

THE (MIS)APPROPRIATION OF INDIGENOUS CULTURAL ELEMENTS AS TRADEMARKS: ASSESSING NEW ZEALAND'S TRADEMARK REGIME AS A POTENTIAL MODEL FOR CANADA

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The practice of brand-building by appropriating elements of Indigenous culture as trademarks is ubiquitous worldwide. In Canada, trademark legislation offers little protection for Indigenous peoples from the misappropriation of traditional cultural expressions by non-Indigenous people. This paper examines New Zealand's trademark legislation, and the accompanying Māori Trade marks Advisory Committee ("MTAC") as a comparator to address the gaps in Canada's trademark scheme. The paper proposes an enhanced version of the New Zealand regime that is broader in scope of protection and specific to the Canadian context.

L'établissement d'une marque en tant que marque commerciale par l'appropriation d'éléments culturels autochtones est une pratique omniprésente dans le monde. Au Canada, la Loi sur les marques de commerce offre peu de protection aux peuples autochtones contre l'appropriation illicite d'expressions culturelles traditionnelles par des non-autochtones. L'auteure examine à titre comparatif la loi néo-zélandaise sur les marques de commerce et le Māori Trade marks Advisory Committee (Comité consultatif des marques de commerce des Maoris) qui l'accompagne, afin de combler les lacunes du système canadien des marques de commerce. Elle propose une version améliorée du régime néo-zélandais plus spécifique au contexte canadien et dont l'étendue de la protection est plus large.

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1. Part I—Introduction

A) Background

Substantial scholarship exists that discusses the incompatibility of the global intellectual property regime and Indigenous culture and knowledge.¹ Indigenous peoples are rarely able to reap the benefits from this system while simultaneously having their traditional cultural expressions (“TCEs”) lawfully used by non-Indigenous communities. Whether in fashion, entertainment, or sports—it has become common practice to use the intellectual property regime as a tool to commercialize

¹ Aroha Te Pareake Mead, “[Understanding Māori Intellectual Property Rights](#)” (Paper delivered at the Inaugural Māori Legal Forum, 18 November 2002) at 1, online (pdf): *Tangata Whenua* <news.tangatawhenua.com> [perma.cc/74LL-SGE2]; Eru Kapa-Kingi, “Kia Tāwharautia Te Mātauranga Māori: Decolonising The Intellectual Property Regime In Aotearoa New Zealand” (2020) 51:4 VUWLR 643 at 649.

the culture of Indigenous peoples. This exploitation is seen with all forms of IP: patents, copyrights, and plant varieties. This paper will focus on the misappropriation of Indigenous TCEs in trademark law.

Canada's relationship with Indigenous peoples is strained due to the impact of colonization and the ongoing genocide of Indigenous peoples and culture. The misappropriation of Indigenous elements as trademarks contributes to the ongoing erasure and oppression of Indigenous peoples. The issue is widespread and deeply ingrained in Canada. One example is the professional Edmonton football team, founded in 1949 that had been using a racial slur against Inuit people as its team name for over 70 years. It only changed its name as recently as July 2020 and now goes by the Edmonton Elks.² Canadian trademark legislation prohibits the registration of trademarks that are "scandalous, obscene or immoral". This language is so vague, open-ended, and highly subjective that one wonders if it can sufficiently provide recourse when Indigenous peoples are faced with disparaging or offensive uses.

Australia, Canada, the United Kingdom ("UK"), the United States ("US"), and New Zealand are five common law countries with comparable legal systems, and also some of the most prominent countries known for its settler colonialism.³ In recognizing the gaps in Canada's current trademark legislation, this paper turns to the trademark regime in New Zealand, which has been touted as one of the more progressive approaches to protecting Indigenous TCEs. Of these five countries, New Zealand's trademark legislation is the only one that expressly names the protection of cultural interests for a specific community as a ground for refusing registration.⁴ The New Zealand trademark legislation includes language addressing cultural offensiveness to significant populations, including Māori, the second largest ethnic group in New Zealand. In addition to the statutory mechanism, New Zealand has implemented the Māori Trade

² Matthew Black "['We feel it is important to make this change': Edmonton's CFL team to update its name](#)", *CTV News Edmonton* (21 July 2020), online: <edmonton.ctvnews.ca> [perma.cc/RYL8-XD4Z].

³ Stepha Velednitsky, Sara NS Hughes & Rhys Machold, "Political geographical perspectives on settler colonialism" (2020) 14:6 *Geography Compass* 1; Duncan Bell & Srdjan Vucetic, "Brexit, CANZUK, and the legacy of empire" (2019) 21:2 *British J Politics & Intl Relations* 367; Lindsay Proudfoot, Book Review of *Rethinking Settler Colonialism: History and Memory in Australia, Canada, Aotearoa New Zealand and South Africa* by Annie E Coombes, (2007) 33:2 *J Historical Geography* 437.

⁴ *Trade Marks Act 2002* (NZ), 2002/49, s 17(1)(c) [*NZ Trade Marks Act 2002*]; *Trade Marks Act 1995* (Cth), 1995/119, s 42; *Trademarks Act*, RSC 1985, c T-13, s 9(1)(j) [*Canadian Trademarks Act*]; *Trade Marks Act 1994* (UK), 1994, s 3(3)(a); *Lanham Trade-Mark Act*, 15 USCA § 1052(a) (West Supp 2006) (deemed unconstitutional by *Matal v Tam*, 582 US 2017, 137 S Ct. 1744, 198 L Ed 2d 366) [*The Lanham Act*].

marks Advisory Committee (“the Committee” or “MTAC”) as an additional safeguard against the registration of culturally offensive trademarks.⁵ New Zealand’s trademark regime is an appropriate comparator for Canada as both countries have large populations of Indigenous peoples that suffer from significant social and economic struggles due to the ongoing impact of colonization.

This paper addresses the cultural misappropriation of Indigenous culture in trademark law as a contemporary human rights issue in Canada. With the Royal Assent of the *United Nations Declaration on the Rights of Indigenous Peoples Act* (“UNDRIP Act”) in June 2021, it is time to reassess the Canadian trademark legislation.⁶ The paper will evaluate whether the New Zealand trademark regime is one that Canada should consider adopting. The paper will critically assess the extent to which the New Zealand trademark regime has achieved its objectives of creating safeguards for the Māori community. The paper will determine whether the New Zealand approach will work in Canada or what elements of this approach can be adopted to address the current gaps in protecting the interests of Indigenous peoples in the Canadian trademark scheme.

