A SELECTED REVIEW OF FEDERAL AND PROVINCIAL LEGISLATION IMPLICATING INDIGENOUS HERITAGE IN BRITISH COLUMBIA

FIRST PEOPLES' CULTURAL COUNCIL

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Kamloops Lake, Kamloops B.C.

This report does not provide legal advice. It is meant to inform the reader about federal and provincial legislation impacting Indigenous heritage in British Columbia and some reform initiatives at the time of writing. The content is provided for information purposes only and does not provide a comprehensive or exhaustive explanation of all statutes, provisions or other laws affecting Indigenous heritage. We exclude from our review legislation from the province of Quebec and include a selected example of provincial laws from jurisdictions other than B.C. Although Indigenous legal orders, treaties and land claims are discussed, the focus of this review is Canadian legislation and law reform, including its application to First Nations in B.C. For readers who wish to learn more, a list of resources is included.

The First Peoples' Cultural Council is grateful to have our home in the beautiful traditional unceded territory of the W̱SÁNEĆ Nation people, in the village of W̱JOŁEŁP. We have an additional satellite office at Tk'emlups within the traditional territory of the Secwepemc people. Our leadership and staff are honoured to travel, conduct our work and provide support throughout Indigenous homelands across what is now called British Columbia and beyond.

Salmon spawning in B.C.

1.0 INTRODUCTION AND SCOPE OF REVIEW

1.1 INDIGENOUS "CULTURAL" 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. For example, responding to the question "What does the phrase 'cultural property' mean to you?" 'Namgis Elder Andrea Cramer replied:

> "Okay, my whole existence as Andrea is cultural property. It's who I am. It's all the traditions of the *Kwakwaka'wakw* that belong to me and belong to our people. It's the language, the *Kwak'wala* language and, most importantly, our values we have as a people, *maya'xala*, which means respect or treating someone good or something good. It's protecting all our songs and dances and history. It's protecting our land because all of the land base comes out of our creation stories in this area. That's cultural property. So those are the things. It is family passing on family values and the history of each family and all the treasures they own culturally."[1]
>
> – Namgis Elder Andrea Cramer

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. However, responding to input from Indigenous peoples from around the globe, Dr. Erica Irene Daes, member and former UN Special Rapporteur of the United Nations Working Group on Indigenous Populations (1984–2001), proposed the following definition for developing principles of international law as part of a list of 60 recommendations. We adopt this definition, points 11 and 12, for the purpose of selecting national, provincial and territorial legislation impacting Indigenous heritage included in this review:

11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.

12. The heritage of indigenous peoples includes all moveable cultural property as defined by relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immoveable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape or audiotape.[2]

1.2 TRC, UNDRIP AND CANADIAN LEGISLATION

Protection and control of Indigenous heritage in Canada is shaped by many legal influences, including Indigenous law,[3] Canadian common law, legislation, constitutional law and international law.

Nevertheless, it continues to be regulated primarily through federal, territorial and provincial property legislation.

Such legislation is the focus of this review. Subject to a few notable exceptions, much of this legislation 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;[4] the final report and calls to action of the Truth and Reconciliation Commission of Canada (TRC);[5] and the endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) as a framework for reconciliation by Canada.[6] Canadian legal scholars and the 1996 Royal Commission on Aboriginal Peoples (RCAP) have argued that section 35 includes Indigenous rights of access to and control over heritage "integral" to the continuity, "life and welfare of a particular Aboriginal people, its culture and identity."[7] RCAP, the TRC and UNDRIP all speak to the connection and importance of Indigenous heritage in its various forms to self-determination, recovery from colonisation, reconciliation and respect for Indigenous rights.

The residential school system, separation of individuals from families and families from communities, dismantling of traditional governments, jailing of spiritual leaders and banning of ceremonies are all but a few examples of the "cultural genocide" inflicted on Indigenous peoples in Canada and how Canadian law and policy sought to eliminate their cultural distinctiveness and identity.[8] This is only some of the history informing the TRC calls for Canadian governments

and institutions to respect Indigenous laws and support Indigenous peoples in their right to practise their spiritual beliefs. It also informs calls to action more specifically directed at Indigenous heritage, including for a national review of museum, archive and library policies and practices; amendments to the Historic Sites and Monuments Act[9] to include First Nations, Métis, and Inuit representation on the Historic Sites and Monuments Board; ongoing engagement with Indigenous peoples to inform cultural resource management and other heritage related policies; revising policies, criteria and practices of the National Program of Historical Commemoration; funding for Indigenous arts and media programming; and protecting and revitalizing Indigenous arts, cultures and languages.[10] In calling for redress from the impact of State laws and actions in these and other areas, the TRC recommends UNDRIP be the framework for reconciliation.

Four fundamental principles that inform UNDRIP are:

1. freedom from discrimination;
2. self-determination of Indigenous peoples;
3. free prior and informed consent (FPIC); and
4. respect for inherent Indigenous rights, including to their lands, laws and institutions.

These principles inform the interpretation of all articles in UNDRIP. Like the TRC, UNDRIP speaks to the right of Indigenous peoples not to be subjected to "forced assimilation and destruction of their culture" and calls for effective mechanisms for prevention and redress (article 8). Articles expressly aimed at Indigenous rights to heritage include the rights of Indigenous peoples to:

1. protect, maintain, and have access to culturally sacred sites, belongings, designs, ceremonies, visual and performing arts, literature, spiritual and religious traditions, and customs and ceremonies;
2. practise their spiritual and religious traditions, including through access to spiritual sites, use and control of ceremonial items, and repatriation of ceremonial items and ancestral remains;
3. know, use, and pass on to future generations their histories, languages, oral traditions, writing styles and literature;
4. maintain and strengthen their distinctive spiritual relationship with their traditional lands, waters and other natural resources and uphold their responsibilities to future generations;
5. maintain, control, protect and develop their intangible heritage and intellectual property; and

6. meaningful participation and consideration of Indigenous laws and processes in developing mechanisms for redress and resolution of disputes concerning their cultural heritage.[11] All of these interests are touched upon in some way by federal, provincial and territorial legislation in Canada.

As a consequence, engagement with and reform of Canadian legislation is necessary to recognize and respect Indigenous rights and respond to the actions called for by UNDRIP and the TRC. For example, when the Blackfoot people of Alberta sought the unconditional return of over 250 ceremonial items from the Glenbow Alberta Institute, potential liability and the desire for a transparent process resulted in the negotiation and enactment of Alberta's First Nations Sacred Ceremonial Objects Repatriation Act.[12] In B.C., to facilitate implementation of modern treaty and other agreements with Indigenous peoples, the Museums Act provides that the Royal British Columbia Museum, on the request of government and fulfillment of any specified terms and conditions set, must "transfer all of its legal interest in and possession of an artifact in the collection to an aboriginal people."[13]

Pit house depressions at Keatley Creek, B.C., a Ts'kw'aylaxw Cultural Landscape.

Secwépemc Museum and Heritage Park, Tk'emlúps te Secwépemc

1.3 INDIGENOUS CONSTITUTIONAL RIGHTS

Indigenous rights and title recognized and affirmed in section 35 of the Constitution Act originate in Indigenous socio-political orders and connection to the land prior to colonization.[14]

These rights, along with treaties entered between the British Crown and First Nations during the nineteenth and early part of the twentieth centuries (as well as modern treaties and land claim agreements entered with Canadian governments), are protected from interference by Canadian governments that cannot meet a legal justification test.

Legal scholar Brian Slattery argues section 35 can be understood in terms of two broad categories: generic rights such as "Aboriginal title" and specific rights that may exist separate from Aboriginal title and are derived from a particular First Nation's pre-contact practices that continue to be integral to their distinctive cultural identity.[15] Among the generic rights enjoyed by all First Nations is a right of cultural integrity – "the right of Aboriginal peoples to maintain and develop the central and significant elements of their ancestral culture."[16] This generic right fosters a range of "intermediate generic rights," such as "religion, language and livelihood" as well as a host of specific rights that vary from group to group in accordance with their particular practices, customs and traditions, such as the right to follow certain spiritual practices.[17]

Once Aboriginal title is established, it comes with a bundle of associated rights, including jurisdictional rights inherent in collective title. These rights include contemporary economic uses, the right to exclude others and the requirement of consent to use or interfere with Aboriginal title lands and resources on or under those lands.[18] However, Aboriginal rights and title may be infringed by federal and provincial governments that establish compelling and substantial valid legislative objectives and act in a manner consistent with the honour of the Crown, including seeking consent of Indigenous peoples for actions that adversely impact Aboriginal title lands.

The principle of FPIC in international law also does not create a veto.[19] As explained by Special Rapporteur on the Rights of Indigenous Peoples James Anaya, this is because FPIC and other rights articulated in UNDRIP are human rights, which under principles of international law, require compliance with standards of "necessity and proportionality with regard to a valid public purpose defined within an overall framework of respect for human rights."[20]

Where Aboriginal constitutional rights are credibly asserted but not yet proven, Canadian constitutional law nevertheless requires consultation with Indigenous rights holders, and depending on the strength of the claim and impact on Indigenous rights, accommodation. In all instances where government action may or does impact Indigenous rights, Canadian law contemplates a good faith consultative and cooperative process.[21] The implication of these requirements for legislation that impacts Indigenous heritage is elaborated below through the examples of federal and provincial parks and environmental legislation.

What if a First Nation cannot meet the tests set out by the Supreme Court of Canada (SCC) to prove Aboriginal title?

Specific rights of use and stewardship may nevertheless be protected as Indigenous constitutional rights. For example, if prior to European contact a particular place was and continues to be used as an integral part of a ceremony, a continued right to access, protect and/or control may still exist as an independent constitutional right. Disruptions in continuity of practice or connection to the site will not automatically result in rejection of a specific use claim. First Nations constitutional rights to the control and stewardship of heritage places may also be sourced in Indigenous laws. There are several possible arguments here. One is to establish the existence of a law as an integral aspect of the distinctive culture of a First Nation both prior to contact and today, for example, laws with respect to caring for ancestors, burials and belongings, and relations between the living and deceased.[22] Rights of use and stewardship may also be sourced in the communal nature of Aboriginal title and the right of the collective to make decisions about the land and its use.[23]

Secwépemc Museum and Heritage Park, Tk'emlúps te Secwépemc

There are no Canadian judicial decisions concerning Indigenous rights to protection of heritage objects or information. In the rare instances such legal claims have been made, they have been settled out of court. However, when current law on Indigenous constitutional rights is applied to the question of stewardship and control of specific heritage sites, objects and information, five main arguments emerge:

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.
2. Rights of use, control and stewardship may also be sourced in pre-contact 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., spiritual practices).
3. Rights of ownership, use, control and stewardship may be sourced in Indigenous legal institutions that exist independent of and shape the content of Indigenous rights and title.[24]
4. Rights may be sourced in expressed and implied treaty terms. Indigenous peoples did not cede ancestral rights over traditional arts and cultural expressions. Treaties are an expression of shared sovereignty and jurisdiction and include the broad purpose of protecting Indigenous culture.[25]
5. Rights articulated in UNDRIP are recognized in Canadian legislation and policy aimed at reconciliation and engage honour of the Crown.

1.4 LAND CLAIMS, MODERN TREATIES, AND OTHER INSTRUMENTS

In Northern Canada and B.C., First Nations and Inuit have negotiated land claims and modern treaties.

The purpose of these comprehensive, constitutionally protected agreements is to recognize and clarify rights of Indigenous signatories who have not previously entered into treaties with the Crown, including with respect to title and governance over land and resources. All chapters of 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,[26] repatriation of cultural belongings and ancestral remains, ownership and control of archaeological and ethnographic heritage, and other heritage matters.

