Respecting and Protecting Aboriginal Intangible Property:
Copyright and Contracts in Research Relationships with Aboriginal Communities

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Respecting Aboriginal Intangible Property in Canada: Introduction[1]

Aboriginal organizations in Canada have been involved in documenting and archiving important cultural knowledge through collaborative efforts with academic and professional researchers. There have been challenges in conducting this work. First Nations communities need the customary laws and protocols which pertain to this knowledge protected. At the same time, many of these communities wish to document their traditions to revitalize endangered aboriginal languages, support assertions of aboriginal and treaty rights, and promote their ongoing practices of vigorous cultural traditions.

While the Intellectual Property (IP) framework of Canadian law offers some protection for Aboriginal communities engaging in this kind of work, they do not provide any special mechanisms to suit the often unique circumstances regarding collective concerns for **aboriginal intangible property**. Other legal and non-legal tools can be invoked to develop respectful relationships regarding these aboriginal intangible properties, and to protect them from inappropriate use outside the aboriginal communities where the knowledge is from.

Aboriginal Intangible Property is the term used in this paper to describe the traditional, indigenous knowledge held within aboriginal communities as their intellectual property.

The first inclination of many First Nations representatives, when faced with concerns about intellectual property in their cultural heritage, is to protect their cultural heritage from exploitation by people outside the communities on whom their social sanctions and practical effect of their customary law have limited or little effect.[2] On further inquiry, many First Nations people have special concerns about particular areas of cultural knowledge – private, sacred or community-owned songs, stories, images, performances – that they feel require protection from misappropriation and exploitation by their being documented and made available to a wider public. There are also deep concerns about non-community members making profits from their collective community traditions. Indeed, in the context of the overall socio-economic inequality aboriginal peoples find themselves in across Canada, this is often a fundamental concern.

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[1] The author would like to thank Wayne Shinya, Department of Canadian Heritage for his useful guidance in framing the case presented by this report within the context of copyright policy development in Canada. The report expresses the views of the author and not necessarily those of the Department of Canadian Heritage or the Government of Canada. The report does not purport to give legal advice.

[2] Though there are some concerns about young aboriginal people expressing the subjects of their communities' intangible properties inappropriately, there are long-standing and powerful social mechanisms – aboriginal customary laws and protocols – which deal with these concerns in the face-to-face settings of life in aboriginal communities.

Many aboriginal elders and leaders want their children to learn the languages and cultural practices they are trying to protect. One key objective of intellectual property law, including copyright, is to encourage the dissemination and access to the creative and original expressions of individual creators, balancing protection for the creators of these works with public access to them. Such legal tools, when applied carefully in establishing relationships between First Nations communities and researchers or others wishing to document these cultural expressions, may be very helpful in balancing the goals of ensuring information is available in recorded form for future generations, while offering some control to the community over the dissemination of research and access to economic benefits from it.

This report is a case study of how a group of Coast Salish First Nations in British Columbia entered into a formal arrangement with a university and its researchers to document their endangered language and publish resources to encourage the revitalization of the language and culture, while addressing their concerns about protecting and respecting their Aboriginal intangible properties. The arrangement took the form of a memorandum of understanding between the First Nations and the university, and related contracts between the First Nation and individual researchers. It is a potential model that other Aboriginal organizations, academic institutions or government agencies may wish to consider in addressing some of these concerns.

A First Nations' Goal in protecting Intangible Property

In 2004, the six First Nations communities[3] of the Hul'qumi'num Treaty Group (HTG) became successful participants on a $1 million, five-year collaborative research grant[4] (CURA) with the Linguistics Department of the University of Victoria (UVic). The leaders and staff from the member First Nations and the university were enthusiastic to begin a significant project to bring language revitalization efforts into the community while pushing forward significant academic research on a unique and endangered aboriginal language.

Step 1: Determine research goals that benefit both community and research partners. State these goals in the pre-amble of any agreements to give context for future interpretation.

As co-applicants on this collaborative, community-based research project, HTG and the University of Victoria planned to coordinate efforts towards language revitalization, provide community members with training in the linguistic concepts

[3] The member First Nations of the Hul'qumi'num Treaty Group include Cowichan Tribes, Chemainus First Nation, Penelakut Tribe, Lyackson First Nation, Halalt First Nation and Lake Cowichan First Nation. In 2006, there are approximately 6,200 members, roughly half living on-reserve. The Hul'qumi'num Treaty Group is an organization that represents all six First Nations in talks with Canada and British Columbia to resolve outstanding land claims and self-government negotiations.

