

DW²

Deeth Williams Wall



Helping Your Ideas Take Flight.

Indigenous Culture versus IP Rights: Ever, or Never, the Twain Shall Meet?

Madam Justice Fuhrer & Gary Daniel

October 21, 2020

Introduction and Acknowledgement

The information provided in this presentation is for informational purposes only and is copyright protected. © 2020. Deeth Williams Wall LLP / The Honourable Madam Justice Fuhrer, Federal Court of Canada. All rights reserved.



Overview

1. Sources of Law
2. Recent Treatment of Indigenous Rights
3. Indigenous Rights and IP Law
4. Introduction to Traditional Knowledge (TK)
5. Conflict Between Western IP Regime and TK
6. Difficulty of Protecting TK
7. Options for TK Protection
8. Conclusion

Sources of Law

Sources of Law

Indigenous Law

- Sacred Law
- Natural Law
- Deliberative Law
- Positivistic Law
- Customary Law

Non-Indigenous Law

- Legislation
- Jurisprudence
- Unwritten Sources of Law

Sources of Indigenous Law

Natural Law

- Laws that are “being written on earth” through nature and wildlife, the land, climate and weather, etc.

Sacred Law

- Laws are regarded as sacred if they stem from the Creator
- Creation stories in Indigenous legal traditions are a source of sacred law

Deliberative Law

- Indigenous legal tradition formed through the process of persuasion, deliberation, council, and discussion

Sources of Indigenous Law

Positivistic Law

- Political in Nature
- Made by proclamations from a person/group regarded by a sufficient number of people in the community as authoritative

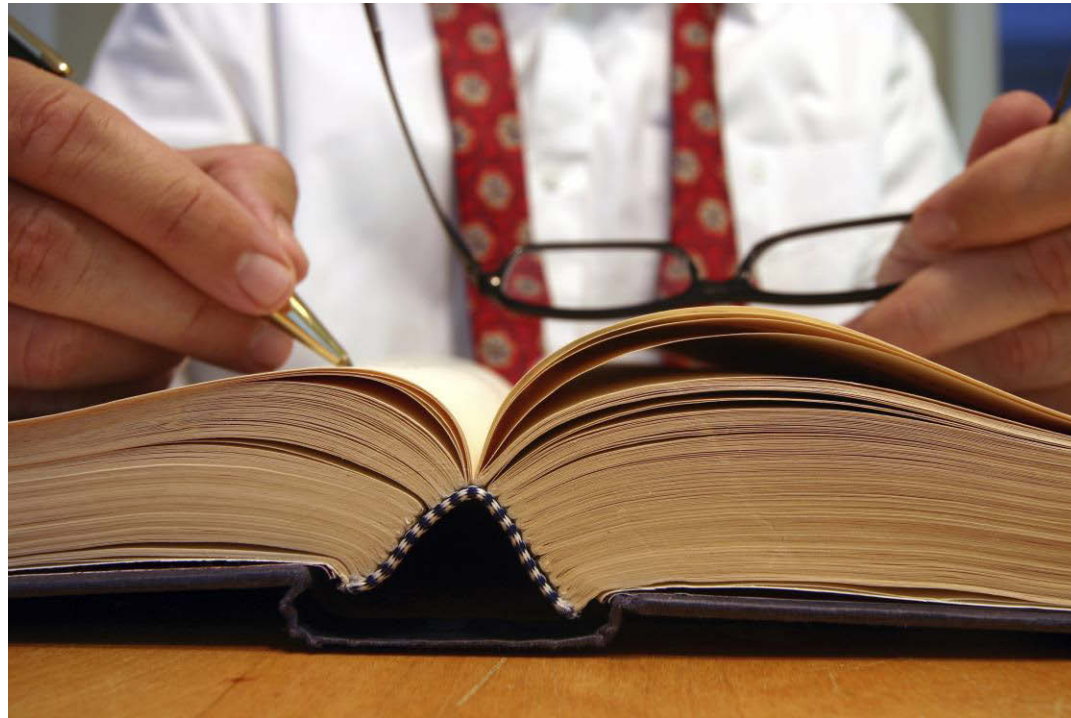
Customary Law

- Practices developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them

Recent Treatment of Indigenous Rights

History and the Constitution

Constitution Act - amended in 1982 and section 35(1) was added which stated that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”



International Treaties

United Nations Declaration on the Rights of Indigenous Peoples (2007)

“The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,¹ by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.”