Inuit, Métis and First Nations in northern and southern Canada have also negotiated ownership and co-management agreements with respect to specific sites, monuments, parks and objects with various levels and departments of government. An example is the recent agreement between Parks Canada and Inuit Heritage Trust concerning joint ownership of artifacts recovered from the *HMS Erebus and HMS Terror*.[27] In Nunavut, Inuit have negotiated extensive jurisdiction formerly exercised by territorial governments over lands and cultural resources through the acquisition of title and creation of a public government in which Inuit are the significant majority.[28] The Inuit of Nunavut and others have established cultural heritage departments and enacted culturally based heritage and other laws that affirm inherent rights to define and manage heritage grounded in Indigenous and Canadian legal traditions and practices.[29] However, in all instances the federal government retains jurisdiction over intellectual property law and international trade, including of Indigenous art, ethnographic and archaeological heritage.

These modern treaties, land claims and other arrangements are not included in this legislative review. However, examples of modern treaties in B.C. containing heritage chapters and provisions are attached in Appendix A. We have also included a list of federal, provincial and territorial land claim and treaty implementation legislation – as well as other federal law concerning Indigenous–Crown relations – in Appendix B.

Squamish, B.C.

1.5 JURISDICTION AND ENACTMENT OF LEGISLATION

Under Canada's Constitution, the federal government has jurisdiction over federal lands, Indians and lands reserved for Indians, shipping, navigation, intellectual property and the regulation of trade and commerce.[30]

Pursuant to this regime, the federal government has enacted various laws that directly and indirectly affect Indigenous heritage. As a matter of policy, the federal government asserts ownership and control over archaeological heritage on federal Crown land. For example, archaeological sites located in national parks are given some protection under National Historic Parks and Sites Regulations.[31] With the exception of limited protection offered under the Indian Act,[32] there is no federal legislation expressly targeted at Indigenous art, moveable cultural property, archaeological heritage or intangible heritage.

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., heritage conservation laws uniformly applicable throughout the province), even if such laws disproportionately impact Indigenous heritage. For example, despite the fact that 90 percent of the heritage resources affected by B.C.'s Heritage Conservation Act[33] are Indigenous, the SCC held that the act is a valid exercise of provincial jurisdiction over lands, movable property and resources.[34] There is no general jurisdiction assigned to "culture" or "heritage" in the Canadian Constitution. Thus federal, provincial and municipal governments have enacted laws that affect ownership and control of Indigenous heritage. However, there are very few examples of provincial statutes aimed specifically at First Nations, Inuit or Métis heritage.

Although Indigenous governments, legal scholars, the RCAP and the TRC advocate that Indigenous constitutional rights include core areas of inherent Indigenous jurisdiction – including over heritage – Canadian governments have maintained such jurisdiction must be negotiated to be recognized and implemented. Nevertheless, UNDRIP, the TRC and Canadian constitutional Indigenous rights call for and place limits on the exercise of federal, provincial and territorial jurisdiction. For example, Canadian law maintains if both federal and provincial governments have a credible constitutional basis to assert jurisdiction, and Indigenous rights are or might be affected, the focus should be on whether:

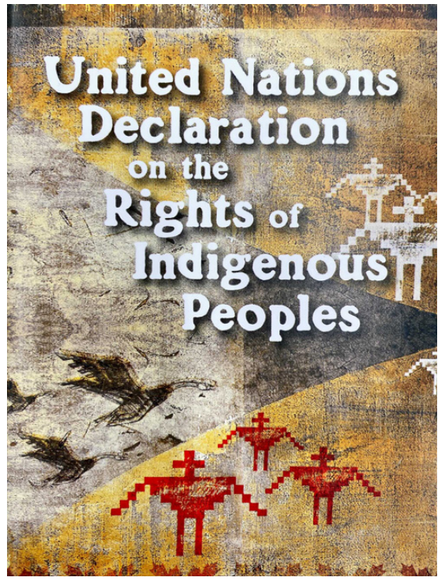
1. the Crown has met its constitutional duty to consult Indigenous peoples[35] or;
2. in the case of infringement of established rights, has obtained consent or can meet a constitutional justification test.[36]

Canadian constitutional law is unclear on the extent governments must engage Indigenous peoples in developing heritage or other legislation and policy. The SCC has held the duty to consult does not apply, but these actions still invoke the honour of the Crown.[37] UNDRIP is clear such activities require good faith consultation and cooperation with Indigenous peoples in order to obtain their FPIC.[38] An example of this principle in practice 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[39] and was "co-developed with Indigenous peoples, provinces and territories to reduce the overrepresentation of Indigenous children and youth in care."[40]

2.0 FEDERAL LEGISLATION APPLICABLE IN B.C.

2.1 UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT

On June 21, 2021, Bill C-15 (the federal United Nations Declaration on the Rights of Indigenous Peoples Act) received royal assent and became Canadian law.[41]



The purpose of the legislation is to make clear that Canada is "committed to taking effective measures – including legislative, policy and administrative measures – at the national and international levels, in consultation and cooperation with Indigenous Peoples, to achieve the objectives of the Declaration." It affirms UNDRIP as a universal, international, human rights instrument with application in Canadian law and provides a framework for the Government of Canada to implement UNDRIP.[42] It also clarifies the relevance of UNDRIP in the interpretation of Indigenous rights and relations in Canada and creates a framework to advance and monitor federal implementation of UNDRIP, including taking "all measures necessary to ensure that the laws of Canada are consistent with the Declaration" in consultation and cooperation with Indigenous peoples. Importantly, it also provides that while UNDRIP may be used to help interpret Indigenous and treaty rights protected under section 35 of Canada's Constitution, measures to implement UNDRIP may not be done in such a way as to abrogate or derogate from section 35 Indigenous and treaty rights.[43]

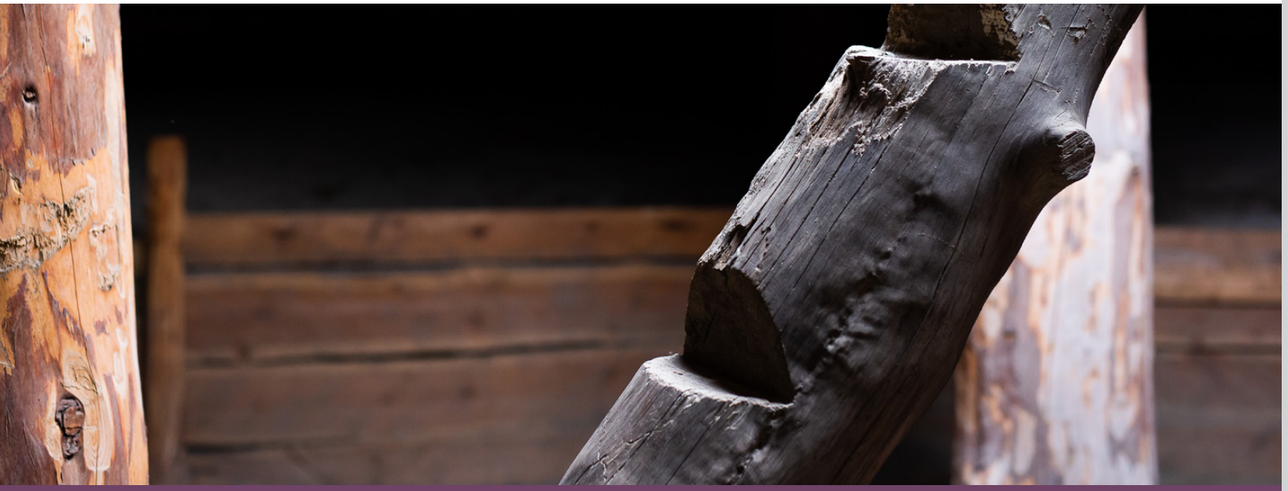
After several weeks of consideration, the Senate passed Bill C-15, at which time the House of Commons made several amendments, largely to the Preamble, which sets out the purpose of the legislation and guides in its interpretation and implementation.

Important features of the Preamble include:

1. direction that measures address racism and discrimination, including systemic racism;
2. rejection of doctrines, policies and practices "based on or advocating the superiority of peoples or individuals on the basis of national origin or racial, ethnic or cultural differences," including the doctrines of discovery and *terra nullius*;[44]
3. affirmation that rights affirmed in section 35 are capable of evolution over time; and
4. direction that relations with Indigenous peoples be "based on the recognition and implementation of the inherent right to self-determination, including the right of self-government." Other amendments related to the requirement of an action plan – reducing the time limit for preparation from three to two years and the need to address both racism and systemic racism within that plan.

There remain debates concerning the necessity and utility of such legislation to advance UNDRIP in Canada and potential measures for compliance. However, among the benefits of implementation legislation such as this is a clear statement of purpose engaging the Crown's honour in purposive and timely implementation of UNDRIP, including a legal mechanism for accountability and oversight.[45]

To date, there has been limited federal and provincial law reform to align existing laws with UNDRIP. However, ministries are purportedly seeking input on proposed legislation, in circumstances where previously they may not have sought input from Indigenous peoples. An example of law reform is the amendments made to B.C. environmental assessment legislation elaborated below in section 4.6.4.



Secwépemc Museum and Heritage Park, Tk'emlúps te Secwépemc

Lower Similkameen pictographs provided by Rheana Marchand

2.2 INTELLECTUAL PROPERTY LAW

What constitutes Intellectual Property (IP) law has different meanings in different legal systems:

"Western industrialized nations understand IP as intangible products of the human mind over which property rights exclude others from doing certain things (e.g., to use, reproduce, alienate, generate profit from) and are enforced by State law."[46] The current IP regime in Canada encompasses protection for copyright, patents, trademarks, industrial design, plant breeders' rights and integrated circuit topography.[47] Other forms of IP include trade secrets and misappropriation of personality, which receive some limited protections in Canadian common law. Although usually embodied in physical property, IP is legally and conceptually distinct from its physical form. For example, the original expression of a story in which the author holds copyright is distinct from the property rights to the book in which it appears, borrowed from a public library.

Most IP rights exist for a limited period of time. A significant hurdle faced by Indigenous peoples who seek greater control over certain forms of intangible heritage (e.g., a name or song) is the fact that a large proportion is considered under Canadian and international IP law to be in the "public domain," a term used to describe intangibles in which no one can establish or enforce ownership. The concept of the public domain does not take into account Indigenous law and custom, for example, concerning stewardship, attribution, communal and intergenerational rights and responsibilities.

There are also other incompatibilities between Indigenous laws and concepts of property. For example, copyright law applies to new works of authors and creators. Indigenous stories could be implicated by notions of originality and authorship. While a new work can be based on the earlier works of others, it must constitute a new expression to receive copyright protections.[48] Songs, images and other forms of cultural expression Indigenous peoples seek to protect and control may originate in contributions by different generations over centuries. Further, copyright attaches when the work is reduced to fixed form: for example, when a song is scored, sound is recorded or the content is otherwise fixed. When this is done by someone outside an Indigenous community, it is the outsider who obtains first ownership of the score or recording and the right to control its reproduction or other benefits of copyright law. It does not attach to oral information, spectacles or other forms of intangible heritage that have not been reduced to fixed form.

