REPATRIATION AND PROVINCIAL HERITAGE LAW
Contemporary Issues in Practice, Policy, and Reform

WORKSHOP REPORT & REFLECTIONS

Ariel F. Sallows Chair in Human Rights Workshop

(March 9-10, 2023)

Faculty of Law, University of Saskatchewan

Authors: Catherine Bell, Katherine Faryna, Dr. Jaime Lavallee, Charlotte McLachlan

Contents

ᐊᐧᓇᕆᐘᐃᐧᐣ / Wânaskêwin Heritage park, Treaty 6 Territory, Saskatchewan

Traditional territory of the Nehiyaw and Nehithaw/Cree, Nahkawe/Saulteaux, Stoney, Nakota, and Dakota peoples and Homeland of the Métis Nation.

ACKNOWLEDGEMENT, BACKGROUND, AND GOALS OF WORKSHOP

Land Acknowledgment

This workshop took place on Treaty 6 Territory, the traditional territory of the Nehiyaw and Nehithaw/Cree, Nahkawe/Saulteaux, Stoney, Nakota, and Dakota peoples and the Homeland of the Métis Nation. We pay our respect to the First Nations and Métis ancestors of this place and reaffirm our relationship with one another.

Background

There is no single international or Canadian legal definition of "cultural heritage," "heritage", or "Indigenous heritage". Rather, definitions are context-specific and vary among different legal instruments such as treaties, land claims, international human rights instruments, and federal and provincial laws. In many countries, including Canada, heritage protection laws and processes are primarily directed at statutorily defined cultural property of national or historical significance, archaeological and other significant heritage sites, and objects.

Indigenous concepts of heritage and property do not always fit neatly into Canadian property law constructs such as tangible, intangible, land, object, and ownership. Consequently, there is little to no protection or recognition of Indigenous concepts of heritage. Indigenous concepts of heritage are much broader and diverse. For example, in 2019-2020 the Indigenous Heritage Circle explored the meaning of Indigenous heritage, among other issues, in workshops with First Nations, Métis and Inuit across Canada. From those workshops the following definition emerged:

> Indigenous heritage is complex and vibrant. Indigenous heritage encompasses ideas, experiences, belongings, artistic expressions, practices, knowledge, and places that are valued because they are culturally meaningful and connected to shared memory. Indigenous heritage cannot be separated from either Indigenous identity or Indigenous life. It can be inherited from ancestors or created by people today. [1]

Protection and control of Indigenous heritage in Canada is shaped by many legal influences, including Indigenous law, Canadian common law, legislation, constitutional law, and international law. Nevertheless, it continues to be regulated through dated federal, territorial, and provincial property laws that create barriers and significantly impair the ability of Indigenous peoples' rights to and relationships with their heritage. Much of this legislation was enacted in the 1970s prior

[1] Indigenous Heritage Circle, "Indigenous Heritage Engagement Sessions: Report from the Indigenous Heritage Circle to Parks Canada" (2020), online at: <https://indigenousheritage.ca/wp-content/uploads/2022/06/IHC-PCA-Report-EN.pdf> at 8-9. The IHC is an Indigenous-designed and Indigenous-led organization formed in 2016 dedicated to the advancement of cultural heritage priorities that are of importance to Métis, Inuit, and First Nations Peoples in Canada.

to protection of Indigenous rights in Canada's constitution; the Royal Commission on Aboriginal peoples,[2] recommendations of the Qikiqtani Truth Commission (2010)[3]; the calls to action of the Truth and Reconciliation Commission,[4] calls to justice of the National Inquiry into Murdered and Missing Indigenous Women and Girls,[5] and Canada becoming a signatory to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[6] These commissions and inquiries all speak to the connection and importance of Indigenous heritage in its various forms to self-determination, recovery from colonization, reconciliation, and respect for Indigenous rights.

The last few years have seen significant activity concerning review of law, policy and practice affecting Indigenous heritage with a particular emphasis on alignment with UNDRIP. Legislation, policy, and practice is being reviewed, and in some instances amended or is in the process of being amended, in several areas including repatriation, provincial heritage conservation and designation, national historic sites and monuments, parks, and environmental assessment. Reports issued by governmental and non-governmental Indigenous and non-Indigenous organizations have also identified the need to review laws that intersect with Indigenous heritage and to make reforms to strengthen protection of Indigenous heritage and respect the right of Indigenous people to exercise self-determination in relation to their heritage.[7]

---

[2] Canada, Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal Peoples*, PRB 99-24E (Ottawa: Parliamentary Research Branch, 1999) [RCAP].

[3] Qikiqtani Inuit Association, *Qikiqtani Truth Commission: Thematic Reports and Special Studies 1950-1975*, (Nunavut: Qikiqtani Inuit Association, 2014) [Qikiqtani Truth Commission].

[4] Canada, Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, IR4-8 (Ottawa: Truth and Reconciliation Commission of Canada, 2015) [TRC].

[5] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), Volume 1a at 181-221 [MMIWG vol 1a] and Volume 1b at 171 [MMIWG vol 1b] and call 1.2 online: <https://www.mmiwg-ffada.ca/final-report/>.

[6] UN General Assembly, *United Nations Declaration on the Rights of Indigenous peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, online at: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [UNDRIP]. UNDRIP is reproduced and discussed in further detail in Appendix 3 of these proceedings: Background Papers "United Nations Declaration on the Rights of Indigenous Peoples and Indigenous Heritage."

[7] See e.g., Catherine C. Cole & Julie Harris, *Indigenous Heritage and UNDRIP* (IHC 2022); *Moved to Action, Activating UNDRIP in Canadian Museums* (CMA 2022) & Catherine Bell & Melissa Erickson, Companion Report *UNDRIP & Indigenous Heritage* (CMA forthcoming 2022); Catherine Bell & Sarah Lazin, *A Selected Review of Federal and Provincial Legislation Implicating Indigenous Heritage in BC* (FPCC 2022); Tony Belcourt, Heather Igloliorte & Dylan Robinson, *Promoting and Protecting the Arts and Cultural Expressions of Indigenous Peoples: A Compendium of Experiences and Actions* ((Indigenous Futures Research Centre, 2021); Lindsay Nixon, A Culture of Exploitation: "Reconciliation" and the Institutions of Canadian Art" (Yellowhead Institute, 2020); UN Expert Mechanism on Rights of Indigenous Peoples, "Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples" (2020 (UN Doc A\HRC\45\35); Karen Aird, Gretchen Fox, and Angie Bain on behalf of FPCC *Recognizing and Including Indigenous Heritage in BC* (FPCC 2019); David M. Schaepe, George Nicholas, & Kierstin Dolata, *Recommendations for Decolonizing British Columbia's Heritage-Related Processes and Legislation* (FPCC 2020); *BC Heritage Conservation Act Transformation Project* and engagement process, *Bill C-23 Historic Places of Canada Act* (past first reading), *Bill c-391 Aboriginal Cultural Property Repatriation Act* (COVID-19 stalled progress).

Workshop Goals

This workshop brought together a small group of Indigenous experts, Elders, knowledge keepers and allies in archaeology, law, and heritage to discuss these developments, explore contemporary issues and share research, experiences, successes, and challenges in repatriation and provincial regulation of Indigenous heritage in Western Canada (See Appendix 1 for biographies of participants). The theme, purpose, and content of the workshop were informed by current Indigenous-led research reports and law reform initiatives on UNDRIP, repatriation, and provincial heritage management and were developed by Catherine Bell (Ariel Sallows F. Chair in Human Rights College of Law, University of Saskatchewan [2022-2023] and Professor Emerita Faculty of Law, University of Alberta) in collaboration with Karen Aird (Heritage Manager for First Peoples Cultural Council of British Columbia), Brenda Gunn (Professor of Law, University of Manitoba and Research Director at the National Center for Truth and Reconciliation), Dr. Jaime Lavallee (Assistant Professor of Law, University of Saskatchewan), and Dr. Kisha Supernant (Associate Professor of Anthropology, University of Alberta, President of the Indigenous Heritage Circle and Director of the Institute of Prairie and Indigenous Archaeology). It was hosted by the College of Law, University of Saskatchewan and with support from the First Peoples Cultural Council of British Columbia and the Institute of Prairie and Indigenous Archaeology for student assistance and mentorship.

By engaging in conversation and sharing knowledge, the workshop aimed to:

- Build new relationships and growth in knowledge through shared teachings, experience, and expertise.
- Share teachings, research, experience, practices, and insights on repatriation and provincial heritage property/conservation legislation.
- Explore how UNDRIP standards are expressed in the context of repatriation and Indigenous heritage.
- Explore issues of alignment of UNDRIP with law, policy, and practice.
- Explore Indigenous rights and values-centred approaches to collaboration and reform.

Workshop Materials

Prior to the workshop participants were provided with a Workshop Package that included a copy of the agenda, questions to reflect on for the discussions, and background documents on UNDRIP and Indigenous Heritage and repatriation and provincial heritage legislation in Western Canada (See Appendix 2). Additional research on Australia and New Zealand Heritage Law, and Canadian Federal Bill C-391 (*An Act Respecting a National Strategy for Repatriation*)[8] was also conducted in preparation for the workshop and are included in Appendix 3.[9]

Workshop Themes (Summary of Collective Observations)

The following themes emerged from the workshop:

1. The importance of ceremony, protocol, and Indigenous law as a guide.
2. The importance of truth-telling.
3. The need to respect Indigenous law, jurisdiction, and equitable participation in decision-making.
4. The need for alignment of provincial laws with UNDRIP and Indigenous laws.
5. The significance of returning cultural belongings to living traditions and Indigenous Nation building.
6. The priority of repatriating ancestral remains.
7. The need for proactive repatriation policies to cover tangible and intangible items.
8. The importance of legislative support.
9. The need for laws that impact Indigenous archaeological heritage to respect Indigenous rights.
10. The priority of sufficient and appropriate funding mechanisms for reform.
11. The importance of connectivity to traditional lands for continuity and protection of living and intangible heritage.
12. The goal of consensus through cooperation, mutual respect, collaboration, and good faith dialogue.

The workshop report that follows is organized into two main sections, beginning with a summary of panel presentations under the heading "What We Shared." Where panelists presented in a

[8] Bill C-391, *An act respecting a national strategy for the repatriation of aboriginal cultural property*, 1st Sess, 42nd Parl, 2019 [Bill C-391]. As elaborated in Appendix 5 Background Paper "Bill C-391: An Act Respecting A National Strategy for Repatriation" this law received mixed responses from the Indigenous and heritage community and was not passed due in part to the pandemic.

[9] See Appendix 3 – Background Papers.

conversational or collective voice, the presentation is not attributed to a particular speaker. Otherwise, summaries of presentations have been attributed to a particular panelist or moderator. A summary of participant roundtable discussions which were held after the panel presentations is included in this section. A note-taker was assigned to each table. Although questions were provided to participants to facilitate discussion, participants were also encouraged to add their own questions or to focus on those provided that were of most concern to them (see Appendix 2 Workshop Agenda). Consequently, the summary of roundtable discussions is not organized by questions or comments common to all discussion tables. Rather it is organized under two broad topics: "Challenges and Priorities for Change" and "Alignment with UNDRIP." Within these broad topics, comments are organized by issue.

In the second section, "What We Heard" observations flowing from the panel presentations and roundtable discussions are organized, elaborated and discussed under the major themes identified by the authors of this report. The Appendices that follow include participant biographies, workshop agenda, and background papers provided to participants and completed in preparation for the workshop.

Sharing Our Experiences: Repatriation Case Studies, Lessons, Successes, Challenges

WHAT WE SHARED

Attendees of the workshop gathered at Wanuskewin Heritage Park on Thursday, March 9, 2023. Wanuskewin Heritage Park is a declared National Historic Site and Canada's longest-running archaeological dig located just outside the city of Saskatoon, Saskatchewan. The facility's name comes from the nêhiyawêwin (Plains Cree) word ᐚᓇᐢᑫᐧᐃᐣ / wânaskêwin which means "being at peace with oneself".[10]

Over the course of a day and a half, the workshop saw 18 presentations and welcomed over 40 participants. The workshop was divided by "Reflections" and "Sharing Experiences". Sharing Experiences included presentations on repatriation case studies, legislation, and law reform. Reflections included personal accounts, lived experiences, and future visions of participants. The workshop was immersed in expertise thanks to the participants' research, advocacy, and a wealth of personal experience.

Grounding us and resonating throughout our discussions was a deep respect for the importance of ceremony, protocol, and Indigenous law to guide our hearts and minds and an awareness of the emotional toll this work can take. We were grateful to have Joseph Naytowhow (Elder and Cultural Advisor, Sturgeon Lake First Nation), Rose Roberts (Knowledge Keeper, Woodland Cree) and Wanbdi Wakita (Sioux Valley Dakota Nation) and Pahan PteSanWIn (Elders and members of the Respectful Rematriation/Repatriation Ceremony, University of Manitoba) start our gathering by offering prayers in a pipe ceremony to honour ancestors and provide us with spiritual guidance and for their participation and support throughout our discussions.[11]

Day 1 (March9, 2023) Morning Presentations

UNDRIP and Indigenous Heritage – Fundamental Principles: Brenda Gunn[12]

UNDRIP is aimed at enhancing "harmonious and cooperative relations… based on principles of justice, democracy, respect for human rights, non-discrimination, and good faith".[13] What Indigenous peoples' rights look like and the standards to be achieved in a particular context are to be pursued in a spirit of cooperation, mutual respect, collaboration, and good faith dialogue aimed at consensus. This, Brenda Gunn explained, is the starting point for approaching UNDRIP and interpreting its standards.

---

[10] Wanuskewin Visitor Centre, "Visit the Park", online at: <https://wanuskewin.com/visit/>.

[11] Rematriation is a word used by some Indigenous peoples to refer to returning items to mother earth and to acknowledge matrilineal heritage systems and the impact of patriarchy and colonialism in Indigenous heritage.

[12] See Appendix 1 – Participant Biographies.

[13] UNDRIP, *supra* note 6 at Preamble.

After decades of advocacy from Indigenous peoples fighting to have their rights recognized, UNDRIP was the ultimate result of involvement and consultation with Indigenous peoples around the world. UNDRIP is different from other international human rights legislation and should not be read as a typical human rights instrument. Indigenous law is woven into the declaration at every turn. It does not create Indigenous rights, as such rights already existed. While UNDRIP alone cannot fix the problems Indigenous peoples face, it can be the starting place to change human rights and have them seen through an Indigenous lens.

Brenda Gunn

The starting points for approaching UNDRIP are set out in the preamble, which recognizes that Indigenous people are equal to all other people. The declaration is posited as "a standard of achievement to be pursued in a spirit of partnership and mutual respect."[14] It recognizes the connection between land and people. The recognition of these rights will "enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith."[15]

UNDRIP is an advocacy tool which can be leveraged to help achieve repatriation goals, such as bringing ancestors home and addressing unmarked graves. It can also set the stage for building fundamental relationship ties, as the declaration is stated to be a standard of achievement to be pursued in a spirit of partnership and mutual respect.

The concept of Indigenous rights to participate must be established. Indigenous peoples have a right to participate in decision making when their rights are specifically and especially impacted; there are no caveats to this right to participate. Consent is not a legally challenging question; it is clearly set out in jurisprudence. UNDRIP, however, includes "free, prior, and informed consent" (FPIC).

The concept of "free" is a critical starting point to obtaining consent. It must be free from coercion which requires an avoidance of "divide and conquer" tactics. "Prior" requires that there be sufficient time for Indigenous peoples to gather information. A prime difficulty in Canadian law centres on timelines as the necessary planning to gather information for Indigenous peoples does not fit into the colonial framework. "Informed" means that communities require sufficient time to access non-biased information that will assist the community in determining ramifications and goals. "Consent" arises only after the previous steps have been finalized. Consent is obtainable when Indigenous peoples are involved with each step of the process, with meaningful input and decision-making capabilities. Consent is only complicated when it is taken out of the decision-making process or when parties are attempting to promote a colonial agenda.

[14] *Ibid* at Preamble.
[15] *Ibid*.

UNDRIP only has one provision with respect to treaties and it simply states that treaties must be respected. What is not obvious from UNDRIP is the role that the spirit and intent of treaties must factor into decision making.

UNDRIP is not the only international tool. The *American Declaration of the Rights of Indigenous People*[16] builds on the minimum standards of UNDRIP and the obligations of the state and the Organization of American States General Assembly has a declaration which specifically speaks to upholding the spirit and intent of treaties. It is therefore fair to interpret UNDRIP as requiring states to uphold and implement treaties.

Sharing Our Experience: Repatriation Case Studies, Lessons, Successes, Challenges and Experiences (Part One): The Respectful Rematriation and Repatriation Ceremony: Jaime Lavallee (moderator), Pahan PteSanWin, Cary Miller, Lara Rosenoff Gauvin

The words selected to make up the name "The Respectful Rematriation and Repatriation Ceremony" (RRRC) are significant for two reasons:

(1) The words acknowledge that this work is sacred and *is* ceremony. The process is not just repatriation; it is also "rematriation" in the sense that they are going home to Mother Earth. Also, that it is spiritual and involves more than the human world.
(2) The words are respectful to coincide with the work which must be conducted in a respectful manner.

Rematriation and repatriation are pathways to reconciliation through institutional atonement and transformation. To support this, repatriation/rematriation activities should be proactive; institutions should have an obligation to return cultural heritage rather than requiring communities to request repatriation.

The RRRC has roots in 2018 when a former student informed the new head of the Department of Anthropology at the University of Manitoba (UM) that there were approximately Indigenous Ancestors in the archaeology laboratories that were not being respectfully taken care of and for which there was no descendant community input nor outreach. To begin to address this, a census of Ancestors held by the University began in 2019, and in 2020, consultation at UM began with Elders, Knowledge Keepers, Grandfathers, and Grandmothers. A small group of five Elders, Knowledge Keepers, Grandfathers, and Grandmothers started to meet regularly which led to the creation of the RRRC Council. The RRRC Council meets monthly to provide guidance for all aspects of this Ceremony, including policy, practice, ceremonies, outreach and care.

[16] OAS, General Assembly, 3d Sess, *American Declaration on the Rights of Indigenous Peoples*, OR OEA/Ser.P/RES.2888 (2016).

Finding out about the history of UM with Indigenous Ancestors is at first difficult, painful, triggering, and full of anger. But the rematriation process is required healing for Indigenous and non-Indigenous people, and institutions alike. This awareness forms the basis for the RRRC Council's wise guiding thoughts for policy, which recognizes key factors, such as:

1. The ceremonial nature of the work involved,
2. The University taking moral, spiritual, and financial responsibility,
3. The Council and Working Circles should control the process rather than colonial structures and ideals,
4. Rematriation and repatriation of Ancestors should occur as soon as possible,
5. The work is an educational endeavor as it teaches others how to be respectful,
6. Research and research data also needs to be repatriated,
7. The policy needs to be broad enough to cover all harms from research with Indigenous Ancestors, peoples, belongings without consent,
8. The University needs to engage in comprehensive truth-telling about its history of research regarding Indigenous peoples.

Policy is required because of the way the law has dispossessed and dehumanized Indigenous people which consequently gave rise to disconnection. Ancestors and Indigenous cultural heritage are treated like property for the public good which is inherently problematic. Building Indigenous Nations requires control over identity and narratives, as well as Ancestors and cultural heritage. As such, there is a need to focus on intergenerational wealth and privilege in a cultural sense, in contrast to common narratives about intergenerational trauma and marginalization, through work to recover that culture from archives and museums that sequester it.

There is still much work to be done: University of Manitoba Archives also needs to examine what items, photos, music, and stories have been recorded so that the University can inform communities what it has in its possession and to take further action to engage in responsible data management that respects Indigenous data sovereignty through consultation and negotiation with Indigenous communities of origin. This will bring the University into compliance with Articles 11 and 12 of UNDRIP.

It must be remembered that this work is triggering and painful for Indigenous peoples first learning about their Ancestors in universities. The process requires healing and policies should be crafted to avoid disrespectful and dehumanizing language. Decision-makers need to think critically about the "public good," and its use in colonizing practices and violence.

Grandmother Pahan PteSanWin, Dr. Cary Miller
Dr. Lara Rosenoff Gauvin, Dr. Jamie Lavallee

Sharing Our Experience: Repatriation Case Studies, Lessons, Successes, Challenges (Part Two): Stephanie Danyluk (moderator), Paulina Csiscai, Bailey Monsebroten, Alex King

Stephanie Danyluk: The Truth and Reconciliation Council's Call to Action #67 called upon the federal government "to provide funding to the Canadian Museums Association to undertake, in collaboration with Aboriginal peoples, a national review of museum policies and best practices to determine the level of compliance with the *United Nations Declaration on the Rights of Indigenous Peoples* and to make recommendations."[17]

In 2022, the Canadian Museums Association released its report *Moved to Action: Activating UNDRIP in Canadian Museums* as a response to the TRC's Call to Action #67.[18] The report is the result of consultation with Indigenous communities in which topics such as decolonization within the Canadian Museums Association and implementation of UNDRIP principles were discussed. Article 12 of UNDRIP is of particular importance, as it provides the right for Indigenous peoples to repatriate their human remains and places an onus on states to repatriate human remains in their possession through processes developed with Indigenous peoples' participation.

The report sets out 30 new standards for museums and urges museums to move forward on repatriation rather than place the onus on Indigenous rights holders. Museums are encouraged to prepare their collections ahead of incoming requests and to reach out to Indigenous communities as part of an effort to shoulder the burden of repatriation which can be a resource-laden endeavour that communities may not be equipped for. The work of repatriation is also emotionally taxing on communities, particularly when ancestral remains have not been properly cared for within museums.

Finally, the repatriation narrative needs to be reframed. It is not a drain on museums; rather, it is an investment in community. Repatriating items that do not belong to a museum is not reconciliation; it is quite simply the museum's job.

Paulina Csiscai:

FPCC is a First Nations-led Crown Corporation[19] with a legislated province-wide mandate to support First Nations communities in the protection, revitalization, and transmission of cultural heritage, arts, and language in British Columbia. FPCC is governed by an Indigenous board of 11 members and guided by an Advisory Board composed of the 34 BC First Nation languages and a Heritage Advisory Committee. It partners with BC First Nations and organizations, universities, governments, and philanthropic organizations.

---

[17] TRC *supra* note 4 at Call to Action #67.

[18] See Stephanie Danyluk and Rebecca Mackenzie, "Moved to Action: Activating UNDRIP in Canadian Museums" (2022), online: *Canadian Museums Association* <https://museums.ca/uploaded/web/TRC_2022/Report-CMA-MovedToAction.pdf> [CMA Moved to Action Report].

[19] A Crown Corporation is an entity created by provincial or federal legislation and which is owned by the Crown.

Paulina Csiscai

FPCC has been in operation for 33 years and throughout that time has established organizational capacity and a proven track record in delivering grants, programs, and services to First Nations communities in BC. FPCC has three programs: language, arts, and heritage. The heritage program was established in 2019 and currently supports three major funding opportunities: the Heritage Infrastructure Program, the Heritage Stewardship Program, and the Braided Knowledge Grant. Since its inception, the program has distributed almost 400 grants and millions of dollars directly to First Nations communities in BC, which support a broad range of projects related to cultural heritage.

The FPCC also advances research to establish benchmark data and evidence to support the safeguarding and stewardship of cultural heritage for BC First Nations. The FPCC Heritage Program is currently undertaking the Repatriation Cost Analysis and Scoping Study (RCA).[20] The intention behind the RCA is to provide a comprehensive cost analysis framework that will outline the full costs of repatriating ancestors and belongings to First Nations in BC. The study is especially required given that the availability of funding for repatriation work in BC is very limited and there are countless ancestors and belongings currently housed in museums, government offices, academic institutions, and private collections worldwide awaiting repatriation to B.C. First Nations communities.

The study will include an environmental scan of published literature, a review of case studies and models for repatriation, a review of repatriation legislation, practices, and policies, including UNDRIP and NAGPRA (an American law),[21] a review of previous repatriation grants and programs, and will also identify museums or institutions that house ancestors and belongings of BC First Nations.

The cost analysis will seek to understand and document the full spectrum of costs associated with repatriation, including research to articulate legal traditions and protocols, developing repatriation processes, identifying infrastructure required to support repatriation, transportation and conservation costs, costs associated with ceremony and engagements, and the costs of developing databases to support repatriation processes.

Engagement will include:

- First Nations in BC, particularly those that have previously undertaken repatriation processes.

[20] For further information, see the First Peoples' Cultural Council, "Heritage Stewardship Program", online at: <https://fpcc.ca/program/heritage-stewardship-program/>.
[21] 04 Stat. 3048 [NAGPRA].

- First Nations museums with a view to assessing what funding is required to support internal capacity for repatriation work; and,
- At least one major provincial museum to understand and flag any capacity issues that may impact participation in repatriation work.

The ultimate outcomes for the RCA include a comprehensive estimate of costs, a set of recommendations on how the provincial government can support B.C. First Nations in repatriation work, an assessment of funding required to support an Indigenous governed agency in delivering repatriation grants and outreach, and research that can be built upon for future projects.

The final report of the RCA is expected to be complete by February of 2024.

Bailey Monsebroten: The Royal Saskatchewan Museum (RSM) has a 12-year-old repatriation policy that covers sacred and ceremonial belongings but which has not been fully utilized.[22] To date, there have been three "successful" repatriations with the RSM's involvement, which resulted in trust agreements. There are also seven trust agreements in which First Nation governments or individuals are identified as owners of items and the RSM is designated as the items' caretaker.

Repatriation efforts are challenging due to legal and bureaucratic processes which are further hampered by lack of resources. Interjurisdictional legal hurdles have hindered repatriation efforts resulting in sacred items being held by the RSM on long-term loan from other institutions rather than being returned to their traditional owners. The process to identify pieces which should be repatriated and the communities to which they belong is a long, slow process and the current policy places a good deal of the burden onto communities to initiate the repatriation process rather than placing the onus on the museum. The first viewing request of belongings covered under the RSM's repatriation policy occurred in late 2022 and took 3 months to gain permission from the tribal council the belongings are covered under so the viewing could take place.

In addition to its commitment to responsible stewardship, the RSM is also committed to increasing transparency. Since 2019, the RSM has reorganized the collections area to transform it into a public access space and has opened the space up to regular tours with community members and organizations. Plans include undergoing a massive digitization effort to upload the standard collection and make it available online in a searchable catalogue hosted on the RSM website. Doing so will require a considerable amount of consultation with communities to ascertain what can and what cannot be photographed and what information should be made available online.

[22] See Royal Saskatchewan Museum, "Policy for the management and repatriation of sacred and culturally sensitive objects of Aboriginal origin" (2010), online at: <https://royalsaskmuseum.ca/pub/Research/Indigenous%20Studies/rsm-repatriation-policy-booklet.pdf>.

Alex King: The University of Regina is committed to taking responsibility for objects in its collection and repatriating where appropriate. While independent from the University, the MacKenzie Art Gallery retains a partnership through formal agreement with the University of Regina. The oldest public art gallery in Saskatchewan, the MacKenzie Art Gallery was founded on the collection of its namesake, Norman MacKenzie, a private collector who bequeathed his collection to the University of Saskatchewan (now, the University of Regina).[23]

The collection contains items from Asia, Africa, South America, ancient Europe, and the Middle East. Objects in the gallery can have painful histories, particularly those that were obtained through theft and then mistreatment, such as the Annapoorna idol in 1913. Annapoorna was a small stone Hindu idol obtained by MacKenzie while travelling in India by negotiating its theft through a local citizen. Once in possession of the idol, his wife boiled it several times to rid it of ceremonial residue.[24]

Partnering with the Indian High Commission in 2015, the Annapoorna statute represents one of few repatriations between Canada and India. Upon her return to India, ceremonies and celebrations were publicly broadcast online, which followed her throughout her travels to the temple where she was ultimately housed.

While the repatriation of the Annapoorna statue was ultimately successful, it could have benefited from more engagement. A more deliberate process would have enhanced the value of repatriation to both parties. The benefits of repatriation for institutions does not compare to the meaning and value the item has for the community. More than simply a question of legality, repatriation is a question of ethics.

The process of returning the Annapoorna statue prompted a broader review of the University's collections held at the MacKenzie Art Gallery. Over 300 items have been identified as requiring further research. The University created the Collections Review Committee to work alongside the gallery to:

- identify objections inappropriate for retention,
- build positive and collaborative relationships that respect community partners' ways of knowing and being,
- take reparative action including unconditional repatriation, and
- make the review process and findings as transparent and accessible as possible.

The process of repatriation is as critical as the return itself. While the policy creation is in its infancy, there is an overarching awareness that the work must be decolonized and origin-community led. The Committee is also developing a roadmap to address the principles of

[23] See MacKenzie Art Gallery, "History" (2023), online at: <https://mackenzie.art/about/history/>.
[24] See Alex King, "Repatriation at the University of Regina" (Sharing our experience: Repatriation, Saskatoon, 9 March 2023) [unpublished].

UNDRIP and potentially establishing a "witness-in-residence" to observe the process moving forward.

Day 1 (March 9, 2023) Afternoon Presentations

Reflections on Repatriation – Isaiah Roberts' Canoe: Dr. Rose Roberts

Knowledge Keeper Dr. Rose Roberts shared the experience of repatriating her grandparents' canoe.[25] Below is a summary of this sharing from her perspective.

The canoe was built in the 1970s by Isaiah and Annie Roberts, my grandparents, who were members of the Lac La Ronge Indian Band.[26] Isaiah Roberts was a known master canoe builder.

Isaiah Roberts' process of building the canoe was documented by the University of Saskatchewan and the Federation of Sovereign Indigenous Nations (then FSIN) in a film entitled *My Last Canoe*.[27] The film was produced in Cree and English. Annie Roberts was also integral to building the canoe as she embellished the canoes with dyed tree roots. This was her signature touch. The canoe disappeared shortly after the filming of *My Last Canoe.*

It was an "emotional timeline" for my family, working to find out what happened to my grandparents' canoe. In February 2020, I received an e-mail from the Department of Archaeology and Anthropology at the University of Saskatchewan. The e-mail read that the canoe had been in storage for years in the basement.[28] The canoe was not receiving proper care.

When I saw the canoe, I felt a rush of different emotions. I was able to recognize my grandparents' canoe because of my grandmother's signature dyed tree roots. Looking at the canoe, I remembered the summer my grandparents were building the canoe. The sight of the canoe instantly took me back to the time when I was a child, even though the canoe had been appropriated for research and stored inappropriately for decades.

The process of bringing the canoe home to the community was difficult. I wanted to stay away from the legal arguments, I wanted to drop the "issue of ownership" as I just wanted the canoe back in the community where it belonged. However, there was a lot of "red tape to overcome."

---

[25] This summary includes the presentation by Dr. Rose Roberts, as well as articles by the University of Saskatchewan and Maclean's Magazine.

[26] See Marth Troian, "A Cree family's canoe is returned, after sitting in a University of Saskatchewan storage room for years" (28 October 2021), online at: *Maclean's Magazine* <https://macleans.ca/news/canada/a-cree-familys-canoe-is-returned-after-sitting-in-a-university-of-saskatchewan-storage-room-for-years/> [Roberts Family Canoe Returned].

[27] See Shannon Boklaschuk, "Digital replica of birch bark canoe on view at Remain Modern through USask partnership" (26 January 2022), online at: *University of Saskatchewan* <https://artsandscience.usask.ca/news/articles/7196/Digital_replica_of_birch_bark_canoe_on_view_at_Remai_Modern_> [Canoe on View at Remain Modern].

[28] See *ibid*.

One notable barrier was that the University of Saskatchewan and the Department of Archaeology and Anthropology did not have repatriation policies in place. However, they were able to figure out the path of bringing the canoe back to the community.

When the canoe was ready to make its journey back home, a wooden crate was made to protect it. I performed ceremony with the four medicines – tobacco, sweetgrass, sage, and cedar – and placed the medicines inside the crate with the canoe for its journey. Unfortunately, without repatriation legislation in place, the burden of the cost for transporting the canoe to the Lac La Ronge community was carried by the community.

Having the canoe back in the community is significant for many reasons. It is an opportunity to "teach" the culture to the next generation. This is a skill that could be lost, and it must be taught and continued.

The canoe will be permanently displayed at the Isaiah Roberts Memorial Cultural Centre when it is built. On October 23rd, 2020, an unveiling of the canoe took place and ceremony was made.[29] The medicines that journeyed with the canoe were burned in a clean fire, creating a completed circle for my family. Repatriation is important because these items are "ours and they belong in our communities."

The canoe was digitally replicated and is available to view at the Remai Modern Gallery in Saskatoon through an interdisciplinary research initiative at the University of Saskatchewan.[30]

Reflections on UNDRIP, Treaty and Indigenous Heritage: Brenda Gunn (moderator), Elders Harry Lafond, Joseph Naytowhow and Wanbdi Wakita

Grandfather Wanbdi Wakita, Elders Harry Lafond and Joseph Naytowhow, Brenda Gunn

[29] See Roberts Family Canoe Returned, *supra* note 26.
[30] See Canoe on View at Remain Modern, *supra* note 27.

Harry Lafond: Language is a source of identity. Speaking Cree in formal settings represents an important part of cultural ownership in the Canadian environment. Canadian legislation such as the *Indian Act* disrupted the importance of connection to community which is vital to Indigenous ways of life. It did not respect Indigenous people as *people.* Repatriation is ultimately about community. Bill C-92 (*An Act respecting First Nations, Inuit and Métis children, youth, and families*)[31] is repatriation itself; it takes control of the future generation and puts children first.

Our lesson to take away is to not make the same mistakes again. Often, Indigenous communities model their internal processes off provincial governments, but this simply perpetuates colonialism.

Colonization is a tool for forgetting. The historical legacy of colonization has created a system of disrespect towards Indigenous people and the values they represent. A necessary component of decolonization is realizing that there is a significant difference between doing things for people and walking with them. Doing things for people creates reliance; walking with them lets people do things for themselves because it is their work to do. This is true repatriation.

Joseph Naytowhow:

There are several different Cree words that would describe repatriation. The Cree word pekiwew ᐯᑭᐍᐤ means “returned home” and is appropriate when discussing repatriation. Other Cree words include:

- kayawisin ᑲᔭᐏᓯᐏᐣ (hard work),
- kosokonayahcikewin ᑯᓱᑯᓇᔭᐦᒋᑫᐏᐣ (burden),
- pwâwatêwin ᑷᐘᑌᐏᐣ (heavy burden),
- kwayask itatisiwn ᑿᔭᐢᐠ ᐃᑕᑎᓯᐏᐣ (clean living),
- nipahâhkwan ᓂᐸᐦᐋᐦᑿᐣ (big medicine)
  or maci-maskihkiy ᒪᒋᒪᐢᑭᐦᑭᐩ (terrible medicine),
- isihcikewin ᐃᓯᐦᒋᑫᐏᐣ (ceremony),
- nitohtamowin ᓂᑐᐦᑕᒧᐏᐣ (listen),
- tapwewin ᑕᐻᐏᐣ (the act of telling the truth), and
  kisêwâtisiwn ᑭᓭᐚᑎᓯᐏᐣ (kindess).[32]

Elder & Knowledge Keeper Joseph Naytowhow

These words describe not only the experience of repatriation but can inform what the process looks like.

[31] SC 2019, c 24 [Bill C-92].

[32] Note: spellings from “Online Cree Dictionary”, online at: <https://www.creedictionary.com/>.

