

# CHALLENGES IN USING ABORIGINAL TRADITIONAL KNOWLEDGE IN THE COURTS

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Aboriginal traditional knowledge has governed Aboriginal Peoples<sup>1</sup> relationships with themselves and their world since time immemorial. The problem is the recognition of that knowledge within Canadian society and in particular the legal system. Canada's Assembly of First Nations (AFN) describes three definitions of *aboriginal traditional knowledge* (ATK):

Aboriginal Traditional Knowledge is not a concept that is easily defined or categorized. However, it can be generally described as the customary ways in which aboriginal peoples have done or continue to do certain things or activities, as well as the new ideas or ways of doing things that have been developed by Aboriginal peoples which respect their traditions, cultures and practices. Many of these customary ways have been passed on from generation to generation and are considered sacred. This unique body of knowledge is culturally based, context specific, holistic and differs from nation to nation.

The Royal Commission on Aboriginal People (1996) has also described indigenous knowledge as "oral culture in the form of stories and myths, coded and organized by knowledge systems for interpreting information and guiding action ... a dual purpose to manage lands and resources and to affirm and reinforce one's relationship to the earth and its inhabitants."

ATK can also be seen as the summation of all knowledge, information, and traditional perspectives relating to the skills, understandings, expertises, facts, familiarities, justified beliefs, revelations, and observations that are owned, controlled, created, preserved, and disseminated by a particular Indigenous nation. ATK is comprised of a holistic body of knowledge and it remains the sole right of the community to determine what knowledge establishes their ATK.

It is important to note that these are general definitions and do not necessarily reflect or conform to the definitions held by ATK holders.<sup>2</sup>

The entry points for ATK in Canadian courts can be grouped into three categories:

1. Court Review of government action under legislation referencing ATK; and
2. Court Review under the common law doctrine of the Crown's duty to consult and accommodate Aboriginal Peoples.
3. Aboriginal rights claims, aboriginal title and criminal defence of "wildlife charges".

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<sup>1</sup> In this paper this term refers to First Nations, Inuit and Métis Peoples.

<sup>2</sup> Assembly of First Nations (AFN), *Aboriginal Traditional Knowledge and Intellectual Property Rights* (Ottawa: 2011) at 3, online: <[http://www.afn.ca/uploads/files/env/atk\\_and\\_ip\\_considerations.pdf](http://www.afn.ca/uploads/files/env/atk_and_ip_considerations.pdf)> (Accessed 19 February 2015).

## PACKAGING ATK

Despite admonitions of the highest authority in *Delgamuukw v. British Columbia*<sup>3</sup> lower courts have been and continue to be reluctant to accept and consider ATK. There may be many reasons for this, including the oral transmission nature of ATK that runs afoul of the hearsay. While courts and tribunals may not follow the standard or revised evidentiary rules (e.g. *Delgamuukw*) the definitional issues, and oral nature of ATK prompts situation in which ATK being given little weight.

In response to this attitude, aboriginal litigants have resorted to studies of ATK such as Traditional Land Use Studies, historical studies, etc. and engaged experts in related fields to collect and opine on them.<sup>4</sup> With few experts in ATK, this second hand collection of ATK by way of expert reports risks the attendant misunderstandings and issues.<sup>5</sup> While a tradition has arisen in aboriginal litigation since *Delgamuukw* to present a Aboriginal Peoples members first,<sup>6</sup> ATK if it is included has been generally packaged by experts. This is an expensive and cumbersome process leading to some situations where relevant ATK is not advanced including, among others, financial constraints or confidentiality concerns.

## COURT REVIEW OF GOVERNMENT ACTIONS UNDER STATUTES THAT REFERENCE ATK

The two-dozen Canadian statutes that reference *aboriginal traditional knowledge* (ATK)<sup>7</sup> in the environmental context, do not define what that term means. These statutes fall into

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<sup>3</sup> [1997] 3 SCR 1010, 153 DLR. (4th) 193 at para 84 [*Delgamuukw*], “adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts.” See also para 87.

<sup>4</sup> *Tsilhqot’in Nation v British Columbia*, 2007 BCSC 1700 (CanLII), Executive Summary: “Evidence was tendered in the fields of archeology, anthropology, history, cartography, hydrology, wildlife ecology, ethnoecology, ethnobotany, biology, linguistics, forestry and forest ecology.”

<sup>5</sup> For an elaboration on the difficulties these experts face, see Arthur Ray, *Telling it to the Judge Taking Native History to Court* (Montreal: McGill-Queen’s University Press, 2011) ch 8 at 145-159.

<sup>6</sup> *Ibid* at 28.