Drum made by Sarah Rhude, artwork by Alysha Brown, image by Karen Aird

There have been many writings on the limits of IP law for protecting Indigenous traditional knowledge. However, IP law has been used by Indigenous artists and communities where concepts of property and transferability of rights are reconcilable with Indigenous legal orders and contemporary Indigenous laws and perspectives on commercial use. A well-known example of the use of IP law in Canada is the defensive use of the Trademarks Act[49] by the Snuneymuxw (Nanaimo) First Nation to protect petroglyph images from use in advertising for, and on merchandise promoting a music festival.[50] Indigenous peoples have also been using other IP mechanisms to protect and control Indigenous knowledge such as patents, licensing agreements and research protocols. In some countries, IP law has been amended to recognize and respond to Indigenous rights and interests. Examples include defensive measures incorporated into the 2002 Trade Mark Act in New Zealand[51] that enable prohibition of a mark likely to "offend a significant section of the community, including the Maori"; the American Indian Arts and Crafts Act of 1990[52] that provides for criminal sanction and civil actions for misleading the public over the sale of arts and/or crafts as being "authentic" Native American; amendments to IP laws to provide for the recognition and protection of certain manifestations of Indigenous knowledge;[53] and the creation of legislation directed at specific forms of IP and mechanisms for economic benefit sharing for use of intergenerational and collectively held Indigenous knowledge. However, this has not yet occurred in Canada.

Despite various initiatives by Canada to learn more about the interface of Indigenous knowledge, cultural expressions and IP law, little progress has been made with a view to reconciling indigenous laws, rights and interests. The current federal legislative framework surrounding IP provides virtually no protections or considerations specifically for Indigenous peoples. Federal response to Indigenous concerns has largely been to identify protection mechanisms available through means other than law reform and to create information tool kits to help Indigenous artisans, creators and communities take advantage of existing laws and IP management tools. Canada has also hosted World Intellectual Property Organization workshops on IP and traditional knowledge, supported and participated in conferences concerning Indigenous knowledge and IP protection, hosted workshops in communities to discuss the benefits and limits of existing IP law and commissioned research in these areas.[54]

More recently, the Canadian government has acknowledged that "Indigenous people have a particular stake" in IP "as it relates to their broader interests in protecting their knowledge and culture and ensuring its appropriate use."[55]

In 2018, the Minister of Innovation, Science and Economic Development announced the launch of an Intellectual Property Strategy as part of Canada's commitment to the implementation of UNDRIP and, in particular, articles 11 and 31. These articles provide that Indigenous peoples have the right to "maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions" and to "redress...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" and that States are to "take effective measures to recognize and protect the exercise of these rights."

Moccasin Beadwork, image by Karen Aird

2.2.1 Copyright Act, RSC 1985, c. C 42

The Copyright Act applies to original literary, dramatic, musical and artistic works, all of which are defined in the legislation.

Copyright law gives creators the exclusive right to control how their work is copied and made available to the public. It provides the sole right to adapt, produce, reproduce, publish, communicate, record and present to the public the work in question. The duration of these rights is the life of the author plus an additional 50 years following the death of the author, at the end of which the work becomes part of the public domain. Infringement of copyright occurs when any person, without permission of the copyright holder, does any action that only a holder of copyright may lawfully do. If a work is under copyright protection, permission is required to undertake copyright-protected actions, such as reproduction through digitization, unless the action contemplated falls within an exception to copyright infringement. Fees (known as royalties and tariffs) may be required for use of copyrighted material.

Under copyright law, the first owner of a work is the creator or "author." Though copyright is able to deal with multiple individual authors, it does not recognize communal authorship or ownership.[56] Copyright holders can transfer their rights to someone else by selling them or licencing them for a limited period of time or purpose. In addition to copyright, the Copyright Act protects a distinct set of IP rights known as "moral rights" and "neighbouring rights." The owner of moral rights to a work (i.e., the author/creator) has the right to the integrity of the work and, where reasonable, the right to be associated with the work as author, by name (sections 14 and 17.1). Unlike copyright, moral rights are retained by the author even if he or she has transferred copyright to someone else. "Neighbouring rights" is a term used to "indicate rights of performers and producers to be compensated when their performances and sound recordings are performed publicly, rented out, or reproduced."[57] Neighbouring rights provide compensation whether or not the works themselves are copyrighted, but unlike moral rights, they end in the case of performers after 50 years of the performance, and in the case of sound recording producers, 70 years after it is first fixed in a sound recording (section 23).

The only mention of "culture" in the Copyright Act falls under section 32.1(1)(c): "It is not an infringement of copyright for any person to make a copy of an object referred to in section 14 of the Cultural Property Export and Import Act[58] for deposit in an institution pursuant to a direction under that section." Pursuant to this section, export permits may not be issued for manuscripts, original documents, archives, photographic positives and negatives, films, and sound recordings on the cultural property control list until a copy is deposited in an institution as directed by the minster designated under the legislation.

There are also exceptions to copyright infringement in the Copyright Act that facilitate access to copyrighted works, including for academic research or private study, criticism or review, or for educational/teaching purposes (section 29). Further, there is an exemption for museums, libraries and archives to make reproductions or engage in other copyrighted uses for various purposes, so long as an otherwise prohibited use (e.g., making a digital image of a photograph over which copyright still subsists) is not of direct or indirect economic or commercial advantage (see sections 2 and 30.1–30.5).

The Canadian Copyright Act is reviewed every five years for the purpose of determining what, if any, statutory changes should be made (as required by section 92). The most recent review of the Act began in 2017 and culminated in 2019. Indigenous scholars, lawyers and activists were outspoken in their hope that this review would finally reflect and protect Indigenous linguistic, cultural and IP rights. In May 2019, the Parliamentary Standing Committee on Canadian Heritage released a report entitled "Shifting Paradigms,"[59] and a month later, the Parliamentary Standing Committee on Industry, Science and Technology (IST) released its report, "Statutory Review of the Copyright Act."[60] Some of the recommendations made by Indigenous peoples to these committees are elaborated in the publication *Promoting and Protecting the Arts and Cultural Expressions of Indigenous Peoples*.[61] Among them were the following:

- Establishment of a "national Indigenous arts advocacy and service organization" supported by provincial organizations. Such an organization would collaborate with Canadian Artists' Representation and Copyright Visual Arts to support Indigenous artists, fight copyright infringement and misappropriation, and educate the public;
- Establishment of an Indigenous art registry to authenticate and track sales of Indigenous art;
- Amending IP legislation to include express recognition of UNDRIP and Indigenous constitutional rights, including a non-derogation clause "to clarify that aboriginal knowledge and cultural expressions are protected and promoted under subsection 52(1) and section 35 of the Constitution Act, 1982, and section 25 of the [Canadian Charter of Rights and Freedoms];
- Consideration of "*sui generis* concepts and methods to recognize, preserve and share Indigenous Traditional Cultural Expressions"; and
- More generally, for the government to launch extensive consultations to explore ways to "protect traditional arts and cultural expressions from misappropriation and copyright infringement, and to reconcile Indigenous notions of ownership with the Act."[62]

The Heritage Committee included Indigenous perspectives on copyright, including from Scott Robertson, President of the Indigenous Bar Association, who called for "wide and meaningful consultation with Indigenous peoples on reform." [63] Tony Belcourt presented a number of priorities and recommendations on behalf of the National Collaborative Roundtable. Although the report notes that Canada has been working with international partners to develop norms to address Indigenous concerns, none of the 22 recommendations in the Heritage Committee report directly address concerns raised. Of the 36 recommendations in the Industry, Science and Technology report, only two focus on Indigenous IP. The fifth recommendation calls for "the recognition and effective protection of traditional arts and cultural expressions in Canadian law, within and beyond copyright legislation [and] the participation of Indigenous groups in the development of national and international IP law." [64] It also called for creation of an Indigenous arts registry, an Indigenous authority to manage traditional arts and cultural expression through the inclusion of a non-derogation clause in the Copyright Act. The ninth recommendation called for a collaborative investigation with Indigenous and governmental stakeholders to determine the feasibility of implementing a national artist's resale right. [65]

2.2.2 Patent Act, RSC 1985, c. P 4

The Patent Act[66] *was designed to protect inventions by providing the patent holder with the exclusive right to make, use or sell the invention for a period of 20 years, with these rights being assignable.*

An invention, to which patent protection applies, may be "any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter" (section 2). A patent cannot, however, be issued for a "mere scientific principle or abstract theorem" (section 27[8]).

The application of patent law to Indigenous knowledge requires that such knowledge meet the criteria of novelty, inventiveness and utility that are necessary to get a patent. For example, if more than one First Nation is privy to certain knowledge on which an invention is based, it could be argued that the knowledge is not novel. Moreover, "[q]uestions relating to public disclosure may also be raised when traditional knowledge has been previously shared widely within an Aboriginal community, but not with outsiders."[67] Additionally, patent rights, like other IP rights, are individual in nature. Communal ownership of an invention by a First Nation would require the creation of a legal entity such as a corporation or society. Yet another consideration is that once a patent expires, the invention enters the public domain and any traditional knowledge used in its creation would be available to the public.

Unlike copyright, patent rights do not arise automatically. The first inventor to file a patent application is the owner. However, any defect in the registration for a patent can affect its validity. There are two aspects to a patent application: the patent specification and the patent claims. The patent specification provides complete details of the invention, its construction and use. Applicants are required to furnish drawings, models and specimens of ingredients as appropriate. The patent claims describe the subject-matter of the invention, and the breadth of the patent. Patent applications are reviewed by the Commissioner of Patents and decisions may be appealed to the Federal Court of Canada and the SCC. For protection outside of Canada, patents must be applied for in each country for which protection is sought.

Sua Youth Program, Klemtu B.C., image provided by Lisa Hackett

The process of obtaining a patent is costly, which may act as a deterrent for Indigenous peoples with limited resources. Additional maintenance fees must also be paid to maintain a patent for the full 20-year duration available. In addition, "a concern raised by indigenous people is that applicants for patents are not required to publicly identify the source of traditional knowledge or of genetic resources used in inventions."[68] Canada is a signatory to the *Convention on Biological Diversity,* which provides for respect, protection and maintenance of Indigenous knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity and equitable benefit sharing by Indigenous peoples when their knowledge about genetic resources is used.[69] However, Canada has not ratified the most recent international instrument on access and benefit sharing (ABS), the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.*[70] It also has not implemented national legislation to implement, or amended existing patent and other laws to address, protection and benefit for Indigenous knowledge associated with genetic resources.

2.2.3 Trademarks Act, RSC 1985, c. T 13

The Trademarks Act protects distinctive words, designs and symbols used to distinguish one merchant's products or services from another's.

Specifically, section 9 of the Act protects official marks, royal crests and international symbols such as the Red Cross. Trademarks include (a) ordinary marks used to distinguish wares or services, (b) certification marks, and (c) distinguishing guises (section 2). Unlike copyright, there is no automatic protection afforded on the creation of a trademark. A trademark is deemed to be adopted upon its introduction and use in Canada or upon filing an application for registration of the mark in Canada. A "registered" trademark is one that has been entered on the Trademarks Register.

The COWICHAN label and Igloo Tag trademarks are examples of how trademark law has been used to protect Indigenous intangible heritage from appropriation. The COWICHAN mark is used to certify that goods have been hand knit in one piece in accordance with traditional methods by members of the Coast Salish Nation. The Cowichan Tribes has also registered a number of other trademarks incorporating the word "Cowichan." However, other trademark registrations using the word "Cowichan" have been registered by non-indigenous legal persons.[71]

The Igloo Tag trademark is used to indicate authenticity of Canadian Inuit art. In 2017, Canada transferred control of the mark to the Inuit Art Foundation as part of its commitment to UNDRIP and ongoing efforts toward reconciliation. In a news release, then Minister of Indigenous and Northern Affairs Carolyn Bennett explained:

> "Our government recognizes that protecting, revitalizing, and promoting Inuit language, culture, and identity can dramatically improve socio-economic outcomes, leading to stronger, more confident generations. Actions like transferring the rights of the Igloo Tag trademark to the Inuit Art Foundation are small, but powerful steps on the journey of decolonization. The Igloo Tag supports Inuit artists and culture and we are pleased that it will now be managed by an Inuit-led organization."[72]
>
> – Then Minister of Indigenous and Northern Affairs Carolyn Bennett

Trademarks, whether registered or otherwise, are transferable and may be licensed to others. Trademark registration lasts for 15 years, but registration can be maintained indefinitely through paying a renewal fee every 15 years (section 46[1]). The possibility of perpetual protection makes trademarks unique among other forms of IP and more in line with the goals of Indigenous peoples seeking ongoing protection for certain cultural expressions. However, if the registration of a trademark is not renewed within six months following the notice of renewal, the trademark is no longer valid (section 46[3]).

