



FOCUS GROUP REPORT

*Summary of Central Canada Focus
Group Sessions: Ottawa, ON*

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Summary of ABS Canada's Ottawa Focus Group: May 5-6, 2016

Introduction

Our Project

ABS Canada is an independent, SSHRC-funded research project. Its objectives include capacity building through education, training, networking, and outreach, and the development of new and better relationships between Aboriginal peoples and other ABS stakeholders. As part of this strategy, ABS Canada is convening a series of loosely-guided focus groups on ABS in key regions across the country, shaped by the input and participation of Aboriginal partners. The purpose of these regional focus groups is to engage all ABS stakeholders, including governments, civil society organizations, and the private sector, in an open and frank discussion about the challenges and opportunities of an Aboriginal-sensitive ABS policy for Canada. In these sessions, ABS Canada hopes to build relationships, find common ground, and partner with participants to develop a deeper appreciation of the interests and perspectives of each stakeholder group on ABS.

This report provides a summary of ABS Canada's second focus group and capacity building workshop, held in Ottawa in May 2016. It outlines a list of issues raised by focus group participants; some are canvased here for the first time, while others reflect and affirm the discussions and outcome document of the previous focus group, held in Moncton in October 2015. A number of the issues raised in Ottawa have been flagged for further exploration at subsequent focus groups. For a brief historical overview of ABS in Canada, please consult the [relevant sections](#) of our Moncton Focus Group Report (available with all other outcome documents on the ABS Canada project website: abs-canada.org).



The Central Canada Regional Focus Group on ABS: Ottawa, ON

On 5-6 May 2016, ABS Canada held the second of three scheduled capacity building workshops and focus groups on Access and Benefit Sharing with Aboriginal communities from Central Canada. The forum's objectives included awareness-raising, capacity building, and identification and discussion of issues relating to ABS in Canada from Aboriginal and other stakeholder perspectives. As with our other research and capacity building activities, insights generated from this forum are expected to support future policy developments and/or implementation of national or international ABS frameworks in Canada in ways that reflect and embody Aboriginal sensitivities and interests.

The Ottawa ABS forum was organized in partnership with Aboriginal leaders from Central Canada and in collaboration with the Maritime Aboriginal Peoples Council (MAPC), an organization which continues to demonstrate expertise and national leadership on the subject, and with additional support from the Centre for International Governance Innovation (CIGI). It brought together representatives of Aboriginal communities from across Central Canada, along with researchers, technical experts, and government officials. Several participants from the 2015 Eastern Canada Focus Group held in Moncton, NB also attended to share their insights and experiences. The participation of these delegates was in response to the outcome of the first focus group where participants strongly advocated for cross-regional interaction and knowledge sharing to help develop Canada-wide synergies and institutional knowledge on the subject of ABS.

The first day of the forum was dedicated to a capacity building seminar on ABS with resource support from the ABS Canada team and Merle Alexander, a Tsimshian lawyer of the Kitsoo Xai-xais First Nation, and expert in Aboriginal resource law. Mr. Alexander has been involved for over a decade in pro bono treaty negotiations at the UN level on files directly linked to the preservation of Indigenous knowledge. He provided first-hand insight on the challenges and opportunities faced by Aboriginal peoples seeking to influence the tenor of these negotiations and resulting international legal instruments.



The second day included loosely-facilitated discussions amongst Aboriginal and other participants. Through these discussions, participants provided perspectives relating to the protection, governance, and administration of biodiversity and traditional knowledge (TK) in Aboriginal communities, both in the Central Canada region and across the country. They also reflected on the ramifications of the current rapprochement of the new government in Ottawa with Aboriginal peoples and the need for urgent action on the ABS file.

Participants' interventions were wide-ranging. The tenor of their comments often re-echoed a strong historical mistrust of government actors rooted in colonial dynamics, the legitimacy of Aboriginal-related research projects, concerns over regional and inter-group differences and histories, the relative priority of the ABS file among the many pressing issues facing Aboriginal peoples, and the combined effects of the foregoing on the quest for an Aboriginal-sensitive ABS policy. Overall, participants at the forum were passionate, frank and determined in their collective resolve on the need for Aboriginal peoples to be fully consulted, resourced, and integrated in a transparent manner by all levels of government into any further discussions on ABS and related matters in Canada. Participants also provided insights into areas of opportunity and reflected on potential approaches to regional implementation of ABS in Canada.



