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## Aboriginal Partnership, Capacity Building and Capacity Development on ABS

### *The Maritime Aboriginal Peoples Council (MAPC) and ABS Canada Experience*

*Chidi Oguamanam and Roger Hunka*

#### Abstract

This chapter focuses on frameworks for Aboriginal capacity building and capacity development on access and benefit-sharing (ABS) under the Nagoya Protocol (NP). It examines the experiences of the Maritime Aboriginal Peoples Council (MAPC) and its collaboration with ABS Canada and reflects on other possible avenues for building trust and effective collaboration for capacity building and capacity development on ABS. Noting that Canada has an enviable track record of supporting development initiatives in the global South, it argues that Canada – specifically its Aboriginal Peoples – could benefit from capacity development support on ABS even from third parties including Indigenous and local communities (ILCs) of the global South who have experience with ABS. A potential South–North or North–North capacity building and capacity development trajectory could represent an attempt to acknowledge the status of Aboriginal peoples in the likeness of a global South in the North in need of capacity building and capacity development in a niche and emerging field such as ABS.

#### INTRODUCTION

‘Capacity building’ and ‘capacity development’ are buzzwords in contemporary development, including international development and policy discourse. They designate a variety of support mechanisms, including processes and interventions directed to enable or empower institutions, communities, collectives or even individuals to obtain or acquire required skills, expertise, competences or knowledge to optimally perform or bridge existing performance or skills and competence gaps in

an identified area. Although in the strict sense, the two phrases do not mean the same thing, they are used interchangeably here for simplicity and pragmatic reasons. Theoretically, capacity building presumes there is no pre-existing capacity on the part of the target, whereas capacity development assumes the converse but aims at improving existing capacity. Capacity building and capacity development may define an intra-institutional need, i.e. it can apply within a firm or across related firms or institutions or their component departments (organizational capacity building and capacity development) or within a community or across related communities and their constitutive segments (community capacity building and capacity development).

However, in the context of the development discourse, these phrases find traction within the usual fault line of global North–South relations and power dynamics. However inaccurate, the South is often portrayed as lacking capacity and the North as having the desired capacity, notably in technology and infrastructure. The South is, therefore, a subservient or docile recipient of capacity building and capacity development in the fashion designed by the North. That approach is a corollary of colonial ideology, that is often knowingly or unknowingly weaved into the contemporary development narrative and policymaking. As a result, Indigenous peoples in Canada and elsewhere in the global North have often been characterized as the ‘South in the North,’ the ‘Fourth World’ that are perennially circumscribed in the historical inequities of colonialism (Wilmer 1993). Ironically, Canada is on the frontline of international development aids and other intervention initiatives in the global South. Canada and its developed colonial and industrialized counterparts are heavily invested in exporting ‘development,’ including its adjuncts such as capacity building and capacity development, to the global South. Not only does Canada have some of the globally reputable international development agencies, in addition to trade, international development is the fulcrum of Canada’s foreign relations. In this benevolent endeavour, Canada prefers to revel in its enviable, albeit suspect, recognition as a model of justice, equality, and an example of a viable multicultural liberal democracy and polity.

Yet, Canada remains in denial of the injustices that characterize the Aboriginal experience domestically, which have carved a deep scar on Canada’s national conscience. Today, the Indigenous peoples of Canada continue to remain the South in the ‘True North’ in terms of their living conditions and standard of living. For example, in a 2012 visit to Canada, then-United Nations Special Rapporteur on the Right to Food, Olivier de Schutter, lamented the magnitude of food insecurity among Northern Aboriginal communities and other remote Indigenous communities in Alberta and Manitoba. In his scathing remarks during that visit (which the then-Conservative government of Stephen Harper snubbed), the envoy characterized the conditions as not only ‘very desperate’ but the people as being in ‘extremely dire straits’ in regard to food insecurity. He counselled that ‘Canada needs to drop its

“self-righteous” attitude about how great a country it is and to start dealing with its widespread problem of food insecurity’ (Kilpatrick, 2012) that is visibly prevalent among Indigenous peoples.

Few things underscore the prominence of capacity building and capacity development more than their inclusion into modern treaties, other international legal instruments, and into the language of various manners of development agencies – World Bank, IMF, WTO, UNCTAD, UNDP, etc. While the focus on infrastructure remains constant, in most of these contexts, the specific subject matters or targets, as well as triggers for capacity building and capacity development, are either novel or emerging phenomena including contingency situations such as disaster mitigation response. Some examples of the focus of capacity building and capacity development in miscellaneous areas most relevant to Indigenous peoples include information communication technology, other paradigmatic innovations and technologies such as bio and digital technologies, the climate change phenomena, ocean ecosystems and fisheries management (Rutherford, Herbert and Coffen-Smout, 2004; Weng et al., 2015) conservation, livelihood improvement and poverty alleviation (Haque, Deb and Medeiros, 2009); research collaboration (Broad and Reyes, 2008; Smith et al., 2014); tourism development (Bennett et al., 2012) pandemics, and various forms of natural and human-made disasters of unprecedented magnitude, to mention a few.

In other cases, what may be new and in need of capacity building and capacity development is espoused as intervention or mitigation strategies, including governance, institution building, legal or regulatory capacity enhancement. Often, some of the prescribed responses are alien, to variable degrees, in relation to the existing worldviews, priorities or even aptitude of the target IPLCs. As well, they come with questionable and often paternalistic assumptions in regard to these target beneficiaries of capacity building and capacity development initiatives. With specific regard to the Nagoya ABS framework, Perron-Welch and Oguamanam (Chapter 6) observed that ‘the global norms on ABS reflect aspects of colonial legacy of fixation on economic appeal of raw materials’ through access mechanisms, while benefit-sharing takes the form of platitudes (Wright, 2017). In this market economic consideration, the valourization of genetic resources (GRs) as resources takes precedence over other cultural affinities that undergird Indigenous peoples’ relationship with life forces, including biological diversity, GRs and TK. There is often an unrecognized need to build and develop capacity for those who seek to build and develop capacity to understand their target beneficiaries.