Canadian legislation does not address concerns about appropriation of traditional cultural expressions or images as trademarks.[73] However, following the proceedings and recommendations of recent Parliamentary standing committees and other engagements on Indigenous issues in IP, Canada is exploring the feasibility of providing greater protection to Indigenous artists. This could include, for example, establishing legislation equivalent to the Indian Arts and Crafts Act, which imposes criminal and civil sanctions for falsely identifying arts and/or crafts as being "authentic" Native American.

2.3 EXPORT AND IMPORT OF CULTURAL AND ARCHAEOLOGICAL PROPERTY

2.3.1 Cultural Property Export and Import Act, RSC 1985, c. C 51

The Cultural Property Export and Import Act (CPEIA), 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 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.*[74]

The Act establishes the Canadian Cultural Property Export Control List and describes a wide range of material that may be included on the list. To be included, property must be at least 50 years old and made by someone no longer living.[75] 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. 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" (section 11[1]). 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 has the ability to 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 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 (section 37).

Although the Act controls the export of Indigenous archaeological heritage and other belongings that appear on the Control List, it was drafted prior to recognition of Indigenous constitutional rights and does not expressly incorporate their unique rights and interests. For example, there is no obligation to notify Indigenous governments, cultural education centres, or other organizations from communities of origin unless those organizations fall within the category "A" institution designation. There is also no mechanism to investigate or challenge the legitimacy of the permit applicant's title, leaving the only options available (to Indigenous peoples fortunate enough to learn of a pending export) to either litigate or negotiate the purchase of contested items at what are often inflated prices. There is also no requirement that Indigenous people act as examiners to assess cultural significance or have a role in determining what should go on the export control list. Adding to the importance of addressing these problems is the fact that there is little that can be done once an item leaves Canada, even if it is stolen or exported in violation of Canadian law. Success depends on the laws of the country where the item is located. For example, our cultural property law has provisions to implement obligations under the 1970 UNESCO convention against trafficking in illegally exported and stolen property that enable another nation state to ask the Attorney General of Canada to bring an action for its recovery. However, large art market countries like the United States and France do not have these kinds of provisions. Apart from how other countries enforce international law, national law may also limit responses.[76]

In the 1990s, in response to concerns from Indigenous peoples and the scientific community, the federal government considered banning exports of archaeological material as part of new federal legislation concerning protection of archaeological material discovered on federal land, excluding reserve lands. However, this legislation was never enacted for a variety of reasons, including fear of increasing the value and trade in archaeological heritage through the prohibition of export and thus encouraging black market exports; concern about the authority of the federal government to legislate ownership of archaeological property located within provincial boundaries; and opposition by First Nations to provisions vesting ownership of First Nation archaeological material in the federal government rather than recognizing control and stewardship responsibilities of descendant communities as in legislation enacted at the same time in the United States. Some provincial governments, like B.C., also considered enacting illegal trafficking provisions prohibiting removal of First Nations archaeological and other significant moveable heritage from the province, but this was never done, again in part because of jurisdiction uncertainty.[77]

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 the Review Board. 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. More recently, a 2018 private members bill was introduced in Parliament proposing a national strategy for repatriation of Indigenous human remains and cultural property.[78] 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;
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. This legislation was never passed. It is unclear if or when similar legislation will be proposed in the future. Unlike the United States and other countries, Canada does not have express legislation prohibiting sale and export of ancestral remains.[79] However, in response to UNDRIP, the Expert Mechanism on the Rights of Indigenous Peoples has conducted gatherings of experts and Indigenous peoples, including in Canada, for the purpose of preparing a report and recommendations on repatriation of ceremonial objects and human remains under UNDRIP.[80]

Argillite plate, collection of objects from other museums, Haida Gwaii Museum

2.4 ACCESS TO INFORMATION AND PRIVACY LAW

Many public bodies must comply with access to information and privacy legislation.

Public bodies are defined by legislation and typically include universities, government agencies and departments, tribunals, municipal governments and many other public institutions that are repositories of information. Such legislation applies to some, but not all public museums and archives and generally sets a default rule that all records held are to be accessible to the public. However, as elaborated in our discussion of B.C. legislation in section 4.0 below, some Canadian museums and archives have developed special policies to enhance Indigenous access and to restrict public access to sensitive information where discretion under existing legislation allows.

Privacy legislation, such as the federal Privacy Act, regulates the way that public bodies may collect, use and disclose personal information.[81] Such laws typically exempt from mandatory disclosure records that contain confidential information that could harm intergovernmental relations, including relations with Indigenous governments. Such exemptions may dictate the content of specific terms and restrictions that Indigenous organizations negotiate in various agreements to protect information from disclosure.[82]

Under the Canadian Access to Information Act (AIA),[83] if information is obtained in confidence from recognized Indigenous governments, it is protected from disclosure without consent – unless it has already been made public (as per sections 13[1][e], 13[3]). The AIA also exempts financial, commercial, scientific or technical information that is "confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party" (section 20[1][b]). This section could potentially cover sensitive financial, land, medicinal, plant or other environmental or ecological knowledge provided to government institutions. Importantly, federal access to information legislation often does not override other legislation that affects federal or territorial institutions and that may contain other restrictions on disclosure (section 24 and schedule II). This is of greater relevance in northern Canada, where Inuit and First Nations have obtained greater control over traditional knowledge through land claims and legislation. In some instances, First Nations and Inuit may also invoke privacy provisions to prevent disclosure of sensitive information.

2.5 LANGUAGE, MUSEUMS AND ARCHIVES LAWS

2.5.1 Indigenous Languages Act, SC 2019, c. 23

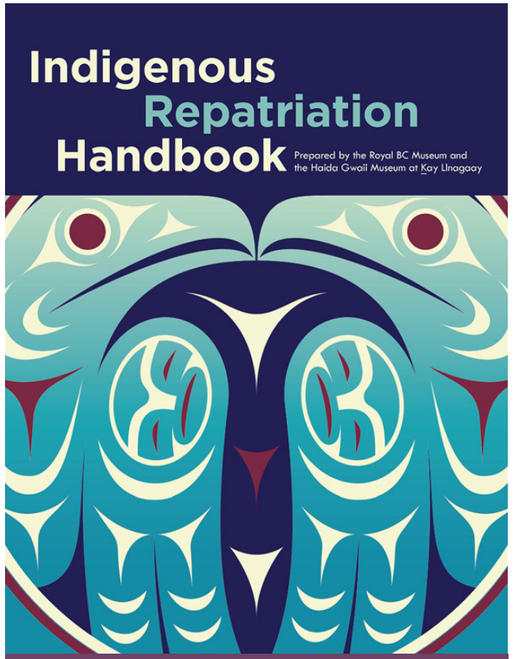
This Act received royal assent in June 2019.

Its main purposes include recognizing and affirming the language rights of Indigenous peoples; supporting Indigenous peoples in their efforts to reclaim, revitalize, maintain and strengthen their languages; providing (culturally appropriate) services; and supporting research surrounding Indigenous languages.[84] In doing so, the Act calls for cooperation between provincial, territorial, federal and Indigenous governments, as well as the implementation of UNDRIP (sections 5 and 8).

This act was born as a response to UNDRIP and Calls to Action 13 through 15 of the TRC. Call to Action 14 directs the federal government to enact an Aboriginal languages act that incorporates the following principles:

1. Aboriginal languages are a fundamental and valued element of Canadian culture and society, and there is an urgency to preserve them.
2. Aboriginal language rights are reinforced by the treaties.
3. The federal government has a responsibility to provide sufficient funds for Aboriginal-language revitalization and preservation.
4. The preservation, revitalization, and strengthening of Aboriginal languages and cultures are best managed by Aboriginal people and communities.
5. Funding for Aboriginal language initiatives must reflect the diversity of Aboriginal languages.

These points are observable throughout the text of the Act – though some have been included more explicitly than others. For example, the preamble of the Act speaks to the "urgent need to support the efforts of Indigenous peoples to reclaim, revitalize, maintain and strengthen [Indigenous languages]," and holds that "Indigenous peoples are best placed to take the leading role in reclaiming, revitalizing, maintaining and strengthening Indigenous languages." The second point is only partially evident in the Act, with section 4 holding that any inconsistencies arising between the Act and a treaty should be resolved in favour of the treaty. The provision of adequate, sustainable funding is included in section 5 as one of the purposes of the Act, while section 7 requires the Minister to consult with various Indigenous stakeholders "in order to meet the objective of providing adequate, sustainable, and long-term funding for the reclamation, revitalization, maintenance and strengthening of Indigenous languages." In June 2021, Ronald Ignace, a member of the Secwepemc Nation was appointed the first Commissioner of Indigenous Languages.



Indigenous Repatriation Handbook, The Royal British Columbia Museum

2.5.2 Museums Act, SC 1990, c. C 3

Federal museum, archive and library legislation is relevant to First Nations in B.C. because these collections contain ancestral remains, archaeological heritage, and audio-visual and other material originating from B.C. that have been obtained through various means, including some taken under circumstances that today would be considered illegal, unethical and contrary to Indigenous law.

The Museums Act was established to "preserv[e] and promot[e] the heritage of Canada and all its peoples throughout Canada and abroad and in contributing to the collective memory and sense of identity of all" (section 39[a]). The Act governs six distinct museum corporations: the National Gallery of Canada (sections 4–6), the Canadian Museum of History (sections 7–9), the Canadian Museum of Nature (sections 10–12),the National Museum of Science and Technology (sections 13–15), the Canadian Museum of Human Rights (sections 15.1–15.3), and the Canadian Museum of Immigration at Pier 21 (sections 15.4–15.6). The museums are the repositories of federally owned property, as well as objects acquired through purchase and donation. They have the power to sell, exchange, give away, destroy or otherwise dispose of works of art or other museum material in their collections.[85] The Act also empowers the corporations to lend or borrow museum material in their collections on long-term or short-term loans.[86] However, the museums cannot deal with property otherwise than in accordance with the terms on which it was acquired or is held.[87] In exercising the Act's functions, federal museums must take into account their statutory and common law obligations to the public they are intended to serve.