<sup>7</sup> Search term “aboriginal traditional knowledge” conducted on 19 February 2015. We have limited this discussion to the environment but note that this search flagged legislation relating to *human* health, social work and customary election codes under the *Indian Act*, RSC 1985, c I-5.

several categories: environmental protection,<sup>8</sup> environmental assessment,<sup>9</sup> oceans,<sup>10</sup> marine conservation areas,<sup>11</sup> wildlife conservation,<sup>12</sup> species protection<sup>13</sup> including migratory birds,<sup>14</sup> knowledge in the Arctic,<sup>15</sup> surface and water rights in the North,<sup>16</sup> land

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<sup>8</sup> *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, in the Preamble and s 247 alternative qualification for Review Officers that consider appeals from persons under an environmental order. *Environment Act*, RSY 2002, c 76, Tri-Annual State of Environment Report's intended to establish early warning, baseline determinations and ongoing accountability of the Ministry and under s 48(1)(b) shall "incorporate the traditional knowledge of Yukon First Nation members as it relates to the environment; under s 51(2) Educational materials should include the same. Section 53 speaks of partnership with First Nations including using the knowledge and experience of FN.

<sup>9</sup> *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [CEAA]; s 19(3) may take into account "community knowledge and Aboriginal traditional knowledge" in conducting environmental assessments, as well *First Nations Oil and Gas Environmental Assessment Regulations*, SOR/2007-272, s 11(2) notably s 42(6)(b) protects "information whose disclosure would result in the public becoming aware of aboriginal traditional knowledge that a first nation has always treated in a confidential manner."

<sup>10</sup> *Oceans Act*, SC 1996, c 31, s 42(j) Minister may "(j) conduct studies to obtain traditional ecological knowledge for the purpose of understanding oceans and their living resources and ecosystems."

<sup>11</sup> *Canada National Marine Conservation Areas Act*, SC 2002, c 18, preamble and s 8(3) the government may establish facilities to "conduct scientific research ... and carry out studies based on traditional ecological knowledge, including traditional aboriginal ecological knowledge, in relation to marine conservation areas."

<sup>12</sup> *Wildlife Act*, RSNWT 1988, c W-4; s 2(1)(d) principles including "traditional Aboriginal values and practices in relation to harvesting and conservation of wildlife are to be recognized and valued" (e) best available information, including traditional, scientific and local knowledge to be used. Section 2(2) "local knowledge" includes a person's knowledge about wildlife or habitat acquired through experience or observation. Section 168 (1)(b) prohibit disclosure of traditional knowledge if requested. *Wildlife Act*, SNU 2003, c 26 has the most extensive discussion of ATK.

<sup>13</sup> *Species at Risk Act*, SC 2002, c 29, [SARA] Preamble; s 10.2(c) Stewardship Action Plan must include "methods for sharing information about species at risk, including community and aboriginal traditional knowledge, that respect, preserve and maintain knowledge and promote their wider application with the approval of the holders of such knowledge, with other governments and persons"; A Committee on the Status of Endangered Wildlife in Canada (COSWIC) is established in s 14 and members can include holders of "aboriginal traditional knowledge of the conservation of wildlife species." Under s 15(2) COSWIC must operate on the "best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge." COSWIC must establish an Aboriginal Traditional Knowledge sub-committee in s 18. Provinces have a similarly structured acts: *Endangered Species Act*, 2007, SO 2007, c 6; *Species at Risk Act*, SNB 2012, c 6; *Endangered Species Act*, SNS 1998, c 11 where species list changes based on "scientific information and traditional knowledge as documented in peer reviewed status reports"; *Species at Risk (NWT) Act*, SNWT 2009, c 16.

<sup>14</sup> *Migratory Birds Convention Act, 1994*, SC 1994, c 22 amending the Migratory Bird Treaty (1918) to provide in Article II that conservation principals include: "aboriginal and indigenous knowledge, institutions and practices".

<sup>15</sup> *Canadian Polar Commission Act*, SC 1991, s 2 "knowledge" includes traditional and aboriginal knowledge.

<sup>16</sup> *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, SC 2002, c 10, s 119 "due regard and weight shall be given to Inuit culture, customs and knowledge." *Mackenzie Valley Resource Management Act*, SC 1998, c 25, Aboriginal land and water boards shall consider aboriginal traditional knowledge. *Surface Rights Board Act*, SNWT 2014, s 11 alternate Board Membership qualification, s 32(b) hearing shall take into

planning in Northern Ontario,<sup>17</sup> nuclear waste disposal,<sup>18</sup> and game conservation under modern land claim agreements.<sup>19</sup>

### Statutory Bearers of Traditional Knowledge

Only the Ontario *Endangered Species Act*<sup>20</sup> statutes define aboriginal by reference to section 35(2) of the *Constitution Act, 1982*<sup>21</sup> while the remaining statutes are silent when using the word aboriginal.