B) Cultural (Mis)Appropriation: The Ongoing Problem in Trademark Law

1) Defining Key Terms

a) Misappropriation

The crux of this paper’s critique of the New Zealand trademark legislation lies in the distinction between misappropriation and offensiveness. New Zealand trademark legislation provides absolute grounds for refusal of marks that are offensive to Māori.⁷ However, the statute is silent on whether attempts to register marks that misappropriate Māori TCEs but are not offensive can be refused.⁸ This paper discusses misappropriation in the context of settler attempts to acquire trademark rights in Indigenous resources, knowledge, and cultural expressions, often referred to as “cultural appropriation”. The Canadian Encyclopedia defines cultural appropriation as “the act of taking from someone else’s culture without

⁵ Specific references to New Zealand sources and names of entities in this paper will retain the New Zealand and Australian spelling convention “trade marks”, all other references will follow the Canadian spelling convention “trademarks”.

⁶ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [UNDRIP Act].

⁷ *NZ Trade Marks Act 2002*, *supra* note 4, s 17(1)(c).

⁸ Kapa-Kingi, *supra* note 1 at 658.

their consent”.⁹ This paper includes this understanding of cultural appropriation when referring to misappropriation.

A highly technical definition of misappropriation from the World Intellectual Property Organization (“WIPO”) is:

Any acquisition or appropriation of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition or appropriation of traditional knowledge when the person using that knowledge knows, or is grossly negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.¹⁰

As with the work of the WIPO Intergovernmental Committee, this definition has not yet crystallized and continues to evolve. Nonetheless, it provides a helpful starting point to conceptualize misappropriation.

This paper will use the definition of misappropriation proposed in Eru Kapa-Kingi’s article: “When either an applicant for trade mark registration or a trade mark holder uses any form of cultural or indigenous knowledge without providing recognition or recompense to, or gaining consent from, those who are custodians of that knowledge.”¹¹ Kapa-Kingi’s proposed legal definition emphasizes the lack of recognition, recompense, and consent from custodians of the originating culture as central to the concept. This paper acknowledges that this definition does not mention the misuse or misrepresentation of Indigenous TCEs. However, this paper turns to Kapa-Kingi’s proposed definition of misappropriation to fill the gap within New Zealand’s trademark framework that focuses only on offensiveness. This definition aligns with the goal of this paper to underscore the extractive and exploitative nature of settlers commercializing Indigenous TCEs.

b) Traditional Cultural Expressions

For the purposes of this paper, TCEs may include “music, dance, art, designs, names, signs and symbols, performances, ceremonies,

⁹ “[Cultural Appropriation of Indigenous Peoples in Canada](#)” (last modified 20 July 2020), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca> [perma.cc/6AGA-RZMZ].

¹⁰ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Protection of Traditional Knowledge: Summary of Draft Policy Objectives and Core Principles” (20 August 2004) WIPO/GRTKF/IC/7/5 at B1:2.

¹¹ Kapa-Kingi, *supra* note 1 at 656.

architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.”¹² This is WIPO’s working definition of TCEs as there is currently no internationally agreed upon definition. TCEs are extremely important to Indigenous peoples as it is integral to their spirituality, worldviews, socio-economic identity and culture.¹³ This paper does not seek to examine the mechanics of how one decides what is or is not an Indigenous TCE. Furthermore, it has been suggested that the classification of TCEs is an artificial practice, as it is not possible to compartmentalize Indigenous cultural heritage as a singular experience.¹⁴ The paper instead focuses on the legal mechanisms that facilitates third party exploitation of TCEs.

2) Misappropriation as a Branding Practice

In April 2017, owners of a non-Indigenous business filed a trademark application IP Australia for the wordmark “GUMBY GUMBY”.¹⁵ Objections were raised on the grounds that Gumby Gumby is a commonly used name for a tree with orange berries used in Indigenous bush medicine in Australia for centuries. The application lapsed in 2020 due to the applicants’ inability to provide answers to the objections within the permitted timeframe, according to an IP Australia spokesperson. Indigenous business owners in Australia celebrated the failed application, having felt distress at the thought that they would no longer be able to freely use a word they had been using for so long. This situation is one of many that continues to cause concern for Indigenous peoples not being consulted but being “excluded from their own culture”.¹⁶

In September 2019, Air New Zealand attempted to register the trademark “KIA ORA”, the Māori greeting for hello, as a logo for their in-flight magazine.¹⁷ The airline received backlash for trying to claim a Māori word and were faced with threats of boycott. The Māori text is not

¹² World Intellectual Property Organization, “[Traditional Cultural Expressions](#)” (last visited 29 March 2023), online: *WIPO* <www.wipo.int> [perma.cc/H2PJ-B5YQ].

¹³ Brigitte Vézina, “[Traditional Cultural Expressions: Laying Blocks for an International Agreement](#)” (April 2018) at 1, online (pdf): *CIGI Papers No 169* <www.cigionline.org> [perma.cc/ULY3-G5AV].

¹⁴ *Ibid.*

¹⁵ “[“GUMBY GUMBY” trademark application](#), Katja Ada Amato & Klaus Von Gliszczynski, Australia 1839890 (21 April 2017) lapsed: not accepted, online: <search.ipaustralia.gov.au> [perma.cc/NED4-E8RZ].

¹⁶ Jemima Burt, “[Non-Indigenous business fails in bid to trademark Aboriginal bush medicine](#)” (23 January 2020), online: *ABC News Australia* <www.abc.net.au> [perma.cc/ZP9B-3P72].

¹⁷ “[Air New Zealand backs down on Kia Ora trademark bid](#)” (18 September 2019), online: *NZ Herald* <www.nzherald.co.nz> [perma.cc/M8WU-GJ7W].

prima facie offensive, but a non-Māori corporation using a Māori element without any consultation process sparked an outcry from the community for misappropriation and exploitation. The airline has since dropped its application for registration. However, as The Māori Council executive director Matthew Tukaki points out, this is presumably due to the negative response and potential threats to their revenue, as opposed to recognizing the impact of their actions on Māori.¹⁸

In North America, the issue of racist football team names and logos is pervasive. As of 2018, there were more than 2000 professional, college, and high school teams with Indigenous names.¹⁹ These teams have built a brand for decades on disparaging representations of Indigenous peoples. Indigenous peoples, scholars, and supporters alike have called for the changing of team names for many years, but it is only because of more recent public outcry over anti-Black and anti-Indigenous racism, that teams have begun to consider it.²⁰ Unfortunately, not unlike the Air New Zealand incident and many other corporations that appropriate Indigenous text and imagery, the change of heart appears to come more so from the recognition that it can no longer serve the “brand” today.