Some museums have developed policies and practices specific to the repatriation of Indigenous cultural property. Although there have not been specific initiatives aimed at amending national museums legislation, there have been several major internal initiatives and developments in museum policies, practices and codes of ethics concerning the control and repatriation of Indigenous belongings, archival material and ancestors. Principles derived from the Canadian Museum Association (CMA) and Assembly of First Nation (AFN) Task Force Report on Museums and First Peoples inform contemporary policy and practices. In addition to numerous

recommendations relating to interpretation, access, repatriation and training, seven key principles to building new partnerships have emerged. The principles state the following:

1. Museums and First Peoples will work together to correct inequities that have characterized their relationships in the past;
2. These relationships will be an equal partnership, involving mutual appreciation of the knowledge of both entities; both parties will recognize mutual interests in the cultural materials and knowledge of the past, along with the contemporary existence of First Peoples;
3. First Peoples and museums recognize mutual interests in the cultural materials and knowledge of the past, as well as the contemporary existence of First Peoples;
4. They accept the philosophy of co-management and co-responsibility;
5. Representatives of First Peoples will be involved as equal partners in any museum exhibition, programme or project dealing with Aboriginal heritage, history or culture;
6. Both parties recognize the commonality of interest in researching, documenting, presenting, promoting and educating the public – including museum professionals and academics – in the richness, variety and validity of Aboriginal heritage, history and culture; and
7. First Peoples will be fully involved in the development of policies and funding programs pertaining to Aboriginal heritage, history and culture.[88]

More recently, as elaborated in our discussion of provincial museums in section 4.3 below, an Indigenous Reconciliation Council has been formed by the CMA – in response to Call to Action 67 of the TRC – to review museum policy and practice in light of UNDRIP and Indigenous constitutional rights.[89] A final report is expected to be completed in late 2021 or 2022.

Secwépemc Museum and Heritage Park, Tk'emlúps te Secwépemc

2.5.3 Library and Archives of Canada Act, SC 2004, c. 11

There is considerable concern among Indigenous peoples regarding control over, access to, and repatriation of archival material.[90] Although repatriation of archival material such as photographs and records is a concern for many First Nations, the rights of disposition by the Librarian and Archivist are limited by common law obligations to exercise care in the disposition and preservation of public archival material similar to those of museum boards. Moreover, while section 9 grants significant discretion to the Librarian and Archivist, the requirement that the material be "no longer necessary" may suggest limited discretion in determining whether deaccessioning is warranted. While it is the duty of the Librarian and Archivist to "facilitate access,"[91] which is important to Indigenous peoples wishing to view materials, there is no corresponding obligation to restrict access to culturally sensitive material. Furthermore, access to information legislation and the public mandate of the Library and Archives limit the ability to deny access for research and other specified purposes.

However, as in the case of Canadian museums, libraries and archives are developing specific initiatives and services aimed at Indigenous concerns for libraries and knowledge centres located in or governed by Indigenous communities and organizations, as well as those that are not. These include staff capacity and training, cataloguing schemes, programming, and collecting and access to materials in a manner respectful of Indigenous knowledge, laws and rights. The Canadian Federation of Library Associations (CFLC-FCAB) is also in the process of reviewing policies, practices and programs with a view toward reconciliation as addressed by the TRC and implementing UNDRIP.[92] More recently, in May 2018, the CFLC-FCAB released a position statement on Indigenous knowledge and the Copyright Act.[93] It recommended the Act respect, affirm and recognize Indigenous peoples' ownership of their respective traditional and living Indigenous knowledge. The recommendation further stressed the need to:

1. Protect Indigenous knowledge from unauthorized use through copyright legislation;
2. Ensure Indigenous concepts of ownership are respected, while enabling the originating community to actively exploit the knowledge;
3. Ensure that contracts and licenses cannot override rights accorded through legislation;
4. Include a right to regain ownership of some Indigenous knowledge, even if the work has lapsed into the public domain;
5. Consult with Elders and leaders in all Indigenous communities; and
6. Include participation by Indigenous peoples in discussions at the World Intellectual Property Organization.

2.6 RESERVE LANDS

First Nations use a wide range of strategies to protect heritage sites, including through land-use plans and designations designed to protect sensitive areas.

Some of these strategies engage bylaw and land-use management strategies available under federal Indian Act legislation. Some, while difficult to enforce outside reserve lands, nevertheless influence negotiation, public support and government fulfillment of obligations. For example, as elaborated in our discussion of B.C. parks in section 4.6 below, prior to a new designation under B.C. parks law, some First Nations declared important areas within their traditional territories as tribal parks, particularly if resource extraction activities (largely logging and mining) threatened these lands. Although such designations advise the world of the importance of the area, B.C. and Canadian governments view them as Crown land without designation that brings them under federal or provincial parks, monuments or other protection.[94] The Indian Act also has specific provisions relating to some forms of cultural heritage.

Pole in Gitwangak, image by Karen Aird

2.6.1 Indian Act, RSC 1985, c. I 5

The Indian Act is federal legislation concerning the administration of Indian reserve lands, Indian moneys and rights arising from Indian status.[95]

The original Indian Act was adopted in 1876 and has been periodically amended since that time (most recently in 2019). The Act is administered by the Minister of Indian Affairs and Northern Development. Legal title to reserve lands is vested in the Crown but is held "for the use and benefit" of the bands for which they are set apart (sections 2 and 18[1]). Section 91 of the Indian Act provides that in the absence of written consent of the Minister, "no person may … acquire title to any of the following property situated on a reserve, namely, (a) an Indian grave house; (b) a carved grave pole; (c) a totem pole; (d) a carved house post; or (e) a rock embellished with paintings or carvings." Furthermore, no person may "remove, take away, mutilate, disfigure, deface or destroy" any of the above. Objects "manufactured for sale by Indians" are exempt from these provisions.

Despite these provisions, there are accounts of intentional violations of these laws by Indian agents, and mistakes of abandonment arising from lack of understanding of Indigenous lifestyles – resulting, for example, in carved poles being wrongfully severed and removed from Indian land. Perhaps the most famous example is the Haisla Spirit Pole repatriated from the Swedish Museum of Ethnology.[96]

Band councils also have delegated jurisdiction to enact bylaws, analogous to that of a municipality concerning use of reserve lands that contain some mechanisms for regulating cultural heritage on reserve lands. Bylaw powers relating to commercial activities on the reserve and control of access to reserve land can be used to control trafficking in cultural items on reserve lands. Others Indigneous governments have enacted policies and permitting systems outside of the formal bylaw process.[97] For example, the Skeetchestn (Kamloops) Indian Band has adopted a land and resource development plan with their own heritage and cultural resource management zones that applies to all their traditional territories on and off reserve.[98] Although its enforceability as law off-reserve is debatable, it nonetheless guides their consultation negotiations with government and industry. Control over cultural information has also been exercised on some reserves through the implementation of research laws and protocols.

2.6.2 First Nations Land Management Act, SC 1999, c. 24

Some First Nations have also increased their management and control of reserve lands and resources through the First Nations Land Management Act (FNLMA).

The FNLMA enables First Nations who opt into it the ability to manage their lands and resources, enact laws respecting their lands and create summary conviction offences without ministerial approval pursuant to a Land Code. Unlike bylaws, laws enacted by band councils managing lands under a negotiated Land Code or agreement with the federal government do not require ministerial approval. In order for a First Nation to establish a community land management regime, it must go through a series of steps, ending with a community approval process and registration.

2.7 PARKS AND ENVIRONMENTAL REGULATION FRAMEWORK

Parks Canada has jurisdiction and control over Indigenous sites and archaeological heritage discovered in, on or under national parks.

Although Canada does not assert ownership over Indigenous archaeological heritage on federal lands, Canadian property law recognizes rights of control over items buried or embedded in land by the owners of that land.[99] As elaborated below in section 3.2, the law is less clear with respect to ancestral remains. As a consequence, Parks Canada has in its possession and control Indigenous belongings, burial items and remains, and has developed specific policies in relation to conservation, management and repatriation of those resources. In recognition of the importance of this heritage to Indigenous people, Parks Canada policy calls for Indigenous participation in resource protection, management and interpretation.[100] In 2020 it collaborated with the Indigenous Heritage Circle (IHC) to host three national gatherings with Indigenous Elders, knowledge holders, and other cultural experts to discuss issues of concern and revise its cultural resource management policy in light of UNDRIP, Indigenous perspectives and legal orders.[101]

Tse'k'wa National Historic site in Treaty 8 territory, B.C., image by Julie Harris

When establishing new national parks or reserves and national marine conservation areas, or when acquiring national historic sites, Parks Canada "works within Canada's legal and policy framework regarding Aboriginal peoples' rights, as recognized and affirmed by section 35 of the Constitution Act, 1982" and accordingly "consults with affected Aboriginal communities at the time of new park establishment and historic site acquisition, or as part of an Aboriginal land claim settlement."[102] However, Parks Canada goes further in contemporary policy and practice. For example, it has partnered with and is engaging in dialogue with Indigenous peoples concerning legislation, policy and other guidance tools, as well as offering financial and human resources to better support the implementation of UNDRIP, Indigenous rights, modern treaties and other agreements. According to their website, Parks Canada has partnered with more than 300 First Nations, Inuit and Métis groups across Canada to conserve, restore and present Canada's heritage.[103]

In 2015, Parks Canada adopted guiding principles to strengthen ongoing and future partnerships with Indigenous communities: **P**artnership (working collaboratively on heritage place planning, management and operations), **A**ccessible, **R**espectful, **K**nowledge-based (including honouring and creating space for traditional knowledge), and **S**upportive (of Indigenous partners'

community interests). A notable inclusion in these guidelines is the acknowledgements that Indigenous peoples must have access to spaces where they can practise traditional activities and share their knowledge with the younger generation.[104] The implementation of reconciliation activities is supported by Parks Canada's Indigenous Affairs Branch (which provides advice on advancing reconciliation with Indigenous peoples), an Indigenous Heritage Advisory Council and community engagement.[105] Priority areas identified for reconciliation include "strengthening Indigenous connections with traditionally used lands and waters; expanding and ensuring presentation and commemoration of Indigenous histories and cultures; and increasing economic opportunities related to Indigenous tourism."[106]

On August 28, 2019, Canada implemented new federal environmental legislation under Bill C-69 (including the Impact Assessment Act, Canadian Energy Regulator Act, and Canadian Navigable Waters Act, as well as amendments to other federal laws.[107] These new statutes and amendments expressly reference Indigenous constitutional rights and UNDRIP and oblige Canada to consult with Indigenous peoples on mining, pipeline and other projects that require federal impact assessments, certain federal regulatory approvals and permits. Like the equivalent B.C. legislation discussed below in section 4.6.4, this legislative package represents Canada's interpretation of the rights of consultation and FPIC. The legislation clarifies and increases opportunities for Indigenous participation in decision-making processes and to seek consensus but does not recognize an Indigenous people's veto.[108] The new Indigenous-related aspects generally focus on measures designed to:

1. Increase opportunities for Indigenous participation, cooperation and partnership with government in impact assessment processes and decision making;
2. Enhance recognition and consideration of Indigenous rights and interests; and
3. Enhance consultation and engagement opportunities for Indigenous groups.[109]

Some of the key changes included in the new legislation are increased opportunities for Indigenous participation, cooperation and partnership with government in impact assessment processes and decision making; express recognition and consideration of Indigenous rights and interests in environmental assessment and regulatory decisions concerning potential impacts; mechanisms for consideration and protection of Indigenous knowledge; enhanced consideration of the environmental, health, social and economic effects of designated projects and cumulative effects of existing or future activities in a specific region; and consideration of impacts on the rights of Indigenous peoples, including express reference to Indigenous women. It is beyond the scope of this review to go over the details of Indigenous participation throughout this federal environmental legislative framework. However, in section 2.7.3 below we review some of the key provisions in the Impact Assessment Act by way of example.

2.7.1 Canada National Parks Act, SC 2000, c. 32

This act was designed generally to establish and maintain national parks and park reserves in Canada.

Its application may be limited by terms and conditions set out in modern treaties and land claims that establish parks, for example, relating to access for resource harvesting activities, the nature and extent of Indigenous participation in park planning and management and any agreement relating to the Gwaii Haanas National Park Reserve of Canada (sections 2[2] and 17[2]). Administration, management and control of the parks fall under the Minister responsible for the Act, presently the Minister of Environment, who has the power to enter into agreements with governments, including Indigenous governments, bodies established under land claims and other persons and organizations (sections 8–10). The Minister must table management plans and reviews for each park every five years. The Minister must also provide opportunities for public consultation, including participation by Indigenous organizations and bodies established under land claims agreements.