The foundation of the modern international legal system, and more broadly the international order, is largely a derivative and continuation of the legacy of colonial relations. The Indigenous peoples of Canada and their counterparts elsewhere have been co-opted into that order. Until recently, that order called into question their humanity. It has yielded an intimidating or asymmetrical power relation that has taken Indigenous peoples’ priorities, worldviews and values hostage. Millennia of

policies of cultural subjugation, even cultural genocide, epistemic discrimination and devaluation, and determined but thankfully failed attempts to permanently 'solve' the 'Indian question' (Angie, 1996; Anaya, 2004) (through the eradication of the Indian) has left the 'Indian' and their counterparts, and victims of colonialism permanent targets and recipients of all kinds of capacity building and capacity development, in a way, as an inevitable form of a new and barely interrogated orientation.

In this Chapter, we address the capacity building and capacity development dynamic in the context of, and beyond the NP, with a focus on how Aboriginal capacity building and capacity development on ABS could be engaged in Canada against the backdrop of Canada's profile as an active actor in the international development space. We examine the first major ongoing and evolving capacity building and development initiative on ABS in Canada (courtesy of the MAPC and the ABS Canada research initiative) and how the outcome of that partnership helps foreshadow capacity building and capacity development towards an Aboriginal-friendly ABS regime in Canada.

#### CAPACITY BUILDING AND CAPACITY DEVELOPMENT AS AN IMPERATIVE

Without question, there are conspicuous bases for capacity building and for capacity development as strategies for tackling historic injustices in specific and variegated cases (Department of Justice, 2017). The most notable one is in relation to ABS over GRs and TK (Davis et al., 2015), as part of an important step towards justice, reconciliation and international and national cohesion on the Indigenous question. Perron-Welch and Oguamanam (Chapter 6) indicate that the protection of traditional knowledge issue, of which ABS is an adjunct subject, is fairly new in international law. Because of its cross-cutting nature, it is the focus of diverse sites for ongoing legal and policy capacity building and capacity development, as evident in various international law-making processes that have ramifications for ABS. For example, outside of the formal international institutional framework, the German-based ABS Capacity Development Initiative has been involved in building and developing capacity on the implementation of ABS regimes in Africa since 2006. This work has been on both a continent-wide basis throughout the African Union and on national basis across select countries in the region in a classical form of North-South capacity building and capacity development. This is but one example to show that ABS is a novel concept. Even the international community that, in part, collectively invented ABS, as a response and mitigating strategy to biopiracy, needs capacity building and capacity development with regard to the ramifications and applications of ABS.

In the Canadian context, part of the legal preparedness or lack thereof for an Aboriginal sensitive ABS lies in the broader dynamic of Canada's relationship with its Aboriginal peoples. As explored by Joshua Nichols in Chapter 4, Aboriginal

people's claims to GRs and associated traditional knowledge can be broached from within the flawed but salvageable architecture of s. 35 of the *Charter* (i.e. the *Constitution Act, 1982*). Nichols has highlighted and disclaimed the defective sovereign-to-subject foundation and the questionable presumptions that have since animated the interpretational orientation of s. 35 by the courts. That approach has created a series of barriers, scrutiny and constraints with regard to Aboriginal peoples' inherent rights to self-determination and self-government. These are intrinsic rights of any sovereign, which no other sovereign can grant to another, let alone extinguish.

Indigenous peoples' rights claims over biogenetic resources and traditional knowledge must, of necessity, issue from and be recognized as part of sovereign-to-sovereign relationship within the Canadian State. According to Nichols and other contributions to this volume (such as Perron-Welch & Oguamanam in Chapter 6), a progressive interpretational outlook on s. 35 and other frameworks of Canada's relationship with Indigenous peoples has become imperative. These approaches debunk the *terra nullius* doctrine and unequivocally recognizes the pre-contact, unbroken, and unceded sovereignty of Indigenous peoples and their relationship with Canada on a nation-to-nation basis. It is an outlook that grounds Indigenous peoples' rights to natural resources, including, of course, GRs and TK. By extension, such rights constitute the warrant for Indigenous peoples as parties whose interests are significantly engaged in ABS.

As Canada pursues the reconciliation agenda and portends to heed the Truth and Reconciliation Commission (TRC)'s call to action on UNDRIP, there appears a gap for building and developing capacity for a more progressive jurisprudence on Indigenous peoples in the context of new national and international interest on GRs and associated traditional knowledge and, by extension, ABS. Canada's first Aboriginal Minister of Justice, Jody Wilson-Raybould, has indicated that part of Canada's renewed rapprochement with Aboriginal peoples, in the spirit of reconciliation, is breathing new life into s. 35 of the *Constitutional Act, 1982* (Perron-Welch & Oguamanam, Chapter 6). That, in itself, is conceivably the first site for legal and jurisprudential capacity development<sup>1</sup> that would have direct ramifications for ABS.