2. Part II—The Legislation

A) The Canadian Framework

1) Scandalous, obscene, or immoral

The *Trademarks Act* governs trademark law in Canada.²¹ The section most pertinent to the discussion around the prohibition of marks is section 9(1) (j), which states: “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 any scandalous, obscene or immoral word or device”.²² This language is similar to the Australian and United

¹⁸ “[Air New Zealand drops Kia Ora trademark bid](#)” (18 September 2019), online: RNZ <www.rnz.co.nz> [perma.cc/3HDH-5RNR].

¹⁹ Brandon Lang, “Are North American Sports Fans Offended by the Redskins Team Name? A Demographic Analysis” (2018) 38:1 *Can J Native Studies* 19 at 20.

²⁰ The murders of Ahmaud Arbery, Breonna Taylor, George Floyd and many others at the hands of systemic anti-Black racism and police violence brought the Black Lives Matter movement back into mainstream news. This along with the LandBack movement and anti-Indigenous racism prompted widespread conversations around removing racist names and imagery. See Scott McDonald “[Washington Redskins Urged to Lose Name, or Millions in Sponsorships](#)”, *Newsweek* (1 July 2020) <www.newsweek.com> [perma.cc/N4PB-RCCC].

²¹ *Canadian Trademarks Act*, *supra* note 4.

²² *Ibid*, s 9(1)(j).

States provisions. The Australian provision prohibits the registration of a trademark that is “scandalous” or where its use is “contrary to law.”²³ The US provision, while recently deemed unconstitutional, also refused trademark registrations that comprise of any “immoral, deceptive, or scandalous matter”.²⁴ The wording of this statutory prohibition is broad, which allows for a tremendous amount of interpretation from the courts.

The Trademarks Examination Manual is a guide produced by the Canadian Intellectual Property Office (“CIPO”). While it is not binding on the Trademarks Office, it does provide guidance on how each provision of the *Trademarks Act* might be applied during the examination process.²⁵ The words scandalous, obscene, and immoral are explained in the manual to assist examiners:

A scandalous word or design is one which is offensive to the public or individual sense of propriety or morality, or is a slur on nationality and is generally regarded as offensive. It is generally defined as causing general outrage or indignation.

A word is obscene if marked by violations of accepted language inhibitions or regarded as taboo in polite usage. This word “obscene” is generally defined as something that is offensive or disgusting by accepted standards of morality or decency; or offensive to the senses.

A word or design is immoral when it is in conflict with generally or traditionally held moral principles, and generally defined as not conforming to accepted standard of morality.²⁶

The threshold to meet for a scandalous, obscene, or immoral trademark is that it would “offend the feelings or sensibilities of a not insignificant segment of the public”.²⁷ The manual cites the following cases to underscore this threshold requirement. The judge in *Re La Marquise Footwear Inc* agreed that OOMPHIES for shoes invokes “oomph” an American slang for sex appeal. However, he overruled the Registrar’s decision to refuse registration stating that it should consider not only the “general taste of the time” but also the “susceptibilities of persons, by no means few in number” who will be offended.²⁸ The *Miss Universe v Bohna* decision also

²³ *Trade Marks Act 1995*, *supra* note 4, s 4.

²⁴ *The Lanham Act*, *supra* note 4.

²⁵ Canadian Intellectual Property Office, “[Trademarks Examination Manual](#)” (last visited 29 March 2023) at 1.1, online: Government of Canada <manuels-manuals.opic-pico.gc.ca> [perma.cc/3U94-LNH] [Trademarks Examination Manual].

²⁶ *Ibid* at 4.7.6.

²⁷ *Ibid*.

²⁸ *La Marquise Footwear Inc*, (1946), 64 RPC 27.

expressed the threshold requirement for offending the public as “some people by no means few in number”.²⁹ CIPO maintains that “by no means few in number” connotes the same idea as the “not insignificant”. Aside from these decisions, the case law on section 9(1)(j) is limited.³⁰

B) New Zealand's Trademark Regime

1) History: Incorporating Māori Rights into the Trade Marks Act

The *Trade Marks Act 2002* (“*NZ Trade Marks Act 2002*”) governs trademark law in New Zealand and incorporated significant changes to the former *New Zealand Trade Marks Act 1953*.³¹ Discussions had begun in 1990 for a broad and integrated review of New Zealand’s intellectual property legislation.³² The process was subsequently halted as Māori raised concerns that the proposed reforms to the 1953 *Act* did not adequately protect Māori cultural and intellectual property rights. Four national workshops were held in 1994 to consult with Māori following the establishment of the Māori Trade Marks Focus Group, which was tasked with discussing issues relating to the registration of marks that involved Māori “words, symbols, sounds or smells”.³³ The Focus Group published their deliberations in a background paper in 1997, and eight more workshops were held around the country to discuss the issues raised in the paper.³⁴

The Focus Group recommended that elements of Māori culture should be registrable by “any person” if they can satisfy the requirements of source, consent and cultural appropriateness.³⁵ They also recommended the formation of a consultative group of Māori experts within the trade mark application procedure. Finally, the Focus Group agreed with a former proposal to replace “scandalous” and “contrary to morality” from the prohibition section of the 1953 *Act* with language that allows the

²⁹ [1995] 1 FC 614, 58 CPR (3d) 381.

³⁰ Legal scholars and practitioners are turning to human rights law as a potential avenue for challenging offensive marks where trademark law fails. See Teresa Scassa, “[Human rights and trademark legislation: the of offensive marks](#)” (13 June 2017), online (blog): Teresa Scassa <www.teresascassa.ca> [perma.cc/9C7A-6R7F].

³¹ *NZ Trade Marks Act 2002*, *supra* note 4, s 3.

³² Daphne Zografos, “New Perspectives for the Protection of Traditional Cultural Expressions in New Zealand” (2005) 36:8 Intl Rev Intellectual Property & Competition L 1 at 14.

