforded the sacred stories associated with the crests, with telling accompanied by distribution of wealth at potlatch | - matrilineal inheritance within clan | - indefinite term associated with clan - life term associated with individual |
| Personal Crests - crest image - associated dramatic performances of crest story | - to provide an exclusive use, display and performance right | - exclusive use right held by individual - right to exclude others from using the crest and associated stories | - inheritance through mother's line - trade or purchase when not associated with clan title | - life term associated with individual holder |

3. ARCTIC REGION

Inuit

The cultures of Aboriginal peoples living in the north of Canada are renowned for being uniquely adapted to arctic environments. One of the well known adaptations of these communities is their social equality and principles of sharing. Sharing of food, knowledge, skills are all essential for survival in the arctic and cultural principles of sharing are deeply entrenched in Inuit and other northern cultures. Despite popular misconception, such principles have not precluded concepts of property from being manifest in the culture. Territories, and tangible personal chattels are well documented in Aboriginal communities of the arctic. Intangible property is also an important aspect of these arctic cultures.

Anthropologists working with Inuit communities in the arctic have described four main kinds of intangible property. In the western Arctic technical and ritual knowledge related to the food quest has been recorded as being the property of successful hunters. Throughout the Arctic, highly valuable, inheritable and saleable ‘power words’ are known and used along with amulets giving individuals special powers. Inuit shamans also have their own categories of knowledge which are their property. Finally, personal songs and community clothing designs may be understood as having property relations to them.

The following investigation of these property types is based largely on ethnographies written in the early 20th century and reflect Inuit ‘traditional’ culture as it was then. Though it is highly unlikely that these things have fallen into the Inuit ‘public domain’, the authors recommend further studies or consultations with contemporary Inuit and northern Aboriginal communities to fully understand the ways in which these property systems are practised and engaged today.

Technical and Ritual Knowledge and Power for the Food Quest

In families of successful hunters patrilineal inheritance of secret technical and ritual knowledge regarding food quest is important.⁹³ Technical knowledge includes many manners and forms of specialized traditional ecological knowledge and skills relating to engaging the natural world. Ritual knowledge includes “songs having special powers and... symbolic designs representing a

power source”.⁹⁴ Spencer indicates for western arctic communities such as Nunivak that “whoever owned one of these or indeed, any charm, song , or name, had a certain food taboo tied up with the ownership, as for example, being forbidden the back fat of a female caribou or the hind flippers of the ribbon seal”.⁹⁵

*Erinaliu tit - Power words and phrases*⁹⁶

Erinaliu tit are individually owned special words, phrases, songs or prayers that have power to assist in the successful completion of life tasks, such as hunting. These power words are held in secret by an individual.⁹⁷ In Iglulik Inuit communities this secret intangible property “can be bought, at a high price, or communicated as a legacy by one who is dying; but no other person save the one who is to use them may hear them, otherwise they would lose their force”.⁹⁸

There are important restrictions as to when these words may be spoken. When telling a myth or story where a character has used these words, the words themselves may not be repeated.⁹⁹

When actually uttering the words, one must not “eat of the entrails of any beast”, and a man must cover his head with his hood, a woman concealing her face with her hood.¹⁰⁰

These power words had a relatively high value during the early part of the 20th century.¹⁰¹

Rasmussen noted that the price of selling such words to a non-Inuit observer “would soon ruin an expedition. A gun with an ample supply of ammunition was regarded, for instance, as a very natural price for a few... words”.¹⁰² He was, however able to acquire a several of these words and phrases by trading for magic words he had learned in East Greenland. The man (named Aua) with whom he had bartered for them had learned them from an old woman named Qiqertáinaq whose “family had handed down the words from generation to generation, right from the time of the first human beings”. Aua had agreed to provide Qiqertáinaq “with food and clothing for the rest of her life” and when he wished to make use of these words “he had first to utter her name; for only through her had the words any power”.¹⁰³

Though Rasmussen notoriously published all of these words and phrases, including the phrases needed to evoke the old woman’s power, in both Inuktitut and English,¹⁰⁴ part of the intangible

property that goes with such words to make them powerful is the manner and style of their performance, which is difficult to produce in texts.

Angakkuq (Shamanic) Knowledge

Certain special knowledge is the intangible property of the *angakkuq* (*angákut* as it was spelled by Rasmussen), or shaman. The types of intangible property held by the *angakkuq* include curing techniques, *angakkuq* songs, certain rituals to assist in hunting or in the recovery of lost souls, and certain means of forecasting the weather.¹⁰⁵ This intangible property is closely guarded, and can be bought, sold and inherited.¹⁰⁶

Stefánsson records that “a man may buy one of his spirits from a shaman who has many”.¹⁰⁷

Before a sale, the shaman must ask his spirit if he is willing to be transferred; the answer is usually, if not always, affirmative, but it occasionally happens that the purchaser displeases the spirit and it returns to its original master without ever having manifested itself to the buyer... When the spirit is sold the shaman is relieved from the taboos under which that [spirit] has placed him and these are transferred to the purchaser”.¹⁰⁸

The ‘spirit’ and the related taboos Stefánsson describes here are the relationships with the spirits of animals that occur to a shaman in a dream or vision-quest. The taboos are restrictions, for instance, specific things which may not be eaten, that respect the relationship between the shaman and that spirit. From this relationship comes the powers to be successful in the world.

Jenness may have more accurately described the actual property that is sold in such a case, when he says that “the control that a shaman exercises over the spiritual world may be bought by an aspirant” to the shaman’s profession.¹⁰⁹ It is the knowledge associated with this ‘control’ or relationship that is key -- the prayers, songs, words and rituals that are used in evoking the powers of the spirits.