The common formulation in statutes is *aboriginal traditional knowledge* however some use *community knowledge*<sup>22</sup> in addition or in one case *local knowledge*<sup>23</sup> as a replacement. These formulations will allow consideration of non-aboriginal traditional knowledge under those statutes. It is noteworthy that the *Oceans Act* speaks only of traditional ecological knowledge<sup>24</sup> while the *Canada National Marine Conservation Areas Act* includes aboriginal traditional ecological knowledge as a sub-category of traditional ecological knowledge.<sup>25</sup>

In terms of rights to or authority to advance ATK, the relevant aboriginal group would generally hold such knowledge, as an aboriginal right on a communal basis as outlined in *Behn v. Moulton Contracting Ltd.*<sup>26</sup> One aspect of ATK is its diffuse nature, with some knowledge being restricted to certain families and held in confidence within that aboriginal group.<sup>27</sup> This may accord with Supreme Court's statement in *Behn* that:

It will suffice to acknowledge that, despite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual

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account any relevant aboriginal traditional knowledge, s 90 Board can make rules on admission of aboriginal traditional knowledge. [*Emphasis added*]

<sup>17</sup> *Far North Act, 2010*, SO 2010, c 18, s 6 First Nations “may contribute their traditional knowledge and perspectives on protection and conservation for the purposes of land use planning under this Act.”

<sup>18</sup> *Nuclear Fuel Waste Act*, SC 2002, c 23, s 8(2)(b.1) members of advisory council “reflects expertise in traditional aboriginal knowledge.”

<sup>19</sup> *Tsawwassen First Nation Final Agreement Act*, SBC 2007, c 39, Schedule – Chapter 10, clause 43 where the Provincial Minister in approving Wildlife Harvest Plans will take into account scientific *and* aboriginal traditional knowledge of “Wildlife populations, numbers, health, distribution and methods for managing Wildlife” [*emphasis added*]. See also Implementing legislation (CQLR c M-35.1.2, r 1) for Quebec’s *New Relationship with the Crees of Québec* (2014).

<sup>20</sup> *Supra* note 11 at s 2(1).

<sup>21</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution*].

<sup>22</sup> *Supra* notes 10 and 11.

<sup>23</sup> *Supra* note 12.

<sup>24</sup> *Supra* notes 10. This may be a reference to the long history of non-aboriginal fisheries.

<sup>25</sup> *Supra* note 11. It is interesting that the maritime regimes speak of *ecological* knowledge.

<sup>26</sup> [2013] 2 SCR 227, 2013 SCC 26 (CanLII) at para 33 [*Behn*].

<sup>27</sup> For an analogy consider the idea of a “favourite fishing hole” who’s location is kept secret and only disclosed in confidence to other qualified or ‘proper’ persons.

members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature. Nothing more need be said at this time.<sup>28</sup>

Thus, identifying relevant ATK may require additional enquiries, beyond the general knowledge of the aboriginal group, as to who may hold additional knowledge. There are provisions in ATK legislation that could protect the confidentiality of ATK such as section 42(6)(b) in the *First Nations Oil and Gas Environmental Assessment Regulations*,<sup>29</sup> section 10.2(c) of *Species at Risk Act*<sup>30</sup> and the Northwest Territories' *Wildlife Act*,<sup>31</sup> section 168(1)(b). Creative agreements or Court Orders could also be structured to protect ATK but without them holders of confidential ATK may be reluctant to advance it.

### Statutory Preambles and Purpose Sections

References to ATK in the preamble of federal legislation can be found in the *Canada National Marine Conservation Areas Act*,<sup>32</sup> *Canadian Environmental Protection Act, 1999*,<sup>33</sup> *Species at Risk Act*,<sup>34</sup> and provincially the *Species at Risk (NWT) Act*.<sup>35</sup> As noted in *Quebec (Attorney General) v. Moses*,<sup>36</sup> the section 13 of the federal *Interpretation Act* provides:

13. The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.<sup>37</sup>

Therefore “a legislative preamble will never be determinative of the issue of legislative intent since the statute must always be interpreted holistically, it can nevertheless assist in the interpretation of the legislature’s intention.”<sup>38</sup>

What then of purpose statements in ATK legislation, which are a clear indication of the legislature’s intent?<sup>39</sup> The *Canadian Environmental Assessment Act, 2012 (CEAA)* contains a purpose statement in section 4<sup>40</sup> that has yet to receive judicial consideration, however the predecessor legislation the *Canadian Environmental Assessment Act*<sup>41</sup>

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<sup>28</sup> *Supra* note 26 at para 37.

<sup>29</sup> *Supra* note 13.

<sup>30</sup> *Supra* note 13

<sup>31</sup> *Supra* note 12.

<sup>32</sup> *Supra* note 11.

<sup>33</sup> *Supra* note 8.

<sup>34</sup> *SARA*, *supra* note 13.

<sup>35</sup> *Ibid.*

<sup>36</sup> [2010] 1 SCR 557, 2010 SCC 17 (CanLII) [*Moses*].

<sup>37</sup> RSC 1985, c I-21. Section 11 of the *Interpretation Act*, RSNWT 1988, c I-8 is identical.

<sup>38</sup> *Moses*, *supra* note 36 at para 101.

<sup>39</sup> *Canada (Minister of the Environment) v Bennett Environmental Inc*, 2005 FCA 261 (CanLII) at para 63.