International Treaties

United Nations Declaration on the Rights of Indigenous Peoples (2007)

- Article 1: Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms
- Article 31(1): Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expression. They also have the right to control, protect, and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional expressions
- Article 11 condemns past actions where “cultural, intellectual, religious and spiritual property [were] taken without their [i.e., Indigenous Peoples’] free, prior and informed consent or in violation of their laws, traditions and customs.”
- Article 24 asserts that Indigenous peoples have the right to their traditional medical knowledge
- Endorsed by Canada in 2016

WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, (2018), Art 31(1)

Indigenous Rights and IP Law

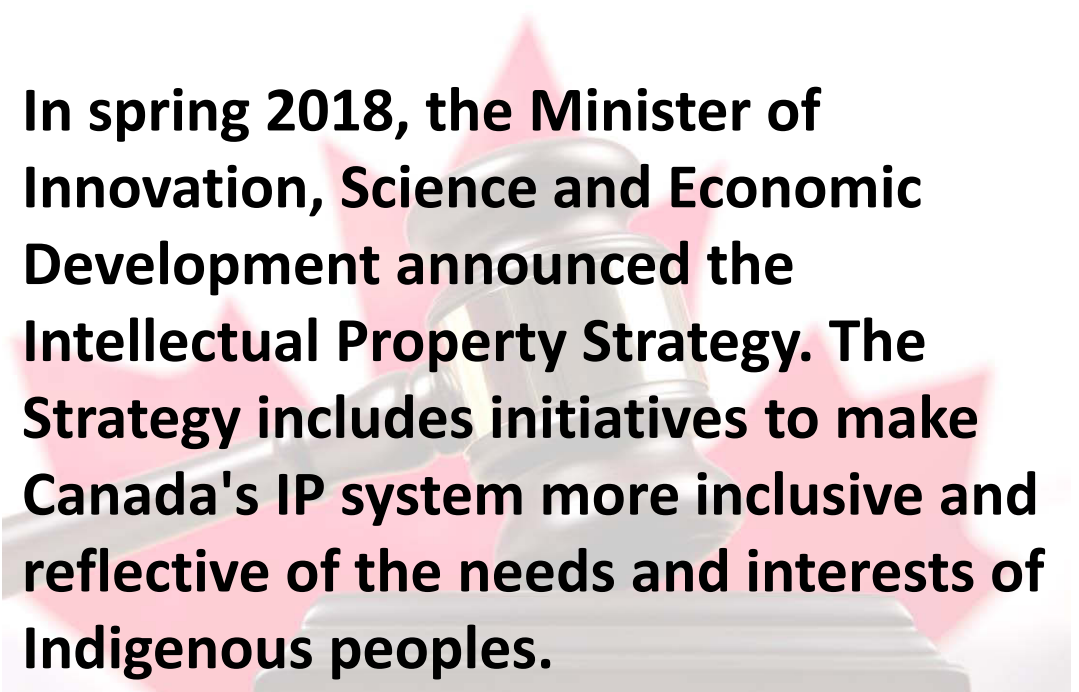
Current IP Law in Canada

- No mention of Indigenous rights in any of our IP regimes or legislation
- There is a lack of protection or recognition of Indigenous IP rights in Canada
- International treaties are not automatically incorporated into Canadian legislation
- Need for dialogue with Indigenous people
- Duty to Consult



Current IP Law in Canada

- No mention of Indigenous rights in any of our IP regimes or legislation
- There is a lack of protection or recognition of Indigenous IP rights in Canada
- International treaties are not automatically incorporated into Canadian legislation
- Need for dialogue with Indigenous people
- Duty to Consult



In spring 2018, the Minister of Innovation, Science and Economic Development announced the Intellectual Property Strategy. The Strategy includes initiatives to make Canada's IP system more inclusive and reflective of the needs and interests of Indigenous peoples.

Why Protect Indigenous Cultural Expressions?