In the early 20th century, the price paid for this property was relatively high. One example was a man who “paid one Hudson Bay Company double-barreled gun, a new double (twelve skin) deerskin tent, and several smaller articles, worth perhaps thirty or forty foxskins, or \$150 to \$200 altogether”. During his work from 1913-1916, Jenness observed an apprentice named Ulöksak

paying several caribou to a shaman from Bathurst inlet “for teaching him how to obtain the command over certain spirits” .¹¹⁰

Inheritance is as important a means of transferring shamanic intangible property as is sale or barter. Angutingmarik, a shaman from the Iglulik area said “My art is a power which can be inherited, and if I have a son, he shall be a shaman also”.¹¹¹ Jenness makes the careful distinction that it is not the power itself which is handed down, but “a knowledge of the necessary procedure, and what may be called his ‘good-will in the business’”.¹¹²

There are various practices for the exercise of the powers which are manifested from this intangible property. When an *angakkuq* is able to use the knowledge for the advantage of the entire community, say for instance in the forecast or control of weather, or in divining the location of game, there is no compensation owing.¹¹³ Indirectly though, the *angakkuq* is compensated by the increase in prestige he or she may have in the community, and the deference and respect that people have for these powers.¹¹⁴ However, when intangible property are used for private service, as for instance the curing of an individual or bestowing luck or power for hunting, a fee is expected and paid.¹¹⁵

Clothing Design

Clothing designs also fall into the category of personal intangible property and are importantly linked to social identity. Observers from the turn of the 19th century noted that Inuit women in different regions worked distinctive design elements into traditional clothes such as boots, mittens, breeches and the *amauti*.¹¹⁶ Recently, Pauktuutit (the Inuit Women’s Association) has worked to protect *amauti* designs in the international context.¹¹⁷ In a workshop organized by Pauktuutit, Inuit women discussed their views regarding *amauti* design. These women “expressed concern about revealing secrets about how the *amauti* is made but indicated that a person could copy a pattern if they had received permission”.¹¹⁸ These women expressed concerns about the mis-use of these regional designs between Inuit communities:

On one hand, any Inuk should be able to learn the different regional styles. On the other, it may not be proper for any Inuk to start profiting from the designs of another region...

Regional differences should be documented and some form of compensation should be returned to the community where a design originated.¹¹⁹

The workshop participants felt that ownership in these designs was held by the community of origin, and any specific execution within that design pattern was the creation of the individual artisan. This issue was discussed in the larger context of the appropriation of *amauti* design by non-Inuit businesses, which was strongly opposed by the Pauktutit and the Inuit community.

| Summary Table Showing Examples of Inuit Customary Intangible Property Protocols | | | | |
|--|---|--|-------------------------|---|
| Scope | Purpose | Rights & Obligations | Mechanism of Transfer | Term |
| Food Quest Knowledge - trad. ecological knowledge & skills - ritual knowledge - certain songs - certain designs | - to provide family knowledge holders exclusive rights which have potential to enrich that family and community | - right to exercise knowledge, skills, songs & designs to aid in food quest - right to transfer - obligation of right holder to respect taboos connected to spiritual source of powers associated with the intangible property | - inheritance - sale | - life term associated with individual holder |
| <i>Erinaliu tit</i> - words/phrases - songs - prayers | - provides exclusive means of exercising supernatural power to knowledge owner - to preserve relationship with spirit world which provides power | - right to invoke power through use of words/phrases - right to transfer - rights of performance of songs/prayers - right to expect payment for sale of the words - obligation not to divulge words directly or incidentally, by respecting taboos | - inheritance - sale | - life term associated with individual holder |

| Summary Table Showing Examples of Inuit Customary Intangible Property Protocols | | | | |
|--|--|--|---|---|
| Scope | Purpose | Rights & Obligations | Mechanism of Transfer | Term |
| <p>Angakkuq (shamanic) knowledge</p> <ul style="list-style-type: none"> - curing techniques - songs - certain prayers - certain words - certain rituals - weather forecasting knowledge | <ul style="list-style-type: none"> - provides exclusive means of exercising supernatural power to knowledge owner - to preserve relationship with spirit world which provides power - to maintain confidentiality so that non-trained (non-shaman) individuals do not mis-use knowledge | <ul style="list-style-type: none"> - right to sale, subject to conferring with spirit which is source of power - right to perform - residual ownership rights vested in original owner - obligation of right holder to respect taboos connected to spiritual source of powers associated with the intangible property - right to expect compensation for certain performances | <ul style="list-style-type: none"> - sale - apprenticeship - inheritance | <ul style="list-style-type: none"> - life term associated with individual holder |
| <p>Clothing Design</p> <ul style="list-style-type: none"> - <i>amauti</i> design | <ul style="list-style-type: none"> - protecting distinctness of designs which are linked to local and regional identity | <ul style="list-style-type: none"> - right to execute design - right to teach design style to others - right of association | <ul style="list-style-type: none"> - apprenticeship | <ul style="list-style-type: none"> - indefinite term associated with group whose identity is represented by the design |

4. PLAINS REGION

The Plains cultural region area in Canada extends east of the Rocky Mountains to Lake Winnipegosis in Manitoba, largely including the watershed of the North Saskatchewan River and the area south of it. The main ‘tribal groups’ of this area include the Stoney, Sarcee, Blackfoot, Gros Ventres, Plains Cree, Assiniboine and Plains Ojibwa, all of which share common cultural features which anthropologists have called ‘High Plains’. Though there is some cultural and linguistic diversity within these communities, the historic importance of the buffalo to subsistence, cultural and social life is shared among them. Another key element of traditional culture held in common by these communities is how spiritual powers are acquired through seeking visions from spirit beings, and the way in which this power is bound up with bundles, songs, dances, designs, ritual, and certain practical, technical and medicinal knowledge.