<sup>40</sup> *CEEA supra* note 9, s 4.

<sup>41</sup> SC 1992, c 37.

contained a similar purpose statement that was the subject of varying interpretations. In *Environmental Resource Centre v. Canada (Minister of Environment)*, a 2001 decision, the Federal Court stated:

Section 4 imposes no duties on the MOE [Minister of the Environment] nor does it state how she is to discharge her duties under the Act. It is a statement of general principle. The MOE does not breach this section and the submissions alleging an error of law in relation to section 4 are without foundation.<sup>42</sup>

However in *Union of Nova Scotia Indians v. Canada (Attorney General)*, a 1996 decision in an aboriginal context, the Federal Court said:

The applicants also urge that the Ministers were required to conduct a careful and reasonable assessment of the project in light of para. 4(a) of the *CEAA* which specifies, among other purposes of the Act, “to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them”. I accept that standard as consistent with the purposes and the processes established by the Act.<sup>43</sup>

It is arguable that in an aboriginal context that *CEAA* would, given the purpose statement invites greater Court scrutiny of government decisions. This contention is supported by *Moses*, that involves a decision as to applicability of *CEAA* under the James Bay Land Claim Settlement where the Supreme Court of Canada said,

[45] Accordingly, unlike the Quebec Court of Appeal, I do not believe the correct outcome here is to substitute the Section 22 Treaty procedure in place of the statutory procedure required by the *CEAA*. The *CEAA* procedure governs but, of course, it must be applied by the federal government in a way that fully respects the Crown’s duty to consult the Cree on matters affecting their James Bay Treaty rights in accordance with the principles established in *Haida Nation v. British Columbia (Minister of Forests)*, ... *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, ... and in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage* [citations omitted].<sup>44</sup>

It should be noted that the current Federal Policy, the *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (2011)* states at page 25:

The environmental review process is generally viewed by Aboriginal groups and third parties ... As the most effective method managed by the Crown to identify environmental effects of proposed activities and related changes.<sup>45</sup>

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<sup>42</sup> 2001 FCT 1423 (CanLII) at para 141.

<sup>43</sup> 1996 CanLII 11847 (FC), 122 FTR. 81 at paragraph 35 [*Union of Nova Scotia Indians*].

<sup>44</sup> *Moses*, *supra* note 36 at para 45.

<sup>45</sup> *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Ottawa: Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011) [Federal Consultation Policy], online: <[http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui\\_1100100014665\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf)>.



The federal *Species at Risk Act (SARA)* contains a purpose in section 6 which states:

6. The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.<sup>46</sup>

This purpose statement has been interpreted in *Adam v. Canada (Environment)*.<sup>47</sup> *Adam* was a judicial review application on a Decision Statement by the Minister of the Environment to not include Alberta Woodland Caribou on a list of species at risk. The Federal Court said,

Given all of the information that was specifically addressed in the Decision, it was not a reviewable error for the Minister to have failed to have specifically addressed the objectives of the *SARA* in his Decision. In my view, the manner in which the Decision addressed the relevant scientific and other information in the Certified Record was not inconsistent with the purposes of the *SARA*, [in section 6].<sup>48</sup>

The implication being that if the Minister had not addressed that information in his Decision that would be a reviewable error and indeed by failing to address an emergency request without justification the Minister committed a reviewable error.<sup>49</sup> It is noteworthy in *Adam* that pursuant to ATK the “First Nations Applicants have voluntarily stopped hunting boreal caribou, in an attempt to address the current threat to the caribou’s survival and recovery.”<sup>50</sup>

The purpose statement in section 4 of the *Migratory Birds Convention Act, 1994*<sup>51</sup> was interpreted simpliciter in *Animal Alliance of Canada v. Canada (Attorney General)*.<sup>52</sup> Other ATK acts that contain purpose statements include the *Canada National Marine Conservation Areas Act*,<sup>53</sup> *Canadian Polar Commission Act*,<sup>54</sup> Ontario’s *Endangered Species Act*,<sup>55</sup> Nova Scotia’s *Endangered Species Act*,<sup>56</sup> New Brunswick’s *Species at Risk Act*,<sup>57</sup> Ontario’s *Far North Act, 2010*,<sup>58</sup> *Species at Risk (NWT) Act*<sup>59</sup> and Inuvit’s *Wildlife*

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<sup>46</sup> *Supra* note 13, s 6.

<sup>47</sup> 2011 FC 962 (CanLII) [*Adam*].

<sup>48</sup> *Ibid* at para 65.

<sup>49</sup> *Ibid* at paras 66-67.

<sup>50</sup> *Ibid* at para 33 v.

<sup>51</sup> *Supra* note 14, s 4.

<sup>52</sup> [1999] 4 FCR 72, 1999 CanLII 8154 (FC).

<sup>53</sup> *Supra* note 11, s 4.

<sup>54</sup> *Supra* note 15, s 4.

<sup>55</sup> *Supra* note 13, s 1.