³³ *Ibid* at 15.

³⁴ *Ibid*.

³⁵ *Ibid*.

Commissioner to refuse to register a trademark that would “cause offence to a significant section of the community”.³⁶

The *NZ Trade Marks Act 2002* that resulted from these consultations and recommendations now states that one of its purposes is to address the concerns of Māori relating to the registration of trade marks containing a Māori sign, including imagery and text.³⁷ This goal would be achieved through a new provision that allows the refusal of trademark registrations on the grounds of cultural offence to Māori and through the establishment of an advisory committee to assist the Commissioner of Trade Marks assess trademarks during the examination process for potential offensiveness to Māori.³⁸

2) The New Offence Provision

Section 17(1)(c) provides, “the Commissioner must not register as a trade mark or part of a trade mark any matter—the use or registration of which would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including Māori”.³⁹ This provision can be found in earlier literature cited as 17(1)(b)(ii), as that was the original clause number before the 2005 amendments.⁴⁰

The statute itself does not define what is meant by likely to “offend”. The Intellectual Property Office of New Zealand (“IPONZ”) practice guidelines use the definition of “offend” from the Macquarie Dictionary, an Australian English dictionary, as meaning: to irritate in mind or feeling, cause resentful displeasure in, to give offence or cause displeasure. The mark is considered to likely offend a significant section of the community if it is likely to cause outrage, or the feeling that the mark should be subject to censure for the likelihood of undermining current religious, family, or social values. IPONZ notes that a significant section of the community may be a minority that is substantial in number. Further, a higher degree of outrage or censure among a smaller section of the community, or a lesser degree of outrage or censure among a larger section of the community, may be enough to satisfy this threshold.⁴¹

³⁶ *Ibid.*

³⁷ *NZ Trade Marks Act 2002*, *supra* note 4, s 3(c).

³⁸ *Ibid.*, s 14.

³⁹ *Ibid.*, s 17(1)(c).

⁴⁰ *Zografos*, *supra* note 32 at 16.

⁴¹ “[Practice guidelines: Absolute grounds—General](#)” (last modified 3 May 2017) at 4.1, online: *New Zealand Intellectual Property Office* <www.iponz.govt.nz> [perma.cc/URF5-AD8A][*IPONZ absolute grounds*].

Māori are expressly regarded as a “significant section of the community” in the offence provision.⁴² IPONZ asserts that it had been concerned with the inappropriate use of Māori elements in trademarks long before this was codified in the legislation. Under the 1953 *Act*, concerns would have been raised on the grounds of “scandalous matter” or “the use of which would be contrary to morality”. Now, trademark applications consisting of a Māori or Māori derived sign undergo an additional review by the Māori Trade marks Advisory Committee. The outcome of this review may lead to IPONZ advising the applicant that the mark is not registrable under section 17(1)(c).

3) The Māori Trade marks Advisory Committee

Sections 177-180 of the *NZ Trade Marks Act 2002* prescribe the appointment of an advisory committee.⁴³ The Committee’s function is laid out in section 178, which states that they are to “advise the Commissioner whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Māori.”⁴⁴ When appointing members to the advisory committee, the Commissioner takes into consideration the person’s knowledge of te ao Māori (Māori worldview) and tikanga Māori (Māori protocol and culture).⁴⁵ The advisory committee can regulate its own procedure, subject to any direction given by the Commissioner.⁴⁶

The rationale behind establishing a committee in addition to the offence provision is to avoid the inadvertent registration of Māori text and imagery that is likely to cause offence to Māori. The function of the Committee remains consultative, as their advice is not binding on the Commissioner. The Commissioner ultimately makes the final decision regarding the registration of the mark, considering all relevant factors affecting registrability. Thus, they may come to a different determination from that of the Committee.⁴⁷ However, IPONZ states that it will likely raise concerns that a mark is not registrable under section 17(1)(c) of the *NZ Trade Marks Act 2002* if the Committee advises the Commissioner that a mark is likely to offend Māori.⁴⁸

⁴² *Ibid* at 4.2.

⁴³ “[Practice guidelines: Māori advisory committee and Māori trade marks](#)” (last visited 31 March 2023) at 1, online: *New Zealand Intellectual Property Office* <www.iponz.govt.nz> [perma.cc/YJN4-9CK6] [*IPONZ Māori advisory committee*].

⁴⁴ *NZ Trade Marks Act 2002*, *supra* note 4, s 178.

⁴⁵ *Ibid*, ss 179(1)–179(2).

⁴⁶ *Ibid*, s 180.

⁴⁷ *IPONZ Māori advisory committee*, *supra* note 43 at 2.

⁴⁸ *IPONZ Absolute grounds*, *supra* note 41 at 4.2.

Every trademark application received by IPONZ is screened for any Māori or Māori-derived sign. The IPONZ practice guidelines provide direction on the identification of Māori signs, words, imagery, and customary concepts. If an examiner is unsure whether the mark seeking registration falls under the assessment for Māori signs, then the application is referred to the Liaison, Māori Trade marks Advisory Committee.⁴⁹

Applications that include a trademark containing a Māori sign are forwarded to the Committee for their advice on the potential offensiveness to Māori. Committee members are required to advise the Commissioner promptly of the outcome of their “preliminary consideration” and the aim is to provide their determination to the Commissioner within 15 working days. During this process, applicants receive confirmation and discussion from IPONZ advising that their application was forwarded to the Committee for their consideration.⁵⁰

If the Committee is confident that the trade mark registration in question will not cause offence to Māori, then the application will proceed through the usual examination process. However, if the application raises concerns, the Committee must come to a determination with four potential outcomes: the mark is either not offensive to Māori, not likely to be offensive to Māori, likely to be offensive to Māori, or offensive to Māori. If the Committee decides that they require further information to make a determination on the application, they can communicate this to the Commissioner for consideration as to whether to advise the applicant to obtain this information or not. After the Committee has provided their advice on the application, IPONZ will examine the trademark and issue a Compliance Report to the applicant.⁵¹

4) MTAC’s Recent Work

IPONZ releases “Year in Review” reports every year to provide the public with a summary of their activities and outcomes from the previous 12 months. Reports for the last four years (2018–2021) are available. The table below provides a snapshot of applications with Māori or Māori-derived text or imagery referred to the Committee, and the number of cases that were deemed likely to offend Māori.⁵² Again, these numbers provide no

⁴⁹ IPONZ Māori advisory committee, *supra* note 43 at 3.