International law vests the sovereign rights over natural resources and authority over ABS on states. But that authority is subject to the national law (*CBD*, Articles 15 (3)). In exercising that authority, the NP supports consideration for and the incorporation of 'indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge and associated genetic resources' (NP, Article 12(1)) for the implementation of ABS. Already, the principles of free, prior, and informed consent and consultation of Indigenous peoples in making decisions that affect them is affirmed in the NP. Those principles are now also part of the international law on Indigenous peoples and cemented in Canadian law, as recently affirmed by the Supreme Court of Canada in *Clyde River (Hamlet) v. Petroleum Geo-services Inc.* (2017).<sup>2</sup> In Canada and elsewhere, recognition

of Indigenous sovereignty includes the recognition of Indigenous legal traditions, customary practices and protocols. Doing so situates Canada as a country with plural legal traditions beyond its much-touted official Anglophone (common law) and Francophone (civil law) bi-juridical status. A fuller realization of that approach remains contentious in the history of Canada's relations with Indigenous peoples. It is a site for capacity building and capacity development for Aboriginal communities and all tiers of government in Canada. Such capacity building and capacity development could not be more urgent and compelling if Canada was to embark on implementing Aboriginal sensitive ABS within or outside the Nagoya framework.

From the foregoing, it is clear that capacity building and development is not a one directional top-down process with Indigenous peoples as the default recipients. Along these sentiments, Indigenous partners and participants at the 2016 ABS Canada Focus Group on ABS held in Ottawa, observed: '[c]apacity building [and development] on ABS need to be a two-way or "multidirectional" exercise. As such, while governments need to support ABS capacity building in different directions, Aboriginal peoples also need to educate the government on how to engage and understand Aboriginal peoples as important stakeholders in ABS' (ABS Canada, Ottawa, 2016, 10). There is much to be said for building and developing capacity of public servants and various policy-makers on cross sectoral scales on awareness of Aboriginal issues throughout the entire accoutrement of Canada's public service and national life generally, even more so in complexly lawyered and novel fields in which ABS is implicated.

#### CAPACITY BUILDING AND CAPACITY DEVELOPMENT IN THE NAGOYA PROTOCOL (NP)

Article 22 of the NP is devoted to *capacity building and capacity development*. That provision deploys the two phrases interchangeably. It prescribes that Parties shall cooperate in capacity building and capacity development for effective implementation of the NP. The NP's design of capacity building mimics the classical international development approach. Its blatant targets for capacity building include 'developing country Parties, in particular, the least developed countries and small island developing States among them, and Parties with economies in transition' (NP, Article 22). For the most part, this is a direct reference to the global South. The Article further provides that Parties shall draw expertise from 'existing global, regional, subregional and national institutions and organizations' to build and develop capacity. There is no direct reference to Indigenous peoples, in the strict sense, as direct targets for capacity building. Rather, the NP provides that in the context of capacity building and capacity development, Parties 'should facilitate the involvement of indigenous and local communities and relevant stakeholders including non-governmental organizations and the private sector'. In a way, Indigenous capacity building and development is not conceived as an imperative but

rather as an adjunct or subservient aspect of building capacity in a state Party. This approach does not address glaring situations of lingering colonial relations such as in Canada, where there is rarely a unity of purpose between a state Party and its IPLCs (Oguamanam, 2004).

The omission of Indigenous peoples as direct targets for capacity building and capacity development and the ambiguous and non-binding reference to facilitating their involvement in capacity building and capacity development is one of the gaps in the NP. The question begs asking, in what ways, to what extent and to what end can States ‘facilitate the involvement of indigenous and local communities’ in capacity building and capacity development? Despite the importance of ABS as a subject critical to Indigenous peoples’ interests, in Canada and elsewhere, the focus of the capacity building provision on the global South reflects one of the perennial fault lines of international development – the presumption that Indigenous peoples of the global North are at parity with dominant populations in their current ancestral-homeland-turned-colonial enclaves and, as such, could not be the primary or legitimate target of capacity building and capacity development. This correlates to the tendency by colonial states, such as Canada, to direct their international development efforts, including capacity building and capacity development, to the global South under the pretext or assumption that there is no domestic development deficit in segments of its constituent units or populations as mentioned in Olivier de Schutter’s remarks.

Under the NP, capacity building and development aims at strengthening human and financial resources, and institutional capacity. Targets of capacity building are required to ‘identify their national capacity needs and priorities through national capacity self-assessments’ while supporting ‘the capacity needs and priorities of indigenous and local communities . . . as identified by them with special consideration for “the capacity needs of and priorities of women”’ (NP, Art 22.3). The NP identifies key areas for capacity building and capacity development. They are: the overall capacity to implement and comply with NP obligations, to negotiate mutually agreed terms with users of GRs, to implement and enforce domestic legislative and administrative measures, and to develop valued-added endogenous research capacities to their genetic resource (NP, Article 22(4)(a–d)).

Finally, the NP outlines measures aimed at building and developing the capacity for implementation of ABS as follows: legal and institutional measures, training for skill in negotiating MAT, monitoring and enforcement of compliance, use of effective communication tools and internet-driven systems for ABS activities, and development and application of valuation methods. Other capacity-building and development measures relate to bioprospecting, including related research and taxonomic studies; sustainable transfer of technology; measures ensuring that ABS contributes to biodiversity conservation outcomes; and devising special measures to boost the capacity of ILCs, and capacity of women members of those communities to participate and benefit from ABS.

Pursuant to Article 22 of the NP on capacity building and capacity development, conceivably, the ability of ILCs to benefit from capacity building and development is at the discretion of state Parties to the NP. Two points should be addressed here: First, under the NP, there is a presumption that the developed, industrialized countries of the global North, who are essentially the users of GRs, have no need for capacity building and capacity development on ABS. Second, as outlined above, since ILCs are technically not parties to the NP, their interest in capacity building and capacity development is essentially secondary. In the Canadian context, both presumptions are fundamentally flawed because ABS is a novel concept. Both the providers and the users of GRs and TK (even if that categorization is misleading) are in need of capacity building and capacity development. As we argued earlier, even though international law recognizes sovereign states as Parties to the international conventions, that position is without prejudice to nation-to-nation or sovereign-to-sovereign status of component nations in a given State, where there is shared sovereignty with full rights of self-determination (Nichols Chapter 4).