The only way to see a Cree object is to see it in the Cree way of seeing and the Cree way of being. Some things are meant to be touched and some things are meant to be put away. The way to know is to connect with the Elders of the community. The Elders will guide the ceremony of repatriation and provide the way of seeing.

Grandfather Wanbdi Wakita: Changing institutional thought requires using your heart and not just your brain. Use your heart instead of your head for sacred things. Repatriation must be done following Indigenous laws and teachings. Natural and sacred laws are important and informative. The work will be hard, but it can be done. We just need to start.

DAY 2 (March 10, 2023) Morning Presentations

Sharing Our Experience: UNDRIP and Provincial Heritage Laws: Dr. Tomasin Playford (moderator), Catherine Bell, Dr. Kisha Supernant, Felix Hoehn, Lily Naytowhow

Catherine Bell, Dr. Tomasin Playford, Dr. Kisha Supernant, Felix Hoen, Lily Naytowhow

Dr. Tomasin Playford: To contextualize the age of *The Heritage Property Act*,[33] Dr. Playford reflected on the music and movies that were topping the charts in 1979/1980. It brought home how dated the current legislation is in Saskatchewan. She elaborated: At the time, the intention was to put in place a system designed to protect heritage resources at risk of being negatively impacted, especially by increasing development. However, as the saying goes – the road to hell is paved with good intentions. Through the Act, heritage in Saskatchewan is defined, legislated, regulated, and owned by the Crown. Furthermore, the language of the HPA has not changed in 43 years and we know language and wording is very important. For example, the HPA refers to 'ownership' of ancestors, the same way it does for geologic fossils. People are not fossils. It does not touch the intangibles, such as the stories and knowledge systems; it only focuses on the physical objects and who owns them. Even the title reflects 'property' when discussing belongings and ancestors. It is a colonial structure with many gaps, and not surprising as it was created over

[33] SS 1979-80, c H-2.2 [HPA].

4 decades ago, without Indigenous input. This negatively impacts Indigenous communities who do not see their heritage perspectives and values protected. The HPA does not reflect ongoing societal change and has only had amendments 16 times, none of which were significant or addressing pressing concerns. This meeting will be a catalyst for change.

Catherine Bell: The *Heritage Conservation Act*[34] (HCA) of British Columbia shares features in common with other provincial legislation concerning archaeological and other heritage sites (as defined by legislation) and objects located on public or private provincial lands.[35] While I use the language of the legislation, I do so recognizing the categorization of Indigenous belongings and ancestors as archaeological heritage, property, objects, and resources is offensive to many Indigenous peoples. Language is one of the issues which should be addressed in reforms to this legislation.

Like other Western provincial laws, the HCA provides for designation to protect heritage sites and objects and controls excavation through a permit system, impact assessments, stop orders and penalties for non-compliance. It also prohibits the export of heritage objects; automatically protects certain sites from destruction, damage, desecration, excavation, alteration of sites and objects without a permit, and includes offences and penalties for contravening the legislation.

In 2019, HCA was amended to include greater protections including:

(1) mandatory reporting of a heritage site or object and

(2) the ability of the Minister to ask the person purchasing, subdividing, developing, or using the property to undertake or pay for the heritage inspection or heritage investigation report before issuing a permit to excavate or otherwise alter land for the purposes of archaeological research or searching for artifacts of aboriginal origin.

However, the HCA also has several unique features. Some of these are a result of consultations with First Nations and the broader public in the late 1980s and early 90s. Various factors influenced the government's decision to have these sessions including cases recognizing Aboriginal title in BC, recommendations of the Royal Commission on Aboriginal Peoples, and the enactment of the *Native American Graves Protection and Repatriation Act*[36] (NAGPRA) in the United States. Although many recommendations were not incorporated, changes were made to strengthen protections for archaeological sites.

Three unique features include:

- The Act is silent on the issue of ownership of archaeological heritage. The 1992 draft proposed Crown ownership of heritage sites and objects in or under the ground pre-

[34] RSBC 1996, c 187 [HCA].
[35] Archaeological heritage includes all evidence of human occupation that comes out of the ground (or underwater).
[36] NAGPRA *supra* note 21.

dating 1858 but this was opposed by many First Nations.[37] The HCA implies Crown ownership by requiring a permit to remove, move or alter a heritage object. However, it can be argued that it is unclear in BC who has title, even if the object is acquired in violation of the legislation, absent a ruling by a court where Aboriginal title and rights have not been ceded. Most of BC is unceded territory (e.g., requires consideration of ownership rights associated Aboriginal title, Aboriginal rights, and common law of property regarding rights of landowners and finders).

- The HCA provides for "consultation with the First Nation whose heritage site or object would be affected" to define the extent of, or to exempt from protection, non-designated automatically protected First Nations sites such as burial, rock art and pre-1846 archaeological sites (s.12.1(4)).

- The HCA enables the Minister to "enter into a formal agreement with a First Nation with respect to the conservation and protection of heritage sites and heritage objects that represent the cultural heritage of the aboriginal people" (section 4) and to further specific objectives of the Act (section 20[1][b]). Some protocol agreements have been entered addressing consultation before issuing heritage inspection or site alteration permits for protected sites (e.g., Treaty 8 in 2010 and the Hul'qumi'num Treaty Group in 2007). The first agreement addressing shared decision making for issuing or amending permits on provincial land was entered in 2022 with the Stó:lō Nation as a one-year pilot project.

First Nations have been critical of the HCA and its implementation for some time. More recently, a dispute over a home being built overtop of burial cairns on Grace Islet, BC highlighted financial issues associated with protecting such sites and raised Indigenous and public interests in reviewing HCA again. Changes to this legislation and heritage management in BC was also identified as an area of priority by First Nations following the endorsement of UNDRIP by the government of BC. The resulting *Heritage Conservation Act* Transformation Project (HCATP) was co-designed by the Joint Working Group on First Nations Heritage Conservation, which was formed in 2007 and includes members appointed by the First Nations Leadership Council and the Province. [38]

Phase 1 of the HCATP took place in 2022 and involved engagement on the process and preliminary analysis and options. Future phases of the HCATP require the approval of government and Modern Treaty Nations and First Nations Leadership. This phase identified three themes arising from concerns identified by First Nations in previous discussions and consultations:

[37] 1846 is the date that the border was fixed between Canada and the United States and Britain asserted sovereignty over Vancouver Island recognizing it as a colony.
[38] The Government of British Columbia, "*Heritage Conservation Act* Transformation Project", online at: <https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/archaeology/hca-transformation-project>.

1. HCA assumes legitimacy of provincial jurisdiction over Indigenous heritage and final decision making;
2. HCA assumes limited rights of Indigenous ownership and control to sites on lands and heritage objects owned by individuals; and
3. HCA provides equal participation and consideration of interests of "stakeholders".[39]

Five areas were identified for the purposes of engagement:

1. Indigenous laws, values, and rights recognition
2. Decision-making
3. Protections
4. Resourcing to support heritage management.
5. Compliance and enforcement.[40]

Possibilities for change exist within HCA, such as the interplay between section 4 of HCA and sections 6 and 7 of the *Declaration on the Rights of Indigenous Peoples Act,*[41] which provide a mechanism to enter into agreements with First Nations with respect to conservation and protection of heritage sites and for joint statutory decision making. These sections were relied upon for a one-year pilot project with the Stó:lō First Nation in July of 2022 and which concerned landscapes within traditional territory and on public land.[42]

Other possibilities for change include:

- Expanding the definition of "heritage" to recognize and protect a broad spectrum of Indigenous cultural heritage.
- Prioritizing First Nations' legal systems and traditional knowledge in decision making.
- Requiring cultural protocols for ancestral remains and burial places under HCA permits.
- Requiring HCA permits to invite, engage, and support the direct participation of First Nations in archaeological work.
- Enabling government to government development of collaborative programs that provide opportunities for First Nations to develop and document their heritage management policies.

[39] Stakeholders include developers, government, and non-governmental departments organizations. At the time of writing the HCATP was in stage two in which near term proposals for reform to the HCA developed by the Joint Working Group on First Nation Heritage Conservation are being discussed at engagement sessions in preparation for submission for Cabinet consideration.
[40] "*Heritage Conservation Act* Transformation Project: Backgrounder" (30 June 2022)[unpublished].
[41] SBC 2019, c 44 [DRIPA].
[42] See Government of British Columbia, "S'ólh Téméxw Stewardship Alliance Strategic Engagement Agreement" (2019), online at: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/stsa_sea_renewal_agreement_-_2019_spring_final_executed_2019-06-28.pdf>.

- Giving First Nations greater control over the selection of repositories for Indigenous cultural heritage resources.
- Ensuring Indigenous place names are used in archaeological records.
- Ensuring Indigenous intellectual property and cultural knowledge are safeguarded and that requests for confidentiality are respected.

Dr. Kisha Supernant: In designing a database for Métis cultural heritage, I asked: "What would my aunties want to know? What is the story?" It is important to have people involved in the project who can ask these questions and respect Métis cultural, tradition, and laws.

Repositories do not provide proper care for relatives. Provincial laws and policy make *wahkohtowin*[43] difficult because it creates barriers. For example, laws and policies prevent people from visiting with ancestors, from using objects for ceremony, and it is often prevented because of the myth surrounding what care is.

The Institute of Prairie and Indigenous Archaeology focuses on practice, policy, and pedagogy. Through practice, it is vital to do ceremony, learn techniques, and explore how information is discussed and taught. The practices are still very colonial. As well, an area of focus is policy. This looks at legislative reform and community-based processes. The change must happen from the top-down.

I began exploring Métis identity as part of an archaeology project entitled Exploring Métis Identity Through Archeology (EMRITA). I noticed that nobody was doing Métis archaeology and wanted to do collaborative Indigenous archeology. I pitched this idea to the Métis National Council, and they were interested in what archeology could bring to Métis history. They wanted to demonstrate their presences and find material evidence to help support Métis history. I wanted to begin the journey of learning my history and the history of my community. I was interested in what it means to do Métis archaeology versus archaeology on Métis sites. I was working in southern Saskatchewan and reconnecting with my living relatives and learning about their ways. I learned about *wahkotowin* and how it impacts work with archaeology.

I started working with certain belongings that had unhappy energy and it was causing me dreams and discomfort. I worked with Métis belongings that were connected to kinship that required reciprocal relations and responsibility. Belongings must be sat with, be a part of ceremony, and have connection through visiting. Most belongings are not in places that can be easily visited,

[43] Dr. Kisha Supernant defined *wahkohtowin* as a reciprocal responsibility. This means visiting with the belongings, not working on the belongings.

which raises issues around access and location. I kept the belongings in my office to connect and visit with.

Dr. Kisha Supernant, Katherine Faryna (sitting)

There are laws in Alberta and Saskatchewan that state relatives must be sent to be incarcerated in museums. I do not want to send my relatives away and disconnect from relations so that they are not being cared for. Relatives are stored, in industrial areas and institutions, in boxes. They are not cared for in a good way, nor in an appropriate way. A permit is required to legally remove the relatives. There is always a fine line to walk with what one is "allowed" to do. It is important to understand the right way to care for relatives and belongings. As an Indigenous archaeologist I want to be able to have the time to discuss this and do work with my community.

This is where the law can change. Provincial heritage laws were built on the premise that Indigenous communities are no longer connected to their ancestors and belongings. There is a need for self-determination to make decisions about what happens to the relatives. Heritage legislation needs to be rethought in whatever way Indigenous peoples choose to have it. There is value in a federal approach to repatriation and heritage due to inconsistency of provincial legislation. The Métis homeland crosses jurisdictions, and a federal approach can help address these issues - a federal framework that allows for communities to decide what needs to be done. Heritage is so much more than legislation and that needs to be understood. Heritage is more than what the provincial acts define, and caring for it requires understanding of all aspects. For example, there is not sufficient support for intangible and tangible heritage. The stories and the names are not separate from the location. Legislation must reflect this and enable Indigenous people to care for their own belongings.

Felix Hoehn: The doctrine of discovery is still the basis of Canadian Aboriginal law and forms the foundation of Aboriginal Title.[44] Numerous Truth and Reconciliation Commission Calls to Action refer to the need to repudiate concepts that are used to justify European sovereignty over Indigenous lands and peoples. These concepts consist of the doctrine of discovery and

[44] *Guerin v The Queen*, [1984] 2 SCR 335 at 377-78, citing *Johnson v McIntosh,* 8 Wheaton 543 (1823). See also Felix Hoehn, "Back to the Future – Reconciliation and Indigenous Sovereignty after *Tsilhqot'in*" (2016) 67 UNBLJ 109, especially at 111-120. In relation to Indigenous cultural heritage, see e.g., David M. Schaepe, George Nicholas & Kierstin Dolata, "Recommendations for Decolonizing British Columbia's Heritage-Related Processes and Legislation", First People's Cultural Council (December, 2020) online: <https://fpcc.ca/wp-content/uploads/2020/12/FPCC-Decolonizing-Heritage-Processes-and-Legislation.pdf> at 5, 24—25, and 61.

terra nullius. The recitals to UNDRIP[45] and the *United Nations Declaration on the Rights of Indigenous Peoples Act*[46] reiterate that the doctrine of discovery is racist, and this adds pressure on the Supreme Court of Canada and legislators to work from a different starting position. These concepts must be done away with. The Supreme Court of Canada has referred to Aboriginal sovereignty and treaties affirming this. In *Haida Nation v British Columbia (Minister of Forests)*,[47] the Supreme Court of Canada stated:

> Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights… Section 35 represents a promise of rights recognition… This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.[48]

Aboriginal rights should be determined through treaty negotiation, not through colonial perspectives and unilateral Supreme Court of Canada decisions. Treaties can reconcile sovereignties. Once the doctrine of discovery is done away with, Crown sovereignty does not exist without treaty. This is consistent with the reserved rights doctrine.[49] This means that any rights (and/or sovereignty) not ceded by the numbered treaties remain and are protected by section 35.

There is considerable evidence treaty clauses that purport to cede sovereignty were not in fact agreed to by the Indigenous parties to the treaty.[50] Peter Hutchins argues that suggesting that Indigenous peoples, when entering treaties, were "severing themselves from their systems of Aboriginal law and the elements of the practices and customs when signing treaties is … an improbable assertion and one that has never been satisfactorily explained in Canadian jurisprudence."[51]

Even where settlers may unjustly claim sovereignty, and in jurisdictions where sovereignty was in some sense ceded, there is no right to act unilaterally. Research has found that the intent of the treaties, as presented to and understood by the First Nations, was for "the government of the settlers to provide benefits in addition to what people already have rather than impose a new

---

[45] UNDRIP, *supra* note 6.
[46] SC 2021, c 14 [UNDRIPA].
[47] [2004] 3 S.C.R. 511, 2004 SCC 73.
[48] *Ibid* at para 20.
[49] See *United States v Winans* 198 U.S. 371 at 381 (1905). See also *Menominee Tribe v. United States,* 391 U.S. 404 (1968) and James [Sa'ke'j] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L.R. 241.
[50] See e.g., Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed. Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference (Vancouver: UBC Press, 1997) and Harold Cardinal and Walter Hildebrand, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).
[51] Peter W. Hutchins, "Cede, Release and Surrender: Treaty-Making, the Aboriginal Perspective and the Great Juridical Oxymoron or Let's Face it-it Didn't Happen" in Maria Morellato, ed. Aboriginal Law Since Delgamuukw (Aurora, Ont.: Canada Law Book, 2009) at 447.

system."[52] Treaties must be honoured, and kindness is a principle in the treaties.[53] Promises made in historical treaties about how we treat one another must be kept. It would be more than reasonable to ensure that people are custodians of their own cultural heritage. At a minimum, as Dr. Michael Asch has argued, the kindness promised by the Crown means that Indigenous people cannot be stripped of their cultural heritage, or of their property and the lands with special spiritual significance.[54] This is consistent with section 25 of UNDRIP, which provides that Indigenous peoples have the right to maintain their spiritual relationship with their traditional territories and other resources.[55]

Legislative law reform should aim to "reflect treaty relationships as it was understood by Indigenous peoples."[56] There was a similar disagreement about the cession of sovereignty in New Zealand with the Waitangi treaty. Instead of focusing on the wording to the treaty, the parties looked to the principles underlying the treaty. In the Waitangi treaty, partnership was seen as an overarching theme. Similarly, the kindness promised by the Crown means Indigenous peoples can't be stripped of their heritage, or of their property and lands with special spiritual significance.

Accordingly, the framework for reform of heritage legislation should reflect a nation-to-nation relationship and a partnership that reflects the principle of sharing the land. At minimum, section 25 of UNDRIP and the kindness principle in the treaties require that Indigenous peoples should control their own heritage property and their spiritual ties to the land should be protected.

Finally, pitting Indigenous peoples against private owners as is done in provincial heritage laws is not conducive to reconciliation. To the extent that interference with private property rights cannot be avoided, the Crown should compensate private owners.

---

[52] "Treaty Relations as a Method of Resolving IP and Cultural Heritage Issues", Final Report by Siku Allooloo, Michael Asch, Aimée Craft, Rob Hancock, Marc Pinkoski, Neil Vallance, Allyshia West, and Kelsey Wrightson. Michael Asch, Principal Investigator, Department of Anthropology, University of Victoria, 2014 online: <https://www.sfu.ca/ipinch/sites/default/files/resources/reports/treatyrelations_finalreport_2014.pdf> at 2.

[53] *Ibid* at 20—22 and 162—63.

[54] *Ibid.*

[55] *Supra* note 6.

[56] *R v Nowegijick*, [1983] 1 SCR 29 at 36.

Lillanohna (Lily) Naytowhow:

Opening Song, Joseph and Lily Naytowhow

I started my journey while doing my master's degree at the University of Saskatchewan, focusing on Indigenous Heritage Management. I wanted to take heritage into my own hands and do what the community wants. I had not lived on the reserve at Sturgeon Lake until this past year. I experienced being an outsider coming into my own community. I always knew about my roots, but never experienced my culture. Conducting research was an opportunity to reconnect with my culture and learn about my identity. I found purpose during my research and work. I noticed that the perspectives and attitudes of professors discussing UNDRIP and other topics were unprogressive.

I went out to the community to learn about my culture. I wanted to immerse myself in culture and to learn songs and ceremonies. While I was growing up, I was taught that the reserve was a bad place to be. I let stereotypes of Indigenous culture affect me and keep me away from my community. When I arrived in my community, I found everyone was very inviting and welcoming. I had always seen the reserve as one road rather than seeing the traditional ceremonial grounds, seeing the sacred spaces. I wanted to hear everyone's perspectives in the community. I worked at the healing lodge and continue to work there today.

Learning one skill within the community compliments a practice of someone else, there is always interconnectivity. For example, skilled with plants and medicines, I found purpose and confidence through having a relationship with the land.

There is a project to digitize the documents of Sturgeon Lake. The first signing of the treaty included names of all the people living in the community at the time. People can decipher the old Cree names from 200 years ago. The goal is to put this in a digital museum online that anyone can access. Once people can connect with the land and learn more about their identity, then people are more likely to lead change.

I hope that we can develop an Indigenous heritage network. Laws need to be made and changed. People in the community need to lead this work and research projects. Research grants should be utilized and looked at for repatriation and heritage work. Indigenous people are told that they do not have history. This is wrong and extremely harmful.

I have been asked to make an Indigenous narrative of Sturgeon Lake's history. This is a project that can be replicated in Indigenous nations everywhere. It is a colonial idea that Indigenous nations must be separate, but the work was traditionally done together. There are many barriers

preventing work from moving forward. I pray for the day that future generations do not feel that they live in a 'bad place'.

Sharing Our Experience: Legislation and Law Reform: David Werner (moderator), Catherine Bell, Rebecca Bourgeois, Dr. Jaime Lavallee, Katherine Faryna

David Werner, Rebecca Bourgeois, Katherine Faryna, Dr. Jamie Lavallee

Catherine Bell: UNDRIP is aimed at enhancing "harmonious and cooperative relations, based on principles of justice, democracy, respect for human rights, non-discrimination, and good faith" (Preamble). What Indigenous rights look like and the standards to be achieved in a particular context will differ. Whatever path is taken, RCAP offers four fundamental principles for forging new relationships between First Nations and the Crown. These are mutual recognition, mutual respect, sharing, and mutual responsibility. To give these principles practical effect in a world where different values and systems of law must co-exist calls for Nation to Nation Indigenous-Crown negotiation, partnerships, parallel systems, dialogue, respect, and cooperation.

The following principles are derived from a review of literature concerning UNDRIP & Heritage Law Reform. It is a place to start to think about the process of law reform but is not an exhaustive list.

1. Before enacting or adopting legislative and administrative measures that may affect Indigenous heritage, governments should consult and cooperate in good faith to obtain free prior and informed consent.

This is a time-consuming, but not an impossible task. An example is Bill C-92, which expressly acknowledges Canada's commitment to implementing UNDRIP and was co-developed with Indigenous peoples. [57]

2. It is important to review legislation to identify and eliminate aspects that perpetuate colonial and racist ideologies such as the doctrine of discovery and *terra nullius.*

[57] See Bill C-92, *supra* note 31.

UNDRIP and TRC Call to Action #47 call on provincial governments "to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts."[58] Examples of how these concepts continue in heritage legislation include the assumption of jurisdiction over and provincial ownership of lands and heritage items within provincial boundaries, absence of express reference to obligations on Canadian governments flowing from section 35 of the *Constitution Act*[59] or treaties including consulting with and involving First Nations in determining strategies and priorities for protections; and unequal treatment of Indigenous burial grounds and non-Indigenous cemeteries.

Response to TRC Call to Action #47 requires that federal, provincial, territorial, and municipal governments review and revise laws that intersect with Indigenous heritage to include appropriate levels of Indigenous control, Indigenous conservation principles, and Indigenous values but this should not undermine the ongoing importance of cooperative relationships built on honesty, trust, and respect.

3. Establish ongoing relationships based on Nation-to-Nation, government-to-government relationships grounded in Indigenous rights, self-determination, and respect for treaty jurisdictions.

Governments should move away from a model that assumes unilateral decision making by provincial governments and engagement with First Nations depending on strength of rights-based claims and duty to consult and accommodate. Instead, develop mechanisms that recognize First Nations laws, policies, governance, and decision-making authorities pertaining to heritage, and incorporate the concept of free, prior, and informed consent. This includes procedural and substantive recognition and respect for the distinctiveness of Indigenous peoples and their jurisdictions, title, and rights, including s. 35 constitutional Aboriginal and treaty rights.

4. Recognize First Nation jurisdiction and statutory decision-making authority over heritage including relationships and connections to lands, culture, laws and rights and responsibilities to care for ancestors. Rights and responsibilities go beyond reserve borders and include traditional territories.

Examples of ways to do this include:

- Treaties.
- New legislation or agreements enabling shared statutory decision-making authority in specific areas.
- Amendments to existing laws and policies aimed at recognizing and respecting Indigenous laws and self-determination.

[58] TRC, *supra* note 4 at Call to Action #47.
[59] *Constitution Act, 1982,* s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Constitution Act].

- Framework legislation that is grounded in rights recognition, affirms self-determination, and creates space for diverse Indigenous Nations and legal orders. Such frameworks risk perpetuating colonization if they are not sufficiently flexible and adaptable to recognize distinctive and diverse First Nations jurisdiction.

5. Create measures in consultation and cooperation with Indigenous governing bodies to develop creative solutions to maintain, control, and protect sites, and belongings on or under private land.

Some advocate recognition of ownership or some other statutorily recognized property interests to address the issue of protection and control on private lands. There are issues attributing the concept of ownership to landscapes and belongings. However, the concept of ownership in current provincial heritage laws plays a pivotal role in creating barriers and rights recognition for First Nations.

6. Provide access to resources and mechanisms to assist with repatriation from private collections.

In the same year that Alberta passed repatriation legislation (2000), the *Alberta Personal Property Bill of Rights*[60] was enacted. This legislation prevents the Crown from passing a law giving the Crown ownership of personal property which is owned by someone else unless a process is in place to determine and pay fair compensation. Similar legislation does not exist in other provinces or territories. However, there are some judicial decisions that suggest there may be an obligation to pay compensation when any form of private property is taken by legislation – taking being understood in this context as denial of all economically beneficial or productive use.

Very different legal and ethical considerations apply to material now in public ownership and material in the hands of private individuals. Statutory taking of public property is easier to accomplish because the principle of protecting *bona fide* third parties enshrined in Western colonial property laws law is easier to refute than in a private context and is unlikely to invoke the requirement of compensation or the necessity to remove this right by legislation—actions which may run contrary to government and public perceptions.

However, other initiatives could be aimed at private collections including: through diplomacy aimed at restitution of ancestral remains and belongings and to change laws in other countries that are barriers to restitution; access to funding to develop the means to locate and purchase significant items; consulting with and obtaining the consent of Indigenous peoples on amendments to legislation concerning sale and export of “cultural property” including through strengthening and enforcing laws concerning desecration, marketing or otherwise disposing of significant belongings and ancestral remains.

[60] RSA 2000, c A-31.

7. Work in collaboration and cooperation with First Nation governments to adopt fair, independent, and impartial processes for dispute resolution that give at least equal consideration to Indigenous laws, dispute resolution processes, and rights to their traditionally owned lands and resources.

For example, in repatriation, there is an increased willingness to return a wider range of items from publicly funded repositories (e.g., museums, galleries, archives, universities, libraries). However, reliance on museum policy and goodwill in negotiation raises issues of power and equality of participation. Although most major Canadian institutions holding First Nation material recognize the importance of repatriating certain items, treat First Nation parties to negotiation with respect, appreciate the complexities created by different cultural understandings, and consider evidence based on kinship, oral tradition, Indigenous laws and other sources; the current regime nevertheless continues to perpetuate colonial relationships of dependency as absolute authority and final decision making remains with external governments and custodial institutions. The only recourse for First Nations if negotiation fails for these or other reasons is public shaming or expensive litigation before Canadian courts.

8. Adopt a more holistic Indigenous centred understanding of heritage and heritage value. This necessarily includes financial support for Indigenous led research related to Indigenous laws, protocols and practices for repatriation and heritage management.

Examples include:

- Greater appreciation for intangible values ascribed to places and belongings and considerations of Indigenous knowledge and laws in attributing meaning and value.
- Recognizing that for First Nations many cultural materials held in museums are the physical embodiment of their ancestors and hold as much power, importance and meaning as ancestral remains.
- Recognizing that First Nations hold responsibilities to care for ancestral remains based in Indigenous laws and cultural protocols that ancestral communities.

9. Provide adequate resourcing for provincial, federal, municipal, and Indigenous governments to develop and administer heritage laws, practices, and policies.

Some would argue the main barrier to recognition and implementation of Indigenous rights in heritage isn't the legal or policy framework but lack of funding. Priority areas some have identified include:

- Infrastructure (the creation and operation of cultural centers), research (especially regarding ancestral remains and resolution of overlaps), archaeology, purchase of significant sites and items and repatriation efforts.
- Investigating, monitoring and enforcement of protections on private and public lands.

- Creation of national and provincial strategies to support repatriation including research and community consultation with adequate funding mechanisms attached.
- Digitizing collections and creating databases of major museum collections with access developed in consultation and cooperation with Indigenous peoples.

10. Enhance protections and regulations with respect to burial sites and repatriation of remains.

Under common law, unless changed by statute, the human body is not owned by anyone, but certain persons may be recognized as having control and responsibility in relation to remains in different contexts (e.g., criminal investigation, on death, scientific research). Law and public policy support rights recognition in descendant communities. Indigenous law may also generate obligations.

Attribute the same respect as is given to remains buried in cemeteries including eliminating the designation of remains as archaeological property and presumption of right to scientific study. There is significant opposition from Indigenous peoples to treatment of remains as archaeological material and Indigenous laws vary concerning care and appropriateness of scientific study. Not all First Nations will object, but FPIC should be obtained.

Section 182 of the *Criminal Code*[61] also makes it an offence to interfere with improperly or indecently, or offer an indignity to, dead bodies or human remains.[62] However, if the remains are archaeological the application of this section is uncertain and will be balanced against the alleged indignity (e.g., scientific study as contrasted to selling remains).

11. Create a body to identify legislative priorities in consultation and cooperation with Indigenous peoples and to review legislation to see if it meets UNDRIP obligations in any enactment or reform of legislation.

There are also important lessons to be learned from other jurisdictions. For example, approaches taken in New Zealand to UNDRIP and heritage law reform. Taking inspiration from the Māori Heritage Council in New Zealand, Heritage Chairs and Officials of Australia and New Zealand drafted a Best Practice Standards for Indigenous Cultural Heritage Management and Legislation in 2020 (the Standards).[63] The Standards are designed to guide jurisdictional reform of cultural heritage legislation that is consistent with UNDRIP principles. The recommended Best Practice Standards are:

- Definitions in legislation recognize that Indigenous Cultural Heritage (ICH) is a living concept.

[61] RSC 1985, c C-46.
[62] See *ibid* at s 182.
[63] See First Nations Heritage Protections Alliance and Australian Government, Department of Agriculture, Water and the Environment, *Modernisation of Aboriginal and Torres Strait Islander cultural heritage protections: Discussion Paper – Stage 1,* (Australia: 2022) at 9.

- Legislation should be structured to provide a blanket protection for ICH, subject only to authorizations granted with the consent of affected Indigenous peoples.
- Authorization made by Indigenous groups is genuinely representative of "Traditional Owners". Legislation should include mechanisms for the identification and appointment of an organization that can genuinely be accepted as the 'representative organization' of the affected community to undertake this role.
- ICH issues are considered early in any development process.
- Indigenous communities are provided with adequate resources to manage ICH processes.
- Enforcement regimes are effective and broadly uniform.
- Regimes for the management of Indigenous ancestral remains, and secret or sacred objects are based on the primacy of Traditional Owners;
- Recognition of frontier conflicted sites is undertaken only with participation and agreement of affected Indigenous communities. [64]

Rebecca Bourgeois: I am conducting fieldwork for my doctorate and building relationships with the four Tłı̨chǫ communities in the Northwest Territories (Treaty 11). One of my projects is to create a digital archive for the Tłı̨chǫ Government. I was invited to sit with the Elders and hear their stories to understand the values for how to create a process for heritage management. The work being undertaken is not creating a framework from something else but building a framework from the ground up. I also created a repatriation guide for communities to start the repatriation process.[65] Repatriation processes in Canada are a patchwork of many different things such as policies and laws. From a public perspective, there is no information on repatriation to see what museums are working on and where Indigenous communities can go. There are more repatriation efforts being made in museums than in universities. Having publicly available information helps Indigenous communities arm themselves with information they need when they are coming to the table. This shifts the power balance.

I examined the changes and amendments to heritage acts, repatriation legislation, and repatriation policies. There have been many changes in museum policy since the 1970s; however, there is little governing legislation and there is a wide swath of differences in the priorities identified in legislation and policies across Canada.

Bill C-391, the *Indigenous Human Remains and Cultural Property Repatriation Act*, was introduced in February 2018 and went to the Senate in February 2019. It has not been picked up since. The process of law reform cannot be defined by a timeline, and it is not necessarily linear. Bill C-391 is the closest Canada has come to a national framework. It is an important first step toward affirming the right of Indigenous peoples and communities to their ancestors and cultural

[64] *Ibid* at 10.

[65] See Rebecca Bourgeois, "Repatriation in Canada: A Guide for Communities" (University of Alberta and Kule Institute for Advanced Studies, June 2021), online at: <https://era.library.ualberta.ca/items/2dfb153e-76da-4cac-a968-a3f6b2e3a61c>.

heritage on a federal level. It also recognized the importance of Indigenous knowledge, representation, traditions, and processes. However, it was underdeveloped with unclear consultation and unclear legal jurisdiction. As well, Bill C-391 focused on mainly physical returns as a statistic for success (see Appendix 3 “Bill C-391: An Act Respecting a National Strategy for Repatriation”).

The Tłı̨chǫ communities I am working with are interested in redefining terms and concepts such as ownership, stewardship, and the values of care. It is important to honour the ancestors and share their stories. There should be a priority placed on strengthening the community and the practices. It is important to learn how to make things and to teach the youth. When creating strategies for heritage management, it is important to first determine what the priorities are in the community and keep these core values in mind.

People are proudly showing their cultural heritage in communities. It is essential to expand the definition of repatriation. It is not just about the physical exchange of items, but the objects being reunited with family and being shared with pride.

Dr. Jaime M.N. Lavallee: I am going to speak about NAGPRA in the United States as an example of law reform. I have worked with federally recognized tribes, state recognized tribes in the United States, and other groups that choose not to become federally or state recognized. When there were disagreements with terms in NAGPRA, we found “creative ways” to ensure institutions were following protocols and ensured tribal advocacy under NAGPRA as was intended by the law.

Dr. Jamine Lavallee, Rebecca Bourgeois

NAGPRA covers all federally funded institutions holding Native American and Hawaiian belongings and remains. This ensures that it is not just museums, but other institutions such as high schools that receive federal funds, that fall under its jurisdiction. A “wallet biopsy” is undertaken to capture all institutions that have had federal funding “trickled down” to them. This is called the “NAGPRA hook” and ensures institutions are complying with NAGPRA. It was important for NAGPRA to be broadly applied to repatriate ancestors and belongings home. It is important when discussing collections to understand that these are people, they are important, and they encompass more than the idea of a museum collection.

There is also a land disturbance section in NAGPRA which provides a process if ancestors are found through inadvertent discovery. This section ensures that an agreement is in place for potential inadvertent discoveries before a company can start their work. This creates an obligation for proper repatriation of the ancestors to their home and is also in a company’s best

interest. Negotiating these agreements for potential inadvertent discoveries prior to disturbing the land ensures the company's work can be continued in a proper and respectful manner.

NAGPRA addresses four areas of law: property, administrative, human rights, and US Federal Indian. NAGPRA provides for ownership, which is a strict Western law concept. The administrative law, which is highly bureaucratic, is aimed at helping the transparency of the process. As a human right, to take care of cultural patrimony and to care for ancestors was a right taken from Indigenous people. US Federal Indian law is also important to interpret NAGRPA. As Federal Indian law, treaties and statutes in the United States are meant to be broadly interpreted in favour of Indians according to the Indian law interpretation principles. However, there are still loopholes used by museums and agencies to not repatriate.

The ripple effect from NAGPRA has been overall more positive than negative. NAGPRA itself has created synergies between nations through repatriation, education, and the creation of items. Some people worried about museums being emptied because of repatriation. However, this has not been the experience in the United States. And "if your collection is from looted items, what does that say about you?".

There needs to be more research on what happens when items are returned to showcase the revitalization and the vibrancy of nations underneath NAGPRA. This is a transmission of knowledge that was taken away and has now been returned home. It is important to create repatriation frameworks, it could be with communities, provinces, or federally. However, frameworks must allow for flexibility and adaptation. We need to be able to create our own laws. There are more items out there across the world that need to be returned to their home. It is important to have transparent frameworks and a federal registry of belongings in institutions across Canada.[66]

Katherine Faryna: This presentation includes some examples of law reform in Australia and New Zealand directed at Indigenous heritage.

In May of 2020, the mining company Rio Tinto destroyed a sacred 46,000-year-old Aboriginal rock shelter at Juukan Gorge in Western Australia, which was among the oldest sites of continuous human habitat in Australia.[67] Rio Tinto had received government authority for the project but had failed to properly engage the traditional owners of the site, the Puutu Kunti Kurrama.[68] The devastation raised widespread awareness that the cultural heritage legislation in Australia was woefully inadequate.