Below are key focus group highlights:

Keynote Address & Introduction:

- Merle Alexander highlighted Canada's inadequate (or lack) of consultation prior to and during the negotiation of the Bonn Guidelines and Nagoya Protocol on ABS;
- He reviewed the current legal status of the Nagoya ABS Protocol, and noted that Canada has yet to ratify the instrument. Participants generally viewed Canada's lack of ratification as an opportunity for Aboriginal peoples; Canada's ongoing lethargy gives them time to become better prepared and to fully engage in shaping the ABS conversation. Participants expressed the need for Aboriginal peoples to be vigilant and involved in pre- and post-ratification consultations that must happen for Canada to domestically implement ABS pursuant to the Nagoya Protocol;
- As an option, Aboriginal peoples in Canada may choose to be "reactive," by calling for or insisting on a consultation process regarding the potential implementation of Protocol, or they can be "proactive," by developing soft laws, community protocols, policies or guidelines and even contractual models to protect their interests pending the eventual response of the Government of Canada to the Protocol;
- Participants noted that these reactive and proactive approaches are not mutually exclusive, and that Aboriginal peoples could concurrently adopt both strategies since bio-piracy practices are ongoing irrespective of whether there is a government-sponsored ABS regime or not;
- Participants recalled that the present focus group discussion builds upon the 2011 [Iskenisk Declaration on ABS](#) (ISKENISK)¹ and the [2015](#)

¹ *Iskenisk Declaration on the Access, Use, and Fair and Equitable Sharing of Benefits Arising out of the Utilization of Genetic Resources and Associated Traditional Knowledge in Canada*, Iskenisk, Mi'kma'ki, Canada (28 March 2011), online: MAPC <<http://mapcorg.ca/home/wp-media/ISKENISK.pdf>>. [*Iskenisk Declaration*]



[Petkoutkoeyek Declaration on ABS](#),² in which Aboriginal organizations and individuals articulated essential principles and considerations should Canada ultimately implement the Nagoya Protocol.

Consultation & Stakeholder Relations:

- Participants noted that the Canadian “federation” remains a work in progress. Negotiations respecting the legal status of the 73 distinct Aboriginal Nations across Canada have to be resolved as a threshold issue in order to fully realize the potential of an equitable ABS policy for Aboriginal peoples;
- Participants expressed concerns over Canada’s continued engagements in sporadically organized government sessions on ABS, noting that this does not amount to full and proper consultation as the Government has failed to provide Aboriginal peoples with opportunities to fully engage in the process;
- Participants expressed disappointment that federal outreach has largely been directed at the large National Aboriginal Organizations (e.g. CAPS, AFN) and not at regional or local groups, who have a better understanding of the situation on the ground and a more direct line to the people being affected by government decision-making;
- Federal officials responded that they were aware of these dynamics but found it difficult knowing who to engage with in Aboriginal communities;
- Federal officials further indicated that future consultation efforts were under development, and that an information session on Canada’s involvement in the 30th WIPO IGC in Geneva (30 May - 03 June) was being put together and that Aboriginal participants would be invited;³

² *Petkoutkoeyek Statement on the Access, Use, and Fair and Equitable Sharing of Benefits Arising out of the Utilization of Genetic Resources and Associated Traditional Knowledge in Canada*, Petitcodiac (Petkoutkoeyek), Canada (16 October 2015), online: ABS Canada <<http://www.abs-canada.org/wp-content/uploads/2016/04/a9201150567993d9916f38cc2cc55521.pdf>>. [*Petkoutkoeyek Statement*].

³ This session was organized by Global Affairs Canada (GAC) and was held on May 17, 2016 via teleconference and in person at the GAC offices in Ottawa. In attendance was Chris Koziol from ABS Canada, as well as a number of Aboriginal and Government participants who were present at the Ottawa focus group on May 5-6, 2016.