In addition to the enduring trust deficit that defines Indigenous peoples' relations with colonial laws, including the international law-making process, the problematic approach to capacity building and capacity development underscores, in part, their lingering skepticism over the Nagoya ABS framework. At the ABS Canada Focus Groups, Indigenous partners and participants questioned the legitimacy of the NP as it relates to their experiences. They expressed deep resentment over Canada's perceived reprehensible role at the Nagoya deliberations. Specifically, as pointed out by Hodges and Langford (Chapter 2), the role included Canada's objections to the reference to 'Indigenous peoples' and preference for the term 'indigenous and local communities'<sup>3</sup> as well as Canada's attempted but failed resistance to the inclusion of the UNDRIP in the preamble to the NP. Not only did Canada participate at the negotiations without consulting Indigenous peoples, Indigenous partners and participants argued that the NP is premised on principles that are irreconcilable with their worldviews.

Some of these objections are no longer as striking as when they were raised. This is largely due to policy shakeups on Aboriginal relations via the implementation of the TRC Report, unqualified endorsement of UNDRIP and progressive approach to s. 35 and nation-to-nation relations pursuant to the Justin Trudeau government's program on reconciliation. Yet Indigenous peoples remain cautious, insisting that the NP represents one ideology or pathway for ABS that does not preclude them from developing their own vision of ABS. As true as that is, many of the NP's elements for capacity building and capacity development are encouraging and can be adapted or internalized to drive Indigenous sensitive ABS within the overarching framework of self-determination. That is the approach taken by the MAPC in its partnership with ABS Canada dating back to 2011 to which we shall return later.



A PARTNERSHIP STRATEGY FOR CAPACITY BUILDING  
AND CAPACITY DEVELOPMENT

The United Nations has deployed partnership building as a tool for sustainable development. Specifically, through both the millennium development goals (MDGs) (2000–15) and the Sustainable Development Goals (SDGs) (2015–30), the UN enunciated the instrumentality of partnership for advancing developmental goals. Although in those contexts, the UN's familiarity or preference for public sector cooperation or partnership with the private sector (the so-called PPP model) is evident (Chon, Roffe and Abdel-Latiff, 2018). However, it does not underestimate the flexibility and inclusiveness required to put partnership at work for addressing capacity building and capacity development gaps. Accordingly, pursuant to SDG #17, the UN observes: 'A successful sustainable development agenda requires partnerships between governments, the private sector and civil society. These inclusive partnerships built upon principles and values, *a shared vision, and shared goals* that place people and the planet at the centre, are needed at the global, regional, national and local level' (UN, SDG, 2015).<sup>4</sup>

As we demonstrate below, after the NP was signed in 2010, perhaps the first Aboriginal-driven initiative to open a conversation on the NP and ABS, in general, has been at the instance of MAPC. MAPC is a regional Aboriginal leadership organization with a strong democratic ethos and deep roots in Aboriginal grassroots in the three Canadian maritime provinces: Nova Scotia, New Brunswick and Prince Edward Island. These provinces represent the traditional ancestral homelands of the Mi'kmaq, Maliseet, and Passamaquoddy Aboriginal peoples of Canada. MAPC is a federating Aboriginal institution for the region, through which the component native councils are able to exert relevance, project and protect the historic and contemporary Aboriginal interests in the region, as well as nationally and internationally. At the core of its objectives, MAPC is committed '[t]o remain ever vigilant and to take any and all measures available: at law, by politics, or through proactive advocacy to ensure that decision-makers do not subject our community of traditional ancestral homeland Aboriginal Peoples to social, economic, educational, political or individual disadvantage, stereotype, vulnerability, prejudice or discrimination' (MAPC, 2017, <http://mapcorg.ca/>).

Over the years, MAPC has remained resolute to the realization of that mandate and earned for itself integrity in advocacy, Aboriginal entrepreneurship and research. Today, it is an authoritative institution involved in continuing capacity building and capacity development that is required for Aboriginal peoples to effectively participate in the evolution or transformations of historical Aboriginal interests and in the emergent fields in which those interests are engaged. So far, given its commitment to capacity building and capacity development, MAPC has partnered with relevant national organizations, including the National Congress

of Aboriginal Peoples in establishing the 'SAR Ikanawtiket' in 2005 (Maritime Aboriginal Peoples Council, 2017). SAR Ikanawtiket is a project dedicated to fostering environmental respect and the realization of the Species at Risk Act (SARA). It is now the foremost and the most resourceful biodiversity conservation, capacity building and capacity development educational tool arising out of Aboriginal knowledge and worldviews of the living environment.

In addition to the SAR Ikanawtiket initiative, MAPC is a contact and contracted partner with constitutive native regional councils and relevant government agencies for a project on Oceans and Aquatic Resources Management, a region-wide initiative aimed at continuing, environmentally respectful and sustainable use by communities of the five regional watersheds in the maritime region, namely the Bay of Fundy, Eastern Shore Atlantic Ocean, Northumberland Strait, Bai De Chaleur and Atlantic Ocean. Using proactive and constructive partnerships, MAPC executes work under this project through the Maritime Aboriginal Aquatic Resources Secretariat (Maritime Aboriginal Aquatic Resources Secretariate (MAARS) 2017) – an incredible resource on Aboriginal sensitive, equitable and sustainable resource management.