For the purposes providing specific examples from the region the ethnographic studies of Blackfoot communities of southern Alberta (including Blackfoot, Blood and Peigan), will be drawn on as well as the research which has been done with the Crow and Hidatsa communities in Montana and North Dakota respectively.

The section will begin with a discussion of the social context – in particular the acquisition of power through visions – in which intangible property rights and obligations are engaged in these communities. Following this is a discussion of two specific types of intangible property in these communities: intangible property associated with sacred bundles and intangible property in artistic designs for painted lodges/teepees, shields and other material items. The section concludes with a brief discussion of some of the contemporary issues with respect to intangible property.

Social Context of Power and Visions

In Crow and the Hidatsa communities¹²⁰, a person who sees a vision on a solitary vision quest may be imparted with important knowledge such as medicines, dances, songs, regalia, or ornamentation styles and designs. These intangible gifts from the spirits to the person seeking the vision formed the basis of many social relationships in the community. They may be helpful

and instructive in the food quest or in former times warfare, or inspire the formulation of new rituals which can increase the status and prestige of the individual. These gifts are kinds of intangible property which can also be transferred through sale, allowing the benefits of the person engaged in the vision-quest to flow to others in the community.¹²¹ Studies in the early part of the 20th century indicate that this type of property commanded very high prices in local economies. Contemporary systematic study of the value of this property, however, is not available from more recent published sources.

The right to transfer intangible property is not absolute. A holder cannot, for instance, transfer them as a gift – even to the closest relative – as the proper ritual and ceremonial protocols must be followed (including payment) for the transfer to take effect. There are also particular restrictions on who is able to purchase these rights. The specific protocol varies between different classes of intangible property.¹²² Lowie is quite clear that these are not transactions in the tangible objects associated with the vision, but rather the “right to use this particular combination of objects together with the right to the associated songs and activities, but also with any coexistent duties and restrictions on conduct”.¹²³

Sacred Bundles

Examples of intangible property traditions are well described for the Hidatsa. A major and important anthropological study of this community was done by A. W. Bowers from fieldwork carried out in 1932-3.¹²⁴ Steward, whose work is drawn on below, has comprehensively summarized this and other primary ethnographic works in which many aspects of Plains life and practices, and in particular, those related to intangible property. Raczka and Lowie have also documented highly interesting and useful detail about the rights and prerogatives of both past and current owners of incorporeal objects associated with medicine bundles in Blackfoot communities.¹²⁵

Ritual property forms the major basis of intangible property rights in Plains communities. Central to these rights are songs and ritual performances associated with sacred bundles. Bundles are collections of small objects put together by an individual who has had a vision and

is engaged in a relationship with animal spirits. The animal spirits help the individual in certain life activities such as hunting and other work.¹²⁶

There are two main kinds of bundles: personal bundles and tribal bundles. Personal bundles are created when an individual encounters a vision and is given certain knowledge, ritual instructions or a song. Personal bundles and their associated intangible property are normally performed only by that individual and cease to be used upon their death, though they can at times be sold to other individuals.

Tribal bundles, whose origins go back into mythical antiquity, contribute to the whole community. The songs and associated origin myths, detailed knowledge of the design, contents, ritual methods of care, restrictions, and certain associated technical and spiritual knowledge are all key elements of the intangible property rights associated with tribal bundles.¹²⁷ Knowledge of and rights to publically recount tribal origin myths (or more specifically, certain aspects or episodes of a tribes origin myth) are associated with particular tribal bundles.

A bundle owner would know the episode relating to his own bundle and know which episodes preceded and followed it, but not necessarily much more, for the tribal myths were knowledge of a very esoteric kind. Apart from the bundle owner himself, a particular episode would also be known to certain other bundle owners whose spirits played some part in that episode. These owners were the major participants at ceremonies relating to the bundle, whether sales [of bundles] or feasts [honouring bundles]. Furthermore, by giving feasts to a bundle, it was possible to purchase knowledge of its myth without purchasing the bundle itself, and important people would gain extensive knowledge of the tribal myths in this way.¹²⁸

Certain individuals are recognized as specialist storytellers: through invitations to feasts or other gatherings, they are paid for the right to tell the stories.¹²⁹

Some practical technical information has been documented as specialized knowledge and is “purchased in a religious ceremony” associated with bundles.¹³⁰ Historically (and most likely today), the types of technical knowledge obtained would be differentiated by gender. Men obtained rights in skills such as the construction of arrows and bull-boats, eagle trapping and medicinal knowledge through their purchase of certain bundles. Women likewise needed to purchase rights in skills such as pot- and basket-making, construction of support-beams,

chimneys and fireplaces for lodges and cabins and certain healing practices.

Of all the songs sung by First Nations people of the Plains, medicine songs used in healing and disease prevention can only be sung by individuals who have received them in dreams or who are initiates in the transfer of bundles.¹³¹ An example of this is summarized by Young from Ewers study of Blackfoot culture:

The seven-hour Horse Medicine ceremony, as recorded in the late 1940s, included about five hours of singing. Each man sang three songs accompanied by three drums, his own and two played by men on his left. Then the drums passed to the left. The songs were personal property and could be purchased or borrowed. The singer's wife might sing softly with him although she did not sit in the circle of men. Although the Blackfoot of the time found Horse Medicine songs 'particularly attractive' and would like to sing them outside the ritual context, they were forbidden to do so.¹³²

As can be seen from these examples of the rights in myths, technical knowledge and songs associated with bundles, the owner has a variety of obligations, restrictions and opportunities for holding and transferring these rights.