[4] Social Sciences and Humanities Research Council (SSHRC) Community-University Research Alliance grant, "Language revitalization in Vancouver Island Salish communities: a multimedia approach", 2003-4 award year.

and methods needed to further language revitalization efforts, facilitate amongst students the learning of the *Hul'q'umi'num'* language, and contribute to developing language revitalization techniques for use in other communities.

However, members of an elders advisory group expressed concerns about how the academic researchers would treat the knowledge of language and culture they would be sharing. The elders wished to ensure that the Hul'qumi'num peoples' customary stories and related teachings did not become the property of UVic or the CURA supported or affiliated researchers. Particularly, they did not want outside researchers to make money off their traditional knowledge, and particularly any oral narratives that the researchers may record during their work. The rationale was rooted in both the economic disadvantage these First Nations are in relative to neighboring non-native communities, and their long-standing sense of community propriety over their cultural traditions.

Second, the elders also wanted to protect very special forms of their knowledge held by families as their intangible property. Protecting these forms of knowledge is rooted in the ongoing customary laws of the community. These laws are largely respected and upheld by community members – young and old – through the face-to-face social mechanisms and sanctions familiar in many smaller communities. In the elders' experience, it is much more difficult to hold people external to their communities accountable to these customary laws. Issues of cultural appropriation and cultural respect by outsiders are serious concerns. Also a concern is the potential social (or spiritual) impacts if private, family held knowledge was mis-acquired or misused by other community members as a result of it being made widely available through the research project.

Step 2: Listen carefully to community and elders' concerns. Try to sort out what the core issues are. Articulate these concerns in the pre-amble of any agreement so everyone is clear on the core issues.

These concerns emphasized a tension in researching and documenting aboriginal culture and language. While the communities and elders wanted to ensure these things continue to be vibrant for future generations, they did not want specific aspects of the information shared to be exploited or to be used in culturally inappropriate ways. The university-based research proponents were sensitive to these issues, and did not want to find themselves unintentionally violating the trust or confidentiality that comes with respecting cultural protocols.

As part of the terms of the CURA funding agreement, an elders advisory board was established to discuss issues arising from the research. The funding agreement also required that representatives from the First Nation and the University sit together on a steering committee to provide practical advice on the direction of the research. All of the individuals participating in these bodies felt that a guiding agreement to protect the aboriginal intangible properties and establish a respectful relationship concerning the future of the stories and cultural knowledge documented in the research process as needed.

Creating Respect for Aboriginal Intangible Property: Inter-Institutional Arrangements

To achieve the goals of respecting and protecting intangible properties, the University researchers and First Nations community drafted a mutually agreeable legal framework. This framework consisted of a Memorandum of Understanding (MoU) between the University of Victoria (signed by the vice-principal of research and the six Chiefs of the HTG communities), and a template Contract for researchers (Contract).[5] These documents set out how Hul'qumi'num intangible property would be respected in the conduct of research, creating common understandings and contractual obligations between the parties, with a clear articulation of the intellectual property interests of the First Nations communities as they relate to the work that the linguists would do.

Step 3: Determine how the relationship(s) for the protection and respect of aboriginal intangible property will be laid out. In a research setting, a MoU between the First Nation and University, with binding contracts for researchers can be an effective tool.

A MoU is a form of agreement between parties.[6] It sets out the ways the parties agree to operate or do business. It does not strongly bind parties in the way a contract does, but can be drawn on to facilitate and maintain relationships, setting out on paper mutual understandings that can guide future actions and decisions with respect to the work that has to be done. A contract is a legal covenant between parties. It is a legally binding relationship that can be enforceable in a court of law. A contract can establish the rights and privileges of each party.

In this case the MoU sets out the relationship between the HTG and UVic on how the aboriginal intangible property of the community would be protected and respected in the language revitalization research that would be done. It is like a handshake between the university and the First Nation regarding ways that researchers and community partners supported by the CURA will interact with respect to aboriginal intangible property.