As its *modus operandi*, MAPC is in the practice of using its 'expertise and capacity to undertake a range of "pilot or regional" programs or initiatives' as may be agreed to by member councils (Projects & Initiatives, 2017). According to it, 'Sometimes, in the context of international subjects, MAPC will be mandated responsibility by the Member Councils, or National Organization, or Traditional Leaders, to follow a subject, make attendances, draft submissions, present same, and report on the outcomes by informal brief or by public paper' (ibid.). MAPC undertakes these kinds of tasks through various commissions, the most 'effective way to gather a large range of views from the traditional ancestral homelands of Aboriginal Peoples, and also serve as one vehicle to raise awareness about important topics, and help to build regional solidarity and focus of the advocacy' (MAPC Commissions, 2017). Given its track record on issues relating to biodiversity conservation, MAPC readily focused on the NP and ABS to raise awareness and gather the views of aboriginal peoples on ABS immediately after the NP was signed in 2010.

In 2010, MAPC led the first major Canadian Indigenous initiative on ABS through a partnership that involved expert support from then Dalhousie University's Professor Chidi Oguamanam, which resulted in a well-mobilized and well-attended Indigenous ABS forum. The partnership strategy reflected a constructive leveraging and adaptation of capacity building and capacity development vision of the NP text explored above. It also involved a significant degree of community awareness-raising on the subject of the NP and ABS even though not in the scale elaborated in Article 21 of the NP. The ongoing MAPC initiative is instructive in many respects, including but not limited to the following. First, by taking charge of capacity building without waiting for Canada, it rejects the location of IPLCs as second layer targets for capacity building under the NP.

Second, by seeking out its own partner(s) on the basis of trust without too much formalism, MAPC underscores Aboriginal initiative and exercise of freedom of judgment and decision-making in matters that concern them. Third, as an entirely MAPC initiative, the first major ABS forum was able to broach the issue of identifying, at least at the regional level, capacity needs and priorities, and consequently opened up a national dialogue on the need for Indigenous capacity self-assessments through broadened conversations on Indigenous-friendly ABS. Fourth, the deliberate attempt by MAPC to ensure equitable gender and transgenerational representation at the first major Aboriginal-initiated ABS forum demonstrated Aboriginal peoples' expansion of capacity need and priority to include not only women but also elders and the younger generation of Aboriginal youths.<sup>5</sup>

After two-day deliberations on ABS, under the auspices of the MAPC commissions program, men, women, elders, younger generations and members of traditional ancestral homelands of Mi'kmaq, Maliseet, and Passamaquoddy Aboriginal peoples of Canada, their collaborating partners and other indigenous delegations enunciated a fifteen-Article *Iskensisk Declaration on ABS*. The document is the first major Aboriginal charter on ABS in Canada and it is reproduced here *in extenso* without the preambles:

We the Aboriginal organizations and individuals assembled in our traditional ancestral homeland gathering site continuum of 10,500 years, declare the following as essential to keep under constant advisement in implementing the intent of the Convention on Biological Diversity in Canada for the access, use, and fair and equitable sharing of benefits arising out of the utilization of genetic resources and associated traditional knowledge . . .

**Article 1:** Mother Earth concentrates all energy to give life to everything, without asking for anything in return. Our worldview, as Aboriginal Peoples, requires us to respect Mother Earth and to conduct ourselves in a manner that does not violate our interconnected and interdependent relationship with our soils, waters, air, ice, mountains, and all natural life (biodiversity) on Mother Earth.

**Article 2:** Aboriginal Peoples within the Federation of the Peoples of Canada have survived the derogation of our complete liberties (rights) under treaties, dislocation from our traditional ancestral homeland territories, denial of our birthright identity, and forced disassociation from our languages, cultures, traditions, and practices thereto.

**Article 3:** Mother Earth and Aboriginal Peoples have been victimized by greed, the doctrine of terra nullius, the doctrine of dominance, and more, all of which have brought about the devastation of biodiversity; destruction of soils, waters, air, and ice; disassociation from respectful and caring practices; denial of peoples duties to future generations; discord between Peoples; disproportionate distribution of wealth from ingenuity and progress; disharmony in the manner and dislocation in the approach for the utilization of natural resources, their genetic characteristics, and their derivatives; and the dishonest treatment of traditional knowledge of Aboriginal Peoples.

**Article 4:** Aboriginal Peoples within the Federation of Canada must be allowed the responsibility to effectively demonstrate our vital role in conservation, sustainable development, and benefit-sharing under fair and equitable terms, as members of the family of humanity on Mother Earth.

**Article 5:** Aboriginal Peoples must not allow Canada to undermine or percolate subversive meaning to the Convention on Biological Diversity, or the decisions or protocols thereto, including the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, to accommodate economic incentives alone or to slip the Convention, decisions, or protocols away from public view.

**Article 6:** Aboriginal Peoples' respect, knowledge, and holistic approach to natural resources and biodiversity includes the genetic properties of such resources and their derivatives. A restricted interpretation of the term 'genetic resources' disrespects the worldviews of Aboriginal Peoples and upstages or puts on hold discussions and concurrent work on the subject.

**Article 7:** There is within the Federation of Canada both a 'user' and a 'provider' construct to access and benefit-sharing. Accepting this 'user and provider' reality, reshapes the opportunities available and reveals the benefits and value of seriously engaging with Aboriginal Peoples in effective, meaningful, and open partnerships; no less than aspired in the Nagoya Protocol, and keeping under review the Convention on Biological Diversity, on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization.

**Article 8:** Canada's assertion of complete authority to determine access to genetic resources is qualified and limited by the provisions of Sections 25 and 35 of the supreme national domestic law - the Constitution Act, 1982.

**Article 9:** Bio-technology activities which may affect Aboriginal Peoples' resources, access, and use rights require consultation and accommodation. If no accommodation can be achieved, then compensation must be made to the affected Aboriginal People. Anything less is considered to be an act of biopiracy.