⁵⁰ *Ibid* at 4.

⁵¹ *Ibid*.

⁵² “[IPONZ Year in Review 2018](#)” (2018), online (pdf): *New Zealand Intellectual Property Office* <www.iponz.govt.nz> [perma.cc/JU89-6XRP]; “[IPONZ Year in Review 2018/19](#)” (May 2020), online (pdf): *New Zealand Intellectual Property Office* <www.iponz.govt.nz> [perma.cc/B6RU-FK66]; “[IPONZ Year in Review 2019/20](#)” (June 2021), online

information as to whether the cases that were deemed offensive were ultimately denied registration by the Commissioner.

Table 1

Year/Period	Number of cases referred to MTAC	Number of cases deemed offensive to Māori
2018	628	69 cases or 11%
2018/19	789	58 cases or 7%
2019–2020	1006	38 cases or 3.8%
2021	1218	41 cases or 3%

3. Part III—Discussion

A) Culturally Offensive vs Misappropriation

Some scholars assert that “culturally offensive” is not the same as misappropriation.⁵³ In fact, offensiveness arguably requires meeting the highest threshold possible. It is interesting to note that during the consultations to reform the 1953 *Act*, the Focus Group preferred the phrase “culturally inappropriate” as opposed to “offensive”, as the latter requires meeting a higher threshold. Of course, this was ultimately not embodied in the 2002 legislative amendments.⁵⁴ The definitions of misappropriation from WIPO and Kapa-Kingi’s paper emphasize that misappropriation includes the act of taking without consent or compensation—financial or otherwise.⁵⁵ This implies that an act can be a misappropriation without rising to the level of being cultural inappropriate or offensive.

Kapa-Kingi illustrates the distinction between misappropriation and cultural offensiveness using Air New Zealand’s koru logo. The “koru” is a Māori loop or coil, showing the unfurling of a silver fern frond that is an integral symbol in Māori art. The use of the koru by Air New Zealand is not explicitly offensive because the image itself is not offensive nor is it attached to inappropriate goods or services. Nonetheless, Kapa-Kingi argues that unjust exploitation of Māori people occur where non-Māori people or corporations are able to commercialize a Māori cultural element

(pdf): *New Zealand Intellectual Property Office* <www.iponz.govt.nz> [perma.cc/6AZF-8XP7]; “[IPONZ Year in Review 2020/21](#)” (December 2021), online (pdf): *New Zealand Intellectual Property Office* <www.iponz.govt.nz> [perma.cc/A9AS-3NNA].

⁵³ *Kapa-Kingi*, *supra* note 1 at 655.

⁵⁴ Eloise Chin, “The Perils of Offensive Trademarks: Trademark Function, Freedom of Expression, and Why We Should Be Barring the Registration of Offensive Marks” (2019) 12:2*Victoria U Wellington Leg Research Papers* 38/2020 at 22.

⁵⁵ See Part I, s B.1, *above*, for more on this topic.

without any consultation, consent, or compensatory process.⁵⁶ This concept of misappropriating non-offensive Māori text or imagery is a gap not addressed in the IPONZ approach. The IPONZ practice guidelines provide examples of offensive Māori elements that are all overtly disparaging images and associations, such as a picture of a Māori chief affixed to butter or food sauces.⁵⁷ However, because the NZ trademark provision only prohibits marks that are disparaging or cause offence, non-Māori people are theoretically able to register and commercialize non-offensive Māori text and imagery, leaving Māori people with no say in the decision or compensation for the commercial benefits gained.

B) Room for Improvement: Recommendations from the Waitangi Tribunal

The Report on the Wai 262 Claim (“the Report”) released by the Waitangi Tribunal in 2011 contextualizes where the *NZ Trade Marks Act 2002* falls short. The Waitangi Tribunal (“the Tribunal”) is a permanent commission of inquiry established in 1975 by the Treaty of Waitangi Act 1975 empowered to hear claims brought by Māori. The Tribunal has exclusive authority to interpret the Treaty of Waitangi as embodied in both Māori and English texts. The Tribunal’s primary function is to inquire into any treaty breaches by the Crown raised by Māori. While the Tribunal’s powers are recommendatory, all governments have historically taken the recommendations seriously.⁵⁸

1) The Wai 262 Claim

The Wai 262 is a claim brought against the New Zealand Crown in 1991 by members of six tribes.⁵⁹ It is often referred to as the indigenous flora and fauna claim or the Māori cultural intellectual property claim.⁶⁰ The claim raises questions about the ownership and control of mātauranga Māori (Māori worldview, including culture and knowledge), taonga works (the tangible products of mātauranga Māori; traditional artistic and cultural expressions), and unique characteristics of indigenous flora and fauna.⁶¹ The discussion on New Zealand’s trademark regime and its

⁵⁶ *Kapa-Kingi*, *supra* note 1 at 657.

⁵⁷ *IPONZ absolute grounds*, *supra* note 41 at 3.2.

⁵⁸ *Zografos*, *supra* note 32 at 8.

⁵⁹ *Ibid* at 6.

⁶⁰ Waitangi Tribunal, “[Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi](#)” (2011) at xxiii, online (pdf): [Waitangi Tribunal Report 2011 <justice.govt.nz>](#) [perma.cc/ZWY5-LDPF] [*The Report*].

⁶¹ *Ibid* at 17.

effectiveness in protecting Māori cultural interests will focus on the first two: mātauranga Māori and taonga works.

2) The Tribunal's Report

The Report entitled *Ko Aotearoa Tēnei*, or “This is Aotearoa”/“This is New Zealand”, is the Tribunal’s first whole-of-government report that considers the meaning of the Treaty relationship after grievances are settled and beyond.⁶² The Tribunal states that the relationship embodied in the Treaty is one of partnership, in which the Crown is entitled to govern, but Māori are to retain *tinio rangatiratanga* (full authority) over their taonga (treasures).⁶³ Instead, current laws and government policies fall short of this promise of partnership and marginalize Māori while allowing others to capitalize on key aspects of Māori culture. Current laws allow for third-party commercialization of Māori artistic and cultural works without *iwi* or *hapū* (tribes and subtribes) acknowledgement or consent.⁶⁴

The findings and recommendations resulting from the Report confirm that while New Zealand’s trademark regime is a good step forward in protecting Māori cultural interests, there is plenty of room for improvement. The Report makes recommendations for an expansive scope of Māori culture ranging from intellectual property to conservation issues. The Report’s findings and recommendations in the chapter titled *Taonga Works and Intellectual Property* are most relevant to this discussion on misappropriation in trademark law.