The MoU is made more effective in concert with a contract that researchers must enter into when doing research supported by or affiliated with the project. Without these contracts, the individual researchers cannot operate with the support of the CURA partners. The HTG and UVic partners felt that this combination of a MoU between institutions and individual researcher contracts could be effectively used to protect cultural information,

[5] A copy of the MoU and contract for researchers can be viewed on the web at: http://www.hulquminum.bc.ca/languages.html

[6] There are many types of Memorandum of Understanding (MoU). For example, the Treasury Board of Canada states in part that a MoU is "[a]n agreement between interested parties establishing their respective rights and responsibilities regarding a project and serving as a basis for a future formal contract." See Treasury of Canada Secretariat, http://www.tbs-sct.gc.ca

while meeting research and local language and culture reinvigoration goals.

While the MoU terminates at the end of the CURA project (in this case, a 5-year term), the contract is binding until dissolved in writing, is unassignable, and binds any successor in interest to either the researcher or the HTG. It was not essential to have the MoU extend past the life of the research project because it governs the relationship during the course of the research. The contract for researchers needs to be in effect for the long-term, as the information recorded will need to be covered by the terms of the agreement in perpetuity.

Step 4: Decide on mutually agreeable terms. Consider practical short-term needs for working together, as well as long-term relationships for protecting and respecting Aboriginal intangible property.

Building Capacity in Aboriginal Governments to Protect Aboriginal Intangible Property

Aboriginal intangible property is dynamic, complex and requires dialogue and understanding to effectively protect and respect in a research context. Although informal and personal relationships are important and develop in almost every setting, First Nations will benefit from adding a degree of formality to their relationships with researchers in areas of decision-making around protecting and respecting Aboriginal intangible property. This can be in the form of elders committees, steering committees or stakeholder committees. An elders committee can provide a level of expert knowledge and experience that is essential for making good decisions. A steering committee can include important political leadership who have an understanding of the larger economic and political context that the research is being done in. A stakeholder committee can be formed of community experts, band or tribal council staff who can provide valuable technical input. When the roles of these groups are well defined, and the ways they interact with researchers set out in a MoU, they can provide a solid and inclusive basis of support and guidance for the research.

The HTG-UVic MoU sets out a process for the communities and the researchers to work together to make informed decisions about prioritizing and approving research questions put forward. The HTG community members and UVic researchers had the benefit of having developed a strategic plan for language revitalization[7] that recommended a wide range of short- medium- and long-term language revitalization research activities. This strategic plan – developed by elders, language educators and university linguists and unanimously adopted by the chiefs – provides a road map to community priorities in research activities.

Step 5: Build good systems of communications to address Aboriginal intangible property concerns. Elders committees, steering committees and stakeholder committees with clear terms of reference can be effective and inclusive means to address issues as they arise.

[7] The Hul'qumi'num language revitaliztaion strategic plan can be found on the web at: http://www.hulquminum.bc.ca/Printable_Files/htg-language-strategic-plan.pdf. A paper describing the process in creating the strategic plan is available at: http://home.istar.ca/~bthom/icsnl2002-edited.htm.

The MoU states that for any project to be carried out under the banner of the CURA partnership or with the CURA funds, the First Nation partners have the opportunity to identify any Aboriginal intangible property concerns they may have. The decision-making process must minimally include the following considerations:

a) The development by potential researchers of an academic- and community-informed research plan (including budget), with explicit reference being made in any such plan as to how the project will meet the strategic language revitalization goals, and how the research project will meet stated theoretical goals for linguistic research;
b) An initial review of these research plans by a steering committee of academic and community partners, and an advisory board of elders. (Both of these bodies are formally defined as governing bodies for the CURA project in the terms of the SSHRC research grant);
c) A review of the research plan by an *ac hoc* committee of stakeholders such as language-teachers, curriculum development staff, or others as appropriate;
d) Final approval of the research plan is made by the steering committee, after consideration of any advice and direction from the elders and stakeholders committee.

The above-noted process has proven successful in addressing the concerns of the participants early in the project. One researcher approached the CURA project with a plan to document and provide a linguistic analysis of "Indian Names" – hereditary names passed on to individuals who have the appropriate ancestry. Though academically quite interesting, the project proposal was rejected because of concerns raised by the elders committee and the stakeholder committee over the implications of inventorying and publishing lists of names. A core concern was that making lists of hereditary names available may result in young people making inappropriate claims to names that would otherwise have to be obtained through consultation with elders who know the bounds of appropriate family histories for the names. With this decision-making structure set out in the MoU, research activities were directed elsewhere *before* Aboriginal intangible property concerns became potential problems for both the First Nation community and the researchers.