The Act also grants the Minister the ability to acquire Indigenous archaeological sites and historic lands for designation as national park lands. However, Parks Canada's internal operational policies provide for consultation with Indigenous peoples and are reflected in efforts to increase the designation of Indigenous cultural landscapes as national historic sites.[110] The Act also empowers the Governor in Council to make regulations respecting the protection of the natural elements of a park, as well as its cultural, historical and archaeological resources (section 16[1][b]). It also prohibits and makes it an offence to threaten the protection of cultural, historical or archaeological resources (sections 27[4] and 27.7[4]) and requires the cleaning up of any pollution that is capable of degrading or injuring cultural resources (section 32[1]).

2.7.2 Historic Sites and Monuments Act, RSC 1985, c. H 4

This act establishes the Historic Sites and Monuments Board of Canada, which serves as an advisory body to the Minister on the commemoration of nationally significant aspects of Canada's history.

However, the Minister is not bound by the Board's recommendations. A request to the Board for the designation of a historic site can be made by any Canadian individual or corporation through the National Historic Sites program. While national historic sites are not owned by the Government of Canada, they are eligible for federal funding through the National Historic Sites Cost-Sharing Program. Protection of national historic sites owned by the Government of Canada is governed by the Canada National Parks Act and associated regulations. During consultations concerning the review of its system plan, Parks Canada identified Indigenous peoples as "insufficiently represented," along with ethno-cultural communities and women.[111] These three groups are now being prioritized by Parks Canada.

While section 4 of the Act establishes the Historic Sites and Monuments Board of Canada – and requires the membership of this Board to include specific participants, such as the Librarian and Archivist of Canada – there is no requirement to include any Indigenous people (whether First Nations, Métis or Inuit) on the Board. However current practice is to include Indigenous representation. Although criteria for designating historic places and monuments include those of Indigenous origin or that have Indigenous significance, a "fundamental flaw with using assessments of 'significance' as an approach to values-based management is that the values that have been most often defined are more often those that are given more weight in 'Western' cultures (historical, aesthetic, scientific) than those that might be given more weight in Indigenous cultures (spiritual, community)."[112] As a consequence, sites of significance to Indigenous peoples may not meet program criteria applied by Parks Canada criteria for designation. Other concerns identified in recent engagement sessions include strengthening Indigenous voices in decision making and greater transparency in decision making. For example, "the current process does not allow for appeals, deliberations are conducted behind

Molly Desjarlais, West Moberly First Nations, image by Diane Desjarlais

closed doors, and Ministerial decisions are delivered irregularly with very little explanation about the rationale for the decision."[113] These and other concerns inform ongoing review of Parks Canada law, policy and practice in light of UNDRIP and Call to Action 79 of the TRC, which calls on Canada to include First Nations, Métis and Inuit representation on the Historic Sites and Monuments Board and its Secretariat and to revise "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."

2.7.3 Impact Assessment Act, SC 2019, c. 28

Projects that trigger environmental assessments also trigger issues of Indigenous rights and a wide range of potential impacts to Indigenous heritage.

Participation in the assessment process is an important mechanism for Indigenous people to voice their concerns, identify impacts on their lands and communities and help determine conditions under which a project will operate. The broad purpose of the Impact Assessment Act (IAA) is to enhance and expand federal environmental assessment processes, ensure projects do not cause significant adverse environmental effects and facilitate public participation in the assessment process.

The Act is clear that it is not intended to abrogate or derogate from the rights of Indigenous peoples protected by the Canadian Constitution (section 3). Enacted in 2018, it recognizes and affirms Indigenous constitutional rights, references UNDRIP and speaks to "fostering reconciliation and working in partnerships" in its preamble. The IAA introduces several measures that could significantly increase opportunities for Indigenous groups to be actively involved in impact assessments. For example, it creates an Indigenous Advisory Committee to advise on assessments and a funding program for Indigenous and public participation (sections 158 and 75[1]). The government may also enter into agreements with Indigenous governing bodies and bodies recognized under land claims and treaties (e.g., co-management boards) on a broad range of subject matters (e.g., assessment of impacts, exchange of information, creation of review panels) and substitute their process for its own (sections 114, 39[1], 93).

There are approximately 20 factors that must be considered in an impact assessment (section 22). These include enhanced environmental and Indigenous factors such as any impacts on Indigenous peoples and their asserted and established Aboriginal or treaty rights. This goes beyond the common law requirements of the duty to consult, which does not consider impacts on Indigenous peoples generally but impacts on established or asserted section 35 constitutional rights. Other factors considered include impacts on physical and cultural heritage, current use of lands and resources for traditional purposes, structures or sites of historical, archaeological, paleontological or architectural significance, changes to health, social or economic conditions and on Indigenous women (e.g., work camps).

The preamble of the IAA recognizes that "impact assessments provide an effective means of integrating scientific information and Indigenous knowledge into decision-making processes related to designated projects." "Indigenous knowledge" has replaced references to the "traditional knowledge of the Indigenous peoples of Canada" to clarify that Indigenous knowledge includes the evolving knowledge of Indigenous peoples. Indigenous knowledge is also included in the Act's list of factors to be considered in making an impact assessment: not only do potential impacts on Indigenous rights need to be considered, but so too must Indigenous knowledge provided with respect to the designated project, coupled with relevant Indigenous cultural considerations, be taken under advisement (sections 22 [1][g] and [l]). Assessment reports need to describe how Indigenous knowledge, if provided, is taken into account. Indigenous knowledge is also recognized and protected in the IAA in other ways. For example, Indigenous knowledge is presumed to have been provided in confidence (unless it is publicly available) – any Indigenous knowledge that is provided in confidence must not be disclosed without written consent and, in cases where the disclosure is necessary for purposes such as procedural fairness or natural justice, the Indigenous person or entity who first provided that knowledge must be consulted (section 119). Second, environmental impact assessment reports must set out how the Agency took into account and used any Indigenous knowledge provided with respect to the designated project (section 28[3.1]).

In further protecting Indigenous heritage, the Act explicitly prohibits the proponents of a designated project from acting in such a way that could impact Indigenous physical and cultural heritage (including impacting any sites or objects of historical, archaeological, paleontological or architectural significance), as well as lands and resources being used for traditional purpose (section 7[1][c]). It further protects against actions that could change the health, social or economic conditions of Indigenous communities (section 7[1][d]). Such prohibited activities cannot be carried out without a decision of the Agency and compliance with whatever conditions are imposed. Consultation with affected Indigenous communities, obligatory components of assessment reports, and processes in these and other contexts are contained in the legislation, as well as policies and reference materials of the Canadian Environmental Assessment Agency.

Technical guidance policies for assessing physical and cultural heritage provide direction to government employees and proponents engaging in a federal environmental assessment with parties including Indigenous groups. These documents recognize the integral connection of spiritual and cultural practices to specific locations and surrounding landscape features, as well as objects. Environmental assessments therefore must also consider how impacts might limit the ability of Indigenous peoples to engage in spiritual and cultural practices.

3.0 PROVINCIAL LEGISLATION

3.1 OVERVIEW OF KEY PROVINCIAL LEGISLATION

Provinces have jurisdiction over provincial Crown lands, property and civil rights within their provincial boundaries.

What is largely missing from most provincial legislation is express recognition of Indigenous rights and Crown obligations to Indigenous peoples. Like many of the federal laws discussed above, provincial laws predate UNDRIP and express recognition of Indigenous constitutional rights in the Canadian Constitution. However, provincial governments are increasingly engaging with Indigenous peoples to change policies and practices affecting Indigenous heritage and, in some instances, are in the process of reviewing and amending provincial law. That said, some provinces have publicly indicated their reluctance to engage in law reform to implement UNDRIP until its principles and implications are better understood.[114]

As elaborated below, an exception to this silence in provincial law is B.C. For example, the Historic Resources Act enables the Minister to enter formal agreements with First Nations concerning conservation and protection of heritage sites (section 4). A recent report released by the First Peoples' Cultural Council (FPCC) explores further steps the province can take to decolonize its heritage law and related practices in light of UNDRIP.[115] In 2006, B.C. also created a special conservancy designation under the Park Act that "explicitly recognizes the importance of these areas to First Nations for social, ceremonial, and cultural uses."[116] More recently in 2018, B.C. reviewed its regulatory process and made amendments to its environmental laws to better reflect Indigenous rights and its understanding of UNDRIP and the principle of FPIC. Because these areas are highly regulated, we do not go into detail in this review. However, we do highlight some of the changes to environmental legislation that respond to Indigenous rights and interests.

Indigenous heritage is also affected by other provincial legislation related to museums, access to information, libraries, limitations and archives. No matter what legislative context, government actions that might potentially adversely impact credibly asserted Indigenous constitutional rights to heritage sites, objects or information could also trigger a constitutional duty to engage in good faith consultation and to accommodate Indigenous rights. This duty is contemplated in many contemporary government policies and practices – for example, in the context of discovering archaeological sites – but in many instances, the duty is not fully understood or considered a legal obligation, nor reviewed in light of the principle of FPIC informing UNDRIP.

Limitation periods that prevent legal actions from being brought before Canadian courts to recover property also affect Indigenous peoples' rights to cultural heritage.[117] Provincial and parallel federal legislation on limitation periods provide that actions must be brought before the courts within a specified period of time. Failure to do so can result in the ability to enforce legal rights, and in some provinces, title to objects may be terminated once the designated time to bring a claim expires. The length of time varies from province to province and with the nature of the claim. The rationale behind such legislation is to provide for greater certainty of title, encourage prompt settlement of disputes and protect reasonable expectations of innocent purchasers. However, even if a taking is illegal in Canadian law, a limitation period can apply. This has particular implications, for example, in the context of repatriation claims for past wrongful takings contrary to Canadian or Indigenous laws.[118] In B.C., a claim may not be "commenced more than 2 years after the day on which the claim is discovered." A claim is discovered by a person on the first day on which the person "knew or reasonably ought to have known" among other factors that "injury, loss or damage had occurred" and that having regard to the "nature of the injury, loss or damage, a court proceeding would be an appropriate means" to seek a remedy. However, the Limitations Act in B.C. "does not apply to court proceedings based on existing aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act*."

Fish drying racks, Lake Babine First Nation, image provided by Cindy Lowley-Patrick

3.2 ANCESTRAL REMAINS AND BURIAL SITES

Indigenous burial sites have significant associated intangible heritage and continue to be integral to ongoing traditions, spiritual beliefs, legal orders and ceremonial practices.[119]

They are also repositories of ancestral remains and objects, and physical evidence of the life and historical record of a people and place. As such, they have significant educational, scientific and heritage value beyond familial, descendant, spiritual or other Indigenous relationships with them. For this reason, burial places and items are often categorized as archaeological and/or ethnographic property in Western legal systems and are highly regulated by laws that often vest ownership in provincial governments. Although some provincial laws address ownership of skeletal remains recovered from archaeological sites, most are silent, and issues of stewardship, internment and repatriation are addressed on a case-by-case basis by various government bodies controlling archaeological heritage (e.g., parks, museums, universities).