Two Māori words require explanation to situate the findings from the Tribunal: *taonga* and *kaitiaki*. A taonga work is “a creation of the pre-existing and distinctive body of knowledge, values, and insights referred to as mātauranga Māori” by Māori. It is also a “result of the effort and creativity of actual people whether in modern times or the distant past”. *Kaitiaki* are “those whose lineage or calling creates an obligation to safeguard the taonga itself and the mātauranga that underlies it”.⁶⁵ The Tribunal’s intellectual property discussion focuses on the obligations of *kaitiaki* over taonga works and mātauranga Māori and how they often do not fit neatly within the requirements of New Zealand’s IP laws.

While there are no perfect English translations for these nuanced Māori language words and concepts, to facilitate an easier understanding

⁶² “[Ko Aotearoa Tēnei: Report on the Wai 262 Claim Released](#)” (2 July 2011), online: *Waitangi Tribunal* <waitangitribunal.govt.nz> [perma.cc/WET7-8TYN].

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *The Report*, *supra* note 60 at 30–31.

of the discussion from this point on, this paper will employ the terms “traditional cultural expressions/TCEs” to refer to *taonga works*, “traditional knowledge” to refer to *mātauranga Māori*, and “guardians” to refer to *kaitiaki*.

The Tribunal found a disconnect between the protections that the guardians seek concerning Māori TCEs and traditional knowledge and what is offered in copyright and trademark law. To be afforded these protections, the interest must conform to specific requirements that are incompatible with Māori TCEs and traditional knowledge. Under copyright, there is no recognition of the perpetual nature of the guardians’ relationship with Māori TCEs and traditional knowledge since NZ copyright law only offers protection for one or two generations at most. Under the current NZ trademark regime, the most pressing impediment was the non-binding nature of the Committee’s advice on determinations of offensiveness.⁶⁶

To address the trademark issue, the Tribunal proposed two practical changes. The first is a new general statutory requirement that requires consultation with or consent from Māori guardians for any commercial use of Māori TCEs and traditional knowledge. The second change would be to establish a new commission with expanded functions to adjudicate, facilitate, and administer the protection of Māori TCEs and traditional knowledge. This paper maintains that the adjudicative function provides the most direct and substantial solution to the non-binding limitation of the current Committee.⁶⁷

3) A New Statutory Standard

The proposed new statutory standards will distinguish between derogatory and non-derogatory uses. Anyone will be able to object to derogatory or offensive public use of Māori TCEs and traditional knowledge, as this responsibility should not fall on Māori guardians or even Māori alone.⁶⁸ For commercial uses of non-derogatory and non-offensive Māori TCEs and traditional knowledge, the Tribunal maintains that this should be left only to Māori guardians. These objections would all be brought to the new commission.⁶⁹ This new statutory mechanism addresses the gap in the

⁶⁶ *Ibid* at 39.

⁶⁷ *Ibid* at 56.

⁶⁸ “[Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua, Volume 1](#)” (2011) at 93, online (pdf): [Waitangi Tribunal <justice.govt.nz> \[perma.cc/NY7M-NZQ6\] \[The Report Volume 1\]](#).

⁶⁹ *Ibid*.

current offence provision which does not capture the non-offensive uses of Māori text and imagery in a commercial context.

4) A New Commission

The new commission's adjudicative functions would empower it to receive objections for derogatory or offensive public use from all objectors. For non-derogatory or non-offensive commercial use, the commission will be tasked with deciding whether a consultation between the user and Māori guardians will suffice, or if consent is required.⁷⁰ The commission would be responsible for determining who are Māori guardians for the purposes of identifying standing to raise objections for non-offensive commercial use and to facilitate the consultation process where necessary. Finally, the establishment of this new commission is recommended to replace the current MTAC at IPONZ. It addresses the purely advisory nature of the current Committee as the new commission's decisions would be final and binding on the Commissioner of Trade Marks.⁷¹

C) The New Zealand Regime: 20 years later

The New Zealand trademark regime does provide limited value. As mentioned, this regime has been touted as having one of the most progressive approaches to protecting Māori cultural interests where it concerns trademark law.⁷² There were no other statutory provisions precisely like it at the time, and it remains the only country with an express provision to protect a specific group's cultural interests.⁷³ It set a precedent on an international stage for other countries to consider their own regimes as it relates to the continued colonial violence experienced by Indigenous peoples.

New Zealand deviated from the UK legislation for the first time in its history with 2002 amendments, as before those reforms, the provision prohibiting registration was nearly identical to that of the UK.⁷⁴ This meant

⁷⁰ *Ibid* at 94.

⁷¹ *Ibid*.

⁷² Owen J Morgan, "[Protecting Indigenous Signs and Trade Marks Under the New Zealand Trade Marks Act 2002](#)" (2004) Intellectual Property Research Institute of Australia Working Paper No 02/04 at 2, online: <papers.ssrn.com> [perma.cc/G5NQ-WZB9].

⁷³ *Zografos*, *supra* note 32 at 16; *Trade Marks Act 1995*, *supra* note 4, s 42; Canadian Trademark Act, *supra* note 4, s 9(1)(j); *Trade Marks Act 1994* (UK), *supra* note 4, s 3(3)(a); *The Lanham Act*, *supra* note 4; *NZ Trade mark Act*, *supra* note 4, s 17(1)(c).

⁷⁴ Susy Frankel, "Third-Party Trade Marks as a Violation of Indigenous Cultural Property: A New Statutory Safeguard" (2005) 8:1 *J World Intellectual Property* 83 at 83 & 89.

that under New Zealand's 1953 *Act*, like many other similar common law systems, culturally offensive marks would have to have been challenged on the basis of "scandalous matter" or being "contrary to morality".⁷⁵ Case law is limited on the prohibitive section from the 1953 *Act*. A search for case law that engage the current 17(1)(c) provision also yields minimal cases with meaningful discussion of the statutory provision. This may suggest that the offence provision and the Committee's advice provide a preliminary safeguard that filters out offensive uses of Māori text and imagery before they become registered.