Hoebel characterized the rights associated with ownership of intangible property in quite clear terms:

All this means simply that the owner of a vision complex can sing its songs and possess its distinctive paraphernalia, and others cannot: this is his privilege-right against any other person. From the standpoint of other warriors in the tribe it means that *A* alone can sing its songs and possess its distinctive paraphernalia, and *B* (or any other person cannot): this is *B*'s duty. But *B*'s duty does not give grounds for a legal claim on *A*'s part in the event of violation; rather, *B*'s duty exists with respect to the supernatural order, not the societal (legal). This form of statement assumes the supernatural powers to be no part of the legal order. But the fact is, in many... cultures they can more properly be viewed as sanctioning officials, operating, so to speak, in 'equity' when the 'common law' of the secular gives no remedy, or even is supposed not to. If we go further, we can say that *A* can give away the entire complex; this is *A*'s power. Suppose *A* is free, as against his family, to give it to a non-relative; his son, *x*, cannot prevent him from so doing; this is *x*'s no-power. *B* offers to give three horses for the complex.¹³³

The complex of rights associated with this intangible property, Hoebel characterized as unequivocally representing true 'ownership', in the western legal sense. The configuration of relationships of rights and obligations, however, is clearly constructed in a manner suited to Plains First Nations traditional social, cultural and economic systems.

Mechanisms for Acquisition, Enforcement & Disputing Rights

Depending on the bundle, inheritance of it and any of the associated intangible property can follow from father to son, from mother to daughter, or along eminent representatives of certain clans. This transfer, referred to in the literature as a “purchase” is contingent on a lengthy ritual and ceremonial process:

The process began when the son (or ... junior member of the clan) of a bundle owner had a dream or vision, often in the course of fasting and self-torture, in which he was instructed by the spirit to take over the bundle of this father (or senior clansman). Without such a dream he could not purchase it. The purchaser then had to collect the large amounts of property needed for the ceremony... A member of the father’s clan would instruct the purchaser in the myths and rituals of the bundle he was to purchase; the instructor was in turn instructed by some well-informed person. These people, and many others, were given property in the course of the ceremony, although neither they nor the seller actually retained what they were given but instead distributed it to others. Those who participated in the ceremony thereby sanctioned the transfer, and certain of them invoked their own spirits to favor the purchaser.¹³⁴

A tribal bundle – or rather the specifications for the bundle and the associated intangible property (songs and ritual performances) – can in principle be sold four times by an owner. Lowie reported that the seller “does not alienate his ownership completely but merely permits the buyer to share in its benefits in return”.¹³⁵ On the fourth sale the owner loses all advantages of having that bundle. This is in fact quite rare, with the rights to many bundles and their associated intangible property never having transferred hands in this way.¹³⁶

Lowie described how the purpose of the ceremonies connected with the sale of these bundles is to perform a “faithful replica of the initial transfer” of the powers conferred in the vision-quest to the original bundle holder.¹³⁷ It is only in this way that the full rapport with the supernatural world that this original bundle holder had can be maintained in the new owner. Thus, Lowie argued “an invasion of copyright would not help insure the blessings – longevity, health, and happiness – linked with authorized ownership”.¹³⁸

Lowie observed that with respect to other *humans* the titles in this property cannot be revoked. However, with respect to the *supernatural* granters of the powers associated with the intangible property and from which the blessings associated with the bundles are granted, “any infraction of the rules linked with the bundle” could result in the blessing (and thus the intangible property

itself) being revoked.¹³⁹ Raczka notes that while the right in intangible property has remained a cultural constant the “procedures and restrictions” for acquiring the right have varied over time, citing the fact that capturing intangible property rights in warfare is no longer part of Plains practice.¹⁴⁰

Property in Respect of Designs

Plains First Nations people recognize ownership in the designs created through certain art forms, including painted teepee designs, designs on sacred robes (see below), as well as the decorative creations of women in bead, quill and rawhide works and shield designs which have associated transferrable powers and rituals.¹⁴¹ The recent summary and analysis of the primary sources by Green is a very significant contribution to the literature on the topic.¹⁴² Her descriptive summary of Plains First Nations practices is useful in this regard:

Many designs used in Plains art were considered a form of property and were conceived of as independent from the objects on which they were placed. Art production was governed by social rules regarding design ownership. Designs were viewed as a form of intangible property governed by complex systems of ownership and rights over production and display. The owner of a design had the exclusive right to reproduce it, and the acquisition of an object bearing a design did not confer upon the new owner the right to copy it. Some designs belonged to individuals, while others were owned by larger groups, such as clans or societies. Some designs were the prerogative of a class of individuals who had earned the right to use them... Regardless of their origin, designs that were owned circulated as a form of valued property and could be sold, loaned, given as gifts, inherited, captured in war, or received as a right of initiation.¹⁴³

Though Greene writes here in the past tense, recent Canadian scholarship has indicated that the functioning of this system still has currency in the 21st century. Raczka, for instance, has described the rights and prerogatives of both past and current owners of incorporeal objects such as inheritable teepee painted designs and images and their associated stories,¹⁴⁴ as well as designs on and ritual prerogatives associated with sacred robes.¹⁴⁵ He observes that “while many art forms fall within the public domain, the major items as well as the techniques used to construct them were considered power and as such, fall within religious and personal property boundaries”.¹⁴⁶