Under common law, the human body is not owned by anyone, but certain persons are recognized as having control and responsibility in relation to remains in different contexts (e.g., criminal investigation, on death, scientific research). Further, there are few judicial decisions concerning disputes over ancestral remains because claimants, including in the context of repatriation, seek to avoid dealing with such sensitive issues through legal frameworks, preferring ethics-based dialogue and negotiation. The New Zealand case of *Re Tupuna Maori* is a rare example of an international repatriation of indigenous remains through court order. It affirmed the legal status of the New Zealand Maori Council, which was ultimately successfully in obtaining an injunction prohibiting the sale of a tattooed, preserved head of a Maori warrior *(toi moko)* collected during the nineteenth century and consigned for auction in London.[120] More recently in *Jones v. Dodd* (1999), a draft of UNDRIP was referenced in a disagreement over the place of burial of a deceased man of Indigenous descent.[121] The Australian High Court recognized the right of a father to bury his son in accordance with Indigenous laws and the spiritual practices of his people. In doing so, the court referred to emotional, spiritual and cultural factors and the right of Indigenous peoples to repatriation of human remains and to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies recognized in the draft declaration. However, as Robert Paterson notes, while the above cases support Indigenous rights, they do not address the law respecting the rights of ownership and possession in general. Were this law to be revisited in Canada, it may well be modified in the light of the reasoning informing UNDRIP and cases like *Re Tupuna Maori* and *Jones v. Dodd*.[122]

Provincial cemetery legislation, with the exception of Ontario and Prince Edward Island, does not apply to archaeological burial sites. This is important, as modern cemeteries are governed by legislation that appreciates their centrality to the culture and religious traditions of living people and anticipates ongoing access, care and preservation of burial places.[123] In contrast, Canadian heritage law and practice applicable to archaeological sites seeks to balance constitutional obligations to Indigenous peoples and various dimensions of heritage value with benefits derived from land and resource development; but heritage, scientific and Indigenous rights and interests are frequently outweighed by economic and private property rationale. Cemeteries may also be negatively impacted by development, but the legal and political process required to expropriate the land for a public benefit and disturb cemeteries is often more difficult and complex. In Canada, this has resulted in Indigenous people asserting rights of stewardship and control to protect burial places and other significant heritage sites.

The issues faced by Indigenous peoples are further compounded by absence of a clear federal prohibition on sale of ancestral remains, difficulty enforcing export controls that do exist once remains are removed from Canada, the selling and trade of remains on electronic sites such as eBay, a lack of clarity on the application of Criminal Code sanctions concerning improper and indecent interference with "a dead human body or remains,"[124] and a clash of world views as Indigenous people try to explain that remains of their ancestors are more than archaeological material. As explained above, since the late 1970s, Canada has placed archaeological material on the export control list, but it has not enacted a clear prohibition or imposed criminal sanctions, in part for fear that this could encourage greater demand through a black market. Recovery of ancestral remains from within and outside of Canada continues to be based largely on negotiation and, along with repatriation of significant items, has been the recent focus of UNDRIP international expert mechanisms hosted in Canada.[125]

Ponderosa Pine needles from central B.C.

4.0 B.C. LEGISLATION

4.1 DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT, SBC 2019 C. 4

On November 26, 2019, the B.C. legislature unanimously passed Bill 41, the Declaration on the Rights of Indigenous Peoples Act (DRIPA).

Other provinces are conducting reviews of legislation, policy and practice in light of UNDRIP, but have yet to enact specific UNDRIP implementation legislation.

The three main purposes of DRIPA are (1) to affirm the application of UNDRIP to the laws of B.C.; (2) to contribute to the implementation of UNDRIP; and (3) to support the affirmation of, and develop of relationships with, Indigenous governing bodies. The Minister must report annually on the progress that has been made towards implementing the necessary measures and achieving the goals in the action plan. Importantly, DRIPA recognizes in section 1(2) that "the government must consider the diversity of the Indigenous peoples in British Columbia, particularly the distinct languages, cultures, customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories and knowledge systems of the Indigenous peoples in British Columbia." This is significant because most of B.C. is unceded territory that is not covered by negotiated treaties. As in other parts of Canada, Indian Act band councils and traditional governments may exercise jurisdiction within Indigenous traditional territories. This section also recognizes that Indigenous peoples have their own laws and institutions concerning representative authority relating to heritage and other matters.

As with its proposed federal counterpart, DRIPA requires consultation and cooperation between provincial lawmakers and Indigenous peoples to ensure provincial laws are consistent with UNDRIP. It establishes a framework for shared decision making between provincial and "Indigenous governing bodies"[126] and could play a role in resolving Aboriginal title[127] and other disputes in B.C. Article 40 of UNDRIP calls on States to help make dispute resolution processes more prompt and accessible to Indigenous communities and recognizes the rights of Indigenous peoples to participate in design of "just and fair procedures for resolution of disputes" taking into account Indigenous customs, traditions, rules, and legal systems." Article 34 speaks to the right of Indigenous peoples to promote, develop and maintain juridical systems and customs. Articles 18 and 27 also 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 other contexts such as 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" (article 11.1).

To date, B.C. has issued two DRIPA progress reports. The reports speak to progress and next steps on alignment of laws, agreements between the province and First Nations, and initiatives to implement UNDRIP in various sectors, including health care, housing, revenue sharing, justice, language, collaborative stewardship of natural heritage and habitat, mental health and wellness, and children and youth in care. There has been limited federal and provincial law reform to align existing laws with UNDRIP. However, ministries are purportedly seeking input on proposed legislation, in circumstances where previously they may not have sought input from First Nations.[128]

Port Renfrew, Vancouver Island, B.C.

Penelakut Trail interpretive signage. The First Peoples' Cultural Council Heritage Program supports cultural heritage projects for First Nations in B.C.

4.2 FIRST PEOPLES' HERITAGE, LANGUAGE AND CULTURE ACT, RSBC 1996, C. 147

The First Peoples' Heritage, Language and Culture Act sets out the mandate for the First Peoples' Heritage, Language & Culture Council (FPHLCC), now the FPCC.[129]

FPCC is created as a provincial Crown corporation to administer the First Peoples' Heritage, Language & Culture Program, which provides assistance "to First Nations in their efforts to revitalize their languages, arts and cultures."[130] The First Peoples' Advisory Committee is also continued under the Act, consisting of one representative from each of the First Nations language groups in B.C. The committee "acts as a bridge to First Nations communities and brings community-based ideas and issues to the attention of FPCC and, in turn, advises communities on FPCC programs, research and advocacy."[131]

4.3 MUSEUMS ACT, RSBC 2003 (ARCHIVES & INFORMATION MANAGEMENT)

Provincial museum legislation is substantially similar across the country.

Museum legislation generally establishes a body corporate (the museum) under the governance of a board of directors. Museum corporations are vested with the power to acquire, preserve and dispose of property, and the authority to make bylaws and give final approval to decisions, including disposition of collections assets, is generally vested in the museum's board of governors. Museum collections are commonly referred to in the legislation as being a public trust held for the benefit of the people.

On April 1, 2003, B.C. repealed its Museum Act[132] and replaced it with a new Museum Act, which establishes the Royal British Columbia Museum (RBCM) as a corporation.[133] RBCM is now governed by an eleven-member Board of Directors reporting to the Minister of Community, Aboriginal and Women's Services. Under the Act, RBCM is responsible for the provincial museum, the provincial archives, Helmcken House, Thunderbird Park, Mungo Martin Big House (Wawadit'la), St Ann's Schoolhouse and the Netherlands Centennial Carillon.[134]

Tse'k'wa Heritage Society, Fort St. John

The objects of the RBCM as laid out in section 4(a) include the acquisition and preservation of "specimens, artifacts and archival and other materials that illustrate the natural or human history of British Columbia"; archives management, collection research and exhibition, as well as promoting public access to its collections and exhibits. Repatriation of objects to First Nations is also addressed in section 5(7), which requires the corporation to transfer title and possession of an artifact in the collection to an "aboriginal people" upon government request. Situations in which such a transfer could occur include a treaty or other agreement made between the government and First Nations. However, the transfer may be subject to government imposed terms and conditions. Government consent is also required prior to any disposition or destruction of a government record held by the corporation.

As elaborated earlier, before UNDRIP and the TRC, much of museum policy was informed by principles derived from the CMA and AFN *Task Force Report on Museums and First Peoples* and the International Code of Museum Ethics 2004 (ICOM). The *Task Force Report* calls on museums and First Peoples to work together to correct inequities and develop cooperative strategies involving mutual appreciation of each other's knowledge, laws and interests, including through co-management and co-responsibility; involvement in museum exhibitions, programmes or projects dealing with Indigenous heritage; and repatriation of significant cultural items and remains.

Since the release of the Task Force Report, UNDRIP and the TRC have called for further national and international review of museum law, policy and practice. Call to Action 67 pertains specifically to the work of the CMA on Indigenous matters:

> "We call 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."
>
> – Call to Action 67

Pursuant to this call, the CMA and RBCM have undertaken initiatives to explore how museums can better align their policy and practices with UNDRIP. In response to allegations of racism and in furtherance of its commitment to UNDRIP, RBCM has also developed a "Culture Change Plan" to ensure "a safer process for people who have experienced discrimination and harassment," including organizational restructure and additional needed resources to the Indigenous Collections and Repatriation department.[135] In August 2016, RBCM released a formal public response to the TRC's calls to action.[136] It speaks to a number of areas where RBCM can respond to the calls, including through education programs concerning First Nations culture and identity, programs that support the use and protection of Indigenous languages and review of all RBCM policy in light of the principles of reconciliation, representation and cross-cultural collaboration. Updated in 2018, the Indigenous Collections and Repatriation Policy speaks to access to Indigenous collections, ancestral remains, burial belongings and archival and audio-visual material relating to Indigenous peoples by researchers. It does not allow research on ancestral remains, with the exception of non-invasive research that may be sought to help identify unknown remains, and requires all research that uses collections, including archival materials, from specific Indigenous communities be approved by the "relevant Indigenous community governing authority" and incorporates contemporary Indigenous research ethics concerning distribution of research outcomes and attribution.[137] For example, sound recordings that "document family histories and ceremonies can be accessed only with the permission of the rights holder of the hereditary privileges."[138]

Archives legislation among the provinces is also substantially similar. The acts are often administered by a provincial archivist under the direction of a government agency with the intent of preserving government documents and materials relating to the history of the province/territory. In B.C., the RBCM has the role of the provincial archivist of the Government of British Columbia and provides research access to records considered to be of enduring value to the province for both the provincial government and public researchers. It has a number of Indigenous-specific programs and policies, including working to provide digital copies of records to Indigenous families and communities; prioritizing digitizing linguistic tapes in order to support language revitalization; and reviewing their descriptive standards with a view to incorporate traditional knowledge, cultural restrictions and Indigenous languages.[139]

B.C. also recently passed the Information Management Act to facilitate digital storage and information management by courts, government ministries, departments and designated public sector organizations (including FPCC and RBCM).[140] It provides the province's legislative framework for modern digital information practices, including transitioning the provincial government to digital storage and information management, as well as establishing the digital archives.

4.4 FREEDOM OF INFORMATION AND PRIVACY ACT, RSBC 1996, C. 165

Many public bodies must comply with access to information and privacy legislation.

Public bodies are defined by legislation and typically include universities, government agencies and departments, tribunals, municipal governments and many other public institutions that are repositories of information. Such legislation applies to some, but not all public museums and archives, and generally sets a default rule that all records held are to be accessible to the public. Privacy legislation regulates the way that public bodies may collect, use and disclose personal information.

The B.C. Freedom of Information and Privacy Act (FIPA)[141] provides for public access to all records in the custody or under the control of a public body, including court administration records, subject to specified exceptions; grants individuals the right to request corrections be made to their personal information; and prevents public bodies from collecting, using or disclosing personal information without authorization. Like many provinces, it exempts from mandatory disclosure court records that contain confidential information that could harm intergovernmental relations, including relations with Aboriginal governments (section 16[1][iii]). A more unique provision not common in most provincial legislation is the ability of a public body in B.C. to refuse to disclose information that could result in damage to or interfere with sites of "anthropological or heritage value" (section 18).