[66] For further discussion of NAGPRA and repatriation law and policy see NAGPRA see "Repatriation and Provincial Heritage Legislation in Western Canada", Appendix 3.
[67] BBC News, "Rio Tinto Bosses Lose Bonus Over Aboriginal Cave Destruction" (24 August 2020), online: *BBC.com* <https://www.bbc.com/news/business-53885695>.
[68] *Ibid*.

In light of the devastation at Juukan Gorge, Western Australia overhauled its legislation. The new statute, *Aboriginal Cultural Heritage Act 2021* (WA),[69] was pitched as "achieving equity in the relationship between Aboriginal people, industry and Government by replacing outdated Aboriginal cultural heritage" with new legislation that puts "Traditional Owners at the heart of decision-making about the protection and management of their heritage, with the principles of free, prior and informed consent enshrined in the agreement making process."[70] While the Act was slated to be fully operational in 2023 following the publishing of regulations, guidelines, and policies, the Government of Western Australia backtracked significantly thanks to protests from private landowners. In August of 2023, a bill was introduced which repeals the new Act and puts back into place legislation from 1972.[71]

The Australian province of Victoria has enacted its own legislation, *The Aboriginal Heritage Act 2006* (VI),[72] which has a few key pieces that differentiate it from other Australian states and territories. The Act establishes the Aboriginal Heritage Council which is composed entirely of Victorian Traditional Owners. The Council oversees both the Registered Aboriginal Parties' (RAP) operations and the return of Aboriginal ancestral remains and advises the Minister on protection of Aboriginal cultural heritage.[73] The RAP in turn evaluate Cultural Heritage Management Plans (CHMP) and have the authority to approve or refuse CHMPs. The Act also establishes the Cultural Heritage Fund which may be used to provide general assistance for protection, management, and conservation of Aboriginal cultural heritage, and to acquire land or other assets.[74]

Under the Regulations, a CHMP is required for an activity if it is in an area of cultural heritage sensitivity (set out in regulation and which can include private land) and it is a high impact activity (something that would result in significant ground disturbance).[75] Exceptions apply to areas that have already experienced significant ground disturbances, which creates a substantial loophole within the Act.

The CHMP process begins with a sponsor giving prior notice of intention to prepare a CHMP to relevant RAPs.[76] RAPs may then give written notice of intention to evaluate the plan, and if an RAP has given notice, a sponsor must apply to that RAP for approval of the plan.[77] Under section 59, a sponsor must make reasonable efforts to consult with RAPs before assessment and during

[69] 2021/27 at s 137 [ACHA].
[70] Government of Western Australia, "*Aboriginal Cultural Heritage Act 2021*" (23 June 2022) online at: <https://www.wa.gov.au/government/document-collections/aboriginal-cultural-heritage-act-2021>.
[71] Government of Western Australia, "Aboriginal Heritage laws" (24 August 2023), online: WA.gov.au < https://www.wa.gov.au/organisation/department-of-planning-lands-and-heritage/aboriginal-heritage-laws>.
[72] 2006/16 at ss 130-131 [AHA].
[73] See *ibid* at s 132.
[74] See *ibid* at s 158D.
[75] See *Aboriginal Heritage Regulations 2018* (VI) 59/2018 at s 46.
[76] See *ibid* at s 54.
[77] See *ibid* at ss 54 and 62.

preparation of the CHMP, and the RAP must use reasonable efforts to cooperate in the preparation.

While Victoria's legislation has some alignment with UNDRIP, such as providing methods for self-determination (RAPs have decision-making powers and are funded by the government; the Council is composed entirely of Traditional Owners) and the right to repatriate ceremonial objects and human remains (there is a legislated process to ensure that ancestral remains and sacred/secret objects are returned to Traditional Owners), there is still room for improvement. In 2021, the Aboriginal Heritage Council published recommendations for legislative reform, which included increasing autonomy for the Council and expanding legislative functions and authority for RAPs to boost self-determination within the Act. The Council also called upon the Victorian Government to increase protection of cultural heritage by introducing liability for civil damages and addressing lax prosecutions of cultural heritage destruction.[78]

Another Australian territorial example lies in Queensland. Queensland's cultural heritage legislation follows a similar process to Victoria in the development of CHMPs. Plans are required based on the project and regardless of ownership of land. Categories of potential impacts are outlined in the law through accompanying Guidelines, with impacts rated on a scale from 1 to 5. Category 5 projects require a cultural heritage assessment and notification to Aboriginal parties.[79] The definition of an Aboriginal party relies on the federal *Native Title Act 1993*, [80] which defines an Aboriginal party as a "native title party". To be a native title party, the party is either a registered native title holder, a registered native title claimant, or a previously registered native title claimant.

Queensland's cultural heritage legislation was under review from 2019 – 2022; however, no amendments have been put forward as of 2023.[81]

Australia's federal legislation *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)[82] was developed as an interim measure and has been described as a legislation of last resort.[83] It contains a provision for the mandatory reporting of ancestral remain discoveries and an emergency declaration provision, which is only activated when an application is made by an Aboriginal group.

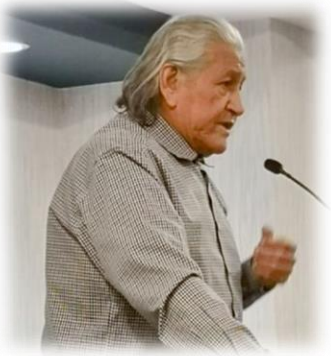
The First Nations Protection Alliance and the Australian Government formed a partnership to undertake a national engagement on developing options for cultural heritage reform. Following

[78] See Victorian Aboriginal Heritage Council, "Taking Control of Our Heritage: Recommendations for reform of the *Aboriginal Heritage Act 2006"* (October 2021) online at: <https://www.aboriginalheritagecouncil.vic.gov.au/recommendations-reform-aboriginal-heritage-act-2006>.
[79] See Duty of Care Guidelines, (2004) QL Gaz (*Aboriginal Cultural Heritage Act 2003*) at 9-10.
[80] *Native Title Act 1993* (Cth), 1993/100 at s 253.
[81] Queensland Government, "Reshaping Queensland's cultural heritage laws", online: < https://qchub.dsdsatsip.qld.gov.au/cultural-heritage-acts-review/news/summary-of-proposed-changes>.
[82] No. 79 of 1984.
[83] See *supra* note 63.

the first stage of consultations, the partnership has published an Options Paper.[84] The options developed by the partnership are intended to meet UNDRIP principles, with a prioritization on self-determination. Stage 2 consultations are currently underway.

New Zealand has two key pieces of cultural heritage legislation, the *Heritage New Zealand Puhere Taonga Act, 2014*[85] (HNZPT) and the *Protected Objects Act 1975*.[86] The *Protected Objects Act 1975* establishes and records ownership of taonga tūturu (an object that relates to Māori culture which is more than 50 years old)[87] and prescribes rules for ownership and trade. The *Heritage New Zealand Puhere Taonga Act 2014* establishes the HNZPT, an oversight body which maintains the New Zealand Heritage List and has authority to enter into registered covenants with owners to provide for the protection, conservation, and maintenance of cultural heritage.[88] The Act also establishes the Māori Heritage Council, which functions as an advisory body to the HNZPT and ensures the HNZPT meets the needs of Māori in a culturally sensitive manner. Half of the members of that Council must be Māori.

WORKSHOP CLOSING



The workshop closed with teachings and prayers from Elder Joseph Naytowhow and Grandfather Wanbdi Wakita. The next section is a summary of the roundtable discussions that took place between panel presentations.

ROUNDTABLE DISCUSSIONS: SHARING OUR COLLECTIVE EXPERIENCE

Panel presentations on UNDRIP, repatriation and provincial heritage laws were followed by roundtable discussions. Participants were provided with the following questions and encouraged to select some to discuss and/or add their own questions and themes for discussion.

- What are some of the most challenging issues in advancing repatriation efforts?

[84] See *ibid*.
[85] 2014/26 [HNZPT].
[86] *Protected Objects Act 1975* (NZ), 1975/41.
[87] See *ibid* at s 2.
[88] See HNZPT, *supra* note 84 at s 39.

- Where do you see issues of misalignment between UNDRIP and provincial laws, policy, and practices of repatriation? What is needed to address these issues and challenges?
- Have you been (or are you) involved in a process or project that involves repatriation legislation? What was your experience?
- What are some of the priority areas for change in provincial heritage laws?
- Have you been involved in a process or project that involved provincial heritage legislation? What was your experience?
- Where do you see issues of misalignment between UNDRIP and provincial laws, policy, and practice?
- What is needed to address these challenges?
- What are some of the challenges repatriation and heritage legislation might address?

Although questions were provided to participants to facilitate discussion, participants were also encouraged to add their own questions or to focus on those provided that were of most concern to them. Consequently, the summary of roundtable discussions that follows is not organized by specific questions or topics common to all discussion tables. Rather it is organized under two broad topics: "Challenges and Priorities for Change" and "Alignment with UNDRIP." Within these broad topics, we provide an overview of issues and comments raised in discussions.

In the following section, "What We Heard" observations flowing from both the panel presentations above and roundtable discussions below are organized, elaborated, and discussed under major themes identified by the authors of this report.

Challenges and Priorities for Change

Proactive repatriation - The human and financial costs of repatriation are largely borne by Indigenous peoples. There is a need for proactive repatriation, for institutions to research collections and to identify origins of ancestors and to reach out to descendant communities. Much of this came into their possession without consent. Institutions with collections have played and continue to have an active role in colonization of Indigenous peoples. Proactive repatriation is important to acknowledge the role these institutions and the government have played, and to take the burden off Indigenous communities and place it on the government and institutions. To begin with, there should be law or policy that requires institutions including universities and archives to do an inventory of Indigenous belongings and ancestors to promote proactive repatriation.

Lack of Information and Transparency - Transparent and easily accessible policies and information about the process of repatriation is needed. Few institutions have this. There is no clear road map or national strategy, and every institution is different. There is no template and there is no general guidance being provided for how Indigenous communities and institutions should approach the process of repatriation.

There are many barriers to accessing information. There is a lot of information that is incorrect in institutions, including attribution. It is important to correct records to maintain accurate histories and ensure repatriation to the appropriate home. Databases and websites identifying Indigenous heritage in the control of institutions need to be created, updated, and be accessible to Indigenous peoples. A national database which indicates what is in the possession of federally funded institutions would help. This would aid repatriation and help ensure belongings are brought to their rightful home. It is important that this is supported by funding, resources, and capacity.

Adherence to Indigenous laws, values, and ceremony - It is important to decolonize the structures in place across Canada. Indigenous laws are not incorporated into current law and legislation affecting Indigenous heritage. There is a disconnect between Canadian law and Indigenous law. For example, with respect to valid acquisition of title and proper care.

There is a need to respect Indigenous laws, values and beliefs in repatriation practice and policy. Through repatriation, sacred and sensitive materials are being discussed. Indigenous people have laws for that; however, the conversation often sits in Canadian legal spaces, not in the sacred space where it is most appropriate to be. It is important to recognize and respect traditional Indigenous laws. The words come from the ancestors through ceremony, and it is important to have ceremony and listen to the ancestors.

Elders are vital in caring for Indigenous items and are important in storytelling. Listening to Elders is important for seeing a path to change and implementing change within institutions.

Creating Mutuality/Relationships - There are words that describe values and values are at the core of this work. It is important to be brave to say what needs to be said, what needs to be done, and what is right. Respect is a vital value when undertaking this work and to learn the practice of what respect really means. Another identified value is believing, which will mean something different to each Indigenous community. It is important to talk to different Indigenous communities to hear their beliefs and the words from the Creator. It is also important to have kindness through repatriation. This is reflected in many of the themes in the next section.

Funding and resources - A dominant theme throughout the roundtable discussions is lack of funding and access to resources, including human resources. The financial burden is often inappropriately placed on Indigenous communities to cover the costs associated with repatriation. Repatriation is a vital part of nation building, but many cannot afford the process. This must be addressed.

Obtaining long-term and equitable funding is a challenge. Indigenous communities do not always have the capacity to support repatriation endeavors themselves, and this must be addressed

through funding. As well, institutions should have long term funding to undertake research and repatriation endeavours. It is important to put in the time to research what is home and where is home for belongings and ancestors.

It is important that funding and resources are disconnected from the political world. There is a role for National Indigenous Organizations (NIOs) in administering funding and helping to set priorities as well. There may also be an issue with funding for repositories and capacity in communities to care for belongings. Repatriation may not be beneficial if a community does not have the capacity to store, care and use the belongings that are returned.

Funding, capacity, and resources should be provided to create a national inventory. It is critical to have a full national inventory and then connect the inventory to Indigenous communities. Funding is required for this, and even where some have started, the work remains underfunded and understaffed.

Finally, it is important to support the communities leading repatriation efforts generally, and in former residential school areas. It is also important to support the development of policies and laws for repatriation internal to Indigenous communities.

Education - A challenge is changing the colonial mindset about the rights and roles of institutions. There needs to be more education about the diversity of Indigenous communities and how institutions acquired Indigenous heritage and ancestors. It is important for institutions and governments to understand that they do not have a right to Indigenous ancestors and belongings. There can be resistance by institutions to changing their colonial ways and fear of their collections being emptied.

Some institutions believe that they are “safeguarding” Indigenous ancestors and goods by not making them available to Indigenous communities. This is an example of myths that are still strongly present in institutions. It is important to work through education to decolonize these myths.

It is important to respect Indigenous teachings, ways, and language. Education through stories is important to humanize Indigenous histories and peoples. It is not just about one word or one symbol, there is much more. Indigenous teachings must be approached holistically with the community directing and focusing the endeavours. Ensuring education on the histories of the community and the stories of the families is vital to repatriation. Making connections and maintaining relationships with the Indigenous communities through programming is important. In looking at the histories, stories, teachings, and laws of Indigenous communities, it is a vital part of repatriating goods and ancestors to the appropriate home.

Unfortunately, not all Indigenous communities retain their cultural knowledge. There has been a removal of inherited objects through theft, coercion, or assimilation. This must be acknowledged.

Academic understandings and practices can also be inconsistent with the significance of Indigenous ancestors and belongings to Indigenous peoples. Examples include definitions and understandings of cultural property. Memory work by and with Indigenous peoples is important to understand the significance of belongings and ancestors. People involved in the repatriation process need to understand this and the significance of the work being undertaken. These are not merely collections, but vital connections to the ancestors and future generations.

It is important to include Indigenous courses, authors, professors, and teachings in academic institutions. However, there are issues with tokenism which need to be addressed. It is important to include teachings about the land, ceremony, and different experiences for students that are centered in Indigenous ways of being and knowing. There are practices underneath the laws that must be understood.

Everyone should be educated, including non-profit boards.

Role for the public - Changing the attitudes and priorities of the government is needed. This can be done through public outcry and media engagement. It is important to engage the public in efforts to change heritage laws and to repatriate. Ensuring that there is public education and anti-racism work undertaken is important.

Need for Legislation - There is a lack of legislation that enables repatriation and respects Indigenous rights of self-determination. Only Saskatchewan and Alberta have repatriation legislation both of which are too narrow in focus (e.g., limited application of Alberta's legislation to First Nations within the province, can only repatriate categories of belongings identified in legislation and from certain museums). Categories and rights to repatriation need to be expanded, processes clarified, and funds provided. It may be necessary to address ancestors in separate legislation to include diverse needs and perspectives of Indigenous peoples and scientific communities.

Federal legislation should be considered to create some consistency. However, there needs to be an awareness of what is appropriate and not appropriate to address in legislation. Indigenous communities across Saskatchewan and the rest of Canada may have different laws, protocols, and priorities. This needs to be understood and diversity needs to be accommodated. Federal legislation could be helpful, but it would need to provide for funding and address potential jurisdictional issues.

Legislation should include a prohibition on the exports of Indigenous ancestors and belongings like in the United States. Legislation should focus on ensuring that Indigenous communities have a right to access their belongings that are in institutions and ensure the onus is not on Indigenous communities to repatriate.

Awareness of provincial heritage laws and practices - Not every community has an archeologist, a historian, or a lawyer. Some Indigenous communities have their own experts in Indigenous laws, what westerners call archaeology, and historians. People need to be more aware of opportunities for this work in communities. Some organizations, like the Saskatchewan Archeology Society, publish and participate in outreach programs. It also goes to schools, camps, and participates in cultural activities to engage in education with children. This type of organization could be a model for other jurisdictions.

Repatriation and protection of ancestors is emotionally triggering work - Repatriation is triggering work for Indigenous people and communities. There needs to be support in place for communities and people working in repatriation to work with their emotions and acknowledge the work is triggering.

Mistreatment and the disrespect shown to Indigenous peoples must be acknowledged and must be remembered. Righting the wrongs is vital to repatriation and important for reconciliation. It is important that reconciliation serves the people, and that it serves Indigenous communities. Being vulnerable through reconciliation and repatriation helps everyone to feel their emotions, to open their hearts, and examine their values. Through this work, people's hearts must be engaged. Through this opening and engagement, actions and results will follow. People create change, and these discussions show it can be done.

Institutions need to acknowledge their role in the destruction that led to this situation in the first place. This is an important stage in repairing relationships, apologizing, and taking accountability. This is important to reconciliation and repatriation.

Alignment with UNDRIP

Language & categories - UNDRIP speaks to the importance of Indigenous language and understandings of heritage. Colonial categories and definitions of belongings are problematic and are narrower than Indigenous understandings. Insufficient consideration is given to intangible heritage and value of belongings. Language is important and language is power, this must be remembered. Colonial definitions can become a barrier to repatriation and law reform.

In Western law and Indigenous law, there are different understandings of concepts such as stewardship, ownership, and how to care for items, ancestors, important places, burial sites, and

the environment. For example, repatriation is often talked about using words such as ownership and property, and not people and spirit. This does not reflect Indigenous laws.

Common law concepts are malleable, and people can change them. Even the word “repatriation” means to give back to the father. This does not accurately encapsulate what repatriation is. The process of repatriation is more of a restoration than a “give it back”, and the word must reflect that. Restitution means returning what was stolen and more.

Through repatriation, sacred things are being discussed. Indigenous people have laws for that; however, the conversation always sits in Canadian law spaces, not in the sacred space where it is most appropriate to be. It is important to recognize and respect traditional Indigenous laws. The words come from the ancestors through ceremony, and it is important to have ceremony and listen to the ancestors.

The Importance of Relationships - UNDRIP promotes harmonious and cooperative relationships grounded in equality and respect for Indigenous rights. Currently the power and control rests with institutions. The relationship is not equal.

There are also issues with the institutions not maintaining relationships with Indigenous communities or relationships impacted by changes in staff and resources. Longterm and ongoing relationships are necessary for proper care of belongings and ancestors, repatriation and other aspects of institutional operations and governance. It is a challenge when institutions initiate a relationship with Indigenous communities only because a relationship is required. Institutions and governments need to take a step back and get to know the Indigenous community before they begin repatriation. Establishing a relationship is important, but continuing that relationship is equally as important.

Repatriation is an opportunity to apologize and ask how the Indigenous community can be supported. Apologizing and building a relationship can be more important than the physical return.

Law reform must be grounded in Indigenous self-determination - There is a need to engage Indigenous laws and Indigenous sovereignty into the Canadian legal system. In the development of case law and legislation, it is important to ensure Indigenous people have more of a voice. Courts may play a role in repatriation and need to advocate for repatriation. It is not only important to change the laws, but also who is making the decisions to have laws changed. What is also important is who is making the decision that laws should or should not be changed.

Legislation might be helpful to align repatriation practices with UNDRIP, but it must be founded on Indigenous self-determination and respect Indigenous laws. Consultation and consent are

important in this process to ensure legislation works for communities across Canada and responds to diversity. However, the burden of drafting legislation should be placed on the government and on institutions. The burden should not be placed on Indigenous communities.

Indigenous peoples have jurisdiction over their heritage that was not surrendered by treaty or other means. There are issues about federal and provincial jurisdiction including whether federal or provincial governments have jurisdiction to pass repatriation or other legislation affecting Indigenous belongings, archaeology, and ancestors.

Working across a homeland and across a border can cause jurisdictional issues. Often these boundaries are not consistent with Indigenous traditional territories. A federal framework could create a broad framework, set of requirements/standards that align with UNDRIP and address possible jurisdictional issues between federal and provincial governments. All federal legislation should align with UNDRIP.

Treaty rights also need to be respected. The Supreme Court of Canada's decision on Bill C-92 (forthcoming in 2023) may provide some insight in how to create a national framework that respects Indigenous self-determination and treaty rights.[89]

Rights to access and control - Indigenous people have the right to maintain, access, develop and control their heritage. This is not reflected in current repatriation law and policy. Some things are just not meant to be preserved or studied or held in a museum. The "public good" and science should not trump an Indigenous community's right to access their ancestors and belongings and repatriate them. Education is important to debunk myths such as this.

Locating & Ownership - There is a lack of knowledge about where Indigenous ancestors and goods are located. Participants expressed concerns about how Indigenous belongings become private property without consent of Indigenous peoples and how private property rights are a barrier to repatriation. Examples of this can be found in historical confiscation and modern legislation that places ownership in governments and landowners.

Involvement of Indigenous communities - Indigenous communities need to be ready to be a part of the repatriation relationship and law reform process. Therefore, institutions and governments (provincial, federal, and Indigenous) need to contribute to growing the capacity in Indigenous communities. It is important to go to Indigenous communities for guidance with respect to repatriation processes. Indigenous voices and stories need to be at the forefront of this process. Everyone needs to decolonize their own thinking.

[89] See Appendix 1; See Bill C-92, *supra* note 31.

It is important to respect each Indigenous community and see the world through their individual and unique perspectives. For example, it is important to see the world through the Cree perspective, rooted in their language and their protocols. From a Métis perspective, see the world through their language and their protocols. Respect each Indigenous community.

Indigenous communities will have different priorities identified and this must be respected. While repatriation may be a top priority, so too are day-to-day priorities that need to be addressed first. It is important to ensure the parties with the resources are obligated to do the work. This can be achieved through policies, laws to obligate institutions, and dedicated resources (including personnel) within Indigenous communities.

Repatriation can lead to the revitalization of traditions. This is intergenerational work that involves everyone from children to grandparents. Repatriation inspires Indigenous communities to not only relearn ceremonies, such as the proper burial of ancestors, but also to create new ceremonies for the repatriation of ancestors. Indigenous people can actively live their traditions.

Indigenous communities must create their own laws and policies for repatriation, instead of having institution policies imposed on them. It would be financially burdensome for an Indigenous community to build a museum with temperature control simply to participate in the repatriation of their own items. The Indigenous communities that are receiving the items should be empowered to ensure their own standards of care. Creation of laws and policies made by Indigenous peoples for Indigenous peoples with their people is fundamental.

WHAT WE HEARD: REFLECTIONS ON PRESENTATIONS AND DISCUSSIONS

In the following section, observations flowing from the panel presentations and roundtable discussions are summarized, organized, and discussed under the numbered major themes identified and elaborated by the authors of this report. In developing these themes, we appreciate that points within them may overlap, some were more emphasized by participants than others, and that we may not have articulated all learnings that participants shared and took with them from the workshop.

Overarching all these themes is the need for a fundamental shift away from unilaterally imposed laws and decision-making processes to Indigenous participation and recognition of Indigenous jurisdiction over their lands and culture. UNDRIP speaks Nation-to-Nation, government-to-government relationships grounded in Indigenous rights, self-determination, and respect for treaty jurisdictions. This includes jurisdiction and decision-making authority over heritage including relationships and connections to lands, culture, laws, and rights and responsibilities to care for ancestors. Rights and responsibilities go beyond reserve borders and include traditional territories.

Elders and others at the workshop observed it is with such recognition that Indigenous people are strengthened to start or continue their own journey to decide what makes their communities whole and how to fulfill their responsibilities to their ancestors, current citizens, and future descendants. It is and should not be the external holders that make these decisions, and where it remains as such, barriers created by legislation, policy, racism, and relationships should be actively removed and amended.

1. The importance of ceremony, protocol, and Indigenous law as a guide

Grounding us and resonating throughout discussions was a deep respect for the importance of ceremony, protocol, and Indigenous law to guide our hearts and minds and an awareness of the emotional toll this work can take. This work is deeply personal and not just a question of academics and law. It is difficult, painful, triggering, and sometimes full of anger, but it is required for healing by both Indigenous and non-Indigenous people. The work of repatriation is emotionally taxing, particularly when ancestral remains have not been cared for properly and with respect.

This was frequently discussed in the roundtable discussions. Repatriation is challenging and triggering work for Indigenous peoples and communities. It is important to put in place supports for this work. At the same time, the mistreatment and disrespect must be remembered. It is important to be vulnerable through repatriation and reconciliation to support everyone's

emotions in repatriation. People's hearts must be engaged throughout this process. It is through this that institutional change will follow.

It must be recognized that these conversations take place in spaces that are most appropriate according to the Indigenous community's laws, protocols, and ceremony. This acknowledges the importance and respect of Indigenous laws. As well, ceremony is important to ensure ancestors are listened to.

Each Indigenous community must be respected, and the work must be done through their unique perspective. As Joseph Naytowhow explained: "The only way to see a Cree object is to see it in the Cree way of seeing and the Cree way of being. Some things are meant to be touched and some things are meant to be put away. The way to know is to connect with the Elders of the community. The Elders will guide the ceremony of repatriation and provide the way of seeing."

Making connections and maintaining relationships with Indigenous communities through programing is important. Understanding the histories, stories, teachings, and laws of Indigenous communities is a vital part of repatriating goods and ancestors to the appropriate home. Repatriation may also lead communities to relearn ceremonies, such as for burial of ancestors or potentially even to create new ceremonies for the repatriation of the ancestors.

2. The importance of truth telling.

Truth must be acknowledged for meaningful reconciliation. In the context of repatriation, this means institutions telling the truth about their role in what has been painful, harmful, and wrong. It is important to be brave to say what needs to be said, what needs to be done, and what is right. This includes taking moral, spiritual, and financial responsibility.

Truth telling also means acknowledging doctrines that are racist and the need to repudiate concepts that are used to justify European sovereignty over Indigenous lands and peoples and that continue to inform heritage law, policy, and practice in Canada.

3. The need to respect Indigenous law, treaties, jurisdiction, and participation in decision-making.

Indigenous law is not recognized in a meaningful way in Canadian laws and policies. Language is vital for incorporating Indigenous laws into Canadian law. It is important to respect the protocols,

practices, and traditions of Indigenous communities and Indigenous law. This must be done by involving Indigenous communities in the work.

Indigenous language, voices and stories must be at the forefront of the repatriation process. Consultation with Indigenous communities is important to understanding their specific priorities. Indigenous peoples should create their own policies and laws and be supported by the government and institutions.

Fundamental to any work impacting Indigenous heritage is the need to respect Indigenous law, jurisdiction and participation in decision making. A necessary aspect of decolonization is realizing "there is a significant difference between doing things for people and walking with them" (Harry Lafond).

Central to the principle of self-determination is the right of Indigenous peoples to the recognition, observance, and enforcement of treaties. Indigenous peoples have consistently expressed that they did not surrender decision making authority on entering treaty and that they continue to hold and exercise jurisdiction over their lands. Promises made in historical treaties about how we treat one another must be kept. Accordingly, the framework for reform of heritage legislation should reflect a nation-to-nation relationship and a partnership that reflects the principle of sharing the land. At minimum, Felix Hoen explained, section 25 of UNDRIP and the treaties require that Indigenous peoples should control their own heritage property and their spiritual ties to the land should be protected.

Legislative and relational reforms must also respect and allow for the diversity and distinctiveness of Indigenous peoples including through equitable inclusion of Indigenous laws, policies, governance, and decision-making authorities and mechanisms to incorporate free, prior, and informed consent. One size does not fit all. It is not only important to change the laws, but also who is making the decisions to have laws changed.

4. The need for alignment of provincial laws with UNDRIP and Indigenous laws

UNDRIP is aimed at enhancing "harmonious and cooperative relations… based on principles of justice, democracy, respect for human rights, non-discrimination, and good faith" (Brenda Gunn). What Indigenous rights look like and the standards to be achieved in a particular context are to be pursued in a spirit of cooperation, mutual respect, collaboration, and good faith dialogue aimed at consensus.

The right to self-determination entails the obligation for States to recognize Indigenous legal and representative institutions. Many articles in UNDRIP call for "due consideration" of the

customs, traditions, land tenure systems, and laws of Indigenous peoples (e.g., arts. 5, 9, 11, 18, 25 -27, 33-34, 40). Indigenous laws are also expressly referenced in designing mechanisms of redress for "cultural, intellectual, religious and other spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs" (art. 11.2).

Practically implementing UNDRIP begins with the understanding that it involves a model of decision making between governments – Indigenous and Crown aimed at achieving consensus.

This approach to decision making is different from the constitutional duty to consult. This difference is recognized in the principles guiding relations between Indigenous peoples and Canada that are informed by the TRC Calls to Action and UNDRIP.

5. The significance of returning cultural belongings to living peoples and Indigenous nation building

Cultural belongings is language used by many First Nations, rather than property terminology such as object or artifact. This language shifts emphasis away from the idea that belongings are inanimate objects of past significance to the importance of their role and the intangibles that accompany them (such as stories, dances, songs, and teachings) to living people. Some of these belongings may be viewed not as an object but more like a relative. The language of belonging places less emphasis on the item and more on relationships, responsibilities and the inextricable connection between people, the material, natural and intangible world.

Building Indigenous Nations requires control over identity and narratives. Repatriation is ultimately about community. It is a transmission of knowledge that was taken away and has now been returned home. Repatriation can lead to the revitalization of traditions and teaches about respect. It is intergenerational work that involves everyone from children to grandparents. Repatriation leads communities to relearn ceremonies, such as for burial of ancestors or to potentially create new ceremonies for the repatriation of the ancestors.

The process of repatriation is as critical as the return itself. The work must be decolonized and origin-community led. As Harry Lafond explained, a necessary component of decolonization is realizing that there is a significant difference between doing things for people and walking with them. Doing things for people creates reliance; walking with them lets people do things for themselves because it is their work to do. This is true repatriation and law reform.

6. The priority of repatriating ancestral remains

Ancestors are not archaeological objects. Ancestors are treated like property for the public good, which is inherently problematic. Descendant communities have ongoing relationships and responsibilities to ensure proper protocols are followed for their care and to welcome them back to their rightful place.

There is a lack of legislation protecting Indigenous ancestors. There are challenges in changing the colonial mindset. It is important that legislation and policies reflect the importance and significance of ancestors. It is also important to decolonize mindsets that believe ancestors are "safeguarded" in institutions. Ancestors must be brought home.

Education is important to ensure the significant importance of ancestors are known to legislators, academics, and the public. Making connections and maintaining relationship with the Indigenous communities is required for repatriation. Looking at the histories, stories, teachings, and laws of Indigenous communities is a vital part of repatriating ancestors to the appropriate home. A national inventory should be created to assist Indigenous communities in knowing where their ancestors are to bring them home.

Words are important in legislation and policies for the ancestors. For example, repatriation is often talked about using words such as ownership and property, and not people and spirit. Concerns were also raised about exports of ancestors outside of the country and lack of protection of burial places in provincial heritage legislation. There is significant opposition from Indigenous peoples to treatment of remains as archaeological material. Indigenous laws vary concerning care and appropriateness of scientific study.

Among issues identified in provincial heritage law were lack of Indigenous participation in decision making, insufficient consideration of Indigenous concerns in conditions for permits, failure to respect Indigenous laws and protocols, and lack of enforcement of heritage protections and offences. For these and other reasons several participants identified the need for provincial heritage legislation to be updated.

7. The need for proactive repatriation policies to cover tangible and intangible items.

Significant human and financial costs of repatriation are borne by Indigenous peoples including research and traveling to locate and negotiate return of belongings and remains. Proactive repatriation can help address some of the significant financial burden assumed by Indigenous people and serve as a pathway to reconciliation and changes in institutions thinking and policy.

Given the circumstances under which belongings, ancestors and other Indigenous heritage has come into the possession of museums, universities, and other institutions, they should have an obligation to research collections and to identify origins and return cultural belongings and ancestors rather than requiring communities to research and request repatriation. Repatriation activities should extend beyond ancestral remains and significant cultural belongings to all Indigenous belongings and intangible heritage such as recordings, photographs, music, stories, and art forms.

"The repatriation narrative needs to be reframed" by these institutions to respond to TRC Calls to Action and UNDRIP. Elaborating on the CMA *Moved to Action Report* on UNDRIP & Museums Stephanie Danyluk emphasized repatriation "is not a drain on museums; rather, it is an investment in community. Repatriating items that do not belong to a museum is not reconciliation; it is quite simply the museum's job."

There should be a law or policy that requires institutions including universities and archives to do an inventory of Indigenous belongings and ancestors to promote proactive repatriation.

8. The importance of legislative support for repatriation.

Repatriation needs to be supported by legislation. Current provincial repatriation legislation is too limited in focus and is interpreted narrowly and inconsistently. Language and definitions can often be a barrier to repatriation. Language is power, and the language must empower Indigenous communities.

In Canada, repatriation occurs largely pursuant to policy or practice in response to a particular request or situation. However, only 7 publicly funded museums and even fewer universities have publicly accessible repatriation policies, although some are in the process of reviewing and amending policies.[90] Despite the increased willingness of institutions to return belongings and develop transparent repatriation policies, there continue to be significant hurdles including the cost of repatriation borne by communities and institutions, the difficulty of accessing information, poor record maintenance, and the need to research provenance. There is no mechanism for

[90] The exception being the University of British Columbia Museum of Anthropology, The University of Toronto Department of Anthropology, and the University of Alberta Museums and Collection Policy. U of M is in the process of developing theirs. For a list of and links to museum and university policies see Rebecca Bourgeois, Repatriation in Canada: A Guide for Communities (University of Alberta and Kule Institute for Advanced Studies, June 2021), online at: https://era.library.ualberta.ca/items/2dfb153e-76da-4cac-a968-a3f6b2e3a61c.

resolving disputes other than expensive litigation before the courts, that ensures due consideration is given to the laws, customs, and traditions of Indigenous peoples.

Some participants at the workshop saw a role for repatriation legislation to address these and other challenges. Others emphasized that no law or policy is helpful without a financial mechanism attached, while others spoke to the ethical obligation of public institutions to take moral and financial responsibility through operational budgets and structures for Indigenous participation in creating and implementing policy.

Only Alberta has specific legislation directed at repatriation. Museums legislation in Saskatchewan and British Columbia also have provisions that speak to repatriation. For example, Section 6 of the *Royal Saskatchewan Museum Act,*[91] provides as follows:

> Subject to the direction of the minister and any regulations made pursuant to this Act, and after consultation with Aboriginal peoples determined appropriate by the minister, the museum is responsible for developing a policy to address the concerns of Aboriginal peoples about the access to and the care, use and repatriation of sacred and culturally sensitive objects originating with their cultures in the museum collections. [92]

Aboriginal sacred and culturally sensitive objects are defined as "any object that: (i) has been used in an Aboriginal ceremony; (ii) reflects the spiritual power of an Aboriginal person; (iii) was left as an offering in an Aboriginal ceremony or practice; or (iv) has ongoing historical or cultural importance to an Aboriginal community" (s.2(a)). Section 6(2) also mandates the museum to consider the following principles in administering its collections and developing repatriation policy:

> (a) Aboriginal peoples have a connection with Aboriginal sacred and culturally sensitive objects, regardless of where those objects are held;
>
> (b) Aboriginal sacred and culturally sensitive objects in the museum collections are vital to the maintenance of traditional ways;
>
> (c) the deeper meanings associated with Aboriginal sacred and culturally sensitive objects are known only to Aboriginal members of their cultures of origin.