<sup>56</sup> *Ibid*, s 2. In *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests)*, 2003 BCCA 403 (CanLII) the Court commented on Nova Scotia’s inclusion of the precautionary principle.

<sup>57</sup> *Ibid*, s 2.

<sup>58</sup> *Supra* note 19, s 1.

<sup>59</sup> *Supra* note 13, s 9.

Act,<sup>60</sup> have yet to receive judicial consideration.

### Permissive Legislation

The importance of Preambles and purpose statements comes from the nature of ATK legislation. Most of the ATK legislation is phrased *permissively* either by giving discretion to a government to consider ATK and confining ATK to an advisory role.

In a maritime context, ATK is limited to educational purposes. In the *Oceans Act* section 42(j) says the Minister may “conduct studies to obtain traditional ecological knowledge for the purpose of understanding oceans and their living resources and ecosystems.”<sup>61</sup> In the *Canada National Marine Conservation Areas Act*, section 8(3) states “The Minister may maintain and operate facilities and carry out operations and activities to achieve the purposes of this Act, and may conduct scientific research and monitoring and carry out studies based on traditional ecological knowledge, including traditional aboriginal ecological knowledge, in relation to marine conservation areas.”<sup>62</sup> The *Canadian Polar Commission Act* establishes a commission whose “purpose of the Commission is to promote the development and dissemination of knowledge [including ATK] in respect of the polar regions.”<sup>63</sup>

In *CEAA*, the only reference to ATK is in section 19(3) that provides:

19(3) The environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge [emphasis added].<sup>64</sup>

This is contrast to section 19(1) where:

19(1) The environmental assessment of a designated project must take into account the following factors:

(a) the environmental effects of the designated project ...

(j) any other matter relevant to the environmental assessment ... [emphasis added].<sup>65</sup>

Likewise, section 11(1) of the *First Nations Oil and Gas Environmental Assessment Regulations* lists factors that must be considered and section 11(2) states “The environmental assessment may also consider community knowledge and aboriginal

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<sup>60</sup> *Supra* note 12 at 8.

<sup>61</sup> *Supra* note 10.

<sup>62</sup> *Supra* note 11.

<sup>63</sup> *Supra* note 10, s 4 [edit added].

<sup>64</sup> *Supra* note 9.

<sup>65</sup> *Ibid.*

traditional knowledge.”<sup>66</sup> In the *Canadian Environmental Protection Act, 1999*<sup>67</sup> the only reference to ATK is to an alternate qualification for Review Officers under section 247. The Ontario *Far North Act, 2010* only reference to ATK is in section 6 which reads, “First Nations may contribute their traditional knowledge and perspectives on protection and conservation for the purposes of land use planning under this Act” [emphasis added].<sup>68</sup>

That being said, particularly when developments are undertaken within the traditional areas of Aboriginal People,<sup>69</sup> in practice some consideration is given to ATK under the doctrine of the Crown’s duty to consult and accommodate Aboriginal Peoples discussed below.

### Species at Risk Acts

SARA, and provincial equivalents, represent a special case. The general scheme under SARA is the listing of at risk species into various categories by way of committees established for that purpose. The listing of a species can change and if it meets legislated standards that status will engage mandatory plans to curtail exploitation, habitat destruction or recovery plans.

In SARA, the Preamble takes notice of ATK when it says “the traditional knowledge of the aboriginal peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures.”<sup>70</sup> SARA establishes a *Canadian Endangered Species Conservation Council* (CESPCC) in section 7 comprise entirely of government ministers or their delegates.<sup>71</sup> The role of the CESPCC is to “provide general direction on the activities of COSEWIC [the Committee on the Status of Endangered Wildlife in Canada], the preparation of recovery strategies and the preparation and implementation of action plans” and to coordinate government activities.<sup>72</sup> SARA directs the creation of a “National Aboriginal Council on Species at Risk [NACSR], consisting of six representatives of the aboriginal peoples”<sup>73</sup> who would presumptively consider ATK but the role of NACSR is *limited to advising* the government’s CESPCC.

At the Minister’s discretion, after consulting with CESPCC, the Minister may create a public “stewardship action plan that creates incentives and other measures to support voluntary stewardship actions taken by any government in Canada, organization or person.”<sup>74</sup> The stewardship action plan is educational and must include commitments to,

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<sup>66</sup> *First Nations Oil and Gas Environmental Assessment Regulations*, SOR/2007-272.

<sup>67</sup> *Supra* note 8.

<sup>68</sup> *Supra* note 17.

<sup>69</sup> It has been estimated that some 75% of Canada’s planned megaprojects (\$100M+) will be in traditional areas.

<sup>70</sup> SARA, *supra* note 13.

<sup>71</sup> *Ibid*, s 7.

<sup>72</sup> *Ibid*. Edit to expand acronym in the legislation.

<sup>73</sup> *Ibid*, s 8.1. Acronym by way of edit.