Informed Consent as a means to protect Aboriginal Intangible Property

Informed consent is an important ethical principle of any community-based research today.[8] Informed consent involves making sure that people contributing their knowledge to the research project understand the purpose, methods and expected benefits of the research, as well as any potential risks or inconveniences (if any), assurances of confidentiality or anonymity, and their rights to withdraw from the research at any time. In gaining informed

[8] Much research funded in Canada requires that researchers obtain the informed consent of people involved in research. See the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans for details: http://www.pre.ethics.gc.ca/english/policystatement/policystatement.cfm.

consent of individual participants in the research, it is critical for them to know what will happen to the information they collect, including to what degree the information may be made public, both in the short and the long term. Clearly explaining the issue of who may have access to the information shared at the time of gaining informed consent is another important step in making sure aboriginal intangible property holders make informed decisions about what they choose to share.

The HTG-UVic MoU establishes that written informed consent of individual community members who take part in the project and provide information must be secured before engaging in research and recordings. Researchers are provided with a "Consent to Participate (Elders)" form on HTG letterhead to facilitate their obtaining written informed consent. The front side of the page contains a written description of the research project, the methods for the individual research and a clear description of how the research will be used and made public in the short and long term. The back of the form is a signature page for both the community knowledge-holder and the researcher to acknowledge that informed consent has been given.

Step 6: Use the informed consent process to clearly explain how information may be made public. Knowing who may be able to see the information in the future can guide aboriginal knowledge-holders in deciding what information to divulge.

Copyright for Aboriginal Governments, Limited Publication Licence for Researchers

Once the research is approved by the community and the informed consent to participate is given by aboriginal knowledge-holders, the tape recorders and video cameras get turned on and the researchers' notebooks come out. It is at this moment, where the traditional cultural expressions of the aboriginal community are captured in fixed form by the researchers that conventional intellectual property law – specifically *copyright* law – comes into play.

The *Copyright Act* provides protection for new works (such as a song, painting or book) based on traditional stories, myths, legends, folklore and other traditional cultural expressions. Copyright provides the copyright holder with a number of rights, including the right to control the production, reproduction, translation, performance, or publication of the work. In general, copyright lasts for 50 years after the death of the author of the work or the performer of a tradition-based performance.

Audio Recordings & Copyright: If an oral narrative is given by an elder is audio-recorded by a researcher, the copyright holder of the fixed form of the performance – the audio-recording and its derivatives such as notes or written excerpts – usually belongs to the researchers. Contracts may be used to clarify any copyright interests the First Nation may wish to have addressed.

Protection is provided for the *expression* of the idea, for example the performance or writing

of an idea, not the idea itself. This is a key point to remember, as it is usually[9] the case in research and interview settings that copyright is held by the *interviewer*, not the *interviewee*. Indeed Canadian copyright law authority Normand Tamaro has written that"... the fundamental principles of copyright permits the attribution of copyright to the person who interviews."[10] Because of this circumstance, participants in collaborative research need to be very clear about who holds copyright to the materials created in the course of the research.

Many Aboriginal people have argued that it should be the community itself who benefits from any copyright in such productions and performances of traditional cultural expressions. Institutions that represent the community collectively, such as a First Nations band or tribal council, may be the appropriate holders of these copyrights.

The HTG grappled with these issues in designing the MoU and contract for researchers. In the MoU, HTG and UVic agree that the University of Victoria Intellectual Property Policy Manual applies to the activities carried out under the CURA project, but that the UVic policy is subject to the terms of the MoU and the researcher contracts.[11] So, while university affiliated researchers are bound to the terms of their work with UVic, they are also bound to the terms of the MoU and contract with HTG, and that the MoU and contracts take priority.

The MoU next requires that in the process of gaining informed consent, the CURA supported or affiliated researchers obtain a release of the information being shared from the interviewee (the person being recorded) to the HTG. In this release, the HTG asks the interviewee to stipulate any restrictions they may wish to attach to HTG's future use of this information. It is the policy of the HTG to indefinitely respect any restrictions on use of information shared, while recognizing that any recordings made are at the discretion of the HTG.

[9] There are special rules that apply if it is song being performed and recorded. In songs, the performer retains some exclusive rights to control the recording of the song and authorizing making copies of the recordings. If musical performances are being considered, researchers and First Nations should make efforts to inform themselves about the way the copyright law (which is currently undergoing changes) deals with them.