**Article 10:** Canada's implementation of the Nagoya Protocol must have the full and effective participation and involvement of all Aboriginal Peoples within the Federation of the Peoples of Canada.

**Article 11:** Aboriginal Peoples, continuing within the boundaries of the Federation of the Peoples of Canada, take issue with the Nagoya Protocol restriction on capacity building limited to Peoples only of 'developing countries'. Aboriginal Peoples in 'developed countries', like Canada, require access to financial mechanisms and broad supports to develop capacity and awareness and for meaningful involvement and effective participation on access and benefit-sharing matters.

**Article 12:** The structure and operational framework of any ABS Clearing-House in Canada must be negotiated with the full and effective participation and involvement of all Aboriginal Peoples within the Federation of the Peoples of Canada.

**Article 13:** For basic transparency and representative governance in Canada, Aboriginal Peoples must be a part of the decision-makers and have seats within an oversight council for any National ABS Clearing-House.

**Article 14:** A National ABS Clearing-House and a National ABS Focal Point in Canada must comply with the constitutional provisions of Section 25 and 35 of the Constitution Act, 1982 and must honour jurisprudence on the subject of ‘dealings with Aboriginal Peoples’, which must not appear to be sharp – the Honour of the Crown is at stake.

**Article 15:** Access, use, and benefit-sharing of natural resources, genetic properties, and traditional knowledge has a moral, social, political, and economic dimension, which must be addressed through international norms and an international regime. Failure to adequately address or police access, use, and benefit-sharing from abuse, violates sustainable use of natural resources and the need to protect human health and the environment from adverse effects and from products or activities with suspect Source of Origin.

In 2014, four years after the *Iskenisk Declaration*, MAPC engaged with the ABS Canada research initiative as a core Aboriginal partner, as part of ABS awareness-raising and nation-wide capacity building and capacity development through, among other things, the instrumentality of focus groups. ABS Canada is comprised of interdisciplinary researchers, national and international experts, including Indigenous experts, students/trainees and experienced policy-makers working as a team on a project titled: ‘Building Capacity: Toward an Aboriginal Sensitive Access and Benefit Sharing over the Utilization of Genetic Resources in Canada.’ Its objectives as outlined in Chapter 1 include capacity building and development through education, training, networking and participatory partnerships with Indigenous peoples for an exchange of ideas between them and other stakeholders on ABS. As part of its strategy and in partnership with MAPC, ABS Canada has convened nation-wide loosely guided focus groups on ABS allowing for open conversations about the challenges and prospects for a Canadian ABS policy that is respectful of Indigenous peoples as core partners. The initiative aims at seeking common grounds and deeper appreciations of the interests, challenges and perspectives of all stakeholder groups on ABS with special consideration and direct articulation of Indigenous peoples’ interests and concerns.

The MAPC-ABS Canada partnership is a confidence and trust-based relationship operating within a sanctioned Canadian research ethical framework of doing or conducting research partnerships by and with Indigenous peoples. It is premised on full consciousness and sensitivity to the long-standing relationship of mistrust and perennial suspicion, which characterize the checkered engagement between Indigenous peoples and researchers. Through personal goodwill of both individual and institutional actors behind ABS Canada and MAPC, the partnership has been able to navigate across occasional suspicion-laden low moments and trust-redeeming

high-points on the field, with each occasion representing a mutual teaching and learning moment for all participants. The ABS Canada team leveraged its mutual goodwill with MAPC in order to reach other Indigenous groups, peoples, leaders and participants in the nation-wide focus groups on ABS conducted across the regions.

A significant aspect of the partnership is MAPC's ability to assume ownership of the focus group process it hosted and, beyond that, its ability to provide advice and support on how to engage kindred Indigenous peoples, leaders and hosts of other regional focus groups. The focus groups were sites of intensive Indigenous participation in terms of recruitment, mobilization and agenda setting. After each focus group, ABS Canada released its factual summary account of the outcomes as pre-approved by participants. MAPC reserved the right to author and disseminate as it deems fit its own account of the focus group proceedings and outcomes from an exclusively Indigenous perspective. In the exercise of that right, after the first of the three nation-wide focus group proceedings hosted by MAPC in Moncton, NB on 15–16 October 2015, MAPC released the *Petkoutkoyek Statement on the Access, Use, Fair and Equitable Sharing of Benefits Arising Out of the Utilization of Genetic Resources and Associated Traditional Knowledge in Canada*. Stripped of its pre-amble, the ten-Article *Petkoutkoyek* Statement reads:

A representative group of Maritime Aboriginal Peoples continuing throughout the traditional ancestral homeland territories of the Mi'kmaq, Maliseet, and Passamaquoddy Aboriginal Peoples, together with ABS Canada (A Social Sciences and Humanities Research Canada Project titled: 'Towards an Aboriginal Sensitive ABS Policy for Canada') with several national and international experts on Access and Benefit Sharing (ABS), participated with the Maritime Aboriginal Peoples Council in a two day Maritimes Regional ABS Focus Group Session convened at Petitcodiac (PETKOUTKOYEK), Moncton, New Brunswick . . .

We promulgate our *Petkoutkoyek* Statement and commend this partnership initiative with ABS Canada to promote Aboriginal capacity building and awareness-raising on access and benefit-sharing, and urge ABS Canada to ensure that Aboriginal Peoples across regions share knowledge and engage on community solidarity and mobilization on the subjects of ABS, and we urge Councils of Governments within the Federation of Canada to take on ABS subject matter with deserving seriousness and genuine commitment.