<sup>74</sup> *Ibid*, s 10.1.

among other things, to “methods for sharing information about species at risk, including community and aboriginal traditional knowledge, that respect, preserve and maintain knowledge and promote their wider application with the approval of the holders of such knowledge, with other governments and persons.”<sup>75</sup>

Section 14 establishes a “Committee on the Status of Endangered Wildlife in Canada” (COSEWIC). The functions of COSEWIC include, periodically assessing the status of species<sup>76</sup> at risk, identify the existing or potential threats and classify each species as extinct, extirpated, endangered, threatened, of special concern or not at risk.<sup>77</sup> COSEWIC “must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and *aboriginal traditional knowledge*”<sup>78</sup> including a finding of insufficient knowledge.<sup>79</sup> Members of COSEWIC “must have expertise drawn from a discipline such as conservation biology, population dynamics, taxonomy, systematics or genetics or from community knowledge or *aboriginal traditional knowledge* of the conservation of wildlife species.”<sup>80</sup> COSEWIC must establish a “subcommittee specializing in *aboriginal traditional knowledge*”<sup>81</sup> whose chairperson and members will be appointed by the Minister after consultation with aboriginal groups that she considers appropriate.<sup>82</sup>

Thus under *SARA*, aside from membership requirements, ATK consideration is confined to an advisory role. Provincial legislation follows the same model as *SARA*.<sup>83</sup>

## Mandatory Legislation

There are some provincial acts that mandate consideration of ATK, most notably in Nunavut’s *Wildlife Act*<sup>84</sup> and *Nunavut Waters and Nunavut Surface Rights Tribunal Act* in section 119 where “due regard and weight shall be given to Inuit culture, customs and knowledge.”<sup>85</sup> The *Mackenzie Valley Resource Management Act*, established Aboriginal land and water boards that shall consider aboriginal traditional knowledge. In the North West Territories *Surface Rights Board Act* hearings must take into account any relevant

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<sup>75</sup> *Ibid*, s 10.2(c)

<sup>76</sup> *Ibid*, s 2(1) defines “status report” means a report, prepared in accordance with the requirements of regulations made under subsection 21(2), that contains a summary of the best available information on the status of a wildlife species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.

<sup>77</sup> *Ibid*, s 15(1).

<sup>78</sup> *Ibid*, s 15(2) (emphasis added).

<sup>79</sup> *Ibid*, s 15(1)(1)(ii).

<sup>80</sup> *Ibid*, s 16(2) (emphasis added).

<sup>81</sup> *Ibid*, s 18(1) (emphasis added).

<sup>82</sup> *Ibid*, s 18(3).

<sup>83</sup> Ontario, Nova Scotia, New Brunswick and the Northwest Territory, see *supra* note 13.

<sup>84</sup> *Supra* note 12.

<sup>85</sup> *Supra* note 16.

aboriginal traditional knowledge.<sup>86</sup> Implementing legislation for modern land claims settlements can mandate consideration of ATK especially with respect to wildlife management with the First Nation parties.<sup>87</sup>

### Consideration of ATK

Whether framed in a mandatory fashion or permissive, there is little statutory guidance for Courts as to the relevance, weight or evidentiary standards regarding ATK. While rules of tribunals, such as the North West Territories *Surface Rights Board Act*, in section 90 can provide guidance as to ATK reception, recourse to the Court's administrative law concepts such as natural justice, proper reasons etc. appear to be the only mechanisms to advance ATK consideration in the Courts under ATK legislation.

### ATK AND THE CROWN'S DUTY TO CONSULT AND ACCOMMODATE

The Crown's duty to consult and accommodate Aboriginal Peoples is well established as part of Canadian law that governs decisions regarding matters that affect Aboriginal rights, lands and interests.<sup>88</sup> The leading authorities include *Haida Nation v. British Columbia (Minister of Forests)*,<sup>89</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,<sup>90</sup> and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005).<sup>91</sup> Together these cases make it clear that governments owe a duty to consult and accommodate Aboriginal Peoples' interests prior to making any government decisions that would impact them. There are aboriginal consultation policy instruments in every Canadian jurisdiction that provide direction to governments as to the existence of that duty, the acceptable delegation of procedural aspects to project proponents and standards of consultation and accommodation with Aboriginal Peoples in order to satisfy this duty.<sup>92</sup>

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<sup>86</sup> *Supra* note 16, s 32(b).

<sup>87</sup> *Tsawwassen First Nation Final Agreement Act*, SBC 2007, c 39, Schedule – Chapter 10 Wildlife Management Plans, para 43, Provincial Minister will take into account Tsawwassen First Nation ATK; *Maa-nulth First Nations Final Agreement Act*, SBC 2007, c 43, Schedule – Chapter 23, para 23.10.1 “consult with applicable Maa-nulth [FN] ATK”.