- Limit cultural appropriation and biopiracy
- International treaties recognize Indigenous rights in protecting traditional cultural expressions
- Show good faith to repair generational harm and prevent further negative effects of colonization
- UN Declaration Preamble

Trade Secrets

- Several Indigenous traditions and cultural expressions have been kept a secret from non-Indigenous people
 - Ex. Ceremonies, art, stories, herbal remedies/medicines



Patent Law

- **Australia:** Smokebush medicinal plant used to create HIV treatment
- **Kalahari Desert:** San people would eat a succulent called Hoodia on long sacred migrations through the desert
- **Hawaii:** Taro Plant as part of the Indigenous group's cosmogenic story
- **Peru:** Napo Pharmaceuticals developed Mytesi and Crofelemer drugs-derived from the red sap of *C. lechleri* with anti-inflammatory, anti-microbial, anti-cancer properties, also a digestive aid
- **USA:** Paclitaxel is an anti-cancer drug developed from the bark of the Pacific Yew Tree

Copyright Law

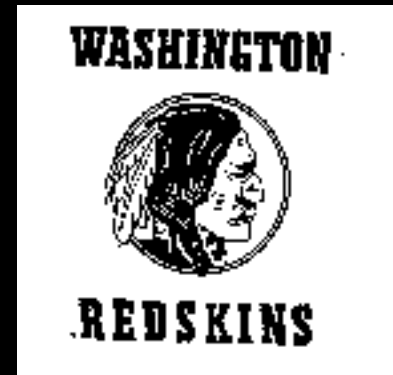
- Issue of meeting authorship and fixation requirements
 - *Canadian Admiral Corp. v. Rediffusion Inc.*, [1954] Ex. C.R. 382 (Ex. Ct.)
- Term/Termination
- Moral Rights



Trademarks

Several trademarks have been found to be offensive by the Indigenous Community

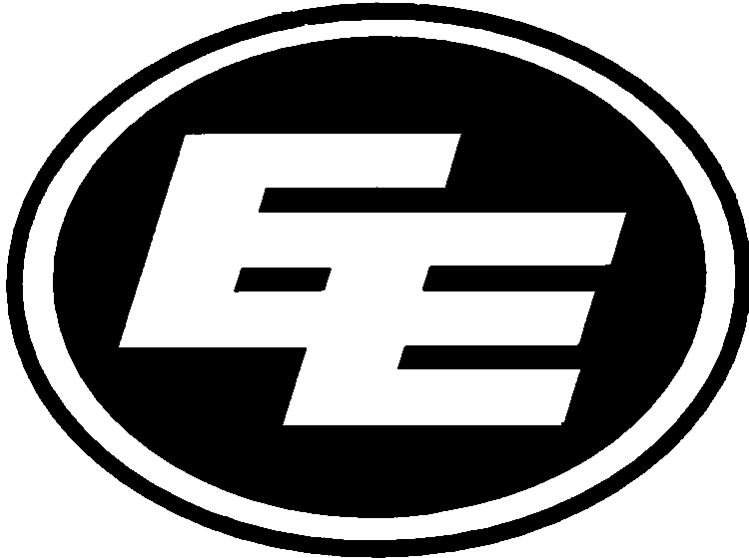
*Pro-Football, Inc. v. Harjo, 567
F.Supp.2d 46, 62 (D.D.C. 2008)*



*Cardinal v Cleveland Indians Baseball
Company Limited Partnership, 2016
ONSC 6929*



Trademarks



Trademarks

Protecting symbols associated with the Indigenous community

- Ex. Snuneynuxw Nanaimo First Nation- Registered 10 Petroglyphs under the Act as official marks
- Certification Marks- Ex. Genuine Cowichan Sweaters

Trademarks

British Columbia

Indigenous designers in B.C. outraged over claims of authenticity by non-Indigenous competitor



Vancouver's Chloë Angus has marketed her company as partially Indigenous owned. That isn't true



[Bethany Lindsay](#) · CBC News · Posted: Sep 30, 2020 1:00 AM PT | Last Updated: September 30

Trademarks

Protecting symbols associated with the Indigenous community

[image can be found here]

<https://www.cosmopolitan.com/uk/fashion/style/news/a42534/free-people-appropriation-native-american-culture/>

Geographical indication of origin?

