

What We Heard:

Indigenous Intellectual Property (IP) Roundtable

Lethbridge, Alberta

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Prepared by: Canadian Council for Aboriginal Business
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What we heard: an overview

- There are difficulties concerning the foundational concepts of IP. Indigenous entrepreneurs need assistance understanding examples of IP in their business, how to protect it, and how to determine what is worth safeguarding.
- There needs to be a more dedicated effort on creating the necessary accessible supports for Indigenous entrepreneurs to educate themselves about IP and its uses/ meanings.
- Litigation processes are daunting and costly creating barriers for Indigenous entrepreneurs that are looking to action an infringement on their IP.
- There must be more options for Indigenous entrepreneurs looking to protect their IP. Participants identified a need for something different. An alternative Indigenous IP system was suggested multiple times by participants and seemed to resonate with all in attendance.
- TK is difficult to define and conflicts with colonial notions of ownership tied to the individual. It more closely aligns with concepts related to collective ownership or communal knowledge not owned by a specific person.

Flaws in the current IP system: an Indigenous perspective

- **Insufficient engagement and education of Indigenous rightsholders on IP**
 - Participants of the roundtable identified that there are minimal efforts being made to make IP education accessible for Indigenous entrepreneurs. Moreover, what does exist lacks effectiveness due to not being tailored to Indigenous peoples. There are two sides of this issue:
 1. Throughout discussions participants raised concerns surrounding how IP education is being provided, what organizations are administering this education, and the quality of the content being covered in resources/ supports/ programs. Many IP resources are held behind paywalls, are inaccessible/ lack utility due to their complexity, and lack applicability or an interactive component that may resonate more with Indigenous SMEs. Participants noted that an important part of educating Indigenous business owners is demonstrating the value of IP and how it can be leveraged or applied in their business at an operational level. Many feel that IP is not effectively being presented to small and medium Indigenous business owners as a viable means of safeguarding their business, thereby contributing to their decisions to use grassroots or alternative business protection strategies.

Several participants indicated that there are not enough Indigenous IP administrators or educational facilitators available for them to connect with. Government agencies should allow the space for Indigenous actors to take the lead on nuanced aspects such as the incorporation/ validation/ protection of TK or TCEs being used in business. Increasing accessibility by removing paywalls and having Indigenous IP

professionals managing/ collaborating with Indigenous businesses seeking to safeguard their IP may provide benefit.

2. Identifying which IP protections to file for and when. Innovators noted that they face confusion when attempting to identify where in the design/ innovation process they need to start planning IP safeguarding provisions. Many are aware of the various streams of IP protections (patents, trademarks, copyrights, industrial designs), but find difficulties pinpointing the ideal time in the process to start filing their IP.
- **There is no space in the current IP system for collective knowledge, communal ownership, or the notion that an idea/ practice/ concept might not be owned by an individual**
 - The current, or colonial, IP system does not have the tools available to adequately protect communal or collective knowledge. Much of what Western society understands about ownership is interpreted through notions of the individual and property ownership derived through classical liberal ideology. This inherently deviates from the foundation of Indigenous Knowledge/ Traditional Knowledge/ Cultural Expressions because these are not understood to be owned by the individual, rather housed, and stewarded by the community, which is the center of life in many Indigenous cultures. This puts more traditionally oriented Indigenous businesses inherently at odds with the current IP system, they are being forced to compromise their inclusion of TK in their business to meaningfully protect it and ensure they do not violate sacred values. Participants equated this to attempting to fit a square peg into a round hole.
 - **There is limited progress being made to engage with Indigenous businesses, communities, and elders to solicit feedback on what might create a more robust IP system that works for them**
 - Participants expressed a need for increased consultation with Indigenous rightsholders regarding their IP needs. There were shared frustrations around the lack of involvement of Indigenous businesses, communities, and peoples in the development of IP supports and programming. To engender change and establish an inclusive IP framework that addresses the needs and barriers faced by Indigenous entrepreneurs trying to protect their creations, more collaboration must be pursued.

The need for something new, something Indigenous

- **A need for a standalone Indigenous system of protection/authentication or an Indigenous-led overseeing of how IP is applied and interacts with Indigenous businesses**
 - Regarding strategies for change, one that was echoed most clearly was the need for an IP network owned, operated, and responsible to Indigenous peoples. Participants indicated that this may involve the creation of an Indigenous Knowledge Hub or some form of Indigenous IP hub that would respond and more effectively serve the needs of Indigenous entrepreneurs.

Some attendees indicated that the creation of something standalone and Indigenous is not outside of the realm of possibility. Citing various articles of UNDRIP and Calls to Economic Prosperity captured in the NIES, participants noted that Indigenous peoples already are afforded the right to establish a knowledge hub, but support is required.