**Article 1:** We require Canada to work with Aboriginal Peoples to develop our aboriginal human capacity on ABS, and to support us with the necessary financial and human resources to conduct effective, meaningful and transparent participation at fora on ABS, the Nagoya Protocol and the Convention on Biological Diversity;

**Article 2:** The Aboriginal Peoples of the 73 Aboriginal Nations of Aboriginal Peoples continuing throughout the Federation of the Peoples of Canada, assert our Aboriginal Right to maintain, control, protect and develop our cultural

heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of our sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna, flora, oral traditions, literatures, designs, sports, and traditional games, visual and performing arts. We also have the right to maintain control, protect, and develop our intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions;

**Article 3:** We require Canada to work and consult with all the Aboriginal Peoples of Canada to develop the necessary Aboriginal Peoples National Institutions on Access and Benefit Sharing throughout Canada, where Canada shall recognize multiple Aboriginal Peoples National Focal Points and multiple Competent National Authorities reflective of the 73 diverse Aboriginal Nations of Aboriginal Peoples continuing throughout the Federation of the Peoples of Canada;

**Article 4:** We require Canada to establish a national consultation table with representatives from the 73 Aboriginal Nations of Aboriginal Peoples, to discuss and determine the number of Aboriginal National Focal Points and Aboriginal Competent National Authorities necessary to implement and deal with the: protocols, processes and procedures on access to genetic resources and the fair and equitable sharing of benefits therefrom;

**Article 5:** The Councils of non-Aboriginal Governments must recognize that their homocentric worldview is dramatically different from our eco-centric worldview which must be recognized as a fundamental starting construct in formulating protection regimes for ‘Community Shared Ownership with Responsibility Rights’ as compared to formulating ‘Individual Proprietary Rights’;

**Article 6:** We require Canada to support our Aboriginal Peoples’ work to develop a framework on which to build a protection regime for ‘Indigenous peoples Intellectual Manifestations’ (IPIM), drawing from sacred, restricted or communal Traditional Knowledge about biodiversity – ‘Aboriginal traditionology’;

**Article 7:** We require Canada to support a representative table of the 73 Aboriginal Nations of the Aboriginal Peoples to expand on the monetary and non-monetary benefits and Annex of the Nagoya Protocol;

**Article 8:** We Aboriginal Peoples of our 73 Aboriginal Nations of Aboriginal Peoples within the Federation of the Peoples of Canada seek ‘full benefit capture’, from access to our genetic resources and use of our traditional aboriginal knowledge – ‘traditionology’;

**Article 9:** We Aboriginal Peoples of our 73 Aboriginal Nations of Aboriginal Peoples confirm that the transgenerational learning and teaching of our youth must always be foremost considered and incorporated into all aspects of our discussions about Access and the Fair and Equitable Sharing of Benefits advanced in the Nagoya Protocol and championed in the Convention on Biological Diversity:

**Article 10:** We the Aboriginal Peoples of our 73 Aboriginal Nations of Aboriginal Peoples as partners in the human family, approach the subject of ABS as State Parties to the Nagoya Protocol and the Convention on Biological Diversity, holding as a minimum standard and guide, the Purpose and Articles of UNDRIP.

LESSONS IN CAPACITY BUILDING AND CAPACITY  
DEVELOPMENT ON ABS

We can draw a few lessons regarding capacity building and capacity development on ABS from the lens of the MAPC experience with ABS Canada on the basis of the 2010 *Iskenisk Declaration* and 2015 *Petkoutkoyek Statement* on ABS. First, even though the NP's vision of capacity building reinforces the gap in international development that ignores the genuine deficit in capacity building and capacity development in the global North, Indigenous people can seize the moment, invert the omission and seek real capacity development partners from both within the North and outside of it. For example, ABS capacity and awareness are far more advanced in the global South among developing countries such as India, Brazil, Peru, South Africa and Namibia to mention a few. This presents an opportunity for South-North capacity building outside the default North-South traffic of capacity building and development.

Second, and in a related vein, courtesy of MAPC and indeed all other Indigenous partners' contributions to the ABS Canada Focus Groups, an eloquent case was made for the need to build and develop the capacity of capacity builders. Specifically, development agents at state and non-governmental levels need to build and develop the capacity to fully understand the usual targets or recipients of capacity building and capacity development, namely IPLCs. There is much to be mutually learned from one another by all partners in capacity building and capacity development, warranting analysts to frame the experience as a solidarity-based partnership for co-development (Eade, 2007). Put differently, capacity building and capacity development need to be multidirectional interchanges. In a related observation, Bockstael (2017) argues that meaningful capacity building should not be a disguise to fit Indigenous people into an unjust colonial structure for ease of social control in furtherance of subjugation. Rather, it should support the enhancement of practical skills within the Indigenous community.

Third, Indigenous peoples have called attention to the need for transformational legal capacity building and development on ABS. Such orientation is necessary to fully engage an interpretative orientation of Canadian constitutional and jurisprudential architecture in favour of sovereign-to-sovereign relationship in which Indigenous peoples' rights to natural resources, including GRs, constitute inherent and inalienable right to self-determination (Perron-Welch & Oguamanam Chapter 6; Nichols Chapter 4). In this regard, Article 10 of the *Petkoutkoyek*



*Statement* bears repeating for emphasis sake: ‘We the Aboriginal Peoples of our 73 Aboriginal Nations of Aboriginal Peoples as partners in the human family, approach the subject of ABS as State Parties to the NP and the CBD, holding as a minimum standard and guide, the Purpose and Articles of UNDRIP’ (Hedges & Langford Chapter 2).