<sup>88</sup> David Laidlaw & Monique Passelac-Ross, *Alberta First Nations Consultation & Accommodation Handbook*, CIRL Occasional Paper #44 (Calgary: Canadian Institute of Resources Law, 2014) Part One [*Handbook*], online <<http://dspace.ucalgary.ca/jspui/bitstream/1880/50216/1/ConsultationHandbookOP44.pdf>>; also Chris W Sanderson, QC, Keith Bergner & Michelle S Jones, “The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty” (2011-2012) 49 *Alta L Rev* 821.

<sup>89</sup> 2004 SCC 73, [2004] 3 SCR 511 [*Haida*].

<sup>90</sup> 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

<sup>91</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew*].

<sup>92</sup> *Handbook*, *supra* note 80. See generally Part 3 and Appendix 4A & 4B.

In the process of consultation with governments under this doctrine, Aboriginal Peoples will deploy ATK to persuade governments about the seriousness of a claim and the impact of the proposed decision. If Aboriginal Peoples are dissatisfied by the actions of government – recourse may be had to the Courts. In those proceedings, analogies from administrative law are applicable and the standard of review would focus on the process.

Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable.<sup>93</sup>

As noted in the *Handbook*, litigation of this type is expensive and potentially futile, such that Aboriginal Peoples may be unwilling to engage in Court proceedings.<sup>94</sup> A good example of ATK playing a role in consultation litigation is *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*<sup>95</sup> in which a permit for coal mining exploration was quashed when it interfered with critical habitat of caribou a species that the West Moberly First Nation had suspended hunting, in accordance with its ATK.<sup>96</sup>

A further barrier to Court consideration of ATK arises through the operation of the environmental assessment process under *CEAA*<sup>97</sup> which is considered by the Federal Government to be the “best process” to satisfy the Crown's duty.<sup>98</sup> *CEAA* defines environmental impact in sections 5(1)(a) and (b) as including the usual impacts on the environment but goes on in section 5(1)(c) to say:

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

(iii) the current use of lands and resources for traditional purposes, or

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.<sup>99</sup>

This definition of environmental impact allows a permissive consideration of ATK in section 19(3) of *CEAA*.<sup>100</sup> Projects, such as oil sands mines, mines, hydropower dams,

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<sup>93</sup> *Handbook*, *ibid* at 1.3. The cited quote is from *Haida*, *supra* note 89 at para 60.

<sup>94</sup> *Ibid*.

<sup>95</sup> 2011 BCCA 247.

<sup>96</sup> *Ibid* at para 26.

<sup>97</sup> *CEAA*, *supra* note 9.

<sup>98</sup> Federal Consultation Policy, *supra* note 45.

<sup>99</sup> Provincial Environmental Assessment legislation does not include similar provisions.

<sup>100</sup> *CEAA*, *supra* note 9.

interprovincial pipelines etc. that engage federal jurisdiction<sup>101</sup> will be subject to *CEAA*. On major projects, *CEAA* provides for Joint Review Panels (JRPs) negotiated with provinces to reduce potential regulatory overlap. These JRPs will hold hearings and make decisions as to the environmental impact of a designated project, and submit their recommendation to the government with cabinet making the final decision.

The mandate of JRPs are open for public comment but the template for aboriginal issues appears to be fixed.<sup>102</sup> This mandate described in *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*<sup>103</sup> in which the Joint Review Panel providing aboriginal people with the opportunity to present their perspective on the following matters:

- traditional ecological knowledge about environmental effects of the Project;
- effect of environmental change caused by the Project that affect the current use of lands and resources for traditional purposes; and
- the nature and scope of their ... asserted Aboriginal rights or treaty rights, the potential impacts of the Crown's activities in relation to the Project on those rights and the appropriate measures to avoid or mitigate those impacts.<sup>104</sup>

However, the Joint Review Panel's mandate excluded any determinations or interpretations as to:

- the validity or strength of any aboriginal group's claims to aboriginal rights or title;
- the scope or nature of the Crown's duty to consult aboriginal persons or groups;
- whether the provincial or federal government had satisfied that duty; and
- any interpretation of the [relevant] Land Claims Agreement.<sup>105</sup>

The Court characterized this saying "[i]n other words, the Joint Review Panel could not determine the strength of the Innu of Ekuanitshit's claim to Aboriginal rights or the scope of the duty to consult but was to consider the Project's impacts on their claimed rights."<sup>106</sup> An argument can be made that despite limited mandate, JRP's are *effectively* ruling on

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<sup>101</sup> Often the *Fisheries Act*, RSC 1985, c F-14. [*Fisheries Act*]

<sup>102</sup> Recent JRP include the same language: Jackpine Mine Expansion Joint Review Panel Agreement, s 6; the Enbridge's Northern Gateway Pipeline Joint Review Panel Agreement, s 8 and JRP for New Prosperity Mine Report (2013) included the original Terms of Reference limiting the consideration of validity or strength (at 258).

<sup>103</sup> 2014 FCA 189 (CanLII) [*Ekuanitshit*]. This case is under appeal.

<sup>104</sup> *Ibid* at para 93.