Trademarks

Existing Arguably Analogous Protections

Stolen Valour – *Criminal Code*

419 Every person is guilty of an offence punishable on summary conviction who, without lawful authority...

(b) wears a distinctive mark relating to wounds received or service performed in war, or a military medal, ribbon, badge, chevron or any decoration or order that is awarded for war services, or any imitation thereof, or any mark or device or thing that is likely to be mistaken for any such mark, medal, ribbon, badge, chevron, decoration or order...

Prohibited Marks – *Trademarks Act*

9 (1) No person shall adopt in connection with a business, as a trademark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for...

(d) any word or symbol likely to lead to the belief that the goods or services in association with which it is used have received, or are produced, sold or performed under, royal, vice-regal or governmental patronage, approval or authority...

(j) any scandalous, obscene or immoral word or device....

Constitutional Considerations

Free Speech



Use vs. Registration



International IP Examples

- **Australia:** *Milpurrurru v Indofurn Pty Ltd 1994 FCA 975*
- **USA:** The federal statute governing trademarks and unfair competition prohibits registration of marks that consist of “matter which may disparage...persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”
- **New Zealand:** Offers the *current* gold-standard of legislated trademark protection for Indigenous peoples



Introduction to Traditional Knowledge (TK)

Traditional Knowledge

Defining TK

- There is no concise or generally accepted definition
- TK refers to the knowledge, innovations, and practice of Indigenous and local communities, which have extended histories of interaction with the natural environment
- TK may be experience gained over centuries and adapted to the local culture and environment
- It is transmitted orally between generations
- It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, etc.

Traditional Knowledge

Defining TK

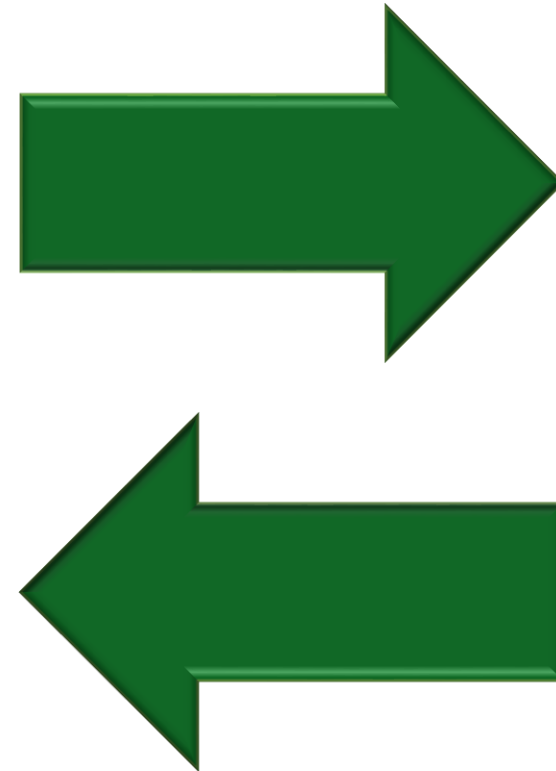
The World Intellectual Property Organization (WIPO):

Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity

Conflict Between Western IP Regime and TK

Conflict with Western Notions of Knowledge and Property

- **Western IP rights** promote innovation and creativity, while also promoting commercial use of the new knowledge and inventions
 - Use of legal monopolies granted to creative individuals
 - Knowledge developed in isolation
- **TK is very different** from the notion of Western IP rights
 - TK is not necessarily commercialized
 - Knowledge is treated as a communal endeavor: developed through relationships between or among others and the land



Value of Traditional Knowledge

TK holds great value that warrants IP protection

- The Truth and Reconciliation Commission of Canada (TRC) recognized the value of TK:
 - It used TK as a guide when writing its report
 - The TRC emphasized the importance of oral history and TK for Indigenous law and identity
 - Protecting TK may assist in the reconciliation process

Protecting Traditional Knowledge

- **The primary purpose** of protecting TK is to provide its “owners” with some prospect of economic development and control of their knowledge and cultural identity
- **Benefits of Protection:**
 - Promotes innovation through the dissemination of knowledge
 - Opportunity to learn from Indigenous groups who have sustainably used biological resources for generations
 - Economic value to Indigenous groups and developing nations