At the workshop we discussed some of the opportunities and limits of legislation and considered laws from other jurisdictions including NAGPRA in the United States. Provincial legislation that exists was critiqued on many levels including the narrow scope of its application to peoples, institutions, and belongings. Further, unlike in the United States, there is no legislation in Canada

[91] SS 2007, c R-23.01.
[92] *Ibid* at s2(a) & 6.

that recognizes Indigenous ownership of and control over ancestral remains and cultural belongings or obligations on institutions receiving government funding to provide inventories and summaries to lineal descendants of culturally affiliated communities to support repatriation.

In Canada, the cost of repatriation and burden to seek out and identify cultural belongings and ancestors is placed on Indigenous people. Costs identified in an ongoing repatriation cost analysis and scoping study by the First Peoples Cultural Council include costs associated with research, travel, and communications, building community consensus and direction, capacity for research and the work of repatriation, the process of repatriation, internment of remains and repositories for items wrongfully removed.

Further there is no obligation to consider Indigenous laws in ascertaining legitimacy of title or an agreed upon process for dispute resolution. Examples can be found in the United States where judicial opinion supports looking to tribal law to ascertain the individual or communal nature of property and the validity of its disposition. If tribal law has been violated, the common law rule of *nemo dat quod non habet* has been applied. According to this rule, a person cannot transfer greater rights in property than he or she has. This inter-societal approach to property rights is adopted in *NAGPRA* which provides for repatriation of cultural patrimony of "ongoing historical, traditional, or cultural importance central to the...group or culture itself, rather than property owned by an individual" and considered by the group to be inalienable by *any* individual at the time of its separation from the group.[93] Tribal law of the originating group determines what is capable of individual ownership and alienable.

Drs. Lavallee and Miller from the University of Manitoba spoke to how these and other features of NAGPRA have strengthened relationships between Indigenous people and cultural institutions and revitalized Indigenous communities, rather than undermined them, which had been a fear/concern at the time of its enactment and has not happened.

9. The need for laws that impact Indigenous archaeological heritage to respect Indigenous rights.

Provincial heritage laws impact Indigenous archaeological heritage, do not respect Indigenous rights, and separate Indigenous peoples from their ancestors and significant cultural belongings. It is not only important to change the laws, but also who is making the decisions to have laws

[93] NAGPRA, *supra* note 21 s. 3(D); NAGPRA defines cultural patrimony as "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual…and such object shall have been considered inalienable by such Native American group at the time the object was separated from the group."

changed. What is important is who is making the decision that laws should or should not be changed.

The language of provincial legislation, particularly the categorization of Indigenous belongings and ancestors as archaeological heritage, property, objects, and resources, is offensive to many Indigenous peoples. Language is one area to address in legislative reform. This point was emphasized by Dr. Tomasin Playford in her discussion of Saskatchewan's *Heritage Property Act*, which, although enacted with good intentions, has not changed in 43 years and is now outdated in language, recognition, etc.

All Canadian provinces have legislation concerning heritage sites and objects (defined by law) located on public or private provincial lands.[94] These sites and objects are protected in a range of ways including ministerial designation of a specific identified site or object or as non-designated sites protected because of historical, archaeological, or other heritage value; mandatory reporting of fortuitous discoveries; and control over excavation, alteration and removal through a permit system, impact assessments, stop orders and penalties for non-compliance.

Alberta, Saskatchewan, and Manitoba vest title to heritage objects under public or private property in the Crown. BC legislation is silent on the issue of ownership but implies Crown ownership in several ways. All these statutes strive to balance economic development and scientific study against the importance of preserving heritage. However, despite mandates to protect and preserve, the tendency is toward focusing on conditions for permits to remove objects and remains to government repositories or burial places.

Indigenous archaeologists Dr. Kisha Supernant and Lily Naytowhow spoke to how this results in separation of belongings and ancestors from those who have the right to be with them and prevents heritage management in a way that is respectful to Indigenous laws and protocol. In the words of Kisha Supernant "the law says I have to move my ancestors to a museum, a government repository, to incarceration" instead of working with descendant communities to determine how their relations should be cared for.

Provincial law also contains prohibitions on export. For example, s. 66.1(7) of the *Saskatchewan Heritage Property Act* provides: "No person shall buy, sell, offer for sale, trade or otherwise dispose of or remove from Saskatchewan any archaeological object or paleontological object found in or taken from land in Saskatchewan without written permission of the minster."[95]

[94] It is important to note that references in legislation to Indigenous belongings and ancestors as archaeological heritage. Property or resources is offensive to many Indigenous peoples. This memo uses the language in the legislation to describe existing law and in awareness that this terminology is problematic.
[95] HPA, *supra* note 33 at s 66.1(7).

However, the enforcement of such prohibitions is dependent on the law of the place in which the illegally exported property is situated. The inability to recover wrongfully removed belongings is further complicated by the absence of federal export prohibitions.

Canada's *Cultural Property Export and Import Act*[96] does not prohibit export of archaeological or other historical material. The Act establishes the Canadian Cultural Property Export Control List. To be included, property must be at least 50 years old and made by someone no longer living. Currently the list includes archaeological material (Aboriginal and non-Aboriginal of any value) and non-archaeological Canadian Aboriginal property of a fair market value of more than $3,000. Owners of controlled objects must apply for an export permit. These applications go to expert examiners, and if they are determined to be of cultural significance a permit may be denied. However, owners have the right to appeal this decision to the Cultural Property Export Review Board which can delay an export for a maximum of six months. The purpose of this delay is to notify Canadian institutions and public authorities (mostly museums and art galleries) so that they have an opportunity to purchase the item and prevent export. Indigenous people are not part of this notification process.

Unlike other provinces, British Columbia is in the process of reforming provincial heritage law to align with UNDRIP. The process developed by a body created by provincial and Indigenous governments consists of three phases including identification and discussion of issues of misalignment with UNDRIP, priority areas for reform, and near- and long-term changes for law reform. Five areas were identified for the purposes of engagement: Indigenous laws, values, and rights recognition; decision-making; protections; resourcing to support heritage management; and compliance and enforcement. The process is now in phase two, development and discussion of near-term changes to be recommended to Cabinet for near term changes to provincial law and policy.

Examples of legislation, repatriation, and Indigenous heritage management in the United States (NAGRPRA), New Zealand and Australia (e.g., Australian province of Victoria *Aboriginal Heritage Act 2006* (VI)) more in alignment with UNDRIP, Indigenous rights and jurisdiction (including sections that speak to repatriation of ancestors in the custody of federally funded institutions and discovered during development) were also presented and discussed.

10. The priority of sufficient and appropriate funding mechanisms for reform.

Some would argue the main barrier to recognition and implementation of Indigenous rights in heritage isn't the legal or policy framework, but lack of funding. Funding for repatriation work is

[96] RSC 1985, c C-51.

very limited and there are countless ancestors and belongings currently housed in museums, government offices, academic institutions, and private collections worldwide.

Obtaining long-term and equitable funding is a challenge. Indigenous communities do not always have the capacity to support repatriation endeavours themselves, and this must be addressed through funding. As well, institutions should have long term funding to undertake research and repatriation endeavours. Funding is a foundational issue as both institutions and Indigenous communities have long been underfunded.

Areas identified in need of funding include: (1) infrastructure (the creation and operation of repositories), research (especially regarding Indigenous laws, ancestral remains and resolution of overlaps), purchase of significant sites and items and repatriation efforts; (2) investigating, monitoring and enforcement of protections on private and public lands; (3) creation of national and provincial strategies to support repatriation and heritage law reform including research and community consultation with adequate funding mechanisms attached; and (4) digitizing collections and creating databases of major museum collections with access developed in consultation and cooperation with Indigenous peoples.

11. The importance of connectivity to traditional lands for continuity and protection of living and intangible heritage.

Relationship to landscapes, (including the land, stories, and spirituality associated with the land, waters, fish, and animals) is considered an inherent part of "being" and living one's heritage. Heritage lives in relationships with and connected experiences to place. Self-determination includes the rights of Indigenous peoples to maintain their connections to these lands, distinctive identities, and livelihoods and to manage traditional lands and natural resources. UNDRIP also speaks directly to the right of Indigenous peoples to "maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard" (article 25).

Respect for Indigenous cultures is demonstrated through Indigenous control, protection, and development of their spiritual and sacred spaces. Repatriation legislation should not end at the borders of a reserve; to be meaningful, it must recognize connectivity to traditional lands.

12. The goal of consensus through cooperation, mutual respect, collaboration, and good faith dialogue.

Response to UNDRIP and the TRC Calls to Action require that federal, provincial, territorial, and municipal governments review and revise laws that intersect with Indigenous heritage to include Indigenous control, Indigenous conservation principles, and Indigenous laws and values but this should not undermine the ongoing importance of cooperative relationships built on honesty, trust, and respect. What Indigenous peoples' rights look like and the standards to be achieved in a particular context are to be pursued in a spirit of cooperation, mutual respect, collaboration, and good faith dialogue aimed at consensus.

To give these principles practical effect in a world where different values and systems of law co-exist calls for Nation to Nation Indigenous-Crown negotiation, partnerships, parallel systems, dialogue, respect, and cooperation.

Before enacting or adopting legislative and administrative measures consulting and cooperating with First Nations in good faith to obtain their free prior and informed consent is necessary. Collaboration and good faith include respecting and recognizing Indigenous rights and jurisdictions.

Relationships with Indigenous communities must also be established and maintained between museums and other actors in the heritage sector. Relationships should not only begin and end with a specific repatriation or consultation long term and ongoing relationships are necessary for proper care of belongings and ancestors, repatriation and other aspects of institutional operations and governance.

Apologizing and supporting Indigenous communities is important to building the relationship and can be more important than physical returns. It is important to be brave to say what needs to be said, what needs to be done, and what is right. Respect is a vital value when undertaking this work and to learn the practice of what respect really means. Another identified value was believing. This will mean something different to each Indigenous community. It is important to talk to different Indigenous communities to hear their beliefs and the words from the Creator. It is also important to have kindness through repatriation. This is reflected in many of the themes in the next section.

Institutions need to acknowledge their role in the destruction that led to this situation in the first place. This is an important stage in repairing relationships, apologizing, and taking accountability. This is important to reconciliation and repatriation.

ᐊᐧᓇᑎᐹᐃᐧᐣ / Wânaskêwin Heritage Centre March 2023

APPENDIX 1: PARTICIPANT BIOGRAPHIES

Karen Aird is a member of Saulteau First Nations in Treaty 8 Territory of BC and is currently the Heritage Manager for First Peoples Cultural Council (FPCC) in BC and Founder/the first President of the national Indigenous Heritage Circle. Karen has worked as an archaeologist, and then in cultural heritage management for the past 25 years on many projects that convey a strong sense of place in Indigenous landscapes encompassing legal traditions, intangible and tangible heritage.

Catherine Bell is Professor Emerita of Law (University of Alberta), the current Ariel F. Sallows Chair in Human Rights at USask (2022-23), and a Board Member of the Indigenous Heritage Circle. She has worked in Indigenous heritage in collaboration with Indigenous peoples for the past 35 years.

Rebecca Bourgeois is a Ph.D. Candidate and Vanier Scholar from the University of Alberta. She is working on re-centering, re-animating, and repatriating archives and collections in collaboration with the Tłı̨chǫ Government. Her work seeks to re-imagine cultural heritage management systems according to Tłı̨chǫ understandings of care, stewardship, and preservation. She is currently conducting her fieldwork and building relationships with the four Tłı̨chǫ communities in the Northwest Territories (Treaty 11).

Ryan Carriere is a proud Swampy Cree Metis from Cumberland House. He is currently the Minister of Culture and Heritage with the Metis Nation Saskatchewan. As part of his portfolio he has been working in partnerships with different organizations to promote Metis Culture and Heritage within Cumberland House and Saskatchewan and to repatriate items back to Cumberland House.

Ingrid Cazacoff has served as the CEO for Heritage Saskatchewan since 2010, a non-profit organization established to promote heritage throughout the province. Ingrid has been an active participant in the cultural community of Saskatchewan for over three decades.

Paulina Csiscai joined FPCC's Heritage Program in 2019 as Cultural Heritage Planner. In this role, Paulina is responsible for providing project management for research studies, overseeing grant programs, providing outreach to communities, and developing resources. Paulina is a registered professional planner with over 15 years of experience in heritage management, community development, and regional planning.

Stephanie Danyluk is a senior analyst skilled in research & analysis related to Indigenous history, policy, and First Nations government. She is the Reconciliation Program Manager and Manager of Community Engagement and Indigenous Initiatives for the Canadian Museum Association; and Co-author of *Moved to Action Activating UNDRIP in Museums*.

Brenda Gunn is a Métis Professor of Law at the University of Manitoba and the Academic and Research Director at the National Center for Truth and Reconciliation. Her current research focuses on promoting greater conformity between international law on the rights of Indigenous peoples and domestic law. She continues to be actively involved in the international Indigenous peoples' movement and developed a handbook on UNDRIP that is one of the main resources in Canada.

Felix Hoehn is a Professor at the College of Law, USask, with expertise in property law, administrative law and Indigenous rights. He is the recipient of the scholarly writing award from the Saskatchewan Book Awards for *Reconciling Sovereignties: Aboriginal Nations and Canada* (2013).

Tarah Hogue is a curator, writer, and cultural worker based in Saskatoon, SK, located in Treaty 6 territory and the homeland of the Métis. She is currently Curator (Indigenous Art) at Remai Modern. Raised in Red Deer, AB on the border between Treaty 6 and 7 territories, she is of Métis and white settler ancestry. Hogue is a citizen of the Métis Nation–Saskatchewan and a member of Gabriel Dumont Local #11.

Leah Howie is the Director of the Law Reform Commission of Saskatchewan, president of the Federation of Law Reform Agencies of Canada, and a sessional lecturer at the College of Law, USask.

Kym Jones joined FPCC's Heritage Program in 2020. She supports several programs for FPCC including a repatriation inventory and data base project, among others for FPCC. She is a graduate of Simon Fraser University with a Bachelor of Arts in Archaeology and Anthropology with a Cultural Resource Management Certificate.

Alex King is the Curator/Preparator for the University of Regina President's Art Collection and the University of Regina/Norman Mackenzie Art Gallery Repatriation Committee.

Chris Lafleur is a Métis lawyer, the former Director of the Indigenous Law Centre, USask, and General Counsel at the Department of Justice prairie region with expertise in land negotiations and interest-based approaches to conflict resolution.

Harry Lafond is a member of the Muskeg Lake First Nation, a Catholic church deacon (Diocese of Prince Albert) and an Indigenous Education Scholar at USask (St. Thomas More College). He is an advocate for Indigenous Peoples and the Cree language and is the former Executive Director of the Office of the Treaty Commissioner of Saskatchewan (2007-2019). Previously, he served his nation as chief, worked as the Director of Education and as the principal of Kihiw Waciston School and as a member of the USask Senate.

Dr. Jaime M.N. Lavallee is a Muskeg Lake Cree from Treaty 6 and an Assistant Professor at the College of Law, USask. She has held numerous positions working on international Indigenous rights. She also worked at the Native American Graves Protection and Repatriation Act (NAGPRA), specializing in the U.S. law; National Preservation Institute; and Johnson Shoyama Graduate School of Public Policy. Prior to joining USask, she was the Director of Indigenous Governance, Law and Policy at File Hills Qu'Appelle Tribal Council. She is also a member of The Respectful Rematriation and Repatriation Ceremony at University of Manitoba.

Dr. Cary Miller, a sixties scoop survivor, is Anishinaabe and descends from St. Croix and Leech Lake communities in Wisconsin and Minnesota. Hired as a faculty member in the History Department at the University of Wisconsin-Milwaukee in 2002, in 2013 she began serving as the Director of American Indian Studies. In 2017 she made the move to Winnipeg as the Head of Indigenous Studies, University of Manitoba and now serves as the Associate Vice President Indigenous – Scholarship, Research, and Curriculum at that institution. Her research is in Anishinaabe leadership in the early 19th century, Anishinaabe women's history, Treaties and sovereignty, Wisconsin Indian History, and Cultures of the Great Lakes Region.

Bailey Monsebroten is Metis and the Curator of Indigenous Cultural History at the Royal Saskatchewan Museum and oversees the repatriation and stewardship of Saskatchewan Indigenous items held in the Ethnology Reserve Collection of the museum.

Emma Morris is past Chair of Heritage Saskatchewan and Executive Director of the Museums Association of Saskatchewan.

Crystal Mowry is the Director of Programs, Mackenzie Art Gallery responsible for overseeing the Gallery's curatorial and educational initiatives and was also the Senior Curator at the Kitchener-Waterloo Art Gallery.

Joseph Naytowhow is a respected Elder and Knowledge Keeper from the Sturgeon Lake First Nation in Saskatchewan, and a highly regarded Indigenous Adviser for Universities, organizations, and communities. He is a prominent and award-winning Plains/Woodland Cree (nehiyaw) singer/songwriter, storyteller, and voice, stage, and film actor and is an elder and Cultural Advisor at the College of Law, USask.

Lillanohna Naytowhow is a Plains/Woodland Cree (nehiyaw) musician graduate student at USask, and archaeologist working with First Nations in Saskatchewan knowledgeable in Indigenous laws, protocols and provincial heritage property law and practice in Saskatchewan.

Grandmother Pahan PteSanWIn co–chairs the Respectful Rematriation/Repatriation Ceremony, University of Manitoba. As a therapeutic counsellor, spiritual caregiver, and Elder, Pahan has spent over three decades providing support to Indian Residential School survivors and their descendants. Recently she completed her thesis for a Master of Social Work based in Indigenous Knowledges. Currently living in St. Andrews, MB, Pahan is Metis Niheyaw with family roots reaching back to Willow Bunch, SK.

Shoshanna Paul is a member of English River First Nation, a Dene community located in Northern Saskatchewan. She is a member of the Board of Directors at Remai Modern, and an associate lawyer with Thompson Dorfman Sweatman LLP who works closely with Indigenous governments and organizations to draft and implement their own laws and policies. Shoshanna has also taught at the University of Manitoba's Faculty of Law, the USask Kanawayihetaytan Askiy program and with the Kawaskimhon Moot.

Candice Pete-Cardoso is a nêhiyaw-iskwêw from the Little Pine First Nation, Treaty 6 Territory and Director Indigenous Land Management Institute at USask.

Dr. Tomasin Playford is the Executive Director at Saskatchewan Archaeological Society and Adjunct Professor at the Department of Archaeology and Anthropology at USask with expertise in the Canadian Northeastern Plains and the Boreal Forest.

Dr. Rose Roberts is a Nihithow (Woodland Cree) is a Knowledge Keeper, trapper, and nurse with expertise in Indigenous and community health. She recently retired as an education development specialist from USask where she was working to decolonize western education systems and reclaim Indigenous spaces and places for the future 7 generations.

Dr. Lara Rosenoff Gauvin is a mother, activist scholar, and Assistant Professor of Socio-Cultural Anthropology at the University of Manitoba. She is currently co-chair of the University of Manitoba's Respectful Rematriation and Repatriation Ceremony. She also continues longstanding relationships with one extended family in Acoliland, Northern Uganda, working together on public dialogues about Acoli Indigenous governance and law.

Dr. Susan Rowley is the Director of the University of British Columbia Museum of Anthropology and an Associate Professor in the Department of Anthropology. Her research focuses on representation, repatriation, public archaeology, Arctic archaeology, oral history, material culture, and access to cultural heritage.

Dr. Allyson Stevenson is a Métis historian and Gabriel Dumont Research Chair in Métis Studies at USask and prior to this held a Tier II Canada Research Chair in Indigenous Peoples and Global Social Justice at the University of Regina. She has been working with the Kewcic Museum

Committee of Cumberland House SK in heritage protection and repatriation of cultural items back to the community.

Dr. Kisha Supernant is Métis and an Associate Professor of Anthropology at the University of Alberta. She is the President of the Indigenous Heritage Circle and Director of the Institute of Prairie and Indigenous Archaeology. She is an award-winning teacher, researcher and writer. Her research with Indigenous communities in Western Canada explores how archeologists and communities can build collaborative research relationships.

Lawren Trotchie is a Métis woman from North Battleford, SK. Lawren obtained a Sociology degree in 2015, a Law Degree in 2018, and a Masters of Law in the area of Gladue in 2022. Lawren recently joined Matrix Law Group in January of 2022 and has begun her career in private practice primarily in litigation. Lawren is also a lecturer at the College of Law, USask for the Kwayeskastasowin course that is offered to first-year law students.

Grandfather Wanbdi Wakita is a council member of the Respectful Rematriation/Repatriation Ceremony at the University of Manitoba. A Sundance Chief and member of Sioux Valley Dakota Nation, MB. Wanbdi has spent three decades working with Indigenous men in correctional settings. Presently he is the Grandfather in Residence for the Access Program at the U of M.

Thank you to the following student researchers, volunteers and presenters their support, participation, and assistance with this event.

Elise Brass is a second-year law student at USask from Peepeekisis Cree Nation on Treaty 4 territory.

Caid Brossart is a second-year law student at USask. He completed his B.A. (Hons) degree at USask in Political Studies and is interested in studying how the relationship between law and public policy impacts Canadians.

Jordan Calladine is a third-year Métis law student at USask and vice president of the Indigenous Law Students Association. She also served as a judicial intern for the Supreme Court of Belize, assisting justices with legal research and analysis.

Katherine Faryna is of mixed Norwegian and Saulteaux descent from Treaty 4 territory. She is a second-year law student at USask and received her undergrad in History at the University of Alberta. She is a Research Assistant for Professor Bell and the Law Reform Commission of Saskatchewan.

Madalyn Mandziuk, B.A. Hons., is a first-year law student at the University of Alberta, and a research assistant at the Institute of Prairie and Indigenous Archaeology. Madalyn's research interests include data sovereignty, heritage law and policy, legal history, socio-legal studies, and community-led, ethical, and trauma-informed research and legal practice.

Charlotte McLachlan (she/her) is a second-year law student at USask, and earned a degree in Psychology from Queen's University prior to attending law school. Charlotte is currently

volunteering as a judicial intern with the Supreme Court of Belize and is working as a Research Assistant for Professor Bell.

Neesha Persad is a second-year law student at USask. Prior to law school she was a high school teacher in Edmonton, Alberta.

Stephanie Varsanyi is a second-year law student at USask. She is originally from Regina, SK and has a Master of Science in Psychology.

David Werner is a third-year Métis law student at USask and is working as a Research Assistant for Professor Bell. David received his BA in Psychology from the University of Alberta and his B Ed with Distinction from USask. David has secured a clerkship at the Court of King's Bench for SK after which he will work with his family at Semaganis-Worme Barristers & Solicitors.

APPENDIX 2: WORKSHOP AGENDA

Thursday, March 9 - Wanuskewin Heritage Park

Wanuskewin Heritage Park is an archaeological site and non-profit cultural and historical centre of the First Nations just outside the city of Saskatoon, Saskatchewan. The faculty's name comes from the Cree language word ᐊᑊᓀᖢᐃᓐ or wânaskêwin, meaning, "being at peace with oneself".

8:00 Shuttle pick up from Parktown Hotel to Wanuskewin

8:30 - 9:15 Territorial Welcome and Pipe Ceremony (Story Circle/Ceremony Room)

We will begin with a pipe ceremony to honour ancestors and provide us with spiritual guidance and support as we come together to talk in a good way about difficult topics. Individuals will be asked to follow certain Plains Cree protocols for participation in this ceremony. If you choose not to participate or must leave the ceremony due to unplanned circumstances, we ask that you do so quietly and respectfully.

9:15 - 9:45 Breakfast (Eagle Room)

9:45 - 10:15 Welcome and Introductions - Catherine Bell

10:15 - 10:45 UNDRIP and Indigenous Heritage – Fundamental Principles - Brenda Gunn

10:45 - 11:15 Sharing Our Experience: Repatriation Case Studies, Lessons, Successes, Challenges (Part One)

The Respectful Rematriation and Repatriation Ceremony- Pahan PteSanWIn, Cary Miller, Lara Rosenoff Gauvin, moderator: Jaime Lavallee

11:15 - 11:30 Refreshment Break - Light snacks, coffee and tea will be served.

11:30 - 12:30 Sharing Our Experience: Repatriation Case Studies, Lessons, Successes, Challenges (Part Two)

Paulina Csiscai, Susan Rowley, Bailey Monsebroten, Alex King, moderator: Stephanie Danyluk

12:30 - 1:15 Lunch

1:15 - 1:30 – Welcome Back & Reflections on Repatriation - Rose Roberts

1:30 - 2:45 Roundtable Discussions

- What are the most challenging issues in advancing repatriation efforts?
- Where do you see issues of misalignment between UNDRIP and the laws, policies, and practices of repatriation?
- What is needed to address some of these issues and challenges?
- Have you been (or are you) involved in a process or project that involves repatriation legislation? What was your experience?

2:45 – 3:30 Health and Refreshment Break

Take time to walk outside or visit the gallery at Wanuskewin. Light snacks, coffee and tea will be served.

3:30 – 4:45 Reflections on UNDRIP, Treaty and Indigenous Heritage

Harry Lafond, Joseph Naytowhow, Wanbdi Wakita, moderator: Brenda Gunn

What fundamental principles inform Treaty jurisdictions in relation to First Nations heritage? What values, rights and principles are fundamental for Indigenous centered approaches to collaboration and heritage law reform?

5:00 Shuttle pick up from Wanuskewin to Parktown Hotel

6:30 Dinner (South Dining Room, Parktown Hotel)

Welcome Remarks - Dean Martin Phillipson, USask College of Law

No formal program is planned. This is an opportunity to relax and dine together. Alcohol will not be served at this event.

Friday, March 10 - Parktown Hotel

7:45 - 8:30 Breakfast (Oak Room)

8:30 - 8:50 Opening Prayer, Remarks and Song - Catherine Bell, Joseph Naytowhow and Lily Naytowhow

8:50 - 10:00 Sharing our Experience: UNDRIP and Provincial Heritage Laws

Catherine Bell, Kisha Supernant, Felix Hoehn, Lily Naytowhow, moderator: Tomasin Playford

10:00 - 11:00 Roundtable Discussion

- What are some of the priority areas for change?
- Have you been involved in a process or project that involved provincial heritage legislation? What was your experience?
- Where do you see issues of misalignment between UNDRIP and provincial laws, policy, and practice?
- What is needed to address these issues and challenges?

11:00 - 11:30 Break

11:30 - 12:45 Sharing our Experiences: Legislation and Law Reform – Room Discussion - Catherine Bell, Rebecca Bourgeois, Jaime Lavallee, Katherine Faryna, moderator: David Werner

- What are some of the challenges repatriation and heritage legislation might address?
- What are the strengths and weaknesses of Bill C-391 (An Act respecting a national strategy for the repatriation of Indigenous human remains and cultural property) and provincial repatriation laws?
- What standards should guide jurisdictional reform of cultural heritage legislation?
- What can we learn from other jurisdictions?

12:45 Closing Remarks

1:00 – Lunch (provided)

Visiting After Lunch

We have booked the Oak Room for the afternoon. Participants are welcome to stay, visit and continue to share stories, ideas & experiences with each other. Enjoy a walk along the river or visit the Ukrainian Museum of Canada located next to the hotel.

APPENDIX 3: BACKGROUND PAPERS

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES & INDIGENOUS HERITAGE

Catherine Bell and David Werner

Introduction to the Declaration

UNDRIP is an international declaration endorsed by Canada. Recommended as the framework for reconciliation by the Truth and Reconciliation Commission of Canada (TRC),[97] UNDRIP recognizes the individual and collective human rights of Indigenous peoples and sets out "minimum standards for the survival, dignity, and well-being of Indigenous peoples of the world.[98] UNDRIP informs *Principles Respecting the Government of Canada's Relationship with Indigenous peoples*,[99] calls to action by the TRC; calls for justice of the National Inquiry into Murdered and Missing Indigenous Women and Girls (MMIWG)[100], recommendations of the Qikiqtani Truth Commission,[101] and a range of federal, territorial, and provincial laws, policies, practices and initiatives aimed at its implementation.

On November 26, 2019, the British Columbia legislature unanimously passed DRIPA.[102] On June 21, 2021, Canada enacted UNDRIPA.[103] Among other things, these laws mandate the federal and BC governments to take effective measures in consultation and cooperation with Indigenous peoples to ensure that their laws, policies, and practices are consistent with the Declaration and to prepare annual reports on progress. Manitoba has also enacted legislation that commits the province to reconciliation as guided by the TRC calls to action and UNDRIP and some federal and provincial statutes expressly reference the TRC and UNDRIP.[104] Other provinces are reviewing

[97] TRC *supra* note 4 at Call to Action #43.
[98] UNDRIP *supra* note 6 at art. 43.
[99] Canada, Department of Justice Canada, *Principles: Respecting the Government of Canada's Relationship with Indigenous peoples*, (2018) Her Majesty the Queen in Right of Canada, as represented by the Minister of Justice and Attorney General of Canada, online (pdf): https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html. UNDRIP was endorsed in 2077 by 144 States. Along with the United States, Australia, and New Zealand, Canada originally refused to endorse UNDRIP because of concerns relating to several articles. Canada endorsed it in 2010 as an aspirational document but in 2016 the Liberal government of Canada committed to its implementation including through review of laws, policies, and collaborative initiatives and actions. For a short history before the 2016 commitment see TRC Report, supra note 1 at 188-190.
[100] E.g., UNDRIP along with other human rights instruments also inform the promotion of "self-determined solutions" appropriate for each Nation or community. See e.g., MMIWG vol 1a and MMIWG vol 1b *supra* note 5.
[101] Qikiqtani Truth Commission *supra* note 3.
[102] DRIPA *supra* note 41.
[103] UNDRIPA *supra* note 46.
[104] See e.g., see *The Path to Reconciliation Act*, 2016 C.C.S.M. c. R30.5; the *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1. 2.

laws, policies and practices but differ in their views on the application and interpretation of UNDRIP to provincial laws.

UNDRIP has substantive and procedural aspects. It establishes minimum standards and anticipates a process based on Indigenous rights recognition, collaboration and dialogue aimed at consensus to determine how its articles are to be interpreted and implemented in different contexts. Consent-based decision-making is founded upon the principle of self-determination. "Practically implementing consent-based decision making begins with the understanding that it involves a model of decision making between governments – Indigenous and Crown" and grounded in the rights of Indigenous peoples."[105] This is different from consultation, where the Canadian governments involve Indigenous peoples in a decision the government is making, and the government may have a duty to accommodate depending on the impact of its decision and the strength of the rights claimed.

Fundamental Principles: Self-Determination, Indigenous law & FPIC

Indigenous peoples have a unique connection to, and rights in their lands, including decision making, governance, jurisdiction, legal traditions, and fiscal relations associated with those lands. These rights are reflected in principles that inform how all the articles in UNDRIP are interpreted and applied – such as the right of self-determination (art. 3), the right of self-government (art. 4), the right to participate in decision making in matters that may affect Indigenous peoples or their rights and to free prior and informed consent before adoption of and implementation of legislative or administrative measures that may affect them (arts. 18 and 19), the right to maintain and strengthen their spiritual relationship with traditionally owned or used lands or waters (art 25), rights to land, territories and resources traditionally owned and development of priorities and strategies for the development or use of their lands or territories (arts.26 and 32), and the right to recognition, observance and enforcement of treaties (art 37). Any limitations on the rights in the Declaration must be consistent with international human rights obligations (art. 46). Article 46.3 further provides that all provisions in UNDRIP are to be interpreted "in accordance with principles of justice, democracy, respect for human rights, equality, non-discrimination, good-governance, and good faith."

The central and guiding principle in UNDRIP is the principle of self-determination. UNDRIP defines the right to self-determination as the right of Indigenous peoples to "freely determine political status and to pursue economic, social and cultural development" (art. 3). Although self-determination informs all articles in UNDRIP, it has two key pillars: the right to autonomy "in matters relating to their internal and local affairs" and the right to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State"

[105] "Operationalizing Free Prior and Informed Consent" *Implementing UNDRIP in BC: A Discussion Paper Series by the Residential School History Dialogue* (March 20202) online:<https://irshdc.ubc.ca/files/2020/03/UNDRIP_Article3_InformedConsent.pdf> at 3.

(arts. 4 & 5). Self-determination is not constrained by narrow legal definitions that confine Indigenous jurisdiction to powers exercised and integral to their distinctive cultures prior to European contact. It is a principle that recognizes "Indigenous jurisdiction…where Indigenous political and legal institutions are intimately involved in decision making about matters that impact Indigenous peoples."[106]

The right to self-determination entails the obligation for States to recognize Indigenous legal and representative institutions. Indigenous law "refers not only to the systems of rules or precepts but also to the authority of Indigenous communities and nations to craft their own understandings of law and the particular form and content their legal orders may take on."[107] For this reason implementing UNDRIP requires recognizing and respecting "strong legal pluralism and to work from that initial point."[108] Many articles in UNDRIP call on States to "give due consideration" to the customs, traditions, land tenure systems, and laws of Indigenous peoples and international human rights" (e.g., arts. 5, 9, 11, 18, 25 -27, 33-34, 40). For example, article 40 calls on States to help make dispute resolution processes prompter and more accessible to Indigenous communities and recognizes the rights of Indigenous peoples to participate in the design of "just and fair procedures for resolution of disputes" giving "due consideration to the customs, traditions, rules, and legal systems of the Indigenous people concerned and international human rights." Article 34 speaks to the right of Indigenous peoples to promote, develop, and maintain juridical systems and customs. Articles 18 and 27 recognize the right of Indigenous peoples to have their laws respected in establishing systems to recognize and adjudicate Indigenous rights relating to land, territories, and resources. Indigenous laws are also referenced in designing mechanisms of redress for "cultural, intellectual, religious and other spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs" (art. 11.2).

Also central to UNDRIP is the right of free, prior, and informed consent (FPIC). "Free, prior, and informed consent is a manifestation of Indigenous peoples' right to self-determine their political, social, economic, and cultural priorities. It constitutes three interrelated and cumulative rights of indigenous peoples: the right to be consulted, the right to participate and the right to their lands, territories, and resources."[109] It speaks to consensus driven good faith processes and includes

[106] Brenda Gunn, "Self-Determination as the Basis for Reconciliation: Implementing the UN Declaration on the Rights of Indigenous Peoples" (2012) 7:30 Indigenous L Bull 22 at 23 [Gunn, 2012].
[107] Gordon Christie, "Indigenous Legal Orders, Canadian Law and UNDRIP" in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws. Special Report* (Waterloo: Centre for International Governance Innovation, 2017) 48 at 48 [Christie]. A second special report by the Centre for International Governance Innovation on implementing UNDRIP explores further Indigenous law and legal institutions and their relationship to implementing UNDRIP. See *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo, Ontario: Centre for International Governance Innovation, 2018).
[108] Christie, *ibid* at 49.
[109] United Nations Human Rights Council, Office of the Human Rights Commissioner, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, (10-28 September 2018, Thirty-ninth session) online (pdf): <https://www.ohchr.org/en/issues/ipeoples/emrip/pages/studyfpic.aspx> [FPIC Report].

ensuring the process to achieve consensus itself is also the product of consensus, addresses imbalances of power, and respects Indigenous representative institutions.