<sup>105</sup> *Ibid* at para 97.

<sup>106</sup> *Ibid* at para 98.

existence and strength of aboriginal rights or title in balancing the “benefits vs the costs.”

In any case, JRPs ruling on ATK and the Court in *Ekuanitshit* deferred to the JRP’s determinations.<sup>107</sup> The use of JRP panels to conduct Crown consultation and accommodation further distances judicial consideration of ATK.

## **ABORIGINAL RIGHTS, ABORIGINAL TITLE AND CRIMINAL DEFENCE OF “WILDLIFE CHARGES”**

In civil litigation to determine constitutional aboriginal rights or aboriginal title ATK plays a significant role in the Courts findings - by their very definition.

In the leading case of *R. v. Van der Peet*<sup>108</sup> Justice Lamer for the Supreme Court said aboriginal right, are activities that “must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,”<sup>109</sup> being practised in a current form that relates to the original practice prior to European contact.<sup>110</sup> The pre-contact way of life is ATK in the broadest sense.

In *Delgamuukw* aboriginal title was described by Justice Lamer, for the majority, as a unique (*sui generis*) fusion of common law and aboriginal legal systems.<sup>111</sup> ATK plays a role in any finding of aboriginal title by evidencing the necessary exclusive occupation<sup>112</sup> and the qualification as to use representing Aboriginal Peoples attachment to land.<sup>113</sup> As noted in the trial decision<sup>114</sup> ATK was deployed in the first declaration of aboriginal title in the recent Supreme Court case in *Tsilhqot’in Nation v. British Columbia*.<sup>115</sup>

Much of the modern aboriginal constitutional jurisprudence has come from the defending

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<sup>107</sup> *Ibid* at paras 101-102. The decision to not contest the specific findings of the JRP was fatal in that case but it may have been influenced by the lack of funding to conduct studies to advance proper ATK see paras 114-118.

<sup>108</sup> *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]. The companion decisions in *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672, 137 DLR (4th) 528 and *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648 [*Gladstone*] were similar “harvesting” cases decided at the same time but they all applied the *Van der Peet* test.

<sup>109</sup> *Van Der Peet*, *ibid* at para 46.

<sup>110</sup> In *R v Sappier; R v Gray*, 2006 SCC 54, [2006] 2 SCR 686 the Supreme Court dealt with some confusion that had arisen with the application of the Van der Peet test. As to the distinctive test, the enquiry into culture, “is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits” at para 45.

<sup>111</sup> *Delgamuukw*, *supra* note 3 at paras 110-112.

<sup>112</sup> *Ibid* at para 143.

<sup>113</sup> *Ibid* at para 117; also see paras 128-130.

<sup>114</sup> *Supra* note 4.

<sup>115</sup> 2014 SCC 44.



Aboriginal Peoples from “wildlife charges.”<sup>116</sup> The first decision of the Supreme Court interpreting aboriginal rights *R v. Sparrow*<sup>117</sup> had its origins in criminal charges under the *Fisheries Act*<sup>118</sup> as did the *Van Der Peet* decision and *R v. Adams*.<sup>119</sup> ATK played a role in those cases – by establishing aboriginal rights to hunt and fish. As aboriginal law doctrines have developed most wildlife statutes have acknowledged exemptions for Aboriginal People’s aboriginal rights,<sup>120</sup> but ATK still plays a role in defining aboriginal rights.

## CONCLUSION

Aboriginal traditional knowledge (ATK) in the Courtroom presents unique challenges. The oral nature of aboriginal traditional knowledge and its transmission are one challenge. Aboriginal litigants have partially addressed this by packaging ATK into experts’ reports whose area of expertise is in scientific fields. The reports are presented as analogous to ATK. This is a cumbersome and expensive process that risks mistranslation of ATK. In terms of statutory consideration of ATK by administrative tribunals or on judicial review, there is no definition in the statutes as to what the term means. With a few minor exceptions, the presentation and consideration of ATK is permissive. There is little guidance in the statutes and rules addressing the acceptance, priority, and weight to be given to ATK.<sup>121</sup> While promising legal innovations are being made, the holistic, ever-changing lived nature of ATK can be antithetical to a court’s quest to identify “facts.” Overcoming these barriers is a challenge that practitioners must address in presenting evidence that accurately reflects the aboriginal perspective.

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<sup>116</sup> Every *Species at Risk Act*, *Wildlife Acts* or *Fisheries Act* proscribe some form of hunting or fishing.

<sup>117</sup> [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

<sup>118</sup> *Fisheries Act* *supra* note 10.

<sup>119</sup> [1996] 3 SCR 101, 138 DLR (4th) 657 [*Adams*].

<sup>120</sup> For example, *SARA*, *supra* note 13 s 3.

<sup>121</sup> The Federal Court has developed *Aboriginal Litigation Practice Guidelines* (16 October 2012), online: <<http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/PracticeGuidelines%20Phase%20I%20and%20II%2016-10-2012%20ENG%20final.pdf>>.