Difficulty of Protecting TK

Difficulty of Protecting Traditional Knowledge

The Issue of Definition

- Difficult to provide protection for that which is not easily identified or specified
- However, a more comprehensive definition will make it harder to design an appropriate protection regime
- Restricting TK to a particular area is problematic, for TK is constantly changing

The Issue of Context

- Each Indigenous group tends to be associated with a particular territory and form of TK
- Defining the concepts associated with TK risks abstracting it from the underlying contexts that give it meaning

Difficulty of Protecting Traditional Knowledge

The Issue of Cost

- Protection levels and registration procedures for various types of IP vary significantly across jurisdictions
- Often necessary to have professional advice for registration
- May have to apply in more than one jurisdiction

The Issue of Privatizing TK

- IP protection could remove the social basis for generating and managing TK, which opposes the communal nature of TK
- Privatization may impede future development of TK

Options for TK Protection

Options for Traditional Knowledge Protection

TK Licenses

- Practical means for Indigenous groups to define the circulation routes and access obligations for digitally available TK
- Limited to material that is subject to copyright



Options for Traditional Knowledge Protection

TK Prior Art Databases

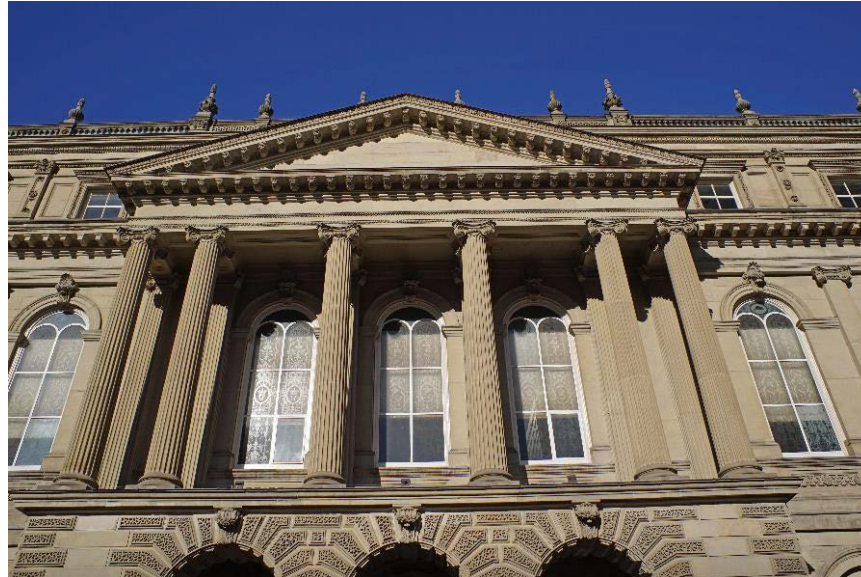
- India – Traditional Knowledge Digital Library
- China – Traditional Chinese Medicine Patent Database for Examiners
- South Korea – Korean Traditional Knowledge Portal



Options for Traditional Knowledge Protection

Private Actors

- Libraries, museums, and archives control large amounts of Indigenous artifacts and works
- They can work with Indigenous groups to ensure representations of TK are accessed in ways to preserve cultural value



Options for Traditional Knowledge Protection

Sui Generis Systems

- Established in countries around the world, including India, the Philippines, and Peru
- To be effective, it requires:
 - Incorporation of legal concepts from both IP and non-IP areas
 - The coordination of various levels of government
 - Balance of defensive and positive protection values



Options for Traditional Knowledge Protection

TK Protocols

- Used to control when and how TK is used in regulatory hearings
- Includes:
 - Prior informed consent to undertake TK project
 - Confidentiality provisions
 - Non-derogation of s. 35 rights under the *Constitution Act*
 - Benefit sharing
 - The recognition of community ownership over all generated knowledge

Options for Traditional Knowledge Protection

WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

- Plans to finalize an agreement on international legal instrument(s) to ensure the balanced and effective protection of TK and traditional cultural expressions.