UNDRIP contains several provisions incorporating the language of FPIC. The most general is article 19 which obligates States to "consult and cooperate in good faith with Indigenous peoples… in order to obtain their free, prior and informed consent before adopting and implementing legislative or other administrative measures that may affect them." FPIC is also contained in other provisions in more specific contexts, including articles 10, 11, 18, 28, 29, and 32 reproduced below.

What FPIC processes look like will vary among Indigenous governments and rights in issue. They may include: (1) establishing clear jurisdictional lines and authorities between those matters that will be solely decided upon by Indigenous governments through their own processes, structures, and laws, and those that will be solely decided upon by the Crown - for example through treaty making between First Nations and the Crown as understood by First Nations and reflected in the Declaration; (2) consent-based decision making through a joint decision maker or process authorized by the Indigenous and Crown governments to make the final and binding decisions regarding a matter; and (3) Indigenous and Crown decision-makers making their own respective decisions pursuant to their own governance structures and legal orders, as well as any processes or criteria they have agreed to between them, if their respective decisions do not align (e.g. paramountcy, dispute resolution mechanism).[110]

For example, sections 6 & 7 of DRIPA enable the province of BC to enter into agreements with Indigenous governing bodies and to exercise statutory decision-making authority together.[111] These agreements are intended to outline the processes for joint or consent-based statutory decision-making and clarify roles and responsibilities of the Province and the Indigenous governing body. In June of 2022 BC entered its first consent-based agreement under DRIPA and provincial environmental legislation with Tahltan Central Government (TCG) related to the environmental assessment of the Eskay Creek Mine revitalization project within Tahltan territory.[112] The agreement seeks to align with several specific articles of the Declaration reproduced below (arts. 1-5, 18, 19, 31, and 32(1)). Among the principles informing the

[110] *Supra* note 105 at 4-6.

[111] DRIPA s. 1(1) defines an Indigenous governing body as "an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act*, 1982." What constitutes an "entity authorized to act on behalf of Indigenous peoples" is a matter of Indigenous self-determination and the idea of authorization "must be read as a form of 'authorization' pursuant to Indigenous legal processes, traditions, and standards, consistent with the UN Declaration, that are undertaken as part of Nations expressing, re-building, and implementing their governance systems." See British Columbia, "Indigenous Governing Bodies in the Declaration on the Rights of Indigenous Peoples Act" at 4 online:< https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoplesdocuments/7928_declaration_act-indigenous_governing_bodies.pdf>.

[112] Declaration Act Consent Decision Making Agreement for Eskay Creek Project, online at: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-firstnations/agreements/declaration_act_consent_decision-making_agreement_for_eskay_creek_project.pdf>.

agreement are "to respect and implement Tahltan's right of self-determination and decision-making authority as Title and Rights holders and stewards over the land, water and resources throughout Tahltan Territory" (s. 3.1(b)). The Tahltan agreement sets out how the TCG and province will be accountable and transparent throughout the environmental assessment process, conduct their own independent assessments, work together through collaborative structures to achieve consensus, and includes provisions for reconsideration of decisions and dispute resolution.[113] The agreement also provides for protection of confidential Tahltan knowledge, including confidential knowledge protected under the legislation.

UNDRIP and Indigenous Heritage

UNDRIP is an expansive declaration consisting of 24 clauses in its preamble and 46 articles. The preamble and articles of UNDRIP are to be read together. All articles in UNDRIP are concerned with Indigenous heritage in its broadest sense. Some are aimed at specific forms. All are informed by core principles discussed above that provide interpretive context. In the Canadian context, such interpretation is not to diminish in any way rights protected under s. 35 of the *Constitution Act*.[114]

An important aspect of interpretation of the UN Declaration is that its provisions must be read as a whole. Articles are interrelated and interdependent. The Preamble is important because it sets the tone for how the rest of the document should be read, interpreted, and applied. For example, informing all of the articles in UNDRIP are the principles that Indigenous peoples "are equal to all other peoples" and to respect and promote Indigenous inherent rights derived from "their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies especially their rights to land and resources"; rights "affirmed in treaties, agreements and other constructive arrangements"; Indigenous control over "developments affecting them and their lands, territories and resources" and respect for "knowledge, cultures and traditional practices."

Many articles in UNDRIP expressly reference "culture" including 5, 8, 11-15 and 31. These articles affirm that "Indigenous peoples suffer violations of their rights to religion, culture, spirituality, education and traditional knowledge when their cultural items, ancestral remains and intangible

[113] "Tahltan Knowledge" means the cultural heritage, traditional knowledge and traditional cultural expressions of the Tahltan, and knowledge of traditional Tahltan lifeways and systems, whether embodied in tangible or intangible form, and from ancient and contemporary time, transmitted from generation to generation that Tahltan makes available for consideration in the Assessments" and includes in the list of manifestations of this knowledge law, spiritual knowledge, "cultural property, including sacred and culturally significant sites and burial grounds", ancestral remains, oral traditions, intangible cultural expressions (e.g., sports, stories, symbols, designs performing arts), documentation of Tahltan heritage and environmental knowledge including flora, fauna, water, soil and medicines and "culturally based value statements about how things should be, and what is fitting and proper to do with respect to animals, the environment, human health and well-being in a holistic sense" (Part One Definitions) ibid).

[114] Constitution Act *supra* note 59.

cultural heritage are improperly acquired, used and kept by others."115 19 UNDRIP calls on States to take measures to prevent further appropriation and exploitation of indigenous peoples' heritage contrary to Indigenous laws, customs and traditions including through application of principles of self-determination and FPIC. It also calls for remedial measures if heritage has been appropriated in violation of these principles.

Examples of articles that speak to what is commonly referred to as "cultural heritage" include: the right not to be subjected to forced assimilation or destruction of their culture (art. 8); the right to practise and revitalize cultural traditions and customs, including the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature (art. 11); the right to spiritual and religious traditions and repatriation (art. 12), the right to participate in decision-making in matters which would affect their rights (art.18); the right to maintain and strengthen the distinctive spiritual relationship with traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources (art. 25); and the right to traditional knowledge, cultural expressions and intellectual property (art. 31).

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of hu- mankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from

[115] UN Expert Mechanism on Rights of Indigenous Peoples, "Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples" (UN Doc A\HRC\45\35) online:<https://undocs.org/A/HRC/45/35> at para 14.

exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and op- pression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations be- tween the State and indigenous

peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration, *Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

UN Declaration Articles

Article 1: Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all 8 human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2: Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development

Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5: Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to

participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6: Every indigenous individual has the right to a nationality.

Article 7: 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8: 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9: Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11: 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, 9 ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs

Article 12: 1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the

use and control of their ceremonial objects; and the right to the repatriation of their human remains. 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13: 1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. 2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14: 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15: 1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information. 2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society

Article 16: 1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination. 2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17: 1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law. 2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking

into account their special vulnerability and the importance of education for their empowerment. 3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary 10

Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20: 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21: 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22: 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration. 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23: Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24: 1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services. 2. Indigenous individuals have an

equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26: 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by 11 reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28: 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take 21 the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29: 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of

indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30: 1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. 2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities

Article 31: 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 32: 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall 12 provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33: 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35: Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36: 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders. 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37: 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements. 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38: States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39: Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40: Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective 27 remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41: The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42: The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full 13 application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43: The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44: All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45: Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46: 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

SELECTION OF ELECTRONIC RESOURCES ON UNDRIP

Assembly of First Nations. *Implementing the UN Declaration on the Rights of Indigenous Peoples*. October 2021. https://www.afn.ca/implementing-the-united-nations-declaration-on-the-rightsof-indigenous-peoples/

Canada, Department of Justice, "Implementing the United Nations Declaration on the Rights of Indigenous Peoples" https://www.justice.gc.ca/eng/declaration/index.html

Catherine Bell and Melissa Erickson, *UNDRIP & Indigenous Heritage* (forthcoming, online Canadian Museums Association, 2023)

Centre for International Governance and Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws, Special Report* (2017) https://www.cigionline.org/publications/undrip-implementation-braiding-internationaldomestic-and-indigenous-laws/

E Ononagh Fitzgerald, J Borrows, et. al., eds., *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Centre for International Governance and Innovation, 2019) https://www.cigionline.org/publications/braiding-legal-ordersimplementing-united-nations-declaration-rights-indigenous/

Brenda Gunn, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook* (2011) Indigenous Bar Association.

Brenda Gunn, et. al., *UNDRIP Implementation: Comparative Approaches from CANZUS* (Canada, Australia, New Zealand, United States). Special Report. Centre for International Governance Innovation: Waterloo, Ontario, 2020. https://www.cigionline.org/publications/undripimplementation-comparative-approaches-indigenous-voices-canzus/

Indigenous Heritage Circle, *Indigenous Heritage and the United Nations Declaration on the Rights of Indigenous Peoples* https://indigenousheritage.ca/wp-content/uploads/2022/05/IHCUNDRIP-Report-EN-medium-res-May-2022-1.pdf

Hayden King, ed., *UNDRIP: Lessons from BC, Yellowhead Institute*, 2020. https://yellowheadinstitute.org/bc-undrip/

Residential School History and Dialogue Centre. *Implementing UNDRIP in BC: A Discussion Paper Series*. University of British Columbia, March 2020–January 2021. https://irshdc.ubc.ca/implementing-undrip/

United Nations Human Rights Council, Office of the Human Rights Commissioner, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, (10-28 September 2018, Thirty-ninth session) https://www.ohchr.org/en/issues/ipeoples/emrip/pages/studyfpic.aspx

National Inquiries & Commissions – Calls to Adopt UNDRIP

Qikiqtani Truth Commission, *Final Report and Recommendations* (2010) https://www.qtcommission.ca/en

The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019) https://www.mmiwg-ffada.ca/final-report/

TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) https://nctr.ca/records/reports/

Legislation

Declaration on the Rights of Indigenous Peoples Act (BC 2019) https://www2.gov.bc.ca/gov/content/governments/indigenous-people/newrelationship/united-nations-declaration-on-the-rights-of-indigenous-peoples

The Path to Reconciliation Act, 2016 C.C.S.M. c. R30.5 https://web2.gov.mb.ca/bills/40-5/b018e.php

United Nations Declaration on the Rights of Indigenous Peoples Act (2021) https://ww.justice.gc.ca/eng/declaration/index.html

REPATRIATION & PROVINCIAL HERITAGE LEGISLATION IN WESTERN CANADA

Catherine Bell

1.0 Federal, Provincial and Indigenous Jurisdiction Over Heritage

Indigenous values, beliefs, laws, institutions, and knowledge systems are diverse. Among many Indigenous peoples, there is no conceptual or linguistic equivalent that separates people and land, or culture from heritage, in what is collectively referred to as "cultural heritage" in national and international heritage law and policy. There is also no single international or Canadian legal definition of "cultural heritage" or "heritage." Rather, definitions are context-specific and vary among different legal instruments. For this document, I use the following definition adopted by the Indigenous Heritage Circle and focus on Indigenous belongings and sites that are identified in provincial and federal law as archaeological sites.

> Indigenous heritage is complex and vibrant. Indigenous heritage encompasses ideas, experiences, belongings, artistic expressions, practices, knowledge, and places that are valued because they are culturally meaningful and connected to shared memory. Indigenous heritage cannot be separated from either Indigenous identity or Indigenous life. It can be inherited from ancestors or created by people today. [116]

Subject to a few exceptions, legislation affecting Indigenous heritage was enacted before recognition and protection of "existing aboriginal and treaty rights of the aboriginal peoples of Canada" in section 35 of the *Constitution Act*, 1982,[117] calls to action of the Truth and Reconciliation Commission of Canada (TRC),[118] the 1996 Royal Commission on Aboriginal Peoples (RCAP),[119] calls to justice of the National Inquiry into Murdered and Missing Indigenous Women and Girls (MMIWG)[120] and Canada becoming a signatory to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[121] RCAP, the TRC, the MMIWG and UNDRIP all speak to the connection and importance of Indigenous heritage in its various forms to self-determination, self-determined solutions appropriate for distinctive peoples and communities, resilience and recovery from colonization, reconciliation and respect for Indigenous rights.

Canada and British Columbia have passed UNDRIP legislation which mandates them, in consultation and cooperation with Indigenous peoples, to ensure that their laws, policies, and

---

[116] In 2020, the Indigenous Heritage Circle (IHC) explored the meaning of Indigenous heritage in workshops across Canada. The quoted definition emerged from these sessions. See Indigenous Heritage Circle, 2020 Indigenous Heritage Engagement Sessions: Report From the Indigenous Heritage Circle to Parks Canada, online:< https://indigenousheritage.ca/wp-content/uploads/2022/06/IHC-PCA-Report-EN.pdf> at 8 & 9.
[117] Constitution Act *supra* note 59.
[118] TRC *supra* note 4.
[119] RCAP *supra* note 2 at 167.
[120] See e.g., *supra* note 5 MMIWG vol 1a at 181-221 and MMIWG vol 1b at 171.
[121] UNDRIP *supra* note 6.

practices are consistent with UNDRIP and to prepare annual reports on progress.[122] Manitoba has also enacted legislation that commits the province to reconciliation as guided by the TRC calls to action and UNDRIP and some federal and provincial statutes that reference UNDRIP standards have been enacted. However, provinces differ in their views on the application and interpretation of UNDRIP to provincial laws. Nevertheless, municipal governments and many Indigenous and non-Indigenous governmental and non-governmental organizations are reviewing policies, practices, and ethical guidelines in response to the TRC, MMIWG and UNDRIP.

The central organizing principle in UNDRIP is the right of Indigenous peoples to self-determination. A complicating factor in Canadian law reform aimed at implementing UNDRIP and removing barriers to self-determination is the division of legislative jurisdiction between federal, territorial, and provincial governments. The federal government can pass laws concerning federal lands, "Indians and lands reserved for the Indians" (which includes Inuit, First Nations, and Métis), shipping, navigation, intellectual property and the regulation of trade and commerce.[123] Pursuant to this authority the federal government has enacted various laws that directly and indirectly affect Indigenous heritage. None of these laws expressly provide for Crown ownership of Indigenous heritage. However, they do provide ways to protect cultural, historical and archaeological resources, for example through the environmental assessment process and enactment of regulations under National Parks Legislation. As a matter of policy, the federal government asserts common law rights of landowners to control archaeological heritage on or under federal Crown land other than reserve land.[124]

Provinces have jurisdiction over provincial Crown lands and property and civil rights within their provincial boundaries. Pursuant to this jurisdiction, provinces can enact laws of general application (e.g., laws that are uniformly applicable throughout the province), even if such laws disproportionately impact Indigenous heritage. For example, even though 90 percent of the heritage resources affected by B.C.'s *Heritage Conservation Act*[125] (HCA) are Indigenous, the Supreme Court of Canada (SCC) held that the HCA is a valid exercise of provincial jurisdiction over lands, movable property, and resources.[126] However, there are very few examples of provincial statutes aimed exclusively at First Nations, Inuit, or Métis heritage sites and belongings.

---

[122] UNDRIP *supra* note 6; DRIPA *supra* note 41.

[123] Constitution Act *supra* note 59. Under s. 91(24), the term "Indians" includes Indians, Inuit and Métis peoples of Canada.

[124] On federal lands, there is no single statute concerning archaeological heritage. Some federal bodies, such as the Parks Canada Agency and the Department of National Defence, have regulatory power and specific rules governing archaeological research. See, e.g., E.g. *Canada National Parks Act*, SC 2000, c.32 s.16(1)b and if enacted this will not be under Bill C-23, *infra* note 121. For a fuller consideration of federal legislation see Catherine Bell & Sarah Lazin, *A Selected Review of Federal and Provincial Legislation Implicating Indigenous Heritage in British Columbia* (First Peoples' Cultural Council, March 2022) online:<https://fpcc.ca/resource/legislation-on-indigenous-heritage/>.

[125] HCA *supra* note 34.

[126] *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31 at paras 65–73.

1.1. Indigenous Constitutional Rights and Jurisdiction

The SCC has held that there is no constitutional duty to consult during the legislative process. However, this does not shield laws or the process of law reform from the obligation of the Crown to "conduct itself honourably" which in turn may result in remedies if a statute is enacted or implemented in a manner inconsistent with the honour of the Crown.[127] Further, UNDRIP is clear that before enacting or adopting legislative and administrative measures that may affect Indigenous peoples, the State must consult and cooperate in good faith to obtain their free prior and informed consent.[128] An example is the *Act Respecting First Nations, Inuit and Métis Children, Youth and Families* (also known as Bill C-92), which expressly acknowledges Canada's commitment to implementing UNDRIP[129] and was co-developed with Indigenous peoples, provinces and territories.[130]

The constitutional validity of Bill C-92 is on appeal to the SCC. While the Quebec Court of Appeal (QCA)found that there is a generic Aboriginal right to self-government over child and family services affirmed by s.35, it also struck down sections 21 and 22(3) which promote Indigenous self-determination by elevating Indigenous laws (adopted through coordination agreements) over conflicting federal and provincial laws. Among the issues on appeal are whether the federal government can recognize rights not yet affirmed by Canadian courts, whether s. 35 includes a generic right of Indigenous peoples to self-government, and whether the federal government can pass a law that says Indigenous laws and jurisdiction override conflicting federal and provincial laws. If the QCA decision is upheld in whole or in part, this decision could have significant implications for recognition of Indigenous jurisdiction over heritage and the use of federal and provincial legislation to implement that jurisdiction.

---

[127] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew* 2]. The SCC held that the legislative process cannot trigger the duty to consult regardless on whether the legislation at issue might adversely impact asserted or established Aboriginal or treaty rights. However, such consultation may be a matter of good public policy. Per Justices Karakatsanis and Gascon and Chief Justice Wagner, "[s]imply because the duty to consult doctrine, as it has evolved to regulate executive conduct, is inapplicable in the legislative sphere, does not mean the Crown *qua* sovereign is absolved of its obligation to conduct itself honourably," *ibid* at para. 52. Instead, declaratory relief could be appropriate where legislation is enacted that is inconsistent with the honour of the Crown and "other protections may well be recognized in future cases," *ibid*.

[128] UNDRIP, *supra* note 6, arts. 18 and 19. Article 19 of UNDRIP reads "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them" [emphasis added].

[129] Bill C-92 *supra* note 31 at Preamble.

[130] "The federal government held some 65 meetings and heard nearly 2,000 community, regional and national organizations as well as individuals, where, among other things, the importance of adopting standards compatible with the *UN Declaration* was emphasized."See *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 (CanLII), <https://canlii.ca/t/jn7nb> (English Version) at paras. 176-77.

On the first issue, the QCA held that s. 91(24) grants the federal government broad jurisdiction over the well-being of Indigenous peoples and their interpersonal relationships. Parliament has the authority, and a duty flowing from the constitutional principal "honour of the Crown," to be proactive in delineating these rights. Refusing to do so, "can result in the *de facto* denial of their very existence or, at the very least, make them ineffective or inoperative."[131] As Bill C-92 is directed at subject matter within federal jurisdiction, national standards adopted are compatible with provincial child welfare legislation, and effects on the work of provincial public servants are incidental to its purpose; the QCA also held that Bill C-92 does not offend principles of federalism by significantly impairing an area of core provincial jurisdiction.[132]

Adopting this reasoning the absence of judicial decisions on the rights of Indigenous peoples to self-government concerning their cultural heritage is not a bar to a negotiated legislative response recognizing Indigenous jurisdiction. However, as elaborated below, unilateral federal action affecting title and control of cultural heritage not located on federal lands or within its control would likely not be valid if inconsistent with ownership of public lands and resources by the province or significantly impairs private property rights and their administration - both within provincial jurisdiction.

Also important for constitutional recognition of Indigenous jurisdiction over cultural heritage is the reasoning of the QCA on the right of self-government. It held that First Nation self-government concerning child and family services is a right that extends to all Indigenous peoples under s.35 because the exercise of such jurisdiction is "intimately tied to their cultural continuity and survival."[133] In doing so, it rejected the argument that rights recognized and protected by s. 35 are limited to those that exist in continuity with precontact practices of a particular Aboriginal group – a test derived from the SCC decision in *R v Vanderpeet*.[134] Rather, the QCA reasoned:

> The central purpose of s. 35 is to effect reconciliation and preserve a constitutional space for Aboriginal peoples so as to allow them to live as peoples—with their own identities, cultures, and values—within the Canadian framework. As a normative system, Aboriginal customary law relating to children and families forms part of those values. Moreover … children and families are the main channel for conveying the markers of Aboriginal identity. Regulation of child and family services by Aboriginal peoples themselves cannot be dissociated from their Aboriginal identity and cultural development.[135]

The QCA also reasoned that Indigenous people have always maintained a form of self-government that flows from their original sovereignty over territory and not the sovereignty of the Crown.[136] The existence of this right is not terminated by the distribution of legislative powers

[131] *Ibid.* at para 444.
[132] *Ibid*. at paras. 32-36.
[133] *Ibid.* at para. 59.
[134] [1996] 2 SCR 507
[135] *Ibid.* at para. 48.
[136] *Supra* note 130 at 49-58.

between federal and provincial governments. Rather," the historical relationship between the Crown and Aboriginal peoples, both before and after the *Constitution Act,* 1867, establishes that Aboriginal peoples have always been recognized as peoples—and not merely as subjects—and that they continue to be governed by their own laws and customs in those areas of jurisdiction that do not conflict with the Crown's assertion of sovereignty, that have not been voluntarily surrendered by treaty, or that have not been extinguished by the government."[137] The process of treaty making is properly understood as "recognizing their status as self-governing peoples.[138] This conclusion is consistent with UNDRIP "whose values, principles and rights are a source for the interpretation of Canadian law," has been "implemented as part of the federal normative order" through federal legislation, and thus "bolsters and confirms the correctness of such an interpretation."[139]

Analogous arguments apply to Indigenous jurisdiction over heritage "intimately tied" to Indigenous "cultural continuity and survival"[140] - for example burial sites, ceremonial and other sites and belongings of ongoing historical, traditional, or cultural importance. The centrality of Indigenous heritage to culture and identity is not disputed nor is the connection and importance of Indigenous ownership, stewardship, and control over heritage in its various forms to self-determination or cultural loss and trauma brought about by colonization. Indeed, such connections were intentionally targeted by discriminatory Canadian laws and policies aimed at assimilation.[141] Cultural heritage is an important expression not only of individual creative processes, but also individual and group identity, spiritual and cultural life. It is for this reason that controlling, removing, and destroying it is an effective tool of domination and a frequent intentional strategy in armed conflict.[142]

Recognition and affirmation of this jurisdiction in s. 35 depends on whether it is incompatible with Crown sovereignty or terminated by clear and plain legislative intent or voluntarily surrendered by treaty, prior to the inclusion of s. 35 in the Constitution. None of these apply. Indeed, in BC where there are subsisting claims to Aboriginal title, provincial heritage legislation is clear that it is not intended to abrogate or derogate from Aboriginal constitutional rights - to do so would arguably be outside the legislative authority of a provincial government.[143] Not only is there an absence of federal legislation asserting ownership over Indigenous heritage, Indigenous constitutional rights are not considered in federal legislation that affects Indigenous

[137] *Ibid.* at para. 466.
[138] *Ibid.* at para. 466, fn. 45.
[139] *Ibid.* at paras. 512-513.
[140] *Supra* note 129 at para. 59.
[141] See e.g., TRC report *supra* note 4, at 1-3.
[142] Indeed, its destruction was recently recognized as a war crime by the International Criminal Court which convicted Ahmad Al Faqi Al Mahdi of intentionally directing attacks against religious and historic buildings in Timbuktu, Mali during the 2012 occupation by Ansar Dine and Al-Qaeda in the Islamic Maghreb.
[143] *Supra* note 126, s.8.

sites, belongings, or archaeological heritage.[144] There is also no evidence of clear and plain intent to terminate customary laws implicating rights of ownership and control. This requires consideration of potential conflict with Aboriginal or treaty rights and a choice to resolve that conflict through abrogation. The fact that contemporary transfers of property operate in a highly regulated environment is insufficient evidence of intent to extinguish.[145] As elaborated below, treaty interpretation also does not support a finding of surrendering jurisdiction.

However, also important to consider is the decision of the QCA to strike down sections 21 and 22(3) of Bill C-92 which says that Indigenous laws adopted through a coordination agreement prevail over any conflicting or inconsistent provisions of federal or provincial law.[146] It held parliament cannot confer the force of law, as federal law, on Indigenous legislation or make their rights absolute. If Indigenous laws override other incompatible legislation, it is because of their constitutional recognition in s. 35, not because it says so in a federal statute or by virtue of laws that make federal law paramount over conflicting provincial law.[147] Federal and provincial governments can enact laws that infringe Indigenous constitutional rights if such actions can meet a constitutional justification test.[148] The test requires that the government pursue a valid legislative objective and it do so in a manner that is consistent with its fiduciary obligations and honour of the Crown. [149] Private property regulation and rationale may provide sufficient justification to narrow Indigenous jurisdiction in its application to privately owned lands and objects. However, as I argue below, it does not terminate Indigenous rights or jurisdiction but does call for good faith negotiated solutions between Indigenous and non-Indigenous governments that seek to respect rights of Indigenous peoples and other owners recognized under Canadian law.

Just as there are no s. 35 cases that address Indigenous jurisdiction over cultural heritage, there are no s. 35 cases that speak to Indigenous rights to sites located on private land or to repatriation of ancestral remains or significant Indigenous belongings now in the custody of others. In the rare

[144] The rationale for this includes fear of increasing value and trade through prohibition, concern about jurisdiction to legislate on ownership of property within provincial boundaries, and opposition by some First Nations to provisions vesting ownership of First Nation archaeological material in the federal government even if for the purpose of protection.

[145] *R v Sparrow* [1990] 1 SCR 1075.

[146] The *Act* says is silent about conflicts of laws which might arise where an Indigenous governing body passes laws without first holding discussions for the purpose of entering into a coordination agreement. This would be a matter of s. 35 constitutional analysis. Where the goal is for Western and Indigenous legal systems to exist in dialogue with each other statutory intervention usually requires the creation of a legal language that both can speak and enforce – thus the coordination agreements.

[147] Paramountcy is a constitutional doctrine that provides if the federal government is operating within its jurisdiction, even if aspects of this jurisdiction may be exercised by the provinces, federal laws override provincial laws where there is an irreconcilable conflict.

[148] *Supra* note 145 at paras. 542-544.

[149] See *R v Sparrow, supra* note 145. There must be a compelling and substantial public objective and compliance with fiduciary obligations including consultation. See *Tsilhqot'in Nation v. British Columbia* [2014] 2 S.C.R. 256.

instances such legal claims have been made, they have been settled out of court.[150] In the only case brought based religious rights recognized under s. 2 of the Charter, the SCC held that there was insufficient evidence that the proposed resort would substantially interference with the ability of the Ktunaxa Nation to act in accordance with their practices or beliefs.[151] Nevertheless, there have been changes in government policy and practice to respond to Indigenous concerns particularly in relation to ancestral remains, burial places and items and sacred/ceremonial material – not coincidentally areas where claims grounded in contemporary ethical norms and Aboriginal and treaty rights are likely the strongest and that are more likely to generate public sympathy.

When current law on Indigenous constitutional rights is applied to the question of maintenance, protection, and control of significant heritage sites and belongings, the following arguments may be persuasive. For example:

1. Rights analogous to ownership, including maintaining, protecting, and controlling archaeological and historical sites, are part of the bundle of rights included within Aboriginal title. The SCC is clear in *Tsilhqot'in* that Aboriginal title is analogous to ownership. Ownership rights include contemporary economic uses, the right to exclude others, and the requirement of consent to use or interfere with Aboriginal title land and items or resources attached to, on or under those lands, including burial sites.[152]

2. Rights may also be sourced in historical and ongoing activities, customs, or practices that were historically and continue to be integral to the distinctive cultural identity of specific Indigenous communities (e.g., items that have a role in ceremony or spiritual practice).

3. Rights may be sourced in Indigenous jurisdiction and legal institutions that exist independent of and shape the content of Indigenous rights and title.[153]

4**.** Rights may be sourced in express and implied terms of treaty. Treaties are an expression of shared sovereignty and jurisdiction and include the broad purposes of protecting Indigenous culture, survival, and jurisdiction.

---

[150] For example, in relation to Grace Islet, discussed below, and the sale of a ceremonial mask contrary to the laws of the Nuxalk Nation. Under the laws of the Nuxalk Nation, the mask and the prerogatives associated with it can only be transferred at a potlatch under the witness of the community. See e.g., discussion in Bell and Paterson, *infra* note 118.

[151] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* [2017] 2 SCR 386.

[152] *Tsilhqot'in,* supra note 149 at para 73. Economic use cannot be "irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place"; *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 at para 128 [*Delgamuukw*].

[153] As argued above in the application of the Bill C-92 case *supra* note 31. Various cases also refer to Indigenous law and institutions as continuing past the assertion of sovereignty and for understanding the sui *generis content* and proof of Aboriginal title. See e.g. *Mitchell v M.N.R.* [2001] 1 SCR 911 at para. 10 and *Delgaamuukw, ibid*. at para 147.

1.2 Treaty Rights

There is significant disagreement between Treaty Nations and provincial governments on the proper interpretation of treaty rights to Indigenous sites and objects located on Crown and private lands.[154] Here again the outcome of the SCC reference on the Bill C-92 may have implications."[F]ederal and provincial governments in Canada have largely proceeded on the basis that the Indigenous treaty parties surrendered their right to make decisions under their own laws, along with other rights not enumerated in the written English text of the treaty document" including in relation to jurisdiction and ownership of Indigenous heritage.[155] Bill C-92 and the decision of the QCA recognize that all Indigenous peoples hold a generic, constitutionally protected right to self-government and to exercise their inherent laws in relation to child and family services. In doing so, lawyer Kate Gunn argues, "contrary to the standard approach to treaty interpretation adopted by Canadian governments, the Court of Appeal decision implicitly affirms that Indigenous groups who are parties to Crown-Indigenous treaties can and do hold rights based on their own law-making authority which were not surrendered on entering into treaty and which continue to exist today."[156]

The QCA also observes that the treaty process itself evidences Crown recognition of self-government as the "signing of treaties presupposes the existence of a people and authorities having the ability to bind that people under the treaty" and notes "that the Crown continued to sign treaties with Aboriginal peoples until the first quarter of the 20th century, which, some would argue, justifies viewing these treaties as one of the foundations of Canadian federalism."[157] The concept of treaty federalism argues that jurisdiction and rights not delegated to the Crown through treaty continue as inherent jurisdiction and rights of Treaty Nations.[158]

---

[154] See e.g., James (Sakej) Youngblood Henderson, "*UN Declaration on the Rights of Indigenous Peoples* and Treaty Federalism in Canada" online:< https://www.constitutionalstudies.ca/wp-content/uploads/2021/02/02_Henderson-4.pdf > and Michael Asch, et. al,, *Treaty Relations as a Method of Resolving IP and Cultural Heritage Issues* (IPiNCH *report* 2014) online:<https://www.sfu.ca/ipinch/sites/default/files/resources/reports/treatyrelations_finalreport_2014.pdf>.

[155] For more detailed discussion see Kate Gunn, "Indigenous Jurisdiction and Bill C-92 at the Supreme Court of Canada" (September 2022) online:< https://ablawg.ca/2022/09/20/indigenous-jurisdiction-and-bill-c-92-at-the-supreme-court-of-canada/>.

[156] *Ibid.*

[157] *Supra* note 130 at para. 375.

[158] See James [Sa'ke'j] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Saskatchewan Law Review 241 [Youngblood Henderson 1994]. And see "Treaty Relations as a Method of Resolving IP Issues, Project Summary online (pdf):< https://www.sfu.ca/ipinch/sites/default/files/resources/reports/treatyrelations_projectsummary_2014.pdf> [Treaty project summary] and for the full report see Siku Allooloo, Michael Asch et. al., Final Report, *Treaty Relations as a Method of Resolving IP and Cultural Heritage Issues* (An Intellectual Property in Cultural Heritage Community Based Initiative 2014) online (pdf)< https://www.sfu.ca/ipinch/sites/default/files/resources/reports/treatyrelations_finalreport_2014.pdf> [Asch, et. al.] and see e.g., accounts of Indigenous Elders in Harold Cardinal & Walter Hildebrandt, Treaty Elders of Saskatchewan: Our Dream is that Our People Will One Day be Clearly Recognized as Nations" (Calgary Alberta: University of Calgary Press, 2000) [Cardinal and Hildebrant].

Treaties were not one-time historical events that extinguished jurisdiction; "instead, they create a continuous, forward-looking relationship and structured process for building the imperial constitutional order in North America."[159] Treaty delegations authorized "settlements and immigration, but they never authorized imperial authority or colonization …."[160]

When interpreting treaties, the SCC has said one must seek to identify the common intention of the parties at the time a treaty was signed by considering treaty text, oral understandings,[161] and context for negotiation including Indigenous understandings, laws, and institutions.[162] Treaties are also to be interpreted in a way that ambiguities are resolved in favour of First Nation signatories, presume the honour and integrity of the Crown, and promote purposive fulfillment. Adopting these principles, self-determination over various forms of heritage can also be persuasively argued as a treaty right. For example, Elder accounts of negotiations, the emphasis placed by Commissioners on safeguarding "ways of life", and express terms in the treaty document consistent with this general purpose such as the right to "pursue traditional avocations of hunting, trapping and fishing" evidence that cultural continuity formed part of the common intention of the parties.[163] The language of kinship used in negotiation and in the text of many treaties also affirms this intention and to create "a permanent living relationship beyond the particular promises" and a "partnership guided by the principle that settlement would cause no harm."[164] Further use of ceremonial items and representative imagery at the time of treaty negotiations and within the text of the treaty itself reflect a common intention not to interfere with cultural and spiritual beliefs and practices. The existence of promises in treaties of peace and friendship in eastern Canada that expressly provide for "free exercise of religion and customs" support this interpretation.[165]

Some First Nations and Inuit have also negotiated land claims and modern treaties that speak more expressly to Indigenous heritage. The purpose of these comprehensive, constitutionally protected agreements is to recognize and clarify rights of Indigenous signatories who have not previously entered treaties with the Crown, including with respect to title and governance over land and resources. Chapters in these agreements touch on Indigenous heritage in the broadest sense of the term, including through development, implementation and institutionalization of governance, management, and co-management of cultural landscapes, including parks, sites, monuments, and natural resources. They also contain terms specific to Indigenous sites, objects and associated intangible heritage, repatriation of cultural belongings and ancestral remains, ownership and control of archaeological and ethnographic heritage, and other heritage matters.

[159] *Supra* note 145 at 22.
[160] *Ibid.*
[161] *R v. Marshall,* [1999] 3 SCR 456.
[162] See e.g., *Restoule v. Canada (Attorney General*), 2021 ONCA 779 (CanLII).
[163] See Cardinal and Hilderbrant, *supra* note 158 and see Asch et. al., *supra* note 158 at 155.
[164] Asch, *ibid*. at 267.
[165] *R v Sioui,* [1990] 1 SCR 1025.

As discussed below, in the Yukon and BC this has been accompanied by amendments to legislation to facilitate repatriation.