Raczka lists a number of specific kinds of intangible property rights (see below) with respect to certain ritual property in Blackfoot culture including “weaseltail and hairlock suits, society

articles, bonnets and shields”.¹⁴⁷ Intangible rights in other ritual and personal property, such as teepee furnishings, clothing and hairstyles are listed as belonging either to the public domain or more restricted, depending on the specific article. The scope of the intangible property rights over these material manifestations can include the right to construction, the right to transfer, the right to instruct new owners, the right to guide ceremonial care, the right to reconstruct or repair, and the right to commission a work.¹⁴⁸ An artist commissioned to create a work is granted certain limited licences to use that property, in addition to the payment received. The artist may gain licence to sing associated songs, and to call on a bundle for help.¹⁴⁹

Painted teepees or lodges have intangible property rights associated with them, including rights in the songs, altars, and flags.¹⁵⁰ Like bundles, the designs on painted teepees also frequently originate in visions. They are the exclusive property of the owner, though often other artists execute the design under the owners’ supervision. They can be inherited within a family, sold, or in former times, taken in war through cutting out the design from a teepee of an opponent.¹⁵¹

It is to be understood that the painting on each lodge is the special property of the lodge owner, and can be used only by him unless he sells his right to it to another individual, in which case the buyer has the sole right to the design and to any 'medicine' or mysterious power which may accompany it. In a majority of cases the designs or the medicine which belongs to them, or both, have come to the original painter of the lodge through a dream.¹⁵²

These designs (and the associated rights) are transferrable through the practices of the Sun Dance ceremony.¹⁵³ The Sarcee of central Alberta share similar rights in painted lodge designs.¹⁵⁴

One study which highlighted the design elements of historic painted teepees in Blackfoot, Sarcee and Plains Cree tribes in Alberta, Saskatchewan and Manitoba, suggested that “though a stylistic tradition may be shared with another tribe with whom there existed intimate cultural ties of great age”, the circumscribed rights to use these design elements greatly limited their specific distribution within a tribe.¹⁵⁵ The practice of these customary laws is documented well into the late 20th century and undoubtedly continues in Plains communities today.¹⁵⁶

Respect forms the primary mechanism by which designs are protected from being copied or used by those who do not have rights to do so.¹⁵⁷ Raczka writes that as dreaming is instrumental to

having a vision, the “validity of the dream”, evaluated in some instances by “a qualified group of elders” is important for establishing these rights.¹⁵⁸ Other tests of validity include standing the scrutiny of other ceremonial leaders, who may accept or reject the claims. The spiritual power itself has a role, the consequence of which the community may observe if “the powers destroy him or his relatives for improper use” of the power invoked by exercising the ritual prerogatives associated with intangible property.¹⁵⁹

Noble presents a case for how the incorporeal property aspects of Blackfoot bundles has generated considerable debate and opportunity in Canadian museums, illustrating the continuing importance of these practices today, even in institutional contexts.¹⁶⁰ These are clearly practices which continue to have great relevance in Plains communities today.

Summary Table Showing Examples of Plains Customary Intangible Property Protocols

| Scope | Purpose | Rights & Obligations | Mechanism of Transfer | Term |
|--|--|---|--|---|
| <p>Intangible Property relating to Bundles</p> <ul style="list-style-type: none"> - ritual performances - certain songs - origin myths - certain medicines - dances - technical knowledge of bundle design, contents & methods of ritual care - regalia - ornamentation | <ul style="list-style-type: none"> - to provide economic return for investments made in engaging vision-quests - to protect respectful relationships with the supernatural world | <ul style="list-style-type: none"> - rights to transfer or sell, subject to the transaction having sufficient value (no gifting) - right to use bundles - rights to perform songs and rituals - right to execute designs -right to duplicate or repair - obligation to respect taboos required by spirit power source - rights to particular aspects of intangible property related to bundles are divisible | <ul style="list-style-type: none"> - non-exclusive transfer through sale and accompanying appropriate ritual, frequently within families to a maximum of four times, when original owner's exclusive rights are ceded | <ul style="list-style-type: none"> - life term associated with personal bundles - indefinite term associated with tribal bundles, with individuals having life terms associated with particular rights they have acquired with respect to those bundles - rights are revocable by spirits who grant them |
| <p>Intangible Property relating to Designs</p> <ul style="list-style-type: none"> - teepee painted designs - stories, songs, altars, & flags associated with teepee designs - sacred robe design - ritual prerogatives associated with sacred robes - decorative creations of women - shield design | <ul style="list-style-type: none"> - to protect respectful relationships with the supernatural world - to protect the reputation of individual, family or group | <ul style="list-style-type: none"> - rights over production - rights to display - rights of reproduction - right to construction - right to transfer - right to instruct new owners - right to guide ceremonial care - right to reconstruct or repair - right to commission a work | <ul style="list-style-type: none"> - sale - loan - gift - inherited - formerly capture in war - received as initiation right - acquisition of object bearing a design does not give reproduction rights | <ul style="list-style-type: none"> - life term associated with individual holder - indefinite term associated with group whose identity is represented by the design |

Concluding Comments

This ethnographic analysis of Aboriginal cultures in Canada has shown conclusively that customary protocols and laws with respect to intangible property exists, and that they play important social and economic roles in Aboriginal communities. The anthropologists who have written the ethnographies upon which this review has been based have long been interested in ideas of 'property' as they are found in non-Western societies. The challenge has been to understand property concepts and institutions in terms that do not impose too heavily Western categories and assumptions about the functioning of property in differently engaged economies. Stereotypes of Indigenous peoples as 'primitive' with social organizations 'too simple' to have complex legal institutions like intangible property relations have pervaded popular and scholarly discourse. Anthropological investigations and analysis grounded in detailed studies of non-Western cultures strongly challenges these perspectives. Since the early 20th century, professional anthropologists have attempted to dispel popular views that Indigenous peoples were 'incapable' of having notions of property. Since the early writings of Franz Boas,¹⁶¹ he and his students have detailed the functioning of intangible property systems throughout North American Aboriginal communities.¹⁶²