- Participants worried that historical, colonial divisions between and among Aboriginal peoples themselves (e.g. between reserve and non-reserve Indians) may, but must not be allowed to draw a wedge between Aboriginal peoples, preventing collective action on the issue of ABS;
- Participants remarked that research and academic communities must develop responsive protocols that are accessible and culturally-sensitive, allowing Aboriginal peoples to view, understand, share, and help shape research findings;
- Participants disagreed over the issue of working closely with corporate and regulatory stakeholders on the ABS file. Some participants felt that there was value in working with these partners, and in “being at the table” to shape the agenda, while others felt that working closely with corporate and regulatory stakeholders only legitimizes an existing colonial process, and that Aboriginal peoples could better serve their interests by working on this file independently;
- Participants observed that while there are a variety of possible benefit-sharing frameworks under ABS, Aboriginal peoples must continue to explore benefit-sharing from other regimes as well. However, any preferred benefit-sharing framework should be grassroots-driven and should not be conflated with or allowed to be a substitution for the Canadian government’s obligations to Aboriginal peoples;
- Participants agreed that in addition to national laws, international legal regimes have recognized the duty to consult on the part of the government in matters that affect the interests of Aboriginal peoples, which include ABS and related matters. Consequently, participants insisted that to be effective, consultation with Aboriginal peoples has to be sufficiently resourced through funding and various forms of mobilization and capacity building. This will ensure that complex legal and policy issues related to ABS are not a barrier precluding effective Aboriginal participation in the process of Government decision-making on the ABS file.



Canada's Role in ABS Negotiations:

- Participants decried the role of Canada during the negotiation of the Nagoya Protocol. Specifically, they denounced Canada's informal preference for the term "Indigenous and Local Communities" over "Indigenous Peoples and Local Communities" as an attempt to undermine the United Nations Declaration on the Rights of Indigenous Peoples, and to deny Indigenous Peoples' right to self-determination. Following Canada's recent and unqualified endorsement of UNDRIPs,⁴ participants are hopeful that Canada will reverse itself on this issue going forward and incorporate ABS into a broader agenda of true reconciliation with Canada's Aboriginal peoples;
- Participants agreed that Canada's current approach to ABS-related negotiations reflect a colonial mindset, as all delegations are led by government officials with limited input from Aboriginal peoples. This non-inclusive approach is troubling for Aboriginal peoples given that the use or sharing of GRs directly engage the economic future for many Aboriginal communities, warranting the duty to include their voices and experiences at international negotiations.

Judicial Developments & Constitutional Implications of ABS:

- Participants noted that ABS is premised on philosophical and legal constructs that are difficult to reconcile with Aboriginal worldviews. Consequently, and as a pragmatic matter, ABS affirms the urgent need to reconstitute and support *Aboriginal* legal and organizational structures as part of the internal capacity building required by Aboriginal peoples;
- Participants engaged in robust discussions on the recent Supreme Court decision in *Daniels v Canada*,⁵ with some participants wondering whether the extension of the *Indian Act* to Métis peoples reflects a

⁴ Gloria Galloway, "Canada drops opposition to UN indigenous rights declaration," *The Globe and Mail* (9 May 2016), available online at: <http://www.theglobeandmail.com/news/politics/canada-drops-objector-status-on-un-indigenous-rights-declaration/article29946223/>.

⁵ *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.



broadening of the Government's duty to consult vis-à-vis off-reserve Aboriginal peoples;

- Participants expressed their optimism that recent Court decisions (e.g. *Daniels v Canada*, *Tsilhqot'in Nation v British Columbia*) the election of the new Trudeau government, Canada's re-engagement in international climate change negotiations, the publication of the Truth and Reconciliation Commission Report⁶ on residential schools, and a renewed federal commitment to reconciliation based on a nation-to-nation relationship collectively represent a new opportunity for Aboriginal participation in policymaking;
- Participants indicated that attempts to engage issues of ABS in Canada ought to recognize the *Constitution Act, 1982* guarantees pursuant to Section 25, 25(a) and Part II, Section 35 and 35.1 recognitions of Treaty Rights, Aboriginal Rights, and other rights, in addition to relevant judicial decisions (including recent Supreme Court jurisprudence on Aboriginal title), the terms of the 1763 *Royal Proclamation*, and with Aboriginal Self-Government;
- Participants noted that some problematic issues highlighted in the discourse of ABS, such as how to deal with transboundary genetic resources, might not be as problematic when recognition is given to Aboriginal legal histories and traditions. For example, Aboriginal Nation-to-Nation treaties could provide insight for national and international law on ABS;
- Participants discussed and were interested in the possibility of using a S. 35 "test case" to assess the interaction of Aboriginal constitutional rights and IP law; some participants felt that this was perhaps the only option to override existing patents on GR (and derivative products) that have already been granted;

⁶ Truth and Reconciliation Commission of Canada, *The Survivor's Speak: A Report of the Truth and Reconciliation Commission of Canada* (Ottawa: 2015). Available online at http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Survivors_Speak_2015_05_30_web_o.pdf