IPONZ had considered the offensiveness of Māori marks in trademark applications and consulted with Māori experts on applications before the offence provision was introduced in 2002. Many were critical during discussions in the 1990s for legislative reforms of the 1953 *Act*, as they questioned why legislative changes were necessary if IPONZ was already reviewing applications for offensiveness to Māori. However, codifying this practice into legislation was worthwhile as it formalized the process, creating more predictability, consistency, and a basic level of accountability. It communicated that the New Zealand government was committed to addressing offensive uses of Māori text and imagery in trademark law.⁷⁶

1) Comparing the Canadian Trademarks Act and the NZ Trade Marks Act 2002

The *Canadian Trademarks Act* prohibits marks that are "scandalous, obscene, or immoral", whereas the *NZ Trade Marks Act 2002* prohibits marks that are "likely to offend a significant section of the community, including Māori".⁷⁷ The language is no doubt more specific in the New Zealand provision as it expressly names Māori as a community to be protected. What likely results is that the threshold for offensiveness from marks comprising of Māori text or imagery is more attainable as it does not have to include non-Māori people. IPONZ practice guidelines also indicate that a higher degree of outrage or censure among a smaller section of the community, or a lesser degree of outrage or censure among a larger section of the community, may be enough to satisfy this threshold.⁷⁸

This is contrasted by what is provided under the *Canadian Trademarks Act*. What constitutes a scandalous, obscene, or immoral mark is left

⁷⁵ IPONZ *absolute grounds*, *supra* note 41 at 4.2.

⁷⁶ Frankel, *supra* note 74 at 91.

⁷⁷ *Canadian Trademarks Act*, *supra* note 4, s 9(1)(j); *NZ Trade Marks Act 2002*, *supra* note 4, s 17(1)(c).

⁷⁸ IPONZ *absolute grounds*, *supra* note 41 at 4.1.

out of the statutory language, but jurisprudence provides that it must offend the feelings and sensibilities of a “not insignificant segment of the public”.⁷⁹ This likely results in a less attainable threshold for oppositions on grounds of cultural offensiveness as the number of people included in the assessment of who is being offended is much larger. The language does not name Indigenous peoples or other racial groups as specific segments of the community that the provision protects. This lack of awareness and acknowledgement of culturally-specific issues make it more challenging to have marks refused on grounds of cultural offence.

D) Adopting the New Zealand Regime in Canada

1) The Proposed Trademark Regime

There are compelling reasons underlying the need to amend the existing Canadian trademark regime. The current statutory scheme does very little to protect the cultural interests of Indigenous peoples from misuse and misappropriation as Indigenous interests in TCEs are not reflected in the prohibited marks section. As discussed in the comparison between the language of the Canadian trademark legislation and the New Zealand trademark regime, the Canadian grounds of opposition require that it offends the feelings and sensibilities of “a not insignificant segment of the public”.⁸⁰ Canada must contend with how engrained anti-Indigeneity and settler colonialism is in its social fabric. For instance, the number of people, particularly white settlers, who continue to oppose the calls to change the disparaging names and logos of football teams is indicative of this.⁸¹ It would be hard to imagine that in practice, Indigenous peoples would be able to rely on this legal mechanism for recourse when the mechanism requires “by no means few in number” of people to be offended.

While the focus of this paper is on the misappropriation of Indigenous TCEs in Canada as a trademark law issue, what underlies the problem is a fundamental human rights concern. The Royal Assent of the *UNDRIP Act* provides impetus for the Canadian government to begin to move towards meaningful reconciliation with First Nations, Inuit and Métis peoples. Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (“the *Declaration*”) provides that “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions ...”⁸²

⁷⁹ *Trademarks Examination Manual*, *supra* note 25 at 4.7.6.

⁸⁰ *Ibid.*

⁸¹ *Lang*, *supra* note 19 at 29.

⁸² “[United Nations Declaration on the Rights of Indigenous Peoples](#)” (13

September 2007) art 31, online (pdf): *United Nations* <www.un.org> [perma.cc/PY98-Q4K3]. [*The Declaration*].

The *Declaration* maintains that States should take appropriate measures, including legislative measures, in consultation with Indigenous peoples to achieve the ends of this Declaration.⁸³ It also states that the rights recognized in the *Declaration* constitute the minimum standards, and thus, Member States can always do more.⁸⁴ In light of the limitations identified throughout this paper within the *Canadian Trademarks Act* and the Royal assent of the *UNDRIP Act*, the trademark regime provides a practical and effective place to start.⁸⁵

This paper proposes that an enhanced version of the New Zealand regime be adopted in Canada, integrating two recommendations from the Report: a new statutory standard and a new commission.⁸⁶ What that might look like is the addition of a clause under section 9(1) Prohibited marks of the *Canadian Trademarks Act* stating, “any text or imagery deriving from First Nations, Inuit, or Métis”. This draws from the New Zealand offence provision in that it specifically names the group whose interest is being protected. This expands the scope of protection than what is offered in the New Zealand offence provision in that it does not require meeting an offensiveness threshold in order to be refused; the proposed language is “any text or imagery” and not “text or imagery that is likely to offend”. This is intended to capture misappropriation. That is, it incorporates the Tribunal’s general statutory standard recommendation to include requests to register non-derogatory or non-offensive commercial use. This would require consultation, and if necessary, consent from First Nations, Inuit, or Métis.

The statutory mechanism to allow for consultation and consent from the protected group is already in place in the *Canadian Trademarks Act*. Section 9(2)(a) Excepted uses provides that “Nothing in this section prevents the adoption, use or registration as a trademark or otherwise, in connection with a business, of any mark described in subsection (1) with the consent of Her Majesty or such other person, society, authority or organization as may be considered to have been intended to be protected by this section”. Section 9(2)(a) would allow for a proposed adjudicative body comprising of First Nations, Inuit, and Métis to make determinations on the trademark applications in question. This leads the second branch of the proposed trademark regime.

⁸³ *Ibid*, art 38.

⁸⁴ *Ibid*, art 43.

⁸⁵ Lindsay Paquette, “Bill C-15 and the United Nations Declaration on the Rights of Indigenous Peoples: A Proposal for Intellectual Property Law Reform in Canada for the Protection, Preservation and Prosperity of Indigenous Traditional Knowledge and Cultural Expression” (2022) 34:2 IPJ 181 at 184.