[10] Page 342 in Normand Tamaro's (2005) *The 2006 Annotated Copyright Act.* Toronto: Thomson, Carswell.

[11] The UVic Intellectual Property Policy Manual, ; number 1180 approved November 2000, can be found on the web at: http://web.uvic.ca/uvic-policies/pol-1000/1180IP.html.

Example of wording for confirming release of interviewee ownership interests and any restrictions interviewee may wish to place on its use.

I, _____, donate to the [First Nation] the audio tape recordings and written transcripts of interviews of myself which took place on the dates listed below.

- ❑ I transfer full title and all literary rights to this material to the [First Nation] and understand that use of these materials will be as outlined on the attached letter.
- ❑ I wish to place the following restrictions on the transfer of title of these materials (ie: review or correct before use; contact myself or designee for permission to use for purposes other than those outlined in the letter; do not release materials for uses other than those agreed to for *n* years, etc.):

This release of any literary title of the interviewee is intended to cover-off any copyright that the community-member interviewee may have had as author of the work.

Step 7: Clarify who owns the copyright in audio-recordings with both the aboriginal knowledge-holders, and with the researchers making notes and recordings. These issues can be clarified in the consent forms and researcher contract.

The MoU and contract for researchers also establish a mechanism for copyright in the recorded works to be vested in the HTG. The MoU and researcher contract stipulates that originals of all audio/visual recordings (digital and analogue formats) will be owned and possessed by the HTG. Copies of all notes, transcripts, photos, and other records of the research will be held by the HTG. Copies of all audio/visual recordings and originals of notes, transcripts, photos and other records will be kept by the CURA supported or affiliated researchers. The contract confirms that the researcher has ownership of her analysis, original thoughts and other such creative work resulting from her research. This mechanism interacts with the copyright law to provide clarity around ownership of the data recorded; linguistic research by the researcher, performance of culture by the aboriginal community. It attempts to achieve the goal of continued control of the material by the First Nation community in order to ensure that the results of the work are available locally for future generations.

Step 8: Make sure that everyone has a common understanding of what will happen to the recordings and notes in the long-term, and ensure that any public access or confidentiality issues are addressed.

To ensure longevity and academic accessibility of the recorded notes and tapes, the MoU and contract demand that researchers use a permanent repository for their research materials. Researchers must ensure that, as a condition of the deposition of their research records, the repository will provide access to the First Nations members and that the

repository will adhere to any confidentiality or use restrictions made by the individual community members.

As collaborators in the language revitalization project, the university researchers have an interest in publishing academic articles, books, educational print, web and multimedia materials. These kinds of publication are the heart of the academic establishment, and are a proven and effective way to disseminate important cultural and linguistic knowledge to younger generations wanting to participate in the revival of their culture. To balance the holding of copyright by the First Nation, and the desire by all parties to have publications come out of the project, the MoU provides researchers with a licence to use and publish most information collected for educational and scholarly purposes, providing that two copies of all publications, conference papers and other works are deposited with the Hul'qumi'num Treaty Group.

Step 9: Balance First Nation control of intellectual property with a limited licence for researchers to create scholarly and educational publications, works that are an essential part of revitalizing aboriginal cultures and languages.

Respecting the wishes of the Elders who have long felt socially and economically disenfranchised from mainstream Canadian society, the UVic and HTG partners agreed that CURA supported or affiliated researchers should not personally acquire any royalties from publishing materials containing Hul'qumi'num stories, myths, legends, folklore, oral traditions and other traditional knowledge. The MoU and contract require that researchers will not personally receive royalties or monies tantamount to royalties from publishing materials that contain these works. As academic or educational publications rarely provide royalties for individual researchers, this was not seen by university researchers as a serious concern. In the case of potential book publications, the steering committee has not yet decided on an appropriate community venue to receive potential royalties, though there have been discussions amongst some committee members of establishing a non-profit culture and heritage society.

Step 10: Define any limits on royalties that may be made by researchers from publication of Aboriginal intangible properties. Provisions in a MoU and contract can clearly establish these limits.

The licence to publish is also restricted by prohibiting certain defined categories of private and sacred aboriginal knowledge from publication, and by ensuring researchers and presses make no claim of copyright on myths, legends and folklore. These two important limitations are discussed below.