Fourth, Indigenous peoples are fully mindful of the capacity building and development architecture of the NP. Without underestimating its inadequacy, they have demonstrated pragmatism in appropriating and adapting those while striving to fill apparent gaps therein. For example, in its work, the MAPC undertakes grassroots mobilization and awareness-raising on novel developmental issues, including ABS. To this end, they have gone beyond special accommodation of women in the NP to include elders and youths with emphasis on transgenerational knowledge mobilization and exchange as a feature of the indigenous capacity building and capacity development. They also recognize the need for capacity building and development to enhance Aboriginal human, financial, organizational and institutional resources, and the role of government. Perhaps more importantly, as part of their right to self-determination, Aboriginal peoples have demonstrated commitment to self-assess, identify or set own capacity needs and priorities as an ongoing matter. In these regards, they have demonstrated the separate and unique historical colonial trajectories and shared experiences of the 73 Aboriginal nations which they insist should be units for nation-to-nation engagements for political and economic rapprochement. They have also gone beyond the economic appeal of ABS to include spiritual ramifications of the relationship with life forces, customary laws, practices and various other considerations that could expand suggested benefit categories under the NP.

Lastly, even within and outside of the Nagoya framework, the latter articulates significant insights and specifics for capacity building and development which Indigenous peoples consider very important to enhance equitable ABS. As technology, innovation, business and industry practices, knowledge – including traditional knowledge innovation and practices of Indigenous peoples – continue to evolve, ABS capacity building and capacity development would remain a work in progress. Overall, on a pragmatic basis, Indigenous peoples would benefit from capacity building and development on a wide array of areas including those identified under Article 22 of the NP.

Among priority areas for capacity building and development are research and development capacity on GRs and associated traditional knowledge, which are necessary to facilitate the understanding of their valorization and dynamics in the value chain as well as to enhance effective participation and engagement of Indigenous peoples with researchers and industry actors. Related to that is building and developing Indigenous peoples’ capacity to use information and communication technologies to leverage ABS opportunities and potentials. Another area of capacity building and development priority is the development of customary laws,

procedures and processes, in particular, biocultural protocols or forms of community protocols for ABS. In addition to customary law regimes, capacity building and development is required to boost formal legal skills for negotiating mutually agreed terms and incidental contractual or benefit-sharing, including intellectual property or related agreements. As well, strategies for effective involvement of Indigenous peoples not only in the making of ABS policies but also in their implementation are areas in need of Indigenous capacity building and development. Overall, legal, institutional, and organizational capacities for ABS-preparedness represents a priority area for capacity building and development. Aside from targeting Indigenous governance and organizational frameworks, such preparedness could account for inter-community (transboundary) and intra-communities' interests as may be potentially implicated in ABS. For example, Indigenous participants and partners in the ABS Canada Focus Groups expressed their desire to have their own competent national authorities, which is captured in the *Petkoutkoyek Statement* above. They also indicated that their customary laws and jurisprudence are able to deal with inter-communities or transboundary issues.

The level or degree of capacity building and development required in these priority areas are not even across jurisdictions within and outside Indigenous communities in Canada. For example, as Thomas Burelli notes in Chapter 13, there are many practices and protocols relevant to ABS used by many Indigenous communities in their relationship and collaboration with researchers. Those are indications of existing capacity, requiring further development, rather than starting from scratch to develop capacity. Another example is the German-based ABS Capacity Development Initiative, which has significant experience with ABS capacity development in the global South, especially in Africa, including among others the development of biocultural protocols and facilitation of ILC-industry linkages for ABS. Those experiences can be rendered handy and scaled to fast-track Indigenous capacity building and capacity development in Canada and elsewhere in the global North on a South-to-North basis, a proposition that is currently within policy contemplation between ABS Canada and the ABS Capacity Development Initiative. That approach provides a vent for an alternative direction for capacity building and development to the narrative discussed earlier in this chapter.

## CONCLUSION

There is potential and actual tendency to mirror capacity building and capacity development within the faultiness of North-South development constructs and its colonial undertones. As evident from our textual analysis of Article 22 of the NP on capacity building and capacity development, that construct hardly accounts for genuine capacity deficits among Indigenous peoples of the global North, such as Canada. The experience of the MAPC and ABS Canada in forging one of the

earliest awareness-raising, capacity building, and capacity development on ABS in Canada underscores the imperative for trust, solidarity, equality and respect in the power and role of partnership in driving the process. The NP has elaborate provisions and opportunities that effectively articulate ABS capacity building and capacity development priorities. It is clear from our analysis that those can be adopted or adapted, as the case may be, and inverted to further Aboriginal capacity development and capacity building in specific national, regional and local contexts. Within that flexibility and framework, there is a possibility to explore more opportunities for South-North or North-North solidarity for ABS capacity building and capacity development as an evolving and continuing experience. In Canada, all levels of government need to be proactive in supporting Aboriginal capacity building and development on ABS in the spirit of justice, equity and reconciliation.

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#### NOTES

- 1 Capacity development is used here advisedly in a technical sense. Canada already has an existing jurisprudence on s. 35 that leans toward a sovereign-to-subject relationship, which is now in need of capacity development or re-orientation toward unequivocal enunciation of sovereign-to-sovereign relationship. That is one of the expectations from the promise to breathe life into s. 35.
- 2 *Clyde River (Hamlet) v. Petroleum Geo-Services Inc* 2017 SCC 40, [2017] 411 DLR (4th) 571.
- 3 For many Indigenous peoples, this is a subtle attempt to re-deny or reignite debate over the status of Indigenous peoples as *people*.
- 4 *Goal 17: Revitalize the Global Partnership for Sustainable Development*, UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS, [www.un.org/sustainabledevelopment/globalpartnerships/](http://www.un.org/sustainabledevelopment/globalpartnerships/) (last visited 18 October 2016).
- 5 Delegates to forum were balanced in regard to gender and generational representation. Much emphasis was placed on the younger generation as the focus for capacity building and capacity development of Aboriginal issues generally but with specific regard to the novel issue of ABS.