- There was some discussion of the *Tsilhqot'in*⁷ decision – some participants noted that the Court declared in that case that Aboriginal title is still subject to overriding Crown sovereignty; this reflects an assumption that the Aboriginal land was *terra nullius* prior to Contact which may have significant legal implications for GR on Aboriginal lands;
- Participants also stressed that a “nation-to-nation” framework is premised on the resolution of Aboriginal sovereignty and self-governance claims; as a threshold issue, these need to be addressed and resolved before Canada knows who to consult with on ABS-related matters;
- Participants noted that Canada’s constitutional framework complicates development of an Aboriginal-sensitive ABS policy, as the federal government retains primary jurisdiction over most Aboriginal files while the provinces retain legal control over natural resources.

Opportunities, Competing Priorities, and Limited Resources:

- Participants expressed concern that notwithstanding the importance of ABS and protecting TK, competing local priorities (e.g. access to health services, clean drinking water, mental health, substance abuse, suicide epidemics, etc.) and the complexity of these legal issues make local capacity building extremely difficult;
- Participants further observed that while ABS may not assume priority over the abject poverty and abysmal living standards of Aboriginal peoples, when Aboriginal history and the colonial experience of subjugation and deprivation is considered holistically, then everything – including ABS – is interconnected and assumes the same urgency;
- According to participants, as the infamous chemical era of agriculture loses traction, and as opportunities for biological agriculture or agrobiodiversity continue to emerge, Aboriginal knowledge and stewardship over biological diversity and genetic resources will be increasingly valued.

⁷ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.



Capacity Building:

- Participants maintained that capacity building 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;
- Participants expressed a desire for additional financial support for capacity building in ABS and related matters, including prioritization of resources to translate documents and the need for plain-language explanations of key concepts and terminology as part of capacity building and consultation;
- Participants were convinced that much more could be done to “spread the word” on ABS, and specifically requested the Government or ABS Canada to produce a simple, 1-page explanatory notes on key issues that can be translated into major Indigenous languages and freely disseminated online;
- In light of the constitutionally-prescribed role of the provinces in regulating natural resources, participants were concerned that many provincial governments do not have *any* human or financial resources dedicated to ABS or TK, and the biodiversity file more generally. There was also a great deal of uncertainty about who to talk to in the federal government, with participants indicating that this information should be more readily available to both promote transparency and facilitate proper consultation;
- Participants noted it may be worth discussing compensation with the federal government for bio-piracy and exploitations of Aboriginal TK that has already occurred. Many observed that this will require additional resources at the community level to adequately map their TK, as well as legal assistance to pursue any compensation claims;
- Participants discussed the issue of TK databases as a defensive measure – while the idea was widely accepted (many participants noted the erosion of TK in their communities as elders pass away),



concern was expressed over who would control these databases, who would have access to them, their status as public or non-public domain assets, what legal consequences there were for “converting” TK into computerized data/written words, and the risk of hacking, inadvertent disclosure, or mismanagement of proprietary information. Also raised were concerns over the cost and technical expertise required to administer this sort of technological infrastructure.

Conclusion:

- Participants expressed appreciation for the two-day session. The extended format of the discussions allowed important knowledge to be freely shared, explanations freely sought, and a level of understanding and solidarity to be developed and nurtured. There was enthusiasm and expressions of interest in participating in subsequent focus groups to enhance nation-wide capacity building efforts and to expand dialogue on ABS to include Aboriginal voices from across the country. In particular, youth participants expressed interest in setting up a youth-oriented forum on these issues in their communities;
- Participants re-emphasized a point made repeatedly at the focus group in Moncton – that all forms of support, capacity building and consultation on ABS must involve a transgenerational approach that deliberately engages Aboriginal youths in learning and teaching on ABS and related concepts;
- Participants urged the Government of Canada to take inspiration from initiatives such as ABS Canada and to take a proactive and genuine leadership role by beginning an earnest consultation with Aboriginal Peoples and to take an official position on the Nagoya Protocol as soon as possible;
- The next ABS Focus Group has been scheduled for Spring 2017 in the Lower Mainland region of British Columbia. Until then, ABS Canada remains engaged in forging partnerships with Aboriginal organizations and individuals, as well as government and industry stakeholders on future focus groups and capacity building activities, collectively aimed at establishing an Aboriginal-sensitive ABS policy in Canada.





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