One critical problem in the anthropology of intangible property has been in how wide or narrow a definition of property may be useful to understand these systems in other cultures. Some scholars have taken a narrow view. Cappannari,¹⁶³ in his study of the property systems of the Shoshone has commented that in framing "the right to tell a particular myth, perform a ceremony or to sing a song" as intangible or incorporeal property, it serves "to obliterate useful and important distinctions in the property rights of different cultures." He claimed that for areas where transactions seldom occur, where there is little commercial significance, or where they function in the realm of the prestige economy rather than the subsistence economy, that 'property' becomes too loose a term for developing a framework of comparative property law.¹⁶⁴ This narrow view of intangible property has been challenged by scholars such as Hallowell who argued that not all property in any society is intended to be exchanged for some commodified value, and that indeed "rights in songs, in magical formulae, legends, etc." are 'owned' in the same sense as are other material objects.¹⁶⁵ The key for these things to fall into the category of

‘property’ rests in the fact that they are valued, and that such values order social behaviour between people.¹⁶⁶

Many ethnographers today continue to emphasize the critical importance of understanding the relationships between people that ‘property’ engages.¹⁶⁷ To understand the centrality of property in general, and intangible property in particular in cross-cultural perspective, it is critical to examine the social relationships that are established and maintained.¹⁶⁸

Much of the anthropological debate around theorizing intangible property has been focussed at generating an understanding of the idea that makes sense in a multitude of diverse cultural settings. Particularly challenging has been the idea that intangible property can exist outside a capitalist economic system and the valuation of commodities that it implies. Anthropologists have concluded, with particular reference to intangible property systems of Aboriginal communities in North America, that intangible property may indeed have important economic values (ie: subsistence) and most certainly have value in prestige economies where social hierarchies may be maintained or reinforced. For example, where

the circulation of goods creates social relationships between the transactors rather than impersonal relationships of price between the objects transacted... [t]he production and consumption of intellectual property function in the maintenance of rank or prestige, in the formation of alliances and patronage networks. Rights in magic, in dances, in rituals, or in the designs of masks or statuary seem therefore to be treated often as intellectual prestige goods, and to form part of special high-status or ceremonial spheres of exchange. Even those forms of intellectual property that are treated, like land, as a clan’s inalienable patrimony, yield for their owners essentially social rewards such as status, reputation or political influence.¹⁶⁹

When the intangible property systems of a particular cultural group are seen in this light, we can better understand the basic principles and objectives underlying their protection within the appropriate customary cultural frameworks. While these may at times differ markedly from those of the formal intellectual property law system (ie: encouraging innovation through protecting rights to profit from the production and circulation of ideas as commodities), they are nonetheless valid and essential defining principles of the communities and cultures from where they emerge.

Looking Forward

In their paper *Intellectual Property and Aboriginal People*, Brascoupe and Endermann discuss a difference in purpose between formal intellectual property laws (which exist to encourage investment and innovation) and traditional knowledge, for which they say “the primary goal of Aboriginal people is usually preservation rather than innovation”.¹⁷⁰ Laws about knowledge and the knowledge itself are different classes of things. Making this distinction creates a sense of difference and irreconcilability that is difficult for policy-makers, Aboriginal people and academics to navigate. This study focusses on the nature and extent of customary protocols and laws centred in different Aboriginal cultures in Canada, highlighting the range and scope of traditional knowledge and traditional cultural expressions that these protocols and laws apply to. Thus, we try to bring out important comparative material which should provide useful in developing policy regarding Aboriginal intangible property.

We found that customary protocol and laws with respect to intangible property are widespread across the diversity of Aboriginal communities, having a different particular scope of subject matters, rights and obligations in the different areas. From a comparative sense there are some strong similarities in the kinds of property relationships expressed in these communities, particularly the importance of collective ownership of some property by certain social groups, and the frequent engagement of non-human (i.e.: spiritual) beings in the rights, responsibilities and obligations associated with these property.

Brascoupe and Endermann have identified a number of questions directed at aiding Aboriginal people in defining their concerns with this long term protection.¹⁷¹ These questions included:

- identify the scope and nature of traditional knowledge in their community
- identify what knowledge is most important in the community
- identify how the preservation of traditional knowledge and practices is at risk
- identify the obligations of individuals to their community when they use or share traditional knowledge
- identify what knowledge is sacred and what knowledge may be shared with others or used commercially

To be clear, this study does not attempt to address these questions on a broad scale for all traditional knowledge or traditional cultural expressions. Specific answers to these questions are

very difficult to arrive at when framed in the broader debate over protecting cultural property.¹⁷² Such a process would be more appropriate for individual communities developing their own protocols with respect to the control, dissemination and commercialization of these kinds of knowledge. However, by examining how people practising their cultures have formulated and live by their own customary protocols and laws with respect to intangible property, we suggest that a starting point for important cross-cultural understandings can be built.