1.3 Private Land

A barrier to increased Indigenous control over heritage sites or objects on or under private land is lack of higher court authority on Aboriginal title to private lands, limited authority on treaty rights relating to private land, and the assumption that such claims are "dubious or peripheral."[166] For example, some argue Aboriginal title has the same features as private ownership so cannot logically exist at the same time with private title or Aboriginal title has always been described in Canadian law as a burden on the Crown's title. These are among the reasons, for example, that lower courts in Canada have held that the provincial land titles system does not anticipate or enable Aboriginal title and other s. 35 interests to be registered against private titles at land title registries.[167]

There are very few cases that directly addresses the application of Aboriginal title claims to private land. One that does is the decision of the Ontario Court of Appeal (CA) *Chippewas of Sarnia* case.[168] Leave to appeal to the SCC was denied in this case. In 1853 title was issued to owners by the government of the time relying on what was proven to be an illegal surrender of First Nation land. By the time the dispute came to court, the land had passed through many purchasers who relied on the validity of the title. The Ontario CA held that it would be wrong to deny a remedy where Aboriginal title had been proved to privately held land, but also that rights of innocent third parties relying on the validity of their individual title had to be respected. It did not grant the remedy sought to set aside the titles of the private landowners and left open for future litigation the issue of whether the First Nation may have a cause of action to claim compensation from the Crown.

This case did not say that private title terminates Aboriginal rights or that such rights and private title can't exist in the same land at the same time. For example, the SCC has held that treaty rights to hunt may exist where private land is unoccupied and not put to an incompatible use[169] and there may be a right of compensation where private title has been issued without Aboriginal title

---

[166] *Tsilhqot'in*, *supra* note 149 at para 79 quoting *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, 2004 SCC 73 at para 37: "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties."

[167] See e.g., *R. v. Paulette*, [1976] S.C.J. No. 89, [1977] 2 S.C.R. 628 (S.C.C.);*Lac La Ronge Indian Band v. Beckman*, [1990] S.J. No. 218, 70 D.L.R. (4th) 193 (Sask. C.A.);*Chippewas of Kettle and Stony Point v. Canada*, [1994] O.J. No. 1073, 4 C.N.L.R. 34 (Ont. Gen.
Div.); *James Smith Indian Band v. Saskatchewan (Master of Titles)*, [1995] S.J. No. 213, 123 D.L.R. (4th) 280 (Sask. C.A.); and *Skeetchestn Indian Band et al v Registrar of Land Titles*, [2000] B.C.W.L.D. 770 (Can. B.C.S.C)

[168] *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135; leave to appeal to S.C.C. denied, [2001] S.C.C.A. No. 63 [*Chippewas of Sarnia*].

[169] *R v Alphonse*, (1993) 80 B.C.L.R. (2d) 17 (Can. B.C.C.A.); see also with respect to access to exercise treaty rights on private land *R v Badger*, (1996) 133 D.L.R. (4th) 324 (Can.).

being negotiated. However, the difficulty of Indigenous peoples obtaining an order for possession to lands held by private landowners has fueled arguments about the subsistence of any Indigenous rights on private lands and consequential Crown obligations, such as the duty to consult. For example, in a few lower court decisions the government of B.C. has argued because the prospect of obtaining ownership, possession or control of a site on private land is so remote, if a duty to consult does exist, it exists on the very low end of the spectrum, requiring only notice and information sharing about Crown decisions.[170] However, many of these cases were decided before the SCC decision in *Tsilhqot'in.* The Alberta Court of Appeal has also held that land held privately or dedicated for a particular purpose for a significant period are factors that weigh against a finding of significant adverse impact on treaty rights and in favour of the minimum standard of consultation.[171]

John Borrows argues Canadian constitutional law calls for a different understanding of the relationship of Indigenous rights and private property. It requires "Courts, Parliaments, Legislatures and Indigenous governments" to "do all they can to ensure no one is unjustly deprived of the benefits of their long-settled expectations regarding land use and occupation — and this goes for both Aboriginal title holders and third-party holders or private land interests."[172] Citing the SCC in *Mikisew* he emphasizes that "reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions" is the fundamental principle in interpretation and recognition of Indigenous constitutional rights.[173] An equally fundamental principle of "our legal system [is] that the right asserted by the claiming party must be considered in relation to the rights of others."[174] No form of property right is absolute, Indigenous or private. For example, private property rights are subject to taking and regulation by governments for many reasons and were intentionally excluded from constitutional protection, although common law principles and statutes call for fair processes and compensation to owners in many circumstances.

Recognition of potential multiple and conflicting interests in the same land calls on Indigenous and non-Indigenous governments to negotiate creative solutions. Borrows observes that "most Indigenous peoples recognize that the dispossession of their non-Aboriginal neighbours would not be just, fair, honourable or in accord with their society's own law and morality."[175] However, Indigenous interests can interact with private title. For example, if private landowners are properly compensated, Canadian law does not prevent putting limits on future disposition of private lands where significant sites are located except to, or with the consent of, an Aboriginal

[170] See e.g., *Hupascasath First Nation v British Columbia (Minister of Forests)* (2005) 51 B.C.L.R. (4th) 133 (Can. B.C.S.C.) [update].
[171] *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation*) (2013) ABCA 443.
[172] John Borrows, "Aboriginal Title and Private Property" (2015) 71 S.C.L.R. (2d) 91 at 121 online:< https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1307&context=sclr>.
[173] *Ibid.* citing *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388, at para. 1.
[174] *Supra* note 172 at 122.
[175] *Supra* note 172.

title holder.[176] Rights of access to private land could also be granted on certain conditions, as is done for example under surface rights legislation for the purposes of extracting Crown minerals. Aboriginal and treaty rights could also "combine individual and collective ownership in new ways, which take inspiration from older shared visions of North American settler/Indigenous life. Indigenous laws that protect both so-called common and private spaces might bring these interests together in new and productive ways."[177]

Despite these arguments, federal and provincial governments are reluctant to interfere with private property rights because of economic and political costs. For example, most provincial heritage legislation does not include an ability to grant access, stewardship responsibilities or other rights to Indigenous peoples often leaving no way to accommodate rights on private land other than through prohibiting development, permitting it subject to conditions, or paying to expropriate the land. Political costs are significant given the potential implications for private landowners. The costs to owners to hire the experts do the necessary research and to comply with permits can be significant because, as a matter of provincial heritage management policy or regulation, the developer of land usually pays. However, increased public support for Indigenous rights and decisions such as the Quebec decision on Bill C-92 and *Tsilhqot'in* help tip the balance in favour of Indigenous jurisdiction and rights recognition particularly where treaties have not been negotiated.

A recent example is the dispute over a home being built over top of burial cairns on Grace Islet in British Columbia. The HCA provides some mechanisms to protect Indigenous interests on private land including denial of permits, the ability to enter agreements with First Nations to manage their own heritage sites, and for purchase of sites by the province. After many months of unsuccessful negotiation and protest, in December 2014 and following the decision in *Tsilhqot'in*, the Cowichan Tribes filed an Aboriginal title claim to protect ancestral burials on Grace Islet from destruction and desecration – the first Aboriginal title claim to private land ever filed in BC and one of very few in Canada.[178] Following significant protest, news coverage and public pressure, the province of B.C. eventually entered into an agreement with the federal government to purchase Grace Islet from the owner and with the affected First Nations for its stewardship.[179]

Fundamentally, the protection and control of significant heritage areas is not only a question of Canadian property and constitutional rights, but individual and collective human rights of Indigenous peoples. This is particularly so in the case of burial areas and ceremonial belongings.

---

[176] *Ibid.* at 131.
[177] *Ibid.*
[178] Katherine Palmer Gordon, Uncharted Territory (January 2015), http://focusonline.ca/?q=node/819 [Palmer Gordon].
[179] *Ibid*. and Wendy Stueck, *British Columbia pays $5.45-million for Grace Islet* (Feb. 16, 2015), THE GLOBE AND MAIL, www.theglobeandmail.com/news/british-columbia/british-columbia-pays-545-million-for-grace-islet/article23022593/. Under the agreement, "the Nature Conservancy of Canada holds title to the land and will work with local First Nations and the province to develop remediation and conservation plans."

These rights include "the right to be buried (or not) according to [one's] own cultural traditions;"[180] to practice, develop and teach spiritual and religious traditions, customs and ceremonies; maintain, protect, and have access to religious and cultural sites; use and control ceremonial objects; respect for Indigenous legal traditions in these matters; and free prior and consent in approving any project that has a potential to impact their cultural, intellectual, spiritual and religious sites and property. Although most provinces have some form of protection for burial sites in heritage legislation, lack of reporting, resourcing, monitoring and location of these sites all contribute to issues of protection and enforcement.

2.0 Overview of Federal and Provincial Legislation

It is beyond the scope of the first draft of this document to address potential applications of UNDRIP to the legislation in any detail or to do a comprehensive review of all federal and provincial laws that affect Indigenous heritage in Canada. It is limited to summarizing legislation that expressly references repatriation, export and import of Indigenous belongings, ancestral remains and archaeological heritage and examples from provincial heritage property/conservation legislation that regulates the designation, protection, and excavation of historic and other sites of significance to Indigenous peoples. It also does not address policy or practice initiatives.

2.1 Provincial Heritage Law

All Canadian provinces have legislation concerning archaeological and historical sites (as defined by legislation) and "resources" located on public or private provincial lands.[181] Most of these laws provide a means to designate and protect historic resources; reporting of archaeological sites, remains and objects discovered inadvertently; and control archaeological excavation through a permit system, impact assessments, stop orders and penalties for non-compliance. They also prohibit destruction, damage, desecration, excavation, or alteration without a permit and include offences and penalties for contravening the legislation.

Alberta, Saskatchewan, and Manitoba vest title to archaeological material under public or private property and other historical objects (defined by legislation) in the Crown. For example, in 1978 the *Alberta Historic Resources Act* [182] was amended to provide that property rights in all archaeological resources and paleontological resources within Alberta are held by the Crown. In

[180] James A.R. Nafziger, *The Protection and Repatriation of Indigenous Cultural Heritage in the United States*, in Catherine Bell & Robert K. Paterson, eds. *Protection of First Nation Cultural Heritage: Laws, Policy and Reform* (Vancouver/Toronto: U.B.C. Press, 2009) 110 at 118.

[181] It is important to note that references in legislation to Indigenous belongings and ancestors as archaeological heritage. Property or resources is offensive to many Indigenous peoples. This memo uses the language in the legislation to describe existing law and in awareness that this terminology is problematic.

[182] RSA 2000, c.H-9 s.32(1).

Manitoba, custodial rights are recognized in private landowners and finders, "unless the finder or owner, as the case may be, elects to give custody of the heritage object to the Crown."[183] Archaeological heritage includes all evidence of human occupation that comes out of the ground (or underwater). Everywhere in Western Canada, except Alberta, the law applies not only to such items in the ground, but on the ground. It may also include rock carvings, paintings, and culturally modified trees.

As the province has ownership, the province can regulate protection and disposition. The common law principle that "no one can give what they do not have" (*nemo dat quod non habet*) operates to prevent the acquisition of ownership from anyone other than the Crown after the effective date of the legislation. Some provinces express this principle in their legislation and all Western provinces prohibit removal outside of the province without a permit. For example, s. 66.1(7) of the *Saskatchewan Heritage Property Act* provides: "No person shall buy, sell, offer for sale, trade or otherwise dispose of or remove from Saskatchewan any archaeological object or paleontological object found in or take from land in Saskatchewan without written permission of the minster."[184]

BC legislation is silent on the issue of ownership. The HCA implies Crown ownership by requiring a permit to remove, move or alter a heritage object. However, it can be argued that it is unclear in BC who has title, even if the object is acquired in violation of the legislation, absent a ruling by the court. The enforcement of provincial export prohibitions contained in BC and other provincial heritage legislation is also dependent on the law of the province within which the illegally exported property is situated. Once removed there is little that can be done to compel return. Absent interprovincial agreements and federal law on interprovincial trafficking, remedies may be limited to fines and other penalty provisions that do not include declarations of title or restitution.

All provincial heritage conservation statutes strive to balance economic development and scientific study against the importance of preserving heritage. However, different concepts of what is valuable heritage and relationships with archaeological heritage often results in development and removal of material culture to government repositories for conservation, rather than *in situ* protection and understanding of the relationship of this heritage to the living cultures of Indigenous peoples. For example, the Supreme Court of Canada (SCC) described the process and purpose of the HCA in *Kitkatla* as follows:

> The Act purports to give the provincial government a means of protecting heritage objects while retaining the ability to make exceptions where economic development or other values outweigh the heritage value of the objects. In the British Columbia context, this generally means that the provincial government must balance the need to exploit the

[183] *The Heritage Resources Act,* C.C.S.M. c. H39.1. Although Canadian common law would also allocate custodial rights in this way, subject to limitation of actions legislation applying to vest ownership in custodians and contracts between owners and custodians, owners have the right to take custody.
[184] *Supra* note 22.

province's natural resources, particularly its rich abundance of lumber, in order to maintain a viable economy that can sustain the province's population, with the need to preserve all types of cultural and historical heritage objects and sites within the province.[185]

Like other provincial heritage conservation legislation, heritage sites on private and public land are protected under the HCA through designation of a specific identified site as "provincial heritage sites" (section 9) or as non-designated sites protected because of historical, archaeological, or other heritage value and a site alteration permit system (sections 12.1–12.8). Several types of sites are automatically protected under the HCA including places containing physical evidence of human use or activity predating 1846, burial places, and aboriginal rock carvings or paintings.[186] 1846 is the date that the border was fixed between Canada and the United States and Britain asserted sovereignty over Vancouver Island recognizing it as a colony. This is one of many aspects of the HCA of concern to First Nations and BC heritage professionals which advocate for a more unified understanding of heritage which reflects national and international understandings, includes tangible and intangible heritage and is not limited to specific dates.

Similarly in Saskatchewan, sites of "a special nature" receive protection under the *Heritage Property Act*:

64(1) Notwithstanding the other provisions of this Act, no person shall destroy, desecrate or deface any pictograph, petroglyph, human skeletal material, burial object, burial place or mound, boulder effigy or medicine wheel.

(2) No person shall remove, excavate, or alter any pictograph, petroglyph, human skeletal material, burial object, burial place or mound, boulder effigy or medicine wheel except as authorized by a subsisting permit from the minister.

Another common feature of heritage legislation is the ability of the Minister to protect heritage objects (as defined by legislation) through designation and registration and the automatic protection of archaeological and other heritage objects from damage, alteration, desecration, and removal from the province. However, as in the case of sites, these terms are not defined and are sometimes a source of conflict – for example over what constitutes "desecration." Crown ownership and control does not extend to objects removed or taken from private lands prior to the effective date of the statute which varies from province to province. Further, protection may be limited to items of a certain age. For example, under the HCA there is no automatic prohibition against damage, excavation, digging, altering, or removing objects from post 1846 sites other than burial places or aboriginal rock paintings or rock carvings of historical or archaeological value (s.12.1(2)(b)-(d)). Traditional use sites that do not leave any detectable, physical evidence are not protected by provincial heritage legislation but may be considered in environmental

[185] *Kitkatla, supra* note 126 at para. 76.

[186] 1846 is the date that the southern border was fixed between Canada and the United States and Vancouver Island was recognized as a British territory by Great Britain.

assessment processes and in BC, as part of the required process for forest licenses and timber sales.[187]

Unlike other provincial legislation, the HCA anticipates consultation with First Nations to define the extent of, or to exempt from protection, non-designated automatically protected First Nations sites such as burial, rock art and pre-1846 archaeological sites (section 12.1[4]). This is one of several amendments made in the 1990s following engagement sessions with First Nations and the broader BC public. Various factors influenced the government's decision to have these sessions including cases recognizing Aboriginal title in BC, recommendations of the Royal Commission on Aboriginal Peoples, and the enactment of NAGPRA in the United States.[188] Although many recommendations were not incorporated, changes were made to strengthen protections for archaeological sites, for example through the ability of the Minister to require heritage reports paid for by developers before any permits issue.[189]

The HCA also enables the Minister to "enter into a formal agreement with a first nation with respect to the conservation and protection of heritage sites and heritage objects that represent the cultural heritage of the aboriginal people" (section 4) and to further specific objectives of the Act (section 20[1][b]). The only s. 4 Agreement entered to date is a one year pilot project that covers an itemized list of objects and sites on Crown land and sets out a process for shared decision making including significant weight being given the Stó:lō First Nation's perspectives on what constitutes desecration of a landscape feature and whether proposed measures are sufficient to prevent desecration. Notably absent from the HCA and other provincial statutes, but that may be included in s. 4 agreements, is an express and mandatory duty for the province to consult or obtain the consent of First Nations before issuing heritage inspection, investigation or site alteration permits for protected sites or disposing of heritage objects.

Nevertheless, it is common in most provinces that some consultation happens before issuing permits occurs as a matter of policy, but this practice is varied and inconsistent depending often on lack of sufficient staff and resources, change in government, and location of the site. Further, many archaeologists and actors in the heritage sector are reviewing practice and policy considering the TRC and UNDRIP. However, significant issues remain, for example relating to reporting of discoveries, insufficient consideration of Indigenous concerns in conditions for permits, and enforcing heritage protections.

2.2 Provincial Repatriation

Repatriation occurs largely pursuant to policy or practice in response to a particular request or situation. Some publicly funded federal, provincial, and territorial museums have electronically

[187] Michael A. Klassen, *et. al*., "First Nations, Forestry, and the Transformation of Archaeological Practice in British Columbia, Canada" (2009) 2(2) Heritage Management 199 at 210.
[188] NAGPRA, *supra* note 21.
[189] Klassen, *supra* note 187.

and publicly accessible policies, some are in the process of amending policies, and many do not have easily publicly accessible policies. Few universities have developed policies, the exception being the University of British Columbia Museum of Anthropology, The University of Toronto Department of Anthropology, and the University of Alberta Museums and Collection Policy.[190] The Canadian Association of Libraries, Archives and Museums Associations have all made recommendations seek to respond to the TRC and UNDRIP. [191] The latter recommends enactment of repatriation legislation consistent with recommendations of the Indigenous Heritage Circle and Yellowhead Institute and draws on research, roundtables, listening circles, workshops, interviews, written submissions and direction from the CMA Reconciliation Council. For example, the Yellowhead Institute calls for development of federal, provincial and territorial repatriation laws with "strong compliance measures" that "expand the notion of repatriation beyond bodies to funerary objects, 'sacred' objects, and objects of cultural patrimony," takes into account "the shortcomings of NAGPRA and is "led by communities of Indigenous artists, curators, cultural administrators, Elders, and other respected Indigenous cultural leaders within Reserve and urban communities."[192] The United Nations Expert Mechanism on Indigenous Peoples [EMIRP] also calls for domestic and international repatriation legislation.[193]

Only Alberta has specific legislation directed at repatriation. Potential liability and the desire for a clear and transparent process by government were the primary motivators for *Alberta's First Nations Sacred Ceremonial Objects Repatriation Act.*[194] Although enacted in aid of specific repatriation negotiations between the Blackfoot people of Alberta and the Glenbow for return of medicine bundles and other ceremonial items, it also applies to the Royal Alberta Museum and

---

[190] For a list of and links to museum and university policies see Rebecca Bourgeois, Repatriation in Canada: A Guide for Communities (University of Alberta and Kule Institute for Advanced Studies, June 2021) https://era.library.ualberta.ca/items/2dfb153e-76da-4cac-a968-a3f6b2e3a61c.

[191] See e.g., Callison, Camille. *Truth and Reconciliation Report and Recommendations: Submission to the Canadian Federation of Library Associations (*2018) online:<. https://cfla-fcab.ca/wp-content/uploads/2017/04/Truth-and-Reconciliation-Committee-Report-and-Recommendations.pdf> and Stephanie Danyluk and Rebecca Mackenzie, *Moved to Action: Activating UNDRIP in Canadian Museums* (Canadian Museums Association, 2002) https://museums.ca/uploaded/web/TRC_2022/Report-CMA-MovedToAction.pdf.

[191] See *ibid* at para 76.

[192] "A 15 Point Guide: Standards of Achievement for the Relationship Between Indigenous Peoples & Cultural Institutions in Canada" from the Yellowhead Institute Special Report by Lindsay Nixon, *A Culture of Exploitation: "Reconciliation" and the Institutions of Canadian Art* online:< https://yellowheadinstitute.org/wp-content/uploads/2020/08/guide-standards-of-achievement-l-nixon-yi.pdf>.

[193] The United Nations (UN) has also established a Report of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), which is mandated to provide the Human Rights Council with expertise on the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and assist Member States with implementing UNDRIP. In 2020, an EMRIP was produced on the thematic studies of the repatriation of ceremonial objects, human remains and intangible cultural heritage which also calls for development, adoption, and implementation of national policies and legal frameworks for repatriation (at para 76). See Human Rights Council, *Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, 45th Sess, UN Doc A/HRC/45/35 (2020) 1 [EMRIP] at para 3 and 86.

[194] RSA 2000, c F-14.

all First Nations in Alberta. It is intended to "ensure First Nations communities have full ownership and responsibility [for] spiritual artifacts" and "to harmonize the role of museums in preservation of human heritage with the aspirations of First Nations to support traditional values...."[195] Section 1(e) defines sacred ceremonial objects as objects, the title to which is vested in the Crown and are "vital to the practice of the First Nation's sacred ceremonial traditions."

Prior to the enactment of Alberta's legislation, some thought returning a large number of items could potentially expose the Glenbow and the government to legal liability as provincial law provided that objects in the Glenbow collection are held by the provincial Crown and Glenbow on behalf of the citizens of Alberta.[196] Glenbow had the authority to manage its collections, including loans to First Nations, however Ministerial approval was required to deaccession and difficult to obtain including because of concerns over conflicting claims. The Act facilitates return to the Blackfoot by relieving the Glenbow and the Province of any legal liability arising from repatriation done in good faith pursuant to the Act.[197] First Nations initiate the repatriation process by negotiating regulations. The Minister must grant approval for repatriations in accordance with the regulations unless, in the Minister's opinion, repatriation would be considered inappropriate (s. 2(1)(2)). Repatriation involves transfer to a First Nation of the Crown's title and acceptance by the First Nation on behalf of all the people of that First Nation. Rules around repatriation of sacred ceremonial items not covered by the Blackfoot agreement are governed by regulations.

Museums legislation in Saskatchewan and British Columbia also have provisions that speak to repatriation. For example, BC statutory reform evolved to address the interplay of repatriation with treaty negotiation, statutory and common law obligations. The BC *Museum Act* [198] gives the Board of Directors authority to dispose of items in the collection at its discretion: "(i) after considering the cultural significance of the objects and public interest in retaining the objects in the collection, and (ii) in accordance with the ethical and other standards." Section 5 further provides:

> s.5(7) On the request of the government, the corporation must transfer all of its legal interest in and possession of an artifact in the collection to an aboriginal people if
>
> (a)a treaty or other agreement with the government provides that the artifact is to be transferred to the aboriginal people, and

[195] Alberta, Legislative Assembly, *Hansard*, 01 (Feb. 17, 2000) at 4 (Speech from the Throne) and *Repatriation Act*, *supra* note 121, Preamble.
[196] The legislation creating the Glenbow Institute and outlining rules with respect to its collections was amended to allow for repatriation and to indicate that except where property has been repatriated, it is held by the Crown on behalf of the people of Alberta. *See Glenbow Alberta Institute Act,* R.S.A. 2000, c.G-6, ss. 20-21.
[197] Catherine Bell, "Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform" in Catherine Bell and Robert K. Paterson, eds. *Protection of First Nation Cultural Heritage: Laws, Policy and Reform* (Vancouver/Toronto: U.B.C. Press, 2009) 15 at 47.
[198] RSBC 1996, c 326.

(b)the terms and conditions, if any, specified by the government for the transfer of the artifact have been met.

Section 6 of the *Royal Saskatchewan Museum Act,*[199] provides as follows:

Subject to the direction of the minister and any regulations made pursuant to this Act, and after consultation with Aboriginal peoples determined appropriate by the minister, the museum is responsible for developing a policy to address the concerns of Aboriginal peoples about the access to and the care, use and repatriation of sacred and culturally sensitive objects originating with their cultures in the museum collections.

Aboriginal sacred and culturally sensitive objects are defined as "any object that: (i) has been used in an Aboriginal ceremony; (ii) reflects the spiritual power of an Aboriginal person; (iii) was left as an offering in an Aboriginal ceremony or practice; or (iv) has ongoing historical or cultural importance to an Aboriginal community" (s.2(a)). Section 6(2) also mandates the museum to consider the following principles in administering its collections and developing repatriation policy:

(a) Aboriginal peoples have a connection with Aboriginal sacred and culturally sensitive objects, regardless of where those objects are held;

(b) Aboriginal sacred and culturally sensitive objects in the museum collections are vital to the maintenance of traditional ways;

(c) the deeper meanings associated with Aboriginal sacred and culturally sensitive objects are known only to Aboriginal members of their cultures of origin.

The limited provincial legislation that exists has helped to facilitate repatriation. However, it can also be criticized on many levels when viewed through the lens of UNDRIP including the narrow scope of its application to peoples, institutions and items and ministerial control. Also important is to give equal consideration of Indigenous laws, effective mechanisms for shared decision making and dispute resolution, addressing the burden placed on Indigenous peoples to seek out and identify their belongings, access to information about collections, funding and other concerns raised by Indigenous peoples in relation to provincial and institutional repatriation laws and policies.

2.3 Private Collections

In the same year that Alberta passed repatriation legislation, the *Alberta Personal Property Bill of Rights* was enacted.[200] This legislation prevents the Crown from passing a law giving the Crown ownership of personal property which is owned by someone else unless a process is in place to

[199] SS 2007, c R-23.01 s2(a) & 6.
[200] R.S.A. 2000, c. A-31.

determine and pay fair compensation (s.2). Personal property is defined as "tangible personal property that is capable of being physically touched, seen or moved" (s. 2). Similar legislation does not exist in other provinces or territories.[201] However, there are some judicial decisions that suggest there may be an obligation to pay compensation when any form of private property is taken by legislation – taking being understood in this context as denial of all economically beneficial or productive use.[202] Consequently, federal and provincial governments are unlikely to enact repatriation legislation that extends to a wide range of privately owned items given the potential costs. Very different legal and ethical considerations apply to material now in public ownership and material in the hands of private individuals. Statutory taking of public property is easier to accomplish because the principle of protecting *bona fide* third parties enshrined in Western law is easier to refute than in a private context and is unlikely to invoke the requirement of compensation or the necessity to remove this right by legislation—actions which run contrary to government and public perceptions of fairness and likely to cause opposition.

Despite the challenges posed by private collections, UNDRIP calls on Canada, BC and others committed to its implementation to provide "redress through effective mechanisms" for the taking of sites, belongings, and other expressions of cultural heritage without consent or in violation of Indigenous laws, traditions, and customs. Examples include through diplomacy aimed at restitution of ancestral remains and belongings and to change laws in other countries that are barriers to restitution. Other initiatives could include addressing issues of Indigenous ownership to items in the ground before removal or within the custody of institutions that derive title from the government, access to funding to develop the means to locate and purchase significant items, a national institute to help facilitate research and repatriation, tax incentives for private owners to donate them back to Indigenous peoples, and consulting with and obtaining the consent of Indigenous peoples on amendments to legislation concerning sale and export of "cultural property" including through strengthening and enforcing laws concerning desecration, marketing or otherwise disposing of significant belongings and ancestral remains.

Like the United States, federal and provincial governments could also make it more difficult to transfer title to certain forms of property through recognition of Indigenous laws and jurisdiction. From the perspective of many First Nations, the solution to reconcile conflict between First Nation and Western law is through respect for laws and treaty jurisdictions of originating First Nations. For example, in the Piikani case study Reg Crowshoe calls for a system of law in which Nitsiitapii law operates in a "parallel, rather than a subordinate fashion, to Canadian law" and offers

[201] Property rights are not protected in the Canadian Constitution. The *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(a) includes a right to "enjoyment of property" and not to be deprived of it "except by due process of law," but this protection has been interpreted as procedural in nature and does not provide substantive protection against government takings. For further discussion see Richard W. Bauman, "Property Rights in the Canadian Constitutional
Context" (1992) 8 S.A.J.H.R. 344.

[202] In *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101 the Supreme Court held that unless words of a statute clearly demonstrate otherwise, legislation is not to be construed to enable takings of property without compensation.)

application and adjudication of military law as an example.[203] Other principles helpful for reconciliation can be found in United States common law and legislation. Judicial opinion supports looking to tribal law to ascertain the individual or communal nature of property and the validity of its disposition.[204] If tribal law has been violated, the common law rule of *nemo dat quod non habet* discussed earlier has been applied. According to this rule, a person cannot transfer greater rights in property than he or she has. This approach is adopted in United States repatriation law in NAGPRA which provides for repatriation of cultural patrimony of "ongoing historical, traditional, or cultural importance central to the...group or culture itself, rather than property owned by an individual" and considered by the group to be inalienable by *any* individual at the time of its separation from the group.[205] Tribal law of the originating group determines what is capable of individual ownership and alienable.

Also important to this approach would be consideration of limitations legislation that operates to vest title in a custodian of an object after a certain period has passed, regardless of defects in the chain of title. There are two main ways to address this legislation – litigation seeking a judicial decision that it does not apply given a particular circumstance and legislative amendment. The decision of the SCC in the Manitoba Métis Federation case suggests factors such as the availability of processes for reconciliation of Indigenous rights claims other than access to the courts, delay, power imbalances, access to information and whether the policy behind limitations legislation is served through its strict or will perpetuate a continuing injustice, are among the factors that will be considered.[206] However, courts will also take into consideration interests of innocent private good faith purchasers, particularly where there is no reason for them to "doubt the validity" of their title. This consideration weighs less in favour of retention of items to which the Crown or its repository has title. Challenges to ownership in this context requires consideration of the role government played in creating discriminatory laws and policies, societal and other pressures that resulted in belongings coming into their possession. UNDRIP and contemporary ethical norms also call on governments not to rely on such technical legal arguments, particularly in relation to repatriation requests for ceremonial objects and human remains (e.g., art. 12).

---

[203] See *e.g.* Brian Noble, "*Poomaksin*: *Skinnipiikani-Nitsiitapii* Law, Transfers, and Making Relatives - Practices and Principles for Cultural Protection, Repatriation, Redress and Heritage Law Making with Canada" in C. Bell & V. Napoleon, eds., *First Nations' Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver: University of British Columbia Press, 2008) 258 at 300.

[204] See *e.g. Journeycake v. Cherokee Indian Nation*, 24 Ct. Cl. 281 (1893) , aff'd 155 U.S. 196 (1894) (W.L.) at 302 explaining the concept of Aboriginal communal property and *Seneca Nation of Indians v. Hammond* 3 Thompson and Cook (N.Y. Sup. Ct.) 347 (App. Div. 1874) where the court concludes those who purchased bark contrary to the laws of the Seneca Nation did not acquire title and could not confer title to the defendants

[205] NAGPRA defines cultural patrimony as "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual…and such object shall have been considered inalienable by such Native American group at the time the object was separated from the group." NAGPRA, *supra* note 21 s. 3(D)

[206] *Manitoba Metis Federation Inc. v. Canada (Attorney General)* [2013] 1 S.C.R. 623 paras. 215-302.

2.4 Ancestral Remains and Burial Places

In the event of discovery of remains, police first determine if the site is a crime scene or something else such as an unrecorded burial site or an archaeological site under provincial law. If it is determined the site is archaeological then policy regulations and procedures require reporting, usually to an archaeological branch of government, and in some instances the protocols and practices for archaeological remains may require contacting the nearest First Nation or internment in a common burial site. Coroners and public health legislation may also apply regulating such matters as investigation, interment, disinterment, and transportation.[207]

Burial places and items are often categorized as archaeological and/or ethnographic property in Canadian legislation. There is significant opposition from Indigenous peoples to treatment of remains as archaeological material and Indigenous laws vary concerning care and appropriateness of scientific study. For this reason, some heritage statutes are silent on this issue of ownership. Others vest ownership in the Crown and all have procedures and practices concerning notification to First Nations and repatriation that may be affected by the location of the remains. For example, the *Heritage Resources Act* of Manitoba provides "The property in, and the title and right of possession to, any human remains found by any person after May 3, 1967, is and vests in the Crown" (s. 45). This can be contrasted to the HCA which is silent on ownership, but as in other provinces, makes it an offence to "damage, desecrate or alter a burial place that has historical or archaeological value or remove human remains or any heritage object from a burial place that has historical or archaeological value" (s. 12.1(2)(b)).

Unlike remains in cemeteries, remains in burial sites may be treated in law as property and subject to scientific study. For example, the *Saskatchewan Heritage Property Act* provides:

> 65(1) All buried human skeletal material not found in a recognized cemetery or otherwise identified is the property of the Crown.
>
> (2) All excavated or naturally exposed human skeletal material shown to predate 1700 A.D. is to be forwarded to the minister for reinterment following scientific examination or any use for research or educational purposes that the minister shall decide.
>
> (3) All excavated or naturally exposed Amerindian skeletal material post- dating 1700 A.D. is to be made available to the Indian Band Council nearest the discovery site for disposition following scientific examination or any use for research or educational purposes that the minister shall decide.
>
> (4) All excavated or naturally exposed human skeletal material postdating 1700 A.D. other than that mentioned in subsection (3) is to be reinterred by the minister in the nearest

[207] Government of Canada, human remains, online:https://parks.canada.ca/docs/r/pfa-fap/sec7/decouv_discov3.

cemetery following scientific examination or any use for research or educational purposes that the minister shall decide.

Under common law, unless changed by statute, the human body is not owned by anyone, but certain persons may be recognized as having control and responsibility in relation to remains in different contexts (e.g., criminal investigation, on death, scientific research). Section 182 of the *Criminal Code* also makes it an offence to interfere with improperly or indecently, or offer an indignity to, a dead human body or human remains. However, if the remains are archaeological the application of this section is uncertain and will be balanced against the alleged indignity (e.g. scientific study as contrasted to selling remains). There are judicial decisions in New Zealand and Australia that recognize cultural and religious values and contemporary human rights norms in defining indignity and allocating rights of control over ancestral remains to Indigenous peoples.[208] UNDRIP, federal and provincial law implementing UNDRIP, the reasoning in these cases, and contemporary ethics concerning the treatment and repatriation of remains all support including Indigenous laws, perspectives, and practices of descendant Indigenous peoples in defining what constitutes "offering an indignity" to ancestral remains.

2.5 Federal Repatriation Legislation (Catherine Bell and Charlotte McLachlan)

In 2018 a private members bill was introduced in Parliament proposing a national strategy for repatriation of Indigenous human remains and cultural property.[209] Bill C-391 was introduced to be "an incremental step to encourage governments, institutions, and private collectors to reorient their thinking around the collection, custody, study, and use of indigenous cultural property."[210] If passed, Bill C-391 would have required collaboration with Indigenous representatives to create a strategy with the follow goals:

1. Implement a mechanism by which any First Nations, Inuit or Métis community or organization may acquire or reacquire Indigenous human remains or cultural property;
2. Encourage owners, custodians or trustees of Indigenous human remains or cultural property to return such material to Indigenous peoples and support them in the process;

[208] For example, *Jones v Dodd* [1989] ACSC 125 a decision of the Australian Supreme Court, involved a disagreement between a former common law spouse and the father of a deceased Indigenous Australian. In upholding the lower court decision that Aboriginal customs and beliefs concerning burial of the deceased should be determinative, the appellate court emphasized cultural, religious, and spiritual factors along the then *Draft Declaration on the Rights of Indigenous Peoples.*

[209] Bill C-391, *supra* note 8.