Understanding and Protecting Aboriginal Categories of Cultural Knowledge

While the assignment of copyright over the recordings and written texts produced as part of the research process can help sort out benefits and distribution rights for materials that everyone agrees should be made public, it does not deal with the Aboriginal intangible

properties that are not intended for broad public consumption. A mechanism is required to establish respectful avoidance of more sacred or private forms of aboriginal knowledge. The challenge in this is defining on paper – to codify – the types of knowledge that need to be avoided. This takes a significant understanding of the cultural practices of the community and the ability to articulate these in a way that can be clear and useful in a contract.

The MoU sets out guidelines for researchers to not record very specific categories of aboriginal knowledge that are locally acknowledged as intangible property. Specifically, ritual power words, family-owned stories and ritual prerogatives, and private family ritual and technical knowledge – all of which defined succinctly using *Hul'q'umi'num'* language terms – are specified as areas that researchers commit to not record. The specific provision in the MoU states:

Step 11: Set out areas of cultural knowledge that are "off-limits" to researchers, and provide ample ways for them to recognize these kinds of Aboriginal intangible property.

> CURA supported or affiliated researchers will respect customary Coast Salish family property laws. To facilitate this, the Parties agree that CURA supported or affiliated researchers will endeavour to, where reasonably possible, not record known Coast Salish customary intangible properties such as *si'win (ritual power words)*, or *ts'exwten (family-owned stories and ritual prerogatives)*, or the details of *snew' (private family ritual and technical knowledge)* respecting private and confidential sacred matters.

To provide additional guidance for researchers, and the various reviewing committees, *si'win*, *ts'exwten*, and *snew'* are all further described within the agreement. A mechanism is also provided for researchers to seek the guidance of elders if they are uncertain about any materials they have worked on.

If such confidential information is recorded, even if the informed consent of the individual providing the information is given, the contract requires that the researcher make all reasonable efforts to not publish it, or take any actions that would have the effect of placing it in the public sphere (such as placing their notes or tapes containing this information in a public archive), where the general public potentially has access to the material. In order to give such a commitment life beyond the length of the research project, these protections are set out as surviving indefinitely into the future, notwithstanding termination of the contract (which can occur with 30 days notice). Since these Aboriginal intangible properties were at the heart of the cultural concerns expressed by the elders in entering into the research relationship, these provisions were

Step 12: Make a firm covenant that holds researchers to their commitment not to publish or make available private and sacred knowledge that they may have documented in the course of their research.

designed to be the strongest, most long-term and binding.

This has been the most difficult part of the agreement to implement from the perspective of the community members participating on the elders, steering and stakeholders committees. The younger people do not always know or fully understand these categories of knowledge. The older people often have more subtle and refined senses of what these terms (especially the term *ts'exwten*) mean, and are often deeply engaged in family or community practices surrounding their teaching and use. The reaction has been to be cautious when evaluating whether a project considers any of these areas.

Understanding and Protecting Collective Community Knowledge

By setting aside certain categories of aboriginal knowledge for avoidance by researcher, the MoU deals with the interests of not commercializing or disseminating private and sacred information. These categories of aboriginal knowledge are a very narrow selection of a vast cultural tradition. In embarking on a multi-year language revitalization project, the elders and leaders of the community did not intend to keep everything private. There is a great deal more – from word lists to traditional stories, myths and legends – that they wanted to share and disseminate to their younger generations, while ensuring that people from outside the community do not enrich themselves through the publication or performance of these cultural traditions.

Myths, legends and folklore – called *sxwi'em'* in the *Hul'q'umi'num'* language – are defined in the MoU as being the collective intangible property of the community as a whole. This is distinct from the private and sacred family properties described above, in that these are aboriginal intangible properties rooted in the culture and tradition of everyone in the community.

Step 13: Collective community property rights in oral traditions can be protected by requiring that in publishing them, no claim of copyright is made by the researchers or press on the stories themselves.

As a mechanism for preventing non-community members from making intellectual property claims to these stories, the MoU defines and sets them aside as the acknowledged property of the Hul'qumi'num community. While the limited licence provided to the researchers to publish includes the publication of these stories, the MoU and contract require that any publication must disclaim any potential assertion of intellectual property over them. The MoU and contract specify that any publication done for scholarly and educational purposes will include the following provision: "The text of the stories, myths, legends, and folklore belong to the Hul'qumi'num people

and therefore no claim of copyright or exclusive rights is made upon them."[12]

Legal scholars Robert Patterson and Dennis Karjala have pointed out that it is unlikely that copyright claims by a researcher or press to published oral narratives would stand up, because "under traditional copyright a work is protected only to the extent that it is original to the purported author... the copyright does not cover any of the individual narratives, because the collector is not the author of any of them" (638-9).[13] The "no claim of copyright" clause in the MoU and contract does give some clarity and certainty to everyone that this is indeed the case.