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Endnotes

1. None of the contents of this report necessarily represent the views or opinions of any of the Aboriginal peoples described herein, nor do they necessarily reflect the views of Industry Canada. This report is intended to be without prejudice to any Aboriginal or treaty rights.
2. 'Customary protocols' refers to rules in relation to rights or powers, and responsibilities or duties associated with the acquisition, use, transfer, management and ownership of cultural expressions or traditional knowledge. Where these protocols are embedded in more formal systems of social relations, the term 'customary laws' is used.
3. 'Traditional knowledge' may refer to knowledge associated with such cultural expressions, other historical knowledge, environmental and technical knowledge, ritual knowledge, or other areas of specialized knowledge.
4. 'Traditional cultural expressions' may refer to tangible or intangible expressions, or both. Examples may relate to, but are not restricted to oral narratives and stories, songs and/or instrumental music (drumming), performances (dances, rituals), titles (names), imagery and designs (masks, teepee designs, wampum belts), woodwork (totem poles), weaving (baskets, articles of clothing), and sacred objects (sacred medicine bundles). The bracketed examples are for illustrative purposes only. Where these expressions are engaged in property relations, the terms 'intangible property' and 'incorporeal property' are (interchangeably) used.
5. The 'cultural regions' referred to here are based on those used in the Smithsonian Institution's 20 volume series *Handbook of North American Indians*. These units are somewhat abstracted generalizations of cultural similarity within these groups and between them. However, as such generalizations always do, these regional groupings of culture belie important similarities that are also found between groups and differences among them. They should not be seen as definitive or as necessarily representing current Aboriginal identities.
6. The use of the descriptive and analytical terms in the report is intended for clarity from policy and generalist perspectives and makes no claims to perfectly reflect the nuance of Aboriginal world views. Indeed, a far more substantial work would be needed to fully engage these views. Particularly concerning to us is the frequent use of terms such as 'sale', 'purchase' and 'barter' in the literature. The intent is not to reduce these complex cultural issues to mere commodities. Rather, it is an attempt to describe, using plain English, some of the social engagements that Aboriginal people have with respect to their traditional knowledge and traditional cultural expressions.
7. Kwakwaka'wakw has frequently been anglicized as Kwakiutl. Although we use the term 'Coast Salish' throughout this paper, the data we have drawn on is specific to the Central Coast Salish, as defined by Suttles 1990.
8. Jorgenson 1980:135.
9. Jorgensen 1980:135, 138.
10. See Cole and Chaikin 1990.
11. 'Na'mima has frequently been simplified as *numyam* or *numema* in the literature.
12. See Lévi-Strauss (1982:163-87).
13. Goldman 1937:185.
14. Codere 1990:366.

15. This list has been summarized from a number of sources, including: Bunzel 1938:358; Codere 1990:366; Goldman 1937:196; and Holm 1990:379.
16. Goldman 1975:44-5.
17. Suttles 1991:92, vis Drucker and Heizer 1967:113.
18. Bunzel 1938:358.
19. Harrison 1992:236-7.
20. Codere 1990:367.
21. Suttles 1991:94.
22. Codere 1990:367; see also Goldman 1937:186.
23. Bunzel 1938:360; Harrison 1992:228.
24. Boas 1966:258-9.
25. Ruth Benedict 1935:151.
26. Harrison 1992:228, emphasis in original.
27. Robbins 1999.
28. Robbins 1999:20.
29. Robbins 1999:21.
30. On this last point Robbins (1999:21) agrees.
31. See for example *Indian Act*, R.S.C. 1906, c.81, s.149.
32. Cramner-Webster 1991:227-9.
33. Cramner-Webster 1991:232.
34. Cramner-Webster 1991: 239.
35. Jenness 1934-5:52.
36. Amoss 1977a, 1978.
37. Homer Barnett (1955:141) recorded the term for this type of hereditary property as '*ʔcalāngan*' in Saanich and '*ʔotakan*' in Comox. His transcription of these terms was not informed by a linguistic methodology and we have not encountered these terms published in other sources, so we are hesitant to use them here.

38. Collins 1979:247.
39. Suttles 1987a:8; Amoss 1977b.
40. Barnett 1955:142; Collins 1979:247.
41. Collins 1979:247; Suttles 1987a:8.
42. Barnett 1955:79.
43. Barnett 1955:110.
44. Collins 1979:247.
45. Suttles 1982:59.
46. Suttles 1987c:108; Stern 1934:57; Jenness 1955:71; Barnett 1955:141.
47. Suttles 1987a:10.
48. Suttles 1987c:106.
49. Suttles 1987a:10.
50. Stern 1934:56.
51. Jenness 1955:71.
52. Suttles 1982:59; Codere 1948.
53. Codere 1948; Duff 1952:123-126; Lévi-Strauss 1982.
54. See for example the example from Musqueam in Thom (2001).
55. Bierwert 1999:169-170.
56. Kew 2000.
57. Bierwert 1999, chapters 4 and 6.
58. Barnett 1955:141, 250; Jenness 1934-5:52.
59. Jenness 1934-5:53. See also the example of this with the variation on the First Salmon ceremony practised by one Nanaimo family (Barnett 1955:90).
60. Jenness 1934-5:52.
61. Barnett 1955:141.

62. Suttles 1987b:19.
63. Gunther 1927:307.
64. Barnett 1955:132.
65. Barnett 1955:133.
66. Jenness 1934-5:55.
67. Collins 1966:426.
68. Collins 1966:429; see also Suttles 1987d:201; Barnett 1955:138-9.
69. Barnett 1955:134.
70. Jenness 1934-5:55.
71. Collins 1966:430.
72. Haeberlin and Gunther 1930:46; Jenness 1934-5:56.
73. The nature and form of property has been extensively debated for Subarctic communities in the form of land tenure and territory, with a long-standing debate between those who believed that Subarctic communities have defined, family-owned hunting territories, and those who argue that they have no clear property concepts in respect of land outside of those imposed or acquired from colonial interactions in the fur trade (summarized in Rogers 1981). In part because of this attention to material property in the ethnographic literature that intangible property has been largely overshadowed in the published literature.
74. cf. Jenness 1943; Duff 1951.
75. Morice 1895:3.
76. Helm 1968:119.
77. Goldman (1940:334-335) describes the extended family as consisting of a group of male siblings, their wives, children and married sons' wives and children. Members of this group, the *sadeku*, recognized the limited authority of a headman, often the first-born male of the sibling group, called the *detsa*.
78. Tobey 1981:420-2.
79. See also Jenness 1943.
80. Jenness 1943.
81. MacLachlan 1981:463.
82. Honigmann 1981:446.