[210] 1st reading, *House of Commons Debates*, 42-1, No 255 (1 February 2018) at 1005 (Bill Casey).

3. Support the recognition that preservation of Indigenous human remains and cultural property and of access to that material for educational and ceremonial purposes are principles of equal importance;
4. Encourage consideration of traditional ways of knowing rather than relying on strict documentary evidence in relation to the repatriation of Indigenous human remains and cultural property; and
5. Resolve any conflicting claims to Indigenous human remains or cultural property, whether within or between Indigenous communities or organizations, in a manner that is respectful of Indigenous traditional processes and forms of ownership and that allows claimants to be self-represented.

The Act would have also required regular reporting to Parliament but was not passed due in part to the pandemic. It is unclear if or when similar legislation will be proposed in the future.

Although well intentioned, the bill received mixed responses from Indigenous people and the heritage community including concerns about lack of mandatory language, substance, funding commitments and failure to align with UNDRIP rights and standards. An array of concerns are were also raised in the House of Commons Debates, including lack of consultation with Indigenous communities, heritage institutions, provinces, territories, and private property owners.[211] Mr. François Choquette (Drummond, New Democratic Party) emphasized the need for a financial commitment to accompany the Act stating "some communities are unable to conserve their artifacts even if they want to and will be forced to give them to museums because of budgetary constraints. There are no financial resources allocated to help preserve these precious and sometimes fragile artifacts [emphasis added]."[212] This is important for the development and implementation of a national strategy and aligns with the 2020 EMRIP recommendations that repatriation programs should be fully funded to ensure that museums and Indigenous peoples are not carrying the burden "that States have to comply with their human rights obligations."[213]

Mr. Romeo Saganash of the New Democratic Party raised concerns that Bill C-391 was not aligned with the UNDRIP and about the financial burden placed on Indigenous communities to prove ownership of an artifact for a successful repatriation claim.[214] Other concerns raised in the parliamentary debates included weak language like "encourage" making many of the provisions of the bill unenforceable,[215] the definition of "Aboriginal cultural property" the need for

[211] See e.g., 3rd Reading, *House of Commons Debates*, 42-1, No 382 (19 February 2019) [Debate No 382] at 1715 (Francois Choquette); 2nd Reading, Debate No 286 (26 April 2018) at 1800 [Debate No 286] (Cathy McLeod); 2nd Reading, Debate 304 ((30 May 2018) at 1745 [Debate No 304] (Arif Virani).
[212] Debate No 382, *supra* note 211 at 1720 (Francois Choquette).
[213] EMRIP, *supra* note 193 at para 87.
[214] Debate No 286 *supra* note 211 at 1745-50 (Romeo Saganash).
[215] See *ibid* at 1750 (Romeo Saganash).

definitions to be developed as part of the national strategy itself with Indigenous communities,[216] and limits imposed by qualifying language such as "strong attachment".[217] Further, the Bill did not expressly reference the TRC and repatriation is a part of the on-going reconciliation process.[218] Creating meaningful relationships with Indigenous communities is a vital part of the process.

Concerns were also raised by the Conservative Party of Canada. Among them was the need to consider how other laws may limit the ability of museums, galleries, libraries, and other publicly funded institutions to repatriate. Noting Parks Canada and the Museum of History already had repatriation policies in place, CPC Member Peter Van Loan emphasized the need to protect private property interests and the need for explicit language indicting the Bill does not apply to individuals or museums that are not willing to "deacquisition or deaccession" artifacts.[219]

The CPC further critiqued Bill C-391 for not adequately considering the public interest of learning, appreciating, and understanding Indigenous culture through allowing the public to view cultural property artifacts and requested an amendment "that would ensure that consideration be given to the public interest in artifacts being available to Canadians in a way that enhances knowledge and appreciation of Aboriginal culture." [220] In response, Liberal Member Mr. Robert-Falcon Ouellette stated repatriation is centered around building relationships and working together, "not simply about indigenous people taking back and never sharing."[221] Bill C-391 aligns with building a continued working relationship through the development of the national strategy.

The CPC additionally had concerns around the special care required to "preserve and protect the quality and integrity" of the Indigenous cultural property.[222] The CPC calls for an amendment to Bill C-391 for consideration of best care. Ensuring that artifacts are preserved in a way that they will be available to instruct and inspire future generations is important to the public interest consideration as well. The Expert Seminar on EMRIP states "it is important to remove existing requirements and conditions that are unfairly and arbitrarily placed on Indigenous communities, which must have access to proper facilities to handle their belongings."[223]

Another critique of Bill C-391 is that it does not speak to the role of Indigenous laws. The 2020 EMRIP states that "in all instances, indigenous peoples' own laws, customs and traditions must be followed by all participants with respect to treatment of ceremonial objects, human remains and cultural heritage."[224] Furthermore, the 2020 EMRIP calls on Member States and Indigenous

[216] See *ibid*.
[217] *House of Commons Debates*, 42-1, Debate No 360 (28 November 2018) at 1825(John Nater).
[218] See Debate No 286, *supra* note 211 at 1755 (Randy Boissonault).
[219] Debate No 286, *supra* note 211 at 1730 (Hon Peter Van Loan).
[220] See Debate No 286, *supra* note 211 at 1735 (Hon Peter Van Loan).
[221] Debate No 304, *supra* note 211 at 1810 (Robert-Falcon Ouellette).
[222] Debate No 286, *supra* note 211 at 1735 (Hon Peter Van Loan).
[223] University of British Columbia, "Repatriation of Ceremonial Objects and Human Remains under the UN Declaration on the Rights of Indigenous Peoples" (5 March 2020), online: <https://indigenous.ubc.ca/indigenous-engagement/featured-initiatives/expert-seminar-indigenous-repatriation-practices/> [UBC Seminar] at 38.
[224] See EMRIP, *supra* note 193 at para 17.

peoples to "enter into agreements regarding the ultimate return of these items to indigenous peoples' territories, consistent with their own laws, customs and traditions, and/or alternative dispositions affirmatively requested by indigenous peoples."[225] It recommends that Federal legislation should assist Indigenous communities in achieving their goals through clarifying the rights of Indigenous communities, particularly around ownership rights.[226] Neither the role of Indigenous law or ownership were addressed in Bill C-391, however the development and implementation of the national strategy could potentially create space for both.

Although well intended, lack of consultation on the Bill gave rise to these and other critiques. Although concerned with UNDRIP, it did not follow the process anticipated by UNDRIP for enacting new legislation – to consult and cooperate in good faith to obtain the free, prior and informed consent of Indigenous peoples before adopting and implementing legislative or administrative measures that affect them." However, the discussions surrounding Bill C-391 signify the importance of continued conversation around repatriation legislation and different views that need to be reconciled across the political spectrum.

2.6 Federal Export and Import Legislation

The Cultural Property Export and Import Act (CPEI)[227] regulates the import and export of moveable "cultural property," which is defined in the legislation. It seeks to balance the right of persons to freely sell and trade in privately owned property with the desire to keep cultural objects of national importance in Canada. It does this through a system of export permits and tax benefits that encourage donations to Canadian institutions and public authorities defined in the Act, and the provision of grants and loans to assist designated organizations (including Indigenous governments and cultural organizations) to prevent export and repatriate cultural objects. It is the federal legislative response to Canada's assent to the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership in Cultural Property*.[228]

The Act establishes the Canadian Cultural Property Export Control List and describes a wide range of material that may be included on the list.[229] To be included, property must be at least 50 years old and made by someone no longer living. Currently the list includes archaeological material (Aboriginal and non-Aboriginal of any value) and non-archaeological Canadian Aboriginal artifacts of a fair market value of more than $3,000. Under the permit system, temporary and permanent export permits are issued for objects that have been in Canada less than 35 years or are on loan.

---

[225] *Ibid* at para 89.
[226] See UBC Seminar *supra* note 223 at 36.
[227] *Supra* note 65.
[228] (1971)10 I.L.M. 189.
[229] Canadian Cultural Property Export Control List (C.R.C., c. 448) online:< https://laws-lois.justice.gc.ca/eng/regulations/C.R.C., c. 448/index.html>.

Applications for permanent export of items on the control list may be referred to expert examiners to determine if the item is "of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of arts or sciences".[230] Objects meeting these criteria are to be denied export permits. However, the exporter may appeal to the Canadian Cultural Property Export Review Board established to review applications for export permits, determine the fair market value of objects or collections and certify cultural property for income tax purposes. The Review Board can delay an export for a maximum of six months. The purpose of this delay is to allow the Moveable Cultural Property Division of the Department of Canadian Heritage to notify Canadian institutions and public authorities (mostly museums and art galleries) so that they have an opportunity to purchase the item and prevent export.

The CPEI offers ways to repatriate items removed from Indigenous communities and burial grounds through grants and loans. Under the CPEI, Canadian institutions and public authorities can apply for Moveable Cultural Property Grants to assist them purchase cultural objects for which export permits have been denied. The terms and conditions of the grant program administered by the Department require designation as a Category "A" or "B" institution for eligibility. Category "A" designation is granted by the Minister of Canadian Heritage for an indefinite period of time to institutions and public authorities that fall within the legal definitions under the *Act*, and receive repeat gifts of cultural objects; are established primarily for the purpose of exhibiting, collecting and preserving cultural material; are accessible to the public; and meet certain legal, curatorial and environmental standards to effectively preserve cultural property that is displayed and stored. Category "B" designation is a one-time designation that may be acquired for this or tax certification purposes, provided certain requirements concerning adequate security and preservation are met.[231] Designated organizations are in Canada and demonstrate the ability to ensure the long-term preservation of cultural property.

Enacted in the 1970s, this legislation is inconsistent with UNDRIP in several ways. For example, there is no requirement to notify Indigenous communities of origin, Indigenous cultural institutions or governments prior to the issuance of an export permit even it is identified by an expert examiner as being significant cultural property. Only Category A institutions are notified and even though a First Nation organization may be able qualify for a one time Category B designation for the purpose of funding, there is no obligation to notify Category B institutions and appropriate professional expertise and technical measures for exhibition, preservation and storage will be considered. There is also no mechanism in the CPEI to address issues of validity of title, prohibit export, or requirement to have Indigenous expert examiners or representation on the Review Board. However, attempts have been made in the administration of the CPEIA to address some of these concerns. For example, Indigenous artists have been appointed to sit on

[230] *Supra* note 65, s.11(1).
[231] Canada, "Designated Organizations – Moveable Cultural Property", online:< https://www.canada.ca/en/canadian-heritage/services/funding/movable-cultural-property/designated-organizations.html>.

the Review Board and value thresholds for Indigenous material have also been kept low in recognition that there is not always a direct correlation between market value and cultural significance.[232]

However, in instances where First Nations are aware of the export, for example through notification by an expert examiner that recognizes its significance and feels ethically obliged to do so, they have partnered with institutions to apply for grants and "buy back" significant cultural items wrongfully or otherwise removed from their communities. An example is the collaboration between the Saanich Heritage Society and the Simon Fraser University Museum of Archaeology and Anthropology regarding the purchase of SDDLNEWHALA, a seated human figure stone bowl. The Museum was able to apply for a federal Moveable Cultural Property Grant. The application clearly indicated that the funds were for the Saanich Heritage Society, but that the museum would "care for the bowl until such time as the Saanich requested the bowl's return."[233] However, in some instances the buy back can be at significantly inflated prices substantially different from the purchase price paid by the seller seeking the export permit.

The Act also contains provisions prohibiting the import into Canada of cultural property illegally exported from foreign States. Courts may order recovery of the property and, where valid title or *a bona fide* purchase can be established, compensation may be ordered to be paid by the foreign State to the individual, institution, or public authority in Canada. [234]

2.7 Bill C-23

Canada is also in the process of enacting Bill C-23: *An Act respecting places, persons and events of national historic significance or national interest, archaeological resources, and cultural and natural heritage.*[235] If enacted Bill C-23 seeks to respond to the Truth and Reconciliation Commission of Canada's (TRC) Calls to Action 79(i) and (ii) by adding Indigenous representation to the Historic Sites and Monuments Board of Canada in addition to provincial/territorial representatives; requiring the board to consider the best available information including Indigenous and community knowledge in its recommendations to the Minister; and providing a process for including in the Public Register "places other than historic places, including, at the request of an Indigenous governing body…identified by that body as being a place of heritage value or significance" without having to prove "national significance." Call to Action 79 provides:

---

[232] For further discussion of the legislation and critique see e.g., Catherine Bell & Robert K. Paterson, "International Movement of First Nations Cultural Heritage in Canadian Law" in Catherine Bell & Robert K. Paterson, eds. *Protection of First Nation Cultural Heritage: Laws, Policy and Reform* (Vancouver/Toronto: U.B.C. Press, 2009) 78

[233] Barbara Winter et.al, "At the Crossroads" (1994) 26:1 The Midden 7-8.

[234] *Supra* note 65 at s 37

[235] Bill C-23, *Historic Places of Canada Act* (short title) Canada, 4th Sess., 44th Parl. (2022), (First Reading June 7, 2022).

> We call upon the federal government, in collaboration with Survivors, Aboriginal organizations, and the arts community, to develop a reconciliation framework for Canadian heritage and commemoration. This would include, but not be limited to:
>
> i. Amending the Historic Sites and Monuments Act to include First Nations, Inuit, and Métis representation on the Historic Sites and Monuments Board of Canada and its Secretariat.
>
> ii. Revising the policies, criteria, and practices of the National Program of Historical Commemoration to integrate Indigenous history, heritage values, and memory practices into Canada's national heritage and history.
>
> iii. Developing and implementing a national heritage plan and strategy for commemorating residential school sites, the history and legacy of residential schools, and the contributions of Aboriginal peoples to Canada's history.

Although these are positive steps, among concerns raised about the legislation is the need "to consult and cooperate" with Indigenous peoples given the potential impact of this legislation on Indigenous heritage. The scope of Bill C-23 encompasses federal lands under the administration of a federal authority (excluding Indian reserves, surrendered lands or other lands set aside for Bands as defined under federal legislation). The Minister has discretional decision-making over many areas that implicate Indigenous cultural heritage - for example concerning designation, management, transmission, protection and control or revocation of designations of Indigenous heritage. The Bill speaks to consideration of Indigenous history, values, and memory practices; it does not call on the Minister or other actors to work in collaboration with affected Indigenous communities or to develop consensus seeking processes to identify, respect, recognize and integrate Indigenous laws, norms, and practices concerning designation, management, transmission, protection and control or revocation of designations of Indigenous heritage affected by the legislation.

Conclusion

Later drafts of this document will explore in further detail UNDRIP implications for the above legislation if the goal is to make it consistent with UNDRIP. With respect to Indigenous heritage, this goal has far reaching implications it is impacted by a wide array of federal and provincial laws, policy, and practice as well as by normative standards informing governmental and non-governmental organizations and professional associations in the heritage sector. In addition to the laws discussed above, other examples include laws regulating parks, the environment, forestry, libraries, archives, museums, non-profit organizations, access to information, and the *Indian Act*.

Law reform has not kept up with contemporary practice, ethics, constitutional rights, or international human rights norms. Whether change to federal and provincial law is necessary to

facilitate repatriation from publicly funded museums remains an issue of debate given advancement in policy and willingness to negotiate return of significant items and ancestral remains. However, Indigenous peoples are united on the need to re-examine provincial heritage laws impacting their archaeological and other heritage.

A Selection of Electronic Resources on Repatriation & Heritage Legislation

Michael Ash, et. al., *Treaty Relations as a Method of Resolving IP and Cultural Heritage Issues* (IPiNCH *report* 2014) https://www.sfu.ca/ipinch/sites/default/files/resources/reports/treatyrelations_finalreport_2014.pdf; and see summary fact sheet https://www.sfu.ca/ipinch/sites/default/files/resources/reports/treatyrelations_projectsummary_2014.pdf.

Catherine Bell & Sarah Lazin, *A Selected Review of Federal and Provincial Legislation Implicating Indigenous Heritage in British Columbia* (First Peoples' Cultural Council, March 2022) https://fpcc.ca/resource/legislation-on-indigenous-heritage/.

FPCC Executive Summary Report, *A Summary of Federal and Provincial Legislation Implicating Indigenous Heritage in British Columbia* https://fpcc.ca/wp-content/uploads/2022/04/FPCC-Heritage-Legislation-Report-Executive-Summary-WEB.pdf.

Rebecca Bourgeois, Repatriation in Canada: A Guide for Communities (University of Alberta and Kule Institute for Advanced Studies, June 2021) https://era.library.ualberta.ca/items/2dfb153e-76da-4cac-a968-a3f6b2e3a61c.

Camille Callison, *Truth and Reconciliation Report and Recommendations: Submission to the Canadian Federation of Library Associations (*2018) online:<. https://cfla-fcab.ca/wp-content/uploads/2017/04/Truth-and-Reconciliation-Committee-Report-and-Recommendations.pdf>.

Jisgang Nika Collison, Sdaahl K'awaas Lucy Bell, Lou-ann Neel, Repatriation Handbook (Royal British Columbia Museum, 2019) https://royalbcmuseum.bc.ca/indigenous/repatriation-handbook.

Darlene Fisher, "Repatriation Issues in First Nations Heritage Collections" (2012) online:< https://jis.athabascau.ca/index.php/jis/article/view/79/75>.

Indigenous Heritage Circle, *Indigenous Heritage and the United Nations Declaration on the Rights of Indigenous Peoples* (IHC & Parks Canada, May 2022) https://indigenousheritage.ca/wp-content/uploads/2022/05/IHC-UNDRIP-Report-EN-medium-res-May-2022-1.pdf.

Indigenous Heritage Circle, Closer to Home: Indigenous Heritage in Archives Outside Canada https://callacbd.ca/resources/Documents/Closer%20to%20Home%20Symposium%20Report%20EN.pdf

Stephanie Danyluk and Rebecca Mackenzie, *Moved to Action: Activating UNDRIP in Canadian Museums* (Canadian Museums Association, 2002) https://museums.ca/uploaded/web/TRC_2022/Report-CMA-MovedToAction.pdf.

Lindsay Nixon, "A CULTURE OF EXPLOITATION: "Reconciliation" and the Institutions of Canadian Art" (August 2020, Yellowhead Institute) online: https://yellowheadinstitute.org/resources/a-culture-of-exploitation-reconciliation-and-the-institutions-of-canadian-art/.

David M. Schaepe, George Nicholas, Kierstin Dolata. *Recommendations for Decolonizing British Columbia's Heritage-Related Processes and Legislation* https://fpcc.ca/resource/recommendations-for-decolonizing-b-c-s-heritage-related-processes-and-legislation/.

UBC Museum of Anthropology, *Returning the Past: Repatriation of First Nations Cultural Property* (2008) https://moa.ubc.ca/wp-content/uploads/TeachingKit-Repatriation.pdf.

James (Sakej) Youngblood Henderson, "*UN Declaration on the Rights of IndigenousPeoples* and Treaty Federalism in Canada" https://www.constitutionalstudies.ca/wp-content/uploads/2021/02/02_Henderson-4.pdf.

Links to Legislation

Bill C-391*, An Act respecting a national strategy for the repatriation of Indigenous human remains and cultural property https://www.parl.ca/DocumentViewer/en/42-1/bill/C-391/third-reading.*

Bill C-23, Historic Places of Canada Act, https://www.parl.ca/DocumentViewer/en/44-1/bill/C-23/first-reading.

Canadian Cultural Property Export Control List (C.R.C., c. 448) online:< https://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._448/index.html>

Cultural Property Export and Import Act (R.S.C., 1985, c. C-51) https://laws-lois.justice.gc.ca/eng/acts/c-51/.

Declaration on the Rights of Indigenous Peoples Act (BC 2019) https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples.

First Nations Sacred Ceremonial Objects Repatriation Act, RSA 2000, c F-14, https://canlii.ca/t/52vmw.

Museum Act, RSBC 1996, c 326, <https://canlii.ca/t/jj5k.

The Heritage Property Act, SS 1979-80, c H-2.2 https://canlii.ca/t/53psl.

Royal Saskatchewan Museum Act, SS 2007, c R-23.01 s2(a) & 6 https://canlii.ca/t/55h3b.

United Nations Declaration on the Rights of Indigenous Peoples Act (2021) https://www.justice.gc.ca/eng/declaration/index.html.

United States

Native American Graves Repatriation Act 25 U.S.C. §§ 3001–3013 (2000)https://uscode.house.gov/view.xhtml?path=/prelim@title25/chapter32&edition=prelim.

UNDRIP

UN General Assembly, *United Nations Declaration on the Rights of Indigenous peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295 [UNDRIP] online < https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

AUSTRALIA AND NEW ZEALAND HERITAGE LAW SUMMARY

AUSTRALIA

I. Applicable Legislation in Australia

Like Canada, Australian statutes are divided between federal legislation and state/territorial legislation. Australia's six states and two territories have all developed cultural heritage legislation with varying degrees of similarity and some key differences between them.

Federal: *Environment Protection and Biodiversity Conservation Act 1999*

- Establishes the National Heritage List which includes natural, Indigenous, and historic places.[236]
    - The Guidelines for the Assessment of Places for the National Heritage List identify criteria such as importance to Australia's history, significance with a particular community or cultural group, and importance as part of Indigenous tradition as examples of places that might qualify as "outstanding heritage value" and which could be placed on the National Heritage List.[237]
- Establishes the Indigenous Advisory Committee to advise the Minister on the operation of the Act or perform such other written functions as the Minister may provide.[238]
- Binds the Crown but is silent on liability.[239]

Federal: *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

- The stated purpose of the Act is to preserve and protect areas and objects that are of "particular significance to Aboriginals in accordance with Aboriginal tradition."[240]
- Binds the Crown but is silent on liability.[241]
- Enables the Minister to make emergency declarations to preserve or protect significant Aboriginal areas from injury or desecration.[242]

---

[236] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), 1999/91, s 324C.
[237] Department of the Environment, Water, Heritage and the Arts, Australian Government, *Guidelines for The Assessment of Places for The National Heritage List*, Commonwealth of Australia: 2009, at 6-7.
[238] *Supra* note 236 at ss 505A-505B.
[239] *Ibid* at s 4.
[240] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), 1984/79, s 4.
[241] *Ibid* at s 6.
[242] *Ibid* at s 9.

- "Significant Aboriginal areas" are defined as areas of land/waters in Australia which are of "particular significance to Aboriginals in accordance with Aboriginal tradition."[243]
- "Aboriginals" are defined as members of the Aboriginal race of Australia "and includes a descendant of the indigenous inhabitants of the Torres Strait Islands."[244]

- Mandates persons who discover anything that they have reasonable grounds to suspect to be Aboriginal remains to report the discovery to the Minister.[245]

Federal: *Native Title Act 1993*

- The Act aims to recognize and protect native title by establishing mechanisms for determining claims to native title.[246]
- States that native title cannot be extinguished contrary to the Act.[247]
- Binds the Crown and all States and Territories, but explicitly prohibits Crown liability for offences.[248]
- Enables applications to the Federal Court to make determinations of native title.[249]
- Permits compensation to native title holders in certain cases.[250]
- Creates the Native Title Registrar[251] and National Native Title Tribunal.[252]
- Permits provision of financial assistance to States and Territories facing compensation claims related to native title.[253]

Federal: *Protection of Movable Cultural Heritage Act 1986*

- Prescribes a National Cultural Heritage Control List which identifies objects not to be exported other than in accordance with permits or certificates.[254]
- Prohibits importation of protected objects of foreign nations.[255]
- Creates the National Cultural Heritage Committee which provides advice to the Minister and maintains the register of expert examiners.[256] At least one

[243] *Ibid* at s 3(1).
[244] *Ibid*.
[245] *Ibid* at s 20(1).
[246] *Native Title Act 1993* (Cth), 1993/100, s 3.
[247] *Ibid* at s 4(1).
[248] *Ibid* at s 5.
[249] *Ibid* at s 13.
[250] *Ibid* at s 17(1).
[251] *Ibid* at s 95(1).
[252] *Ibid* at s 107.
[253] *Ibid* at s 200.
[254] *Protection of Movable Cultural Heritage Act 1986* (Cth), 1986/11, s 8.
[255] *Ibid* at s 14.
[256] *Ibid* at ss 15-16.

member must be a person of the Aboriginal race of Australia or a descendant of an Indigenous inhabitant of the Torres Strait Islands.[257]

- Establishes the National Cultural Heritage Account which "may be expended for the purpose of facilitating the acquisition of Australian protected objects for display or safe-keeping."[258]

Australian Capital Territory: *Heritage Act 2004*

- Provides for the recognition, registration and conservation of places and objects of natural and cultural significance.[259]
- Creates the Heritage Register and Heritage Council.[260]
- Discovery of an Aboriginal object or place must be reported in writing to the Heritage Council, who must then arrange for consultation with the representative Aboriginal organization related to the place or object.[261]
    - "Aboriginal object" and "Aboriginal place" mean an object/place "associated with Aboriginal people because of Aboriginal tradition.[262]

New South Wales: *The National Parks and Wildlife Act 1974*

- Establishes, preserves, and manages national parks and historic sites, and protects certain Aboriginal objects.[263]
    - "Aboriginal object" means "any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains."[264]
- Creates the Aboriginal Cultural Heritage Advisory Committee which advises the Minister and Secretary of the National Parks and Wildlife Service on identifying, assessing, and managing Aboriginal cultural heritage, and provides strategic advice on heritage impact permit processes.[265]
- Provides authority to the Minister to make designations of Aboriginal objects (which are the property of the Crown) and may dispose of Aboriginal objects by returning them to an Aboriginal owner.[266]

---

[257] *Ibid* at s 17(1A).
[258] *Ibid* at s 25(B).
[259] *Heritage Act 2004* (ACT), 2004/57, s 3.
[260] *Ibid* at Parts 3-4.
[261] *Ibid* at ss 51, 53.
[262] *Ibid* at s 9.
[263] *National Parks and Wildlife Act 1974* (NSW), 1974/80.
[264] *Ibid* at s 5(1).
[265] *Ibid* at ss 27-28.
[266] *Ibid* at s 85(A).

- "Aboriginal owner" is defined as Aboriginal persons having a cultural association with the land in the Register of Aboriginal Owners kept under the *Aboriginal Land Rights Act 1983.*[267]

- The Aboriginal heritage impact permits may be issued under prescribed considerations, which does not include consultation, as the applicant for the permit is ultimately responsible for consultation.[268]

Northern Territory: *Northern Territory Aboriginal Sacred Sites Act 1989*

- The Act's stated purpose is to balance the preservation and enhancement of Aboriginal cultural tradition with the economic, cultural, and social aspirations of Aboriginal and all other peoples in the territory. [269]
- Establishes procedures for the protection and registration of sacred sites and establishes procedures for the avoidance of sacred sites in development and use of land.
    - "Sacred site" is defined according the *Aboriginal Land Rights (Northern Territory) Act 1976:* "a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance to Aboriginal tradition."[270]
- Binds the Territory Crown and, if the Territory Crown commits an offence against the Act, makes the Territory Crown liable to be prosecuted as if it were a body corporate.[271]
- Establishes the Aboriginal Areas Protection Authority, made up of 12 members with the Chairperson being an Aboriginal member.[272]
- The Aboriginal Areas Protection Authority establishes and maintains a Register of Sacred Sites, and issues (or denies) Authority Certificates to persons proposing to use or carry out work on land.[273]

Northern Territory: *Heritage Act 2011*

- The object of the Act is "to provide for the conservation of the Territory's cultural and natural heritage."[274]
- Part 2.1 declares Aboriginal/Macassan archaeological places and objects as heritage places and object.

[267] *Ibid* at s 5(1).
[268] *Ibid* at s 90K.
[269] *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), 1989/29.
[270] *Ibid* at s 3(1).
[271] *Ibid* at s 4(2).
[272] *Ibid* at ss 5-6.
[273] *Ibid* at Part III.
[274] *Heritage Act 2011* (NT), s 3(1).

- Promotes conservation of heritage places and objects by establishing a process for declarations. However, a declaration made by the Minister may still include that work may be carried out on the heritage place or object without a work permit.[275]
- Establishes the Heritage Council which provides advice and recommendations to the Minister under the Act. The Council does not specify Aboriginal membership, but does require a representative from the Aboriginal Areas Protection Authority.[276]
- Permits the Minister to enter into a heritage agreement with the owner of a heritage place or object, subject to consultation with the Council. The agreement may permit or restrict work on the place or object, and if it affects a registered land title, the agreement becomes a registrable interest and has the effect of a covenant over the land.[277]

Queensland: *The Aboriginal Cultural Heritage Act 2003*

- The stated purpose of the Act is to provide "effective recognition, protection and conservation of Aboriginal cultural heritage."[278] One of the underlying principles states that "Aboriginal people should be recognized as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage".[279]
- The Act purports to recognize Aboriginal ownership of Aboriginal human remains, and Aboriginal cultural heritage which is held in State collections or which is lawfully taken away by an Aboriginal party.[280]
- Binds all persons, including the State, but does not make the State liable to be prosecuted for an offence.[281]
- "If a particular object or structure is evidence of Aboriginal occupation, the area immediately surrounding the object or structure is also evidence of Aboriginal occupation to the extent the area can not be separated from the object or structure without destroying or diminishing the object or structure's significance as evidence of Aboriginal occupation."[282]
- The Minister may register a corporation as an Aboriginal cultural heritage body.[283] The function of an Aboriginal cultural heritage body is to identify Aboriginal parties for the area.[284]

[275] *Ibid* at s 34(2)(a).
[276] *Ibid* at s 128(2)(b).
[277] *Ibid* at s 70(2)(b)(i).
[278] *Aboriginal Cultural Heritage Act 2003* (QLD), 2003/79, s 4.
[279] *Ibid* at s 5(b).
[280] *Ibid* at ss 6(a)-(c).
[281] *Ibid* at s 3(2).
[282] *Ibid* at s 11.
[283] *Ibid* at s 36.
[284] *Ibid* at s 37.

- Establishes both an Aboriginal Cultural Heritage Database and an Aboriginal Cultural Heritage Register, which assemble information about Aboriginal cultural heritage and are intended to be used as research and planning tools.[285]
- Enables the development and implementation of cultural heritage management plans which may require that developers receive authority prior to starting development.

Queensland: *Torres Strait Islander Cultural Heritage Act 2003*

- Stated purpose is "to provide effective recognition, protection and conservation of Torres Strait Islander cultural heritage."[286]
- Binds all persons including the State, but denies State liability for offences.[287]
- Principles underlying the Act's main purpose include recognition of Torres Strait Islanders as "primary guardians, keepers and knowledge holders" of cultural heritage.[288]
- "Torres Strait Islander cultural heritage" is defined as anything that is a significant Torres Strait Islander area/object, or evidence of Torres Strait Islander occupation in Queensland.[289]
- Identifies Torres Strait Islander cultural heritage which is not in the ownership of the State (human remains, prescribed secret or sacred objects, cultural heritage which is lawfully owned, etc.). Other than those listed, all Torres Strait Islander cultural heritage is owned by the State.[290]

South Australia: *The Aboriginal Heritage Act 1988*

- Binds the Crown but is silent on liability.[291]
- Establishes the Aboriginal Heritage Committee which consists of Aboriginal persons from all parts of the State and which functions as an advisory body to the Minister on matters relating to Aboriginal cultural heritage.[292]
- The Minister is to maintain a confidential archive relating to Aboriginal heritage and to dedicate a part of the archive to the Register of Aboriginal Sites and Objects.[293] A site or object is presumed to be an Aboriginal site or object once entered in the Register for the purposes of legal proceedings.[294]

[285] *Ibid* at ss 38-39, 46-47.
[286] *Torres Strait Islander Cultural Heritage Act 2003*, (QLD), 2003/80, s 4.
[287] *Ibid* at s 3.
[288] *Ibid* at s 5.
[289] *Ibid* at s 8.
[290] *Ibid* at s 20.
[291] *Aboriginal Heritage Act 1988* (SA), 1988/12, s 4.
[292] *Ibid* at ss 7-8.
[293] *Ibid* at s 9.
[294] *Ibid* at s 11(a).

- Establishes the South Australian Aboriginal Heritage Fund which may be applied by the Minister to acquiring land or Aboriginal objects, making research grants or loans in relation to Aboriginal heritage, or for any other purpose related to protection/preservation of Aboriginal heritage.[295]

Tasmania: *The Aboriginal Heritage Act 1975*

- Defines persons of Aboriginal descent as anyone descended wholly or partly from the original inhabitants of Australia.[296]
- Establishes the Aboriginal Heritage Council which makes recommendations and provides advice to the Minister.[297] All members of the Council are to be Aboriginal persons.[298]
- Minister may make declarations of protected sites based on findings of relics.[299]
    - "Relic" is defined as the human remains of an Aboriginal, or any Aboriginal "object, site, or place that bears signs of activities" of original inhabitants or descendants, or any "artefact, painting, carving, engraving, arrangement of stones, midden, or other object, made or created by" Aboriginal and which is of significance to the Aboriginal people of Tasmania".[300]
- The Minister may acquire relics which then become vested in the Crown.[301]

Victoria: *The Aboriginal Heritage Act 2006*

- The stated purposes of the Act are to provide for the protection of Aboriginal cultural heritage, to empower traditional owners as protectors of their cultural heritage, to strengthen the relationship of traditional owners with traditional land and waters, and to promote respect for Aboriginal cultural heritage.[302]
    - "Traditional owner" is defined in accordance with the *Traditional Owner Settlement Act 2010* and may include a group of Aboriginal persons, a native title holder, or in any other case, persons who are recognized by the Attorney-General as the traditional owners of the land.[303]
- Binds the Crown but silent as to liability.[304]

---

[295] *Ibid* at s 19.
[296] *Aboriginal Heritage Act 1975* (TA), 1975/81, s 2(2).
[297] *Ibid* at s 3.
[298] *Ibid* at s 4(2).
[299] *Ibid* at s 7.
[300] *Ibid* at s 2(3).
[301] *Ibid* at s 12.
[302] *Aboriginal Heritage Act 2006* (VI), s 1.
[303] *Traditional Owner Settlement Act 2010* (VI), 2010/62, s 3.
[304] *Supra* note 302*,* s 11.

- Establishes the Aboriginal Heritage Council which is composed entirely of Aboriginal persons.[305] The Council oversees the return of Aboriginal ancestral remails and advises the Minister on protection of Aboriginal cultural heritage.[306]
- Establishes the Cultural Heritage Fund which may be used to provide general assistance for protection, management, and conservation of Aboriginal cultural heritage, and to acquire land or other assets.[307]
- Enables Aboriginal cultural heritage land management agreements.