- **Certification marks, Indigenous verified products, and cataloguing Indigenous IP**

- Interesting discussions were also had related to some of the Indigenous certifications/verifications that are already being utilized in different economic spheres. Participants were aware of the “Igloo Tag” used to verify Inuk entrepreneurs, “Aboriginal” certifications used by various tourism departments, and discussions that are underway to create centralized means of cataloguing Indigenous products or services. Some in attendance even mentioned already having an established certification tag developed in collaboration with their respective Indigenous community. Constructing these certification systems with Indigenous nations achieves the simple and practical solutions echoed as most important by several roundtable participants. We heard that many Indigenous nations across Canada are already actively working to create a form of certification that would protect their entrepreneurs and help mitigate misappropriation of products/ services by external actors. Providing communities with the tools and resources that would allow them to vet, catalogue, and eventually litigate on behalf of their members’ IP/ businesses should be a goal of governments striving towards economic reconciliation. Recognition and support of such protocols may also help to provide clarity on the authorized use of TK or Indigenous inspiration in creations or certain contexts. Some Indigenous entrepreneurs indicated a fear of being criticized for including Indigenous inspiration in their products or creations and noted that this may lead to conflicts within communities. As such, empowering communities to determine protocols around this use of culture is integral to mitigate lateral violence but also to ensure that traditional knowledge is used in an appropriate manner and in line with each Nation’s teachings.

Litigation and infringement

- **There is a lack of resources available to assist small Indigenous-owned businesses and entrepreneurs seeking to action against an IP infringement**

- A common sentiment that was shared amongst Indigenous entrepreneurs in attendance was that when their IP is infringed on, they either do not know where or who to contact to litigate or what steps they need to take to address the infringement effectively. Some participants said that the litigation process is daunting, costly, and does not always result in an outcome that provides a good return on time investment spent litigating. A few Indigenous entrepreneurs in the room took a moment to share personal stories of their IP litigation experiences, with many of them concluding that during the process of litigation they felt left to their own devices and when it was over, they felt unsatisfied with the outcomes. More support should be focused on easing some of the onerous aspects of IP litigation on Indigenous entrepreneurs and communities by providing them clear avenues to action their IP safeguards.

- **For businesses that do incorporate TK/ TCEs into their operations, when these aspects of their business are infringed on it carries extra weight**

- At one point in the roundtable discussion we began to broach a more sensitive topic related to what infringement means to those businesses that actively employ TK or TCEs into their operations or innovations. Hearing from some businesses that do incorporate TK/ TCEs into their business, it was clear that the damage of infringed IP is not just measured in lost revenue. There are other forms of damage that carry more weight for the Indigenous entrepreneurs in the room. The emotional and cultural defilement that occurs when an external entity misappropriates, or breaches Indigenous IP attached to TK far outweighs the fiscal shortfalls.

- **Grassroots strategies/ alternative that Indigenous businesses are taking to protect themselves outside of the realm of colonial IP filing systems**

- We also heard from several participants that Indigenous communities already have IP safeguard provisions in place. Some attendees spoke to the protocols that their community uses as a means of protecting their business owners. Some of these included:

- i) Community managed certification marks or tags that indicate authenticity of the product/ service as an output of an Indigenous entrepreneur.
- ii) Hearings held with Elders/ Knowledge Keepers when there is a dispute in the community between entrepreneurs who may have had their IP infringed on.

There was also discussion of informal strategies utilized by Indigenous entrepreneurs to protect, action, and litigate their IP. For example, several participants noted that solidarity and their loyal customer base has been a valuable resource for both identifying IP infringements on behalf of external actors and informally litigating. One attendee described a situation where another business had misappropriated their design to create cheap, counterfeit products. Their customer network recognized this and used their voice as the consumer to flood that external companies' channels with poor reviews/ details of the infringement, ultimately leading to that company removing the copied product. The power of the customer base as a tool to battle IP infringements seemed to resonate with other Indigenous entrepreneurs at the roundtable. A few participants mentioned that they learned about an infringement on their IP through a concerned customer. While it is difficult to legislate these informal IP practices, these discussions are indicative of an IP system that is not adequately serving the needs of Indigenous entrepreneurs, forcing them to take matters into their own hands.

Participant quotes and direct insights

- “We need to define more clearly what we mean when we say ‘Indigenous-inspired’ versus ‘Indigenous-owned’. Sometimes we see non-Indigenous companies trademarking Indigenous TK or CE which creates a barrier to use for an Indigenous business owner.”

- “IP issues that are taken to court oftentimes cost the Indigenous business owner far more than the revenue that would have been brought in by the infringed-on IP.”
- “If you are copying me. You are behind me.”
- “Currently there is no legal machinery in place to litigate intangible aspects of IP, especially those attributed to Indigenous Traditional Knowledge or Cultural Expressions.”
- “So much of our Traditional Knowledge as Indigenous Peoples is kept with Elders or Knowledge Keepers in our community. Through reclaiming our language, it is important for them to share this knowledge so that we may be better informed on how to protect and action our IP in our businesses.”

Topics of interest for future discussions

- Artificial intelligence (AI) and its relationship with IP. Who owns the IP of a product created by a generative AI operating system?
- The value of new technologies like blockchain encryption or cloud storage as an alternative form of IP safeguarding
- Data sovereignty and the importance of owning the storage and use of data
- Risks related to sharing IP to project partners via joint ventures or exposing delicate IP to a possible funder during the RFP process

Next Steps

- CCAB will assemble and host a three-part webinar series that will address some of the trends and key discussion themes that arose from the first roundtable event
- CCAB is planning an additional roundtable event as part of this project
- CCAB is also conducting IP research in other regions of Canada to gain perspectives from Indigenous entrepreneurs nationwide to assist in the development of policy positions, while spreading education and awareness

For more information about the roundtable discussion, please contact:

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