83. McClellan 1981:488.
84. MacLachlan 1981:463.
85. Tobey 1981:422.
86. Tobey 1981:420.
87. Tobey 1981:420.
88. Steward 1960:732-740.
89. Diamond Jenness (1943) provides a detailed description of the Northern Carrier potlatch system.
90. See especially Mills 1994.
91. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 .
92. Fiske and Patrick 2000.
93. Lantis 1984:218.
94. Lantis 1984:218.
95. Spenser 1984:334.
96. *Erinaliu* † (singular) *Erinaliu tit* (plural) are forms of the Inuktitut term for ‘power word/phrase’ given by Rasmussen. As he did not provide a key to his orthography and the term was not listed in the recent Inuktitut dictionaries consulted, we are unable to provide a standardized contemporary spelling.
97. Weyer 1932:194; Boas 1907:153, 506; Lowie 1928:553-4.
98. Rasmussen 1929:157.
99. Rasmussen 1929:157.
100. Rasmussen 1929:157.
101. Weyer 1932:195.
102. Rasmussen 1929:165.
103. Rasmussen 1929:165.
104. Rasmussen 1929:166-168.
105. Rasmussen 1929: 109.

106. Weyer 1932:195.
107. Stefánsson 1919:369.
108. Stefánsson 1919:370.
109. Jenness 1922:92.
110. Jenness 1922:92,191.
111. Angutingmarik in Rasmussen 1929:132.
112. Jenness 1922:93.
113. Jenness 1922:195.
114. Weyer 1932:435.
115. Weyer 1932:433-4; Stefánsson 1919:170, 374; Jenness 1922:195; Boas 1888:594.
116. See for example Boas 1888:554-8; Bird 2002:13.
117. Blackduck 2001; Bird 2002.
118. Bird 2002:22.
119. Bird 2002:30-1.
120. Crow territories are directly south (in Montana) of Canadian High Plains First Nations: Blackfoot, Gros Venture and Assiniboine communities. Hidatsa are the southern (in North Dakota) Prairie Plains neighbours of Canadian Assiniboine communities.
121. Lowie 1920:238.
122. Lowie 1920:239.
123. Lowie 1920:239.
124. Bowers 1965.
125. Raczka 1979:76; Lowie 1928:555-560.
126. Though the details about practices related to 'bundles' and important intangible property associated with them are from articles particular to Blackfoot communities, the general principles are widely applicable to other Plains communities, and are valuable for understanding these customary protocols.
127. Steward 2001:336; Lowie 1920:239; Driver 1969:285.

128. Steward 2001:338.
129. Steward 2001:341.
130. Steward 2001:338.
131. Young 2001:1032-3.
132. Young 2001:2033, citing Ewers' classic study 1955:262-271.
133. Hoebel 1942:965, working from Lowie's accounts of these property systems.
134. Steward 2001:336.
135. Lowie 1920:239.
136. Steward 2001:336; Lowie 1920:239.
137. Lowie 1928:556.
138. Lowie 1928:556.
139. Lowie 1928:558.
140. Raczka 1980:34.
141. Greene 2001:1052-1053.
142. Greene 2001. See also her other works which specifically review Kiowa intangible property in teepee design Greene 1993 and Greene & Drescher 1994.
143. Greene 2001:1052.
144. Raczka 1979:69.
145. Raczka 1992.
146. Raczka 1980:30.
147. Raczka 1980:20.
148. Raczka 1980:30,32.
149. Raczka 1980:32.
150. Grinnell 1901:655-670.
151. Greene 2001.

152. Grinnell 1901:655.
153. Dempsey 2001c:610, 616; Wissler 1918; Archambault 2001:987.
154. Dempsey 2001b:631.
155. Brassler 1979:32.
156. Brassler 1979:32.
157. Greene 2001:1052.
158. Raczka 1980:32.
159. Raczka 1980:34.
160. Noble 2002.
161. Boas' work is most notably his work with Kwakwaka'wakw people, which will be discussed more fully later in this report. Of the many thousands of pages of Boas' writing on this subject, Boas 1966 is a useful synthetic starting point; Suttles 1991 has given perhaps the most lucid account of the property system drawing on the Boas data.
162. Lowie 1920, 1928; Bunzel 1938 are prominent examples of Boas' students writing about intangible property in Aboriginal cultures. See also Lowie 1949:260-5 for additional South American examples of incorporeal property. Of interest in Lowie's 1920 work are his examples from the Northwest Coast, in his case the incorporeal property held by Nuu-chah-nulth (formerly called Nootka), the intangible property system of the Crow people and the importance of individual incorporeal property rights in Plains religious practice, the later example which is discussed in detail later in this report.
163. Cappannari 1960:140.
164. See also Segale 1941.
165. Hallowell 1943:128-9.
166. Hallowell 1943:134.
167. Hann 1998 on property in general, and in particular pages 4-5, 25, and 30-31 on theorizing intangible property in particular.
168. See Harrison (1992) for an excellent discussion of ritual as intellectual property in Kwakwaka'wakw and Melanesian traditional societies. The study shows how such property is valued and the kinds of social actions (such as feasting and disputes. People in these societies engage over its distribution.
169. Harrison 1992:234.
170. Brascoupé and Endermann 1999:2.
171. Brascoupé and Endermann 1999:4.

172. See, for example, Brown 2003.