In concert, these two limits on the publication licence provided to the researchers help achieve the dual goals of encouraging teaching, research and revitalization of the First Nation's language and culture, while providing a degree of security and protection for their Aboriginal intangible property by ensuring the First Nation has a limited monopoly to the distribution and potential economic benefits of the information using tools available in Canadian law.[14] Age-old customary laws concerning these intangible properties continue to handle local cultural property concerns between families and individuals within the communities.

Assessment to date & suggestions for further development

To date, the MoUbetween HTG and UVic has been in force for just over a year. It has helped establish respectful relationships between the UVic researchers and community elders, providing clarity around sensitive issues that may have otherwise been points of contention. Such MoUs and contracts may be a potential way for other First Nations to deal with their intellectual property concerns.

The MoU and contract system is not, however, the perfect solution to all Aboriginal intangible property concerns. Though the terms of the contracts and MoU may be more straightforward to enforce over during the course of the government-funded research project, it will be less easy for the First Nation members to monitor issues over the longer-

[12] This model of not claiming copyright on aboriginal oral traditions was adapted from the copyright notice in the successful publication of a compilation and analysis of Coast Salish oral traditions from Puget Sound, Washington in the book *Lushootseed Texts: An Introduction to Puget Salish Narrative Aesthetics*, edited by Crisca Bierwert (1996) Lincoln: University of Nebraska Press.

[13] Robert Paterson and Dennis Karjala (2003) Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples. *Cardozo Journal of International and Comparative Law*. Volume 11:633-670.

[14] These ideas are very usefully discussed by legal scholar Christine Farley (1997) Protecting Folklore of Indigneous Peoples: Is Intellectual Property the Answer? *Connecticut Law Review* 30(1):1-57. See especially the concluding discussion on page 56 on using copyright and contracts to facilitate the dissemination of information while protecting a First Nation's interests in publishing and economic benefits.

term. Also, there have been some challenges in interpreting some of the boundaries placed around the different categories of aboriginal intangible property, such as knowing the extent of family-owned stories within the canon of oral literature. These have of necessity been oversimplified through codifying them as defined terms in the MoU and contract. Further refinement of drafting or the development of support resources may help address these concerns.

A more fundamental concern is the lack of ability of such contractual arrangements around research practice and intellectual property to offer protection to aboriginal intangible properties that are not covered by intellectual property law such as copyright. These intellectual property tools do not protect all oral traditions, only the expressions or performances of the oral traditions by individuals. The protection that copyright does provide is time-limited and does not prevent derivative works from being produced by others. It may be, in future, that the intellectual property legal framework in Canada includes a broader, blanket protection for aboriginal intangible properties. While that larger debate continues, practical steps such as these ones can be followed to address specific concerns of First Nations communities.