⁸⁶ See Part III, ss. B.3 & B.4, *above*.

This paper proposes that a commission should be established, separate from CIPO, comprising of First Nations, Inuit, and Métis to adjudicate on the registrability of marks that comprise of any text or imagery deriving from First Nations, Inuit, or Métis. The commission's decision would be final and binding on CIPO. The facilitative and administrative functions of the commission would include providing consultation and consent where needed or facilitating consultation with appropriate Indigenous community members. This draws from New Zealand's MTAC by emphasizing the need for an entity to advise on trademark applications that involve Indigenous cultural interests. However, it enhances the powers of this entity by incorporating the Tribunal's recommendation to ensure that such entity has adjudicative powers that are final and binding, and not merely consultative in nature. Another aspect of the proposed commission is that only First Nations, Inuit, and Métis community members would make up the commission. This aspect diverges from the New Zealand MTAC as members of the MTAC are appointed by the New Zealand Commissioner of Trade Marks and are not required to be Māori.⁸⁷

It should be acknowledged that these proposals are simply suggestions for what the legislative amendments might look like. The process by which this is carried out should uphold the principles in the *Declaration*. The decision-making process to amend the trademark legislation should involve First Nations, Inuit, and Métis peoples throughout.⁸⁸ The Canadian government should ensure that it consults and cooperates in good faith to adopt and implement the legislative changes.⁸⁹

2) Alignment with the Truth and Reconciliation: Calls to Action

The Truth and Reconciliation Commission of Canada: calls to action ("TRC calls to action") contain two sections with calls that justify the need for these changes.⁹⁰

Call 14 in the Language and Culture section states, "We call upon the federal government to enact an Aboriginal Languages Act that

⁸⁷ "[Terms of Reference for the Māori Trade Marks Advisory Committee](#)" (last visited 2 April 2023) at 4–5, online (pdf): *New Zealand Intellectual Property Office* <www.iponz.govt.nz> [perma.cc/NU3C-SVQX].

⁸⁸ *The Declaration*, *supra* note 82, art 18.

⁸⁹ *Ibid*, art 19.

⁹⁰ Truth and Reconciliation Commission of Canada, "[Truth and Reconciliation Commission of Canada: Calls to Action](#)" (2015), online (pdf): *Government of Canada* <https://publications.gc.ca/collections/collection_2015/trc/IR4-8-2015-eng.pdf> [perma.cc/CN4W-B42A].

incorporates the following principles: ... the preservation, revitalization, and strengthening of Aboriginal languages and cultures are best managed by Aboriginal people and communities.”⁹¹ While this call is to enact new legislation, trademark law must also be engaged to embody this call holistically. There cannot be the preservation of Aboriginal languages and cultures if third parties can lawfully use said languages and cultures without consent or recompense. The proposed trademark regime supports this call by prohibiting the misappropriation of TCEs as trademarks, whether or not it is disparaging or offensive. The proposed regime formalizes a process for First Nations, Inuit, and Métis to govern trademark uses of their culture’s text and imagery. This would include making determinations on whether consultation is sufficient or if consent and compensation is required.

Within the Business and Reconciliation section, call 92 states:

We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following: Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.⁹²

The IP regime is an economic and corporate endeavour. Canadian trademark law is regulated under the federal legislative authority on matters of trade and commerce.⁹³ The registration of trademarks that involve Indigenous TCEs can and must be regulated to conform to this call. The proposed trademark regime supports this call as it codifies into the federal *Trademarks Act* the acknowledgement and recognition that consultation and obtaining free, prior, and informed consent from Indigenous peoples are critical elements of the Canadian trademark regime.

E) Limitations of the Enhanced Model and Future Research

The recommendations in this paper relate to trademark registration which do not capture unregistered trademarks. The common law tort of passing off is a potential solution to this gap in the proposed trademark

⁹¹ *Ibid* at 2 (call 14. iv.).

⁹² *Ibid* at 10 (call 92. i.).

⁹³ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(2), reprinted in RSC 1985, Appendix II, No 5.

regime.⁹⁴ Whether the passing off cause of action is robust enough to offer aggrieved Indigenous peoples a remedy for misappropriation is beyond the scope of this paper and is a potential area for future research.

The proposed trademark regime would be an improvement from the current Canadian trademark legislation. However, it is critical to acknowledge that it is far from perfect. Legislative reforms ultimately operate within colonial law and the proposed legislative amendments still embed themselves within a colonial Canadian piece of law. The proposed establishment of a commission comprising of First Nations, Inuit, and Métis, advances the current registration process; and yet it is important to recognize that the structures that dictate this process would still operate within colonial structures of governance.

The literature on the fundamental incongruence of the global IP regime and Indigenous worldview is plentiful.⁹⁵ However, with respect to relationship between Māori and the Crown in New Zealand, Aroha Te Pareake Mead maintains that this incompatibility should not be the reason for doing nothing at all. IP laws have some use and relevance to Māori and Mead suggests that instead of denying the IP regime altogether, it is more impactful to continue enabling dialogue to move closer to alignment with the Treaty. Under this paradigm, this paper emphasizes that the proposed changes to the Canadian trademark legislation should be a starting point and not an end.

4. Part IV—Conclusion

This paper explored the concept of misappropriation in settler colonial states. It asserted that the *Canadian Trademarks Act* does not provide the protection necessary to ensure Indigenous peoples in Canada are protected from the misappropriation of TCEs. The paper turned to the New Zealand trademark legislation to assess whether there are elements that could be adopted in Canada as the trademark regime in New Zealand contains one of the more progressive approaches compared to other similar countries at this point in time.

This paper found that while the New Zealand legislation is indeed more progressive than what currently exists in Canada, there are some limitations. A proposal for an enhanced version of the New Zealand regime to adopt in Canada was outlined. The proposed regime includes statutory mechanisms that prohibit the registration of any text or imagery

⁹⁴ *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*, WIPO, 37th Sess, Annex 1, UN Doc WIPO/GRTKF/IC/37/7 (2018) at 28.

⁹⁵ *Mead, supra* note 1 at 1.

derived from First Nations, Inuit, and Métis, without formal consultation with Indigenous peoples. This paper acknowledges the limitations of legislative reforms and maintains that this is not a complete solution but rather, part of an ongoing process to move closer to a regime that upholds principles of self-determination for Indigenous peoples.