Acknowledgements

The presenters gratefully acknowledge Juliette Sakran, former Student-at-Law of Deeth Williams Wall LLP, for her contribution to this presentation, which was partially derived from an internal presentation given by her on this topic in 2020.

References

- Canadian Association of University Teachers, “Copyright Act review an opportunity to press feds on Aboriginal issues” (Oct 2016) CAUT, at online: <<https://www.caut.ca/bulletin/2016/10/copyright-act-review-opportunity-press-feds-aboriginal-issues>>.
- Alice Diver, “A just war: protecting indigenous cultural property” (July 2004) 6:4 Indigenous Law Bulletin at 7.
- Janet M Fuhrer & Joanna Pitkin, “The Case for Traditional Knowledge: Forget-me-not!” (Presentation delivered at Canadian Bar Association, Yukon Branch, February 2016).
- Janet M Fuhrer & Paul Seaman, “Cultural Issues and Traditional Knowledge: The Impact of the Modern IP Regime” (Presentation delivered at the Law Society of Upper Canada 21st Annual Intellectual Property Law: The Year in Review, 20 January 2017).
- Stephen Gray, “Vampires around the campfire” (1997) 22:1 Alternative Law J, at online: <https://heinonlineorg.lawlibrary.laws.uwindsor.ca/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/alterl22&men_hide=false&men_tab=toc&kind=&page=60>.
- Terri Janke, “From smokebush to spinifex: Towards recognition of Indigenous knowledge in the commercialisation of plants” (2018) 2018:1 Intl J Rural L & Policy 1-37, online: <<https://epress.lib.uts.edu.au/journals/index.php/ijrlp/article/view/5713/6337>>.
- Mallika Kallingal, “Land O’ Lakes replaces Native American woman logo, touts farmer-owned credentials instead” (17 April, 2020) CNN, at online: <<https://www.cnn.com/2020/04/17/us/landolakes-logo-change-trnd/index.html>>.
- Andrea Lesperance, “Indigenous rights affected by Canada’s Copyright Act: Issues and Opportunities” (8 Jun 2017) ABS Canada, at online: <<https://www.abs-canada.org/uncategorized/indigenous-rights-affected-by-canadas-copyright-act-issues-and-opportunities/>>.
- Bethany Lindsay, “Indigenous designers in B.C. outraged over claims of authenticity by non-Indigenous competitor” (30 September 2020), *CBC News*, online: <<https://www.cbc.ca/news/canada/british-columbia/bc-chloe-angus-non-indigenous-fashion-designer-1.5742507>>.
- Lucas Lixinski, “Rights of Indigenous peoples: Collective rights”(2017) 111:1 Am J Int Law at 147.
- Ian Vincent McGonigle, “Patenting nature or protecting culture? Ethnopharmacology and indigenous intellectual property rights” (2016) 3:1 J Law and the Biosciences, at online: <<https://academic.oup.com/jlb/article/3>>.
- Mike Masnick, “Mexican Government Says Starbucks Can’t Use Images of Mexican Artifacts on Mugs Without Paying Up” (10 May 2010) *Techdirt*, at online: <<https://www.techdirt.com/articles/20100510/0247477668.shtml>>.
- C Sorgen, “Non-Traditional medical treatments grow in popularity as patients and healthcare organizations find new arrangements” (1998) 76:1 Hospital Topics, online at: <https://search-proquest-com.ledproxy2.uwindsor.ca/docview/57807367?rfr_id=info%3Axri%2Fsid%3Aprimo>.
- Sima Sahar Zerehi, “KTZ Fashion under fire for using Inuit design without family’s consent” (25 Nov 2015) *CBC News*, at online: <<https://www.cbc.ca/news/canada/north/ktz-fashion-inuit-design-1.3337047>>.

Conclusion

Questions?

Madam Justice Fuhrer
Federal Court/Cour fédérale
Ottawa, ON K1A 0H9

Gary Daniel
Counsel
(416) 941-9201
gdaniel@dww.com

Deeth Williams Wall LLP
Lawyers, Patent & Trademark Agents

DWW.com

The information provided in this presentation is for informational purposes only and is copyright protected. © 2020. Deeth Williams Wall LLP / The Honourable Madam Justice Fuhrer, Federal Court of Canada. All rights reserved.