Western Australia: *The Aboriginal Cultural Heritage Act 2021*

- Amends and repeals the *Aboriginal Heritage Act 1972*.[308]
- Recognizes that Aboriginal people have a living relationship with cultural heritage.[309]
- Binds the Crown but is silent on liability.[310]
- Establishes the Aboriginal Cultural Heritage Council; an advisory body which must include two Aboriginal chairpersons.[311] The Council must in turn establish and maintain the Aboriginal Cultural Heritage Directory, which contains information about protected areas protection agreements, permits, and management plans.[312]
- Declares that Aboriginals have traditional rights and interests in areas that Aboriginal ancestral remains are located, and in respect of a secret or sacred object, are custodians of the remains/objects and are entitled to possession and control of the ancestral remains/objects.[313]
    - "Secret or sacred object" is defined as an "Aboriginal object that is secret or sacred to an Aboriginal person, group or community in accordance with Aboriginal tradition".[314]
    - "Aboriginal" is defined as a person is wholly or partly descended from the original inhabitants of Australia and who identifies as Aboriginal and is accepted as an Aboriginal person by an Aboriginal community.[315]
    - "Aboriginal tradition" is defined as the "living, historical and traditional observances, practices, customs, beliefs, values, knowledge and skills

[305] *Ibid* at ss 130-131.
[306] *Ibid* at s 132.
[307] *Ibid* at s 158D.
[308] Note: as of August, 2023, new legislation introduced to repeal the Act and reintroduce legislation from 1972. See *supra* note 71.
[309] *Supra* note 68, s 9(a).
[310] *Ibid* at s 14.
[311] *Ibid* at s 21(a)(i).
[312] *Ibid* at ss 211, 213.
[313] *Ibid* at ss 55 and 63.
[314] *Ibid* at s 11.
[315] *Ibid.*

of the Aboriginal people" and may be related to particular persons, areas, objects or relationships.[316]

- Prohibits the disturbance or removal of Aboriginal ancestral remains and the selling or removal of secret or sacred objects.[317]
- Enables applications for declarations of protected areas and the creation of Aboriginal cultural heritage protection agreements.[318]

II. Best Practice Standards for Reforming Territorial Legislation

Taking inspiration from the Māori Heritage Council in New Zealand, Heritage Chairs and Officials of Australia and New Zealand drafted a Best Practice Standards for Indigenous Cultural Heritage Management and Legislation in 2020 (the Standards).[319] The Standards are designed to guide jurisdictional reform of cultural heritage legislation that is consistent with UNDRIP principles. The recommended Best Practice Standards are:[320]

- Definitions in legislation recognize that Indigenous Cultural Heritage (ICH) is a living concept;
- Legislation should be structured to provide a blanket protection for ICH, subject only to authorizations granted with the consent of affected Indigenous peoples;
- Authorization made by Indigenous groups is genuinely representative of "Traditional Owners". Legislation should include mechanisms for the identification and appointment of an organization that can genuinely be accepted as the 'representative organization' of the affected community to undertake this role;
- ICH issues are considered early in any development process;
- Indigenous communities are provided with adequate resources to manage ICH processes;
- Enforcement regimes are effective and broadly uniform;
- Regimes for the management of Indigenous ancestral remains, and secret or sacred objects are based on the primacy of Traditional Owners;
- Recognition of frontier conflicted sites is undertaken only with participation and agreement of affected Indigenous communities.

[316] *Ibid.*
[317] *Ibid* at ss 61 and 67.
[318] *Ibid* at ss 72 and 206.
[319] *Supra* note 63 at 9.
[320] *Ibid* at 10.

NEW ZEALAND

I. Treaty of Waitangi (Te Tiriti o Waitangi)

New Zealand became a British Colony after the signing of the Treaty of Waitangi, which was executed on February 6, 1840 between the British Crown and about 540 Māori Rangatira (Chiefs).[321] The Treaty established British sovereignty over New Zealand and guaranteed the Māori possession to land and rights, along with incorporating Māori decision-making.[322] The Treaty has two different versions: one in English and one in Māori. Due to the differences in the translations, interpretations of the Treaty by New Zealand's Parliament tend to refer to the principles of the Treaty rather than the text itself.[323]

II. Creation and Role of Māori Heritage Council

The Māori Heritage Council (the Council) was established by section 84 of the *Historic Places Act 1993* (HPA) and continued under section 26 of the *Heritage New Zealand Pouhere Taonga Act 2014* (HNZPTA).[324] The Council consists of 8 persons appointed by the Minister of Culture and Heritage, at least 4 of whom must be Māori possessing the "skills, knowledge, or cultural background appropriate to the functions and powers of the Council".[325] Remaining Council members are appointed based on their knowledge of te ao Māori (Māori world view) and Tikanga Māori (Māori protocol and culture).[326]

The Council acts as an advisory body to Heritage New Zealand Pouhere Taonga (HNZPT), which was similarly created under the HPA and continued under the HNZPA. HNZPT's functions include administering over identified heritage sites and acting as a heritage protection authority under New Zealand's *Resource Management Act 1991*.327 HNZPT is specifically directed to recognize the interests of an owner when advocating for the conservation and protection of a heritage site.[328] The Council provides additional oversight of HNZPT by ensuring that in the protection of heritage sites HNZPT meets the needs of Māori in a culturally sensitive manner.[329] The Council

---

[321] New Zealand History, "The Treaty in brief: Page 1 – Introduction" (17 May 2017), online: <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief>.
[322] Memorandum from Stephanie Pankiw to Leah Howie (9 August 2021), "Memo #8 – Cultural Artifact Discovery New Zealand".
[323] "The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal", online: (pdf): <https://waitangitribunal.govt.nz/assets/Documents/Publications/WT-Principles-of-the-Treaty-of-Waitangi-as-expressed-by-the-Courts-and-the-Waitangi-Tribunal.pdf>
[324] *Supra* note 85, s 26.
[325] *Ibid* at s 26(2)(b).
[326] *Ibid* at ss 26(2)(a) and 10(3).
[327] *Ibid* at s 13(1).
[328] *Ibid* at s 13(2).
[329] *Ibid* at s 27(1)(a).

also develops programs for the identification and conservation of heritage sites of interest to Māori, and advocates for the interests of HNZPT and the Council so far as they relate to matters of Māori heritage at any public or Māori forum.[330]

III. Legislation

- *Heritage New Zealand Puhere Taonga Act, 2014* (HNZPTA)

  The stated purpose of the HNZPTA is "to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand."[331] The HNZPTA continues the HNZPT and Council established by prior legislation (see above), and makes specific recognition and linkages to the Treaty of Waitangi in section 7 given "the Crown's responsibility to give effect" to the Treaty.[332]

  The principles of the HNZPTA recognize that in the identification, protection, preservation and conservation of the country's historical and cultural heritage, all relevant cultural values should be taken into account, together with making efforts to safeguard options for present and future generations.[333]

  Part 3 of the HNZPTA provides protection of places and areas of historical and cultural value. HNZPT is permitted authority to enter into covenants with owners of heritage sites, so long as consent is garnered from landowners and other parties having registered interests. The covenant then becomes a registered land instrument which runs with the land and binds all subsequent landowners.[334] Subpart 2 of Part 3 provides overarching protection for sites that have been declared by the HNZPT as archaeological sites. Once under a declaration, persons hoping to undertake activities that may impact an archeological site must apply to the HNZPT for authority to conduct such activities.[335]

- *Heritage New Zealand Pouhere Taonga Policy*[336]

  In 2015, HNZPT published a Statement of General Policy with respect to the administration of archaeological provisions under the HNZPTA.[337]

---

[330] *Ibid* at s 27(1)(b)(i).
[331] *Ibid* at s 3.
[332] *Ibid* at s 7.
[333] *Ibid* at s 4.
[334] *Ibid* at s 41.
[335] *Ibid* at s 44.
[336] This section reproduced from: Memorandum from Stephanie Pankiw to Leah Howie (9 August 2021), "Memo #8 – Cultural Artifact Discovery New Zealand".
[337] "Statement of General Policy: The Administration of the Archaeological Provisions" (29 October 2015), online (pdf): *Heritage New Zealand Pouhere Taonga* < https://www.heritage.org.nz/resources/statements-of-general-policy>.

Most of the archaeological sites in New Zealand are of interest to Māori, and the term 'tapuwae' is used to symbolize Māori heritage footprints in the landscape of New Zealand.[338] Archeological sites that are not specifically related to Māori include sites that are related to early European contact, the settlement of New Zealand, and can include gold mining and whaling sites.[339]

The main objectives of the policy include:

- identifying archaeological sites in order to protect, preserve and conserve those sites, all the while taking into account Māori cultural values;
- ensuring that any decision affecting an archeological site is informed by all available information which is made publicly available, and working with landowners to manage archaeological sites on their property;
- kōiwi tangata (human remains) are treated in a sensitive and culturally respectful manner and appropriate processes must be followed and respected, including re-interment.[340] Kōiwi tangata means human remains of any race, but typically, inadvertently discovered human remains in New Zealand come from Māori origin;
- avoidance and protection of archaeological sites through early engagement with Māori stakeholders;[341]
- ensuring that all possible measures will be taken to minimize the impact on an archaeological site if modification or destruction is likely. Further, the HNZPT can impose conditions on an archaeological authority to reduce negative impacts on a site.

- *Protected Objects Act*[342]

The *Protected Objects Act 1975* (POA) outlines the illegal export and import of objects, the export of protected objects, and sale, trade, and ownership of artifacts found at archaeological sites in New Zealand. The stated purpose of the POA includes providing for the better protection of certain objects by enabling New Zealand's participation in the UNESCO Convention[343] and establishing and recording the ownership of taonga tūturu.[344] Taonga tūturu is defined in section 2 as an object that:

---

[338] *Ibid.*
[339] *Ibid* at s 3.
[340] *Ibid* at s 12.
[341] *Ibid* at s 16.
[342] This section reproduced from: Memorandum from Stephanie Pankiw to Leah Howie (9 August 2021), "Memo #8 – Cultural Artifact Discovery New Zealand".
[343] *Protected Objects Act 1975* (NZ), 1975/41, 1, s 1A(i).
[344] *Supra* note 85, s 1A(f).

(a) relates to Māori culture, history, or society; and

(b) was, or appears to have been,

(i) manufactured or modified in New Zealand by Māori; or

(ii) brought into New Zealand by Māori; or (iii) used by Māori; and

(c) is more than 50 years old.

Taonga tūturu is one of 9 categories that are protected objects in the POA, but taonga tūturu is the only category of objects in which the Act prescribes rules for ownership and trade.[345] Any taonga tūturu found anywhere in New Zealand or within the territorial waters of New Zealand is deemed to be prima facie the property of the Crown.[346] If any taonga tūturu has been recovered from the grave of person(s) whose identity is known, the matter shall be referred to the Māori Land Court to determine who is the proper person(s) to hold custody of the taonga tūturu.[347] If actual or traditional ownership, rightful possession, or custody of any taonga tūturu is subsequently claimed, the chief executive or any person who may have any right, title, estate, or interest in any such taonga tūturu may apply to the Māori Land Court to exercise any part of its jurisdiction under section 12; provided that no right, title, estate, or interest in any such taonga tūturu shall exist or be deemed to exist solely by virtue of ownership or occupation of the land from which the taonga tūturu was found or recovered.[348]

[345] "Ministry for Culture and Heritage, Protected Objects Act 1975: Guidelines for Taonga Tūturu" (10 December 2010), online (pdf): Manatu Taonga Ministry for Culture & Heritage <https://perma.cc/VU32-FPLM>.
[346] *Supra* note 85, s 11(1).
[347] *Ibid*.
[348] *Ibid* at s 11(2).

BILL C-391: AN ACT RESPECTING A NATIONAL STRATEGY FOR REPATRATION

Catherine Bell and Charlotte McLachlan

Introduction to Bill C-391

In 2018, House of Commons Member Mr. Bill Casey (Cumberland-Colchester, Liberal) introduced a private member's bill entitled Bill C-391, an act respecting a national strategy for the repatriation of aboriginal cultural property.[349] Bill C-391 progressed through to the first reading at the Senate, however the second reading was adjourned in May 2019 and has not had activity since then.[350]

Agreement across the parties is that Bill C-391 is well intentioned, however lacks important consultation and considerations. Bill C-391 attempts to establish a legal framework across Canada for repatriation, but does not consider its place within existing Indigenous, Canadian, and international legal systems. Furthermore, it is critiqued for a lack of consultation with Indigenous communities, the Canadian Museums Association (CMA), and other stakeholders such as the provinces, territories, and private property owners. There is an array of criticism surrounding the lack of considerations given to funding, language, public interest, care, reconciliation, and the national strategy in the creation of Bill C-391. Overall, Bill C-391 is critiqued from different representatives, but creates an important conversation about the on-going process of repatriation in Canada.

Legal Framework

Bill C-391 was introduced to be "an incremental step to encourage governments, institutions, and private collectors to reorient their thinking around the collection, custody, study, and use of indigenous cultural property."[351] It was designed to strengthen an Indigenous community's positioning when an item becomes available to return to the community through creating a standardized process for repatriation across Canada.[352]

The United Nations (UN) has established a Report of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), which is mandated to provide the Human Rights Council with expertise on the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and assist Member States with implementing UNDRIP.[353] In 2020, an EMRIP was produced on the

[349] "Bill C-391, an act respecting a national strategy for the repatriation of aboriginal cultural property", 1st reading, *House of Commons Debates*, 42-1, No 255 (1 February 2018) [Debate No 255] at 1005 (Bill Casey).
[350] See Parliament of Canada, "C-391" (2019), online: *LegisInfo* <https://www.parl.ca/LegisInfo/en/bill/42-1/c-391>.
[351] Debate No 255, *supra* note 349 at 1005 (Bill Casey).
[352] See *ibid*.
[353] See EMRIP *supra* note 193 at para 3.

thematic studies of the repatriation of ceremonial objects, human remains and intangible cultural heritage. The 2020 EMRIP calls for Member States to:

> …enable the access to and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned, and provide redress through *effective mechanisms*, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent [*emphasis added*].[354]

The 2020 EMRIP states that a vital area is the development, adoption, and implementation of national policies and legal frameworks for repatriation.[355] The *Native American Graves Protection and Repatriation Act* (NAGPRA)[356] is an example of a national legal framework which has established mechanisms for government to work with Indigenous peoples to repatriate human remains and ceremonial objects. NAGPRA is an example for Canada to look to when adopting repatriation legislation, however Canada can adapt new legislation that takes into consideration what was missed in NAGPRA. For example, NAGPRA is not fully funded which places the financial burden on museums and Indigenous peoples, as well the language of NAGPRA is ambiguous, leaving interpretation to the courts.[357] Through comparative research, Canada could learn from NAGPRA and create stronger repatriation legislation.

Although scholars have noted that Bill C-391 is not perfect, it could provide legal support to First Nations, Métis, and Inuit to exercise repatriation by holding institutions accountable.[358] It attempts to establish an effective mechanism and legal framework for repatriation across Canada as recommended by the EMRIP.

However, it is important to note that repatriation of Indigenous cultural objects does happen in Canada without federal legislation.[359] Many museums and the CMA, have built relationships with Indigenous communities in order to repatriate cultural objects and ancestral remains. There is discussion that the proactive and voluntary partnerships established by institutions sets a more

---

[354] *Ibid* at para 4.
[355] See *ibid* at para 76.
[356] NAGPRA *supra* note 21.
[357] See EMRIP, *supra* note 193 at para 78.
[358] See Hrycun, Leah Kirstie (2020), *Heart Work: Weaving Relationality into Métis Material Culture Repatriation* (Thesis, Faculty of Native Studies, University of Alberta) [Hrycun] at 16. Available at: https://era.library.ualberta.ca/items/f57f95a2-3115-4484-a56c-53f08b1e1034/view/900b2898-afb2-4149-8c3c-d0f332d1765a/Hrycun_Leah_202009_MA.pdf.
[359] See Ferber, Andrea, "The Rhizomes Of Repatriation" in *First American Art Magazine* 22 (Spring 2019) 52 at 53.

positive tone and is more aligned with reconciliation than if repatriation were to be mandated by the government.[360]

Indigenous Laws

A critique of Bill C-931's legal framework is that it does not incorporate or create space for Indigenous laws. The 2020 EMRIP states that "in all instances, indigenous peoples' own laws, customs and traditions must be followed by all participants with respect to treatment of ceremonial objects, human remains and cultural heritage."[361] Furthermore, the 2020 EMRIP calls on Member States and Indigenous peoples to "enter into agreements regarding the ultimate return of these items to indigenous peoples' territories, consistent with their own laws, customs and traditions, and/or alternative dispositions affirmatively requested by indigenous peoples."[362] Federal legislation should assist Indigenous communities in achieving their goals through clarifying the rights of Indigenous communities, particularly around ownership rights.[363] In order to have real and respectful consultations, the "Indigenous perspectives and knowledge must be regarded as legitimate" through the legislation.[364] This is not yet established under Bill C-391, however the development and implementation of the national strategy allows space for Indigenous laws.

Canadian Law

The Canadian Museum of History and Parks Canada Agency have existing policies and practices for repatriating human remains in the State's possession back to the Indigenous communities.[365] Currently, it is unclear how Bill C-391 fits into the Canadian legal framework, specifically with national and international repatriation requests. The 2020 EMRIP suggests assessing national laws that limit deaccessioning in order to reform the laws and legislate on repatriation effectively.[366] Bill C-391 does not take into consideration how the federal repatriation legislation fits into the existing Canadian legal framework.

International Law

Mr. Romeo Saganash (Abitibi—Baie-James—Nunavik—Eeyou, New Democratic Party) raised a concern that Bill C-391 was not aligned with UNDRIP.[367] For example, UNDRIP has specific reference to human remains, which is not acknowledged in Bill C-391 but is of significant concern

[360] See Hrycun, *supra* note 358.
[361] See EMRIP, *supra* note 193 at para 17.
[362] *Ibid* at para 89.
[363] UBC Seminar, *supra* note 223 at 36.
[364] *Ibid* at 17.
[365] Debate No 286, *supra* note 211 at 1735 (Hon Peter Van Loan).
[366] See EMRIP, *supra* note 193 at para 18.
[367] See Debate No 286, *supra* note 211 at 1745 (Romeo Saganash).

to Indigenous communities in regard to repatriating ancestral remains home. However, some representatives in the House of Commons debate did find that UNDRIP was complied with.[368]

UNDRIP requires a human rights-based approach to the repatriation of Indigenous peoples' cultural heritage objects and human remains. Included in this approach is the recognition of Indigenous peoples' rights to self-determination, culture, property, spirituality, religion, language, and traditional knowledge.[369] UNDRIP additionally recognizes the applicability of Indigenous peoples' "own laws, traditions and customs, which entail both rights and responsibilities towards ceremonial objects, human remains and intangible cultural heritage."[370] Articles 11, 12, and 31 of UNDRIP are important in assisting Indigenous peoples, governments, museums, and other stakeholders and should be incorporated into federal legislation on repatriation.[371]

Other international instruments to consider are the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Convention for the Protection of Cultural Property in the Event of Armed Conflict, Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects, International Covenant on Civil and Political Rights, Recommendation concerning the Protection and Promotion of Museums and Collections, Code of Ethics of the International Council of Museums, and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The UN, United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Intellectual Property Organization (WIPO) are international organizations to look to for establishing repatriation legislation that is aligned with international laws and customs.

The 2020 EMRIP encourages Member States to develop a process and mechanism to facilitate international repatriation of Indigenous cultural objects and human remains.[372] Furthermore, the 2020 EMRIP recommends that a framework for international repatriation of ceremonial objects, human remains, and intangible cultural heritage should be "firmly based on the United Nations Declaration on the Rights of Indigenous Peoples, in particular the rights to equality, non-discrimination, self-determination, participation and consultation, pursuant to articles 2, 3, 8, 18 and 19."[373] It is recommended that Member States enact or reform legislation on repatriation in

[368] See "Bill C-391, an act respecting a national strategy for the repatriation of aboriginal cultural property", Report Stage, *House of Commons Debates*, 42-1, No 360 (28 November 2018) [Debate No 360] at 1745 (Bill Casey).
[369] See EMRIP, *supra* note 193 at para 6.
[370] *Ibid* at para 6.
[371] See *ibid* at para 7.
[372] See *ibid* at para 85.
[373] *Ibid* at para 86.

accordance with UNDRIP.[374] UNDRIP should be a main instrument in guiding the development of a transparent repatriation process on national and international levels.[375]

Consultation

Indigenous Peoples

There is no clarity on who was consulted in the creation of Bill C-391 and it is important to consult with Indigenous peoples affected by a bill for them to provide guidance.[376] Consultations with Indigenous communities, States, museums, and international bodies such as UNESCO are important when developing a process for repatriation that are based in the rights affirmed in UNDRIP. [377] Free, prior, and informed consent (FPIC) is a requirement through these consultations and should be further strengthened in repatriation legislation.[378] Bill C-391 establishes the development and implementation a national strategy under section 3. However, the national strategy needs to be developed through collaboration with the affected communities as Indigenous communities across Canada are extremely diverse and there is no "one-size-fits-all" solution.[379] Mr. Dan Vandal (Saint Boniface—Saint Vital, Liberal) argues that a distinctions-based approach is possible through Bill C-391 and allows space for respective consultation with affected Indigenous communities, which is aligned with UNDRIP.[380]

Canadian Museum Association

There is disappointment amongst the Conservative Party of Canada (CPC) representatives that the CMA was not consulted during the drafting of Bill C-391.[381] Representatives put forth that the CMA has good working relationships with Indigenous communities and has a lot of expert knowledge. Earlier consultation with the CMA could have highlighted some of the issues with Bill C-391 and amended it to be more effective. The CMA can be used as a continued tool for understanding how to best promote mutual interests in repatriation.[382] The joint recommendation by the CMA and the Assembly of First Nations emphasized that museums and First Nations "should work together to correct the inequities that characterized their relationship in the past."[383] This should be considered for future conversations surrounding federal repatriation legislation.

---

[374] See *ibid* at para 87.
[375] See *ibid* at para 7.
[376] See Debate No 382, *supra* note 211 at 1715 (Francois Choquette).
[377] See UBC Seminar, *supra* note 223.
[378] See *ibid* at 17.
[379] Debate No 304, *supra* note 211 at 1810 (Dan Vandal).
[380] See *ibid*.
[381] See Debate No 286, *supra* note 211 at 1800 (Cathy McLeod).
[382] See *ibid* at 1735 (Hon Peter Van Loan).
[383] Debate No 304, *supra* note 211 at 1755 (Kevin Waugh).

Stakeholders

There is a lack of consultations for Bill C-391 with the provinces and the territories.[384] Consulting with the provinces and territories is important to the implementation of a national repatriation strategy and the governments should be a part of the conversation.[385] Furthermore, there was a lack of consultation surrounding the protection of private property rights.[386] This was a main concern for the representatives of the CPC.

Additional Considerations

Financial

Romeo Saganash raised concerns about the financial burden placed on Indigenous communities to prove ownership of an artifact for a successful repatriation claim. The financial component should be addressed in Bill C-391 to ensure Indigenous peoples are not blocked from repatriation due to financial constraints, as this is contrary to the inherent rights to cultural identity and cultural connection.[387] Mr. François Choquette (Drummond, New Democratic Party) strongly states that "some communities are unable to conserve their artifacts even if they want to and will be forced to give them to museums because of budgetary constraints. There are no financial resources allocated to help preserve these precious and sometimes fragile artifacts [emphasis added]."[388] This is why it is important for the development and implementation of a national strategy for repatriation to include a financial commitment. The 2020 EMRIP recommends that repatriation programs should be fully funded to ensure that museums and Indigenous peoples are not carrying the burden "that States have to comply with their human rights obligations."[389]

Language

Members of the CPC raised concerns about the language of Bill C-391. Honourable Peter Van Loan (York-Simcoe, CPC) spoke to the fact that Bill C-391 did not explicitly indicate that it was not intended to remove artifacts from people.[390] He proposed amendments that clarify Bill C-391 does not apply to individuals or museums that are not willing to "deacquisition or deaccession" items.[391] Bill Casey reinforces that the intent of Bill C-391 is not to force people to "give up" items,

[384] See *ibid* at 1745 (Arif Virani).
[385] See *ibid*.
[386] See Debate No 360, *supra* note 368 at 1820 (Hon Steven Blaney).
[387] See Debate No 286, *supra* note 211 at 1750 (Romeo Saganash).
[388] Debate No 382, *supra* note 211 at 1720 (Francois Choquette).
[389] EMRIP, *supra* note 193 at para 87.
[390] See Debate No 286, *supra* note 211 at 1730 (Hon Peter Van Loan).
[391] *Ibid*.

but to develop a "comprehensive national strategy to promote and support the return of Aboriginal cultural property."[392]

Furthermore, the CPC raises concerns about the definition of cultural property in the bill and states it is too far reaching and could jeopardize the Indigenous art sector as well as the economy of Indigenous communities.[393] Prospective buyers of Indigenous art may be apprehensive of purchasing the art because of the possibility of the art being repatriated.[394] This could be an unintended consequence of Bill C-391 on Indigenous artists and communities.

Additionally, the NDP is concerned about the weak language of Bill C-391 that makes many of the provisions of the bill unenforceable, as the language suggests repatriation is optional.[395] It is recommended that more forceful language be used that is aligned with UNDRIP.[396] Furthermore, representatives of the NDP raise a concern about the definition of "Aboriginal cultural property" and suggest that it should not be defined. There is no definition for "Aboriginal cultural property" in UNDRIP and it would be more appropriate if the necessary definitions were developed as part of the national strategy itself, alongside Indigenous communities and stakeholders.[397] The bill refers to cultural property where there is "a strong attachment", and this has been critiqued as potentially restricting the national strategy on what can be repatriated.[398] There should also be explicit language to included ancestral remains in Bill C-391 to ensure it is acknowledged. Overall, there is a lack of language in the Bill to address respectfully repatriating Indigenous cultural property.

The 2020 EMRIP recommends the following on the language used in legislation:

> Terms like "cultural property", "cultural objects" and "cultural heritage" must be understood to include the ceremonial objects, human remains, spiritual and other properties of indigenous peoples. Similarly, a determination of whether an item is "illicit" or "stolen" property must include analysis not only of State laws, but the laws of indigenous peoples that set out standards of alienability, ownership, treatment and custody of ceremonial objects, human remains and spiritual, intellectual and other properties.[399]

Bill C-391 creates a forum for the resolution of conflicting claims, however this is critiqued as it should be Indigenous peoples sorting out the claim rather than the implementation of a colonial structure to decide a claim. The dialogue should be between Indigenous peoples and institutions

[392] *Ibid* at 1730 (Bill Casey).
[393] See *ibid* at 1735 (Hon Peter Van Loan).
[394] See *ibid* at 1740 (Hon Peter Van Loan).
[395] See *ibid* at 1750 (Romeo Saganash).
[396] See *ibid*.
[397] See *ibid*.
[398] Debate No 360, *supra* note 368 at 1825 (John Nater).
[399] See EMRIP, *supra* note 193 at para 88.

and the government should not insert itself into the dialogue.[400] Rather, the government plays a role in facilitating this dialogue. This would be more aligned with the on-going reconciliation and should be emphasized more clearly in the language of the bill.

Mrs. Cathy McLeod (Kamloops—Thompson—Cariboo, CPC) notes that Bill C-391 does not specify the degree to which museums are obligated to participate, execute, or be involved in the national strategy.[401] This should be clarified in order to clearly lay out what is required under the bill. Furthermore, there is nothing in the bill that contains an enforcement measure, and that should be addressed to ensure Bill C-391 is effective.[402]

Public Interest

The CPC further critiqued Bill C-391 because the bill did not adequately consider the public interest of learning, appreciating, and understanding Indigenous culture through allowing the public to view artifacts.[403] An amendment is requested "that would ensure that consideration be given to the public interest in artifacts being available to Canadians in a way that enhances knowledge and appreciation of Aboriginal culture."[404] Honourable Peter Van Loan (York-Simcoe, CPC) states that access to history is in the public interest, and that is an important consideration for Bill C-391. Mr. Robert-Falcon Ouellette (Winnipeg Centre, Liberal) counters this by providing that repatriation is centered around building relationships and working together, "not simply about indigenous people taking back and never sharing."[405] Bill C-391 aligns with building a continued working relationship through the development of the national strategy.

Care

The CPC additionally had concerns around the special care required to "preserve and protect the quality and integrity" of the Indigenous cultural property.[406] The CPC calls for an amendment to Bill C-391 for consideration of best care. Ensuring that artifacts are preserved in a way that they will be available to instruct and inspire future generations is important to the public interest consideration as well. The Expert Seminar on EMRIP states "it is important to remove existing requirements and conditions that are unfairly and arbitrarily placed on Indigenous communities, which must have access to proper facilities to handle their belongings."[407]

---

[400] See Debate No 304, *supra* note 211 at 1750 (Arif Virani).
[401] See Debate No 286, *supra* note 211 at 1800 (Cathy McLeod).
[402] See Debate No 382, *supra* note 211 at 1715 (Francois Choquette).
[403] See Debate No 286, *supra* note 211 at 1735 (Hon Peter Van Loan).
[404] *Ibid*.
[405] Debate No 304, *supra* note 211 at 1810 (Robert-Falcon Ouellette).
[406] Debate No 286, *supra* note 211 at 1735 (Hon Peter Van Loan).
[407] See UBC Seminar, *supra* note 223 at 38.

Reconciliation

It is important to refer to the Truth and Reconciliation Commission's calls to action for Bill C-391 as repatriation is a part of the on-going reconciliation process.[408] However, there is nothing that specifically deals with policy development and reconciliation in Bill C-391. Unfortunately, the bill does not take into consideration the complexities of repatriation and its importance to reconciliation.[409] However, Bill C-391 could be used as a framework to implement UNDRIP, particularly Article 12.[410]

Birgit Scheps-Bretschneider is an advocate for the "rehumanization" of ancestral remains and describes the process as:

a) Changing ancestral remains from a museum object back to a human being;
b) Giving back human dignity;
c) Treating the ancestral remains with respect;
d) Finding the individual history and biography;
e) Finding out where they were at home;
f) Talking to their people and finding out local histories related to the human remains;
g) Finding out the best and most respectful way to hand them over to their people;
h) Caring for ceremonies and mourning and providing appropriate places;
i) Repatriating the ancestors to their country and people and, if possible, to the family.[411]

This is an important process to consider when creating repatriation legislation in order to approach repatriation as part of the process of reconciliation. Creating meaningful relationships with Indigenous communities is a vital part of the process, and looking at the examples set forth by museums, universities, and other institutions and Indigenous peoples for finding common ground is an important resource.[412]

National Strategy

Bill C-391 provides a two-year timeframe given to create the national strategy, which is not enough time for the creation of a complex process with meaningful consultations. As well, the NDP are supportive of a report that is accountable and transparent, however the measure of success for the report should be augmented to be more holistic.[413]

[408] See Debate No 286, *supra* note 211 at 1755 (Randy Boissonault).
[409] See Debate No 382, *supra* note 211 at 1720 (Francois Choquette).
[410] See Debate No 360, *supra* note 368 at 1805 (Alistair MacGregor).
[411] EMRIP, *supra* note 193 at para 65.
[412] See *ibid* at para 86.
[413] See Debate No 304, *supra* note 211 at 1755 (Arif Virani).

Overall

In conclusion, it is evident that Bill C-391 was established as a well-intended legal framework for repatriation in Canada, however it lacked consultation that would have made it more effective. The discussions surrounding Bill C-391 signify the importance of continued conversation around repatriation as well as its importance across the political spectrum.

Resources

"Bill C-391, an act respecting a national strategy for the repatriation of aboriginal cultural property", 1st reading, *House of Commons Debates*, 42-1, No 255 (1 February 2018)

"Bill C-391, an act respecting a national strategy for the repatriation of aboriginal cultural property", 2nd reading, *House of Commons Debates*, 42-1, No 286 (26 April 2018)

"Bill C-391, an act respecting a national strategy for the repatriation of aboriginal cultural property", 2nd Reading, *House of Commons Debates*, 42-1, No 304 (30 May 2018)

"Bill C-391, an act respecting a national strategy for the repatriation of aboriginal cultural property", Report Stage, *House of Commons Debates*, 42-1, No 360 (28 November 2018)

"Bill C-391, an act respecting a national strategy for the repatriation of aboriginal cultural property", 3rd Reading, *House of Commons Debates*, 42-1, No 382 (19 February 2019)

Dekker, Jennifer, "Challenging the "Love of Possessions" Repatriation of Sacred Objects in the United States and Canada" (2018), 14:1 A Journal for Museum and Archives Professionals 37

Ferber, Andrea, "The Rhizomes Of Repatriation" in *First American Art Magazine* 22 (Spring 2019) 52

Hrycun, Leah Kirstie (2020), *Heart Work: Weaving Relationality into Métis Material Culture Repatriation* (Thesis, Faculty of Native Studies, University of Alberta)

Human Rights Council, *Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, 45th Sess, UN Doc A/HRC/45/35 (2020) 1

Parliament of Canada, "C-391" (2019), online: *LegisInfo* <https://www.parl.ca/LegisInfo/en/bill/42-1/c-391>

University of British Columbia, "Repatriation of Ceremonial Objects and Human Remains under the UN Declaration on the Rights of Indigenous Peoples" (5 March 2020), online: https://indigenous.ubc.ca/indigenous-engagement/featured-initiatives/expert-seminar-indigenous-repatriation-practices/

APPENDIX 4: ACRONYMS

BC: The Province of British Columbia

BILL C-92: *An Act respecting First Nations, Inuit and Métis children, youth and families,* SC 2019, c 24

BILL C-391: *An act respecting a national strategy for the repatriation of aboriginal cultural property*, 1st Sess, 42nd Parl, 2019

CHMP: Cultural Heritage Management Plan (Australia)

CMA: Canadian Museum Associations

CPEI: *Cultural Property Export and Import Act,* RSC 1985, c C-51

DRIPA: *Declaration on the Rights of Indigenous Peoples Act,* SBC 2019, c 44

EMRIP: Report of the Expert Mechanism on the Rights of Indigenous Peoples

> Human Rights Council, *Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, 45th Sess, UN Doc A/HRC/45/35 (2020) 1

FPIC: "Free, prior, and informed consent" (UNDRIP)

FPCC: First Peoples' Cultural Council

FSIN: Federation of Sovereign Indigenous Nations

HCA: *Heritage Conservation Act,* RSBC 1996, c 187

HCATP: *Heritage Conservation Act* Transformation Project

HPA: *The Heritage Property Act,* SS 1979-80, c H-2.2

ICH: Indigenous Cultural Heritage

MMIWG: Missing and Murdered Indigenous Women and Girls

> National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), Volume 1a and Volume 1b, online: <https://www.mmiwg-ffada.ca/final-report/>

NAGPRA: *Native American Graves Protection and Repatriation Act,* 04 Stat. 3048

NIO: National Indigenous Organizations

QCA: Quebec Court of Appeal

RAC: Repatriation Cost Analysis and Scoping Study through the FPCC Heritage Program

RAP: Registered Aboriginal Party (Australia)

RCAP: The Report of the Royal Commission on Aboriginal Peoples

> Canada, Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal Peoples*, PRB 99-24E (Ottawa: Parliamentary Research Branch, 1999)

RRRC: The Respectful Rematriation and Repatriation Ceremony (University of Manitoba)

RSM: The Royal Saskatchewan Museum

SCC: Supreme Court of Canada

TCG: Tahltan Central Government

TRC: Truth and Reconciliation Commission of Canada

> Canada, Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, IR4-8 (Ottawa: Truth and Reconciliation Commission of Canada, 2015)

UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples

> UN General Assembly, *United Nations Declaration on the Rights of Indigenous peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, online at: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

UNDRIPA: *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14

UNESCO: United Nations Educational, Scientific and Cultural Organization