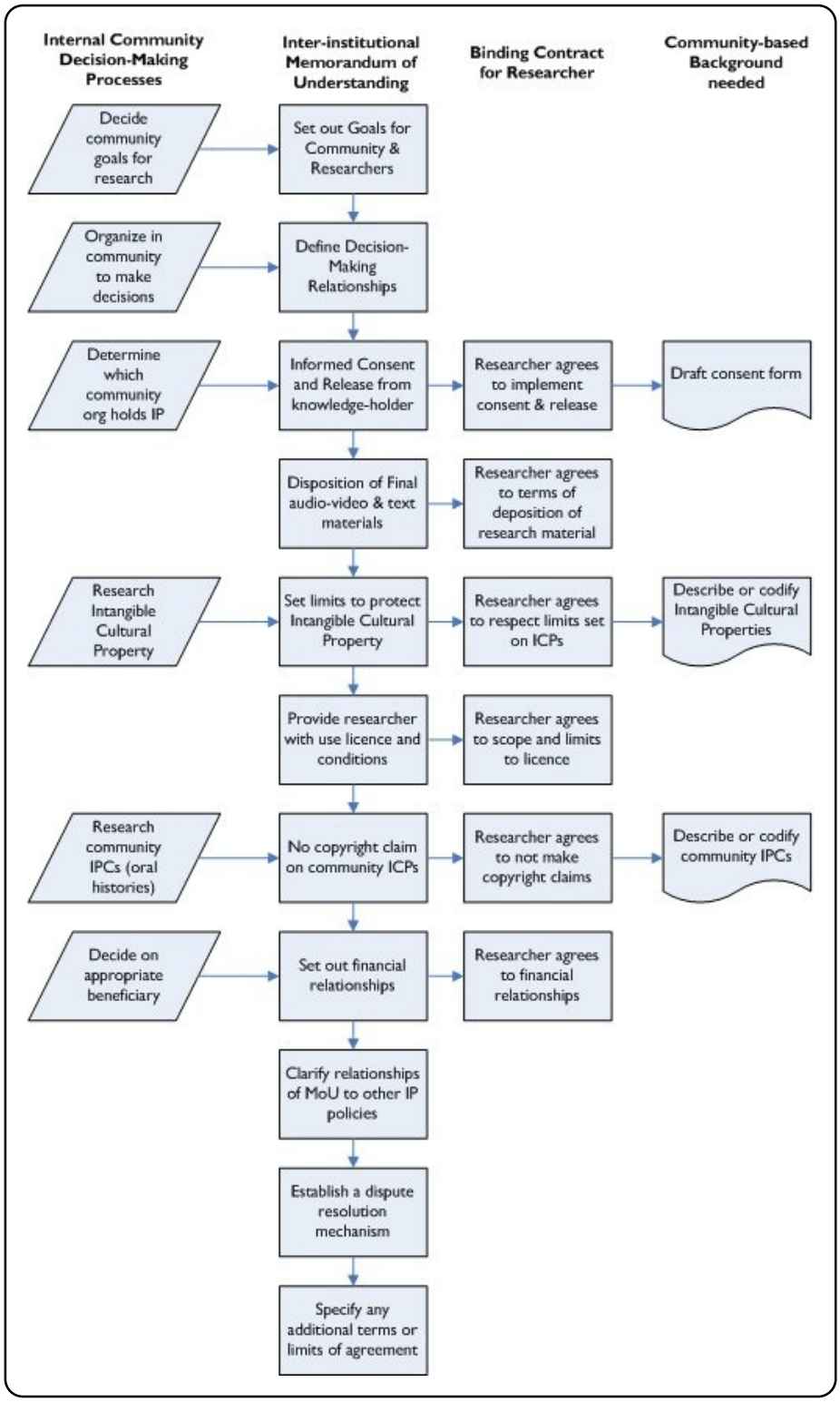
Prominent intellectual property scholar and critic Michael Brown has strongly supported "efforts to create basic mechanisms for the compensation of native peoples for commercial use of" aboriginal knowledge, performances, and creations. Equally necessary, he says, are clear guidelines for the collection of culturally sensitive ethnographic data." (1999:204)[15] The HTG-UVic MoU and contract for researchers are just such mechanisms, providing through legal agreements a balance between protection of aboriginal intangible properties and dissemination of aboriginal culture and language to future generations. Aboriginal communities and the researchers who collaborate with them need to talk about these things in informed and meaningful ways. It is hoped that this report provides communities with a model and a concrete example of its application to build respectful relationships in effectively protecting aboriginal intangible customary property.

[15] Michael Brown (1999) Can Culture Be Copyrighted? *Current Anthropology* 39(2):193-222.

About the Author

Brian Thom is Senior Negotiation Support for the Hul'qumi'num Treaty Group (HTG), advising and providing research support for the six member First Nations on land claims and self-government negotiations. He was one of the supporting community partners in the 2003-4 University of Victoria Community-University Research Alliance (CURA) application, and acted as an advisor to the CURA steering committee during its first year. He received his Ph.D. in anthropology from McGill University in 2005. He has written and published articles on local land tenure systems; social meanings of oral tradition; the role of culture in relations of power between the state and indigenous peoples; and Coast Salish culture and history. Dr. Thom has presented on Coast Salish customary intangible property at the WIPO North American Workshop on Intellectual Property and Traditional Knowledge (2003), and is co-author of Industry Canada's *Aboriginal Intangible Property in Canada: An Ethnographic Review* (2004) (http://strategis.ic.gc.ca/epic/Internet/inippd-dppi.nsf/en/h_ip01199e.html).

Appendix 1.
Elements of MoU and Contract, and community-based work needed to develop them.



Community processes, institutional understandings, contractual obligations, & background information required to develop respectful Aboriginal intangible property relations.