Fraser River, B.C.

4.5 HERITAGE CONSERVATION ACT, RSBC 1996, C. 187

All Canadian provinces have legislation concerning archaeological and historical sites and resources located on public or private provincial lands.

Most of these laws provide a means to designate and protect historic resources, require reporting of archaeological sites and objects discovered inadvertently in the course of development, and control archaeological excavation through a permit system. Most provinces vest title to archaeological property in the Crown, whether it be found under or on both private and public land. The exceptions are Ontario and Quebec. B.C. legislation is silent on this point; instead, it provides that "a public museum, archive or other heritage conservation organization that has possession of an object that it does not own, or is uncertain as to whether it owns, may apply to the SCC for an order vesting ownership" (section 19).

All provincial heritage conservation statutes strive to balance the benefits of economic development and scientific study against the importance of preserving heritage. However, different concepts of what is valuable heritage and relationships with archaeological heritage means this legislation tends to favour 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. The SCC describes the process and purpose of such legislation 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 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."[142]
>
> – *Kitkatla*

Arrowhead at Keatley Creek, B.C., a Ts'kw'aylaxw Cultural Landscape

However, the challenge of reconciling Indigenous land rights with private property interests has often resulted in this balancing process weighing against preservation and the assumption in implementation of government heritage policy that site alteration permits will rarely be denied or development stopped. With the exception of B.C., provincial governments have not explored legislated alternatives to these colonial approaches in dealing with Indigenous cultural heritage, but they have taken some efforts to respond through policies and practices, largely through increased community engagement and consultation.

In the early 1990s, before the SCC elaborated on the principles of consent and consultation, various developments, including the enactment of the Native American Graves and Repatriation Act in the United States and the work of Canada's RCAP, resulted in B.C. and other Canadian governments and professional organizations re-examining law and policies concerning control and management of heritage sites, including burial sites, funerary belongings and ancestral remains. Following a heritage symposium held at Cape Mudge, the Government of British Columbia proposed new legislation to address, among other concerns, that the Heritage Conservation Act (HCA) was geared more towards protecting sites and objects for scientific study than "as the heritage legacy of living cultures" and demands by First Nations for more

respect for their stewardship rights and responsibilities. The proposed law did not specify how, but did envision Indigenous participation in decision making and stewardship. Among other things, it also vested ownership of ancestral remains and grave goods in B.C.'s First Nations, or in descendants or descendant communities, and that such material in the possession of the Crown were deemed to be held in trust. It also sought to regulate removal of archaeological heritage from sites and prohibit export outside the province. However, provisions that deemed pre-1958 owned objects as the property of the Crown and issues around the constitutionality of a province addressing export of archaeological heritage were among the challenges that resulted in an entirely new bill that eventually became law in 1994.[143]

The HCA was further amended in 2019 to strengthen protections for archaeological sites and facilitate implementation of UNDRIP. Changes include a duty to report discovery of sites and objects of heritage value, obligations to pay for and obtain heritage reports prior to obtaining permits and enhanced powers of the ministry to refuse, amend, suspend and cancel permits.[144]

Similar to other provincial heritage conservation legislation, heritage sites are protected under the HCA through designation 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). It also extends designation procedures to "heritage objects" that may be registered; are protected from damage, alteration, desecration and removal from the province; and may result in compensation rights to owners of designated property (sections 1, 11 and 12.1). The HCA also 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]). It also enables the Minister to negotiate agreements with respect to the cultural heritage of a First Nation (section 4) and to further specific objectives of the Act (section 20[1][b]). At the time of writing, only two protocol agreements concerning permit consultations with First Nations regarding heritage sites have been entered, although this is addressed in some modern treaties – one with Treaty 8 in 2010 and the other with the Hul'qumi'num Treaty Group in 2007.[145]

Notably absent from the HCA and other provincial statutes, but contained in these two agreements, is an express and mandatory duty for the province to consult and accommodate interests of First Nations before issuing heritage inspection, investigation or site alteration permits for protected sites. Nevertheless, some consultation before issuing permits occurs as a matter of provincial policy.[146] It is beyond the scope of this paper to review the current law on consultation and HCA processes in light of section 35 Crown obligations. However this is one of several issues to be considered in reviewing and reforming current legislation in light of UNDRIP.

4.6 PARKS AND ENVIRONMENTAL REGULATION

Provincial parks legislation governs the designation and management of parks and historic sites within a province and departments also have within their control Indigenous sites, objects and archaeological heritage.

Parks Canada's system and most provincial systems generally have one class of park and they offer a range of protective measures depending on the purposes for which the park has been created. There are exceptions, such as the Wanuskewin Park in Saskatchewan, which was created as a living memorial to protect an archaeological site and co-managed by the Wanuskewin First Nations and a park authority created for that purpose.[147] Federal and provincial parks have also developed policies and practices that reflect a growing appreciation of Indigenous rights and the benefits of partnerships and other types of agreements with Indigenous peoples. These initiatives may or may not be implemented through legislation.

BC Parks is responsible for protecting and managing park lands as well as a system of ecological reserves. It derives its authority from three pieces of legislation: the Parks Act, Ecological Reserve Act and Environment and Land Use Act. As discussed below, a special conservancy designation was created that "explicitly recognizes the importance of these areas to First Nations for social, ceremonial, and cultural uses."[148] Parks policy and practices are also informed by recognition of Indigenous people's connection to ancestral lands and seeks to respect spiritual and other traditional cultural practices. It has entered into agreements with First Nations, including facilitating sustainable cultural tourism, and has been renaming provincial parks using local First Nations languages to reflect their connection and significance.[149]

Although environmental and natural resource regulatory processes differ provincially, they are cloaked with the same constitutional obligations that apply to federal processes discussed in sections 1.3 and 2.7 above. B.C. has reviewed its process and made amendments to its environmental laws in 2018 to better reflect Indigenous rights, UNDRIP and FPIC. As environmental and natural resources law is highly regulated, we do not go into detail in this review. However we do highlight some of the changes to the legislation made in 2018.

Broken Group Islands, Pacific Rim National Park, image by Dennis McMillan

4.6.1 Park Act, RSBC 1996, c. 344

The Park Act regulates the creation, use and maintenance of provincial parks in B.C., whereby "parks" are Crown land established or continued as a park either under this act or under the Protected Areas of British Columbia Act. Section 4 of the Act speaks directly to the relationship between Indigenous communities and this act, holding that the Minister may enter into an agreement with a First Nation respecting that Nation (a) carrying out activities necessary for the exercise of Aboriginal rights on, and (b) having access for social, ceremonial and cultural purposes to, land.

Unlike other parks systems in Canada, B.C. has a range of classes of primary areas, including one directed specifically at Indigenous connections and uses: "Ecological Reserves; Class A, Class B and Class C provincial parks; and Conservancies, the newest provincially legislated class of protected area. The conservancy designation explicitly recognizes the importance of these areas to First Nations for social, ceremonial, and cultural uses."[150] Low impact economic activities are allowed but they "must still not restrict, prevent, or hinder the conservancy from meeting its intent or purpose with respect to maintaining biological diversity, natural environments, First Nations social, ceremonial and cultural uses, and recreational values."[151]

Before the creation of this designation, some First Nations declared areas within their territories as "tribal parks" (also called Indigenous protected conservation areas or IPCAs) – but the extent to which these areas are outside of the reserve on Crown or private lands, they were not recognized necessarily as such by the Crown. Other than negotiated agreements, treaties and land claims, few legal mechanisms other than B.C.'s designation system "currently exist to formally recognize and establish an IPCA. For the most part, protected area laws in Canada either conflict with or do not allow the types of governance arrangements or uses that would be the basis of most IPCAs."[152]

4.6.2 Ecological Reserve Act, RSBC 1996, c. 103

The Ecological Reserve Act establishes and administers ecological reserves in B.C. Ecological reserves are established under the schedules of the Protected Areas of British Columbia Act or by order in council under the Act. The purpose of ecological reserves set out in section 2 "is to reserve Crown land for ecological purposes," including the following areas:

a. Areas suitable for scientific research and educational purposes associated with studies in productivity and other aspects of the natural environment;
b. Areas that are representative examples of natural ecosystems in British Columbia;
c. Areas that serve as examples of ecosystems that have been modified by human beings and offer an opportunity to study the recovery of the natural ecosystem from modification;
d. Areas where rare or endangered native plants and animals in their natural habitat may be preserved; and
e. Areas that contain unique and rare examples of botanical, zoological or geological phenomena.

Ecological reserves are the most highly protected areas and all extractive activities are prohibited. The Act does not provide for "traditional," "Indigenous," "Aboriginal," "First Nations" or "cultural" uses of the land. However, under section 5.1, permits may be acquired for scientific research and educational purposes.

4.6.3 Environment Assessment Act, SBC 2018, c. 51

In 2018, new legislation was enacted in B.C. that expressly references UNDRIP and the role of the Environmental Assessment Office (EAO) to support the process of reconciliation through recognition of Indigneous peoples'inherent jurisdiction to "participate in decision making in matters that would affect their rights" (section 2[2][b][ii]).

Although the new legislation provides more mechanisms for Indigenous participation and collaborative approaches to assessing projects and provincial decision making, like its federal counter part, it does not recognize FPIC as giving rise to a veto. Rather, it incorporates "consensus-seeking throughout the EA process" – an approach B.C. sees as consistent with FPIC, which it maintains "emphasizes the importance of the process of dialogue and negotiation over the course of a project from planning to implementation."[153] Among these are the potential for collaborative and Indigenous-led assessments, non-binding optional dispute resolution mechanisms, a legislated requirement to seek consensus throughout various stages of the process, and new capacity funding to assess potential rights impacts.

The new law anticipates that Indigenous peoples may withhold their consent in a number of situations and for various purposes or reasons. Withholding may convince the other party not to take the risk of proceeding with the proposal.[154] Under B.C.'s law, consent is sought at various stages. For example, the "Minister must consider notifications by a participating Indigenous nation of their consent or lack of consent at the Readiness Decision stage (when a project may be terminated or exempted), or in advance of the decision by Ministers regarding whether to issue an Environmental Assessment Certificate (EA Certificate)." However, the final decision lies with the Minister. Further, the legislation distinguishes between processes that seek consensus and other consent mechanisms in the Act: "A desired outcome of consensus-seeking through the EA process is to fully inform an Indigenous nation's decision on consent."[155] For example, consensus-seeking processes:

> Inform, but are distinct from, a decision by a participating Indigenous nation to provide notification of their consent or lack of consent at the conclusion of an EA process;
> Inform, but are distinct from, a decision by a statutory decision-maker under the Act; or,
> May be informed by, but are in addition to, Indigenous participation in any Technical or Community Advisory Committee.[156]

Under the Act, the EAO is to use the best available Indigenous knowledge, science and local knowledge in decision making (section 2[2][b][i][C]). The Act also sets out provisions concerning confidentiality and the handling of such knowledge. Indigenous knowledge provided in confidence to the Minister, to the chief executive assessment officers or in a dispute resolution cannot be disclosed without written consent without a court order unless it is already publicly available or it is necessary for the purposes of procedural fairness, and in such circumstances, conditions can be imposed (section 75). Pursuant to these provisions, B.C. has created a *Guide to Indigenous Knowledge in Environmental Assessments* that provides guidance on confidentiality and inclusion of Indigenous knowledge at various stages of the process.[157] Principles guiding use of such knowledge include respect of equally valid and different ways of knowing; relationships are foundational; and Indigenous knowledge should be applied throughout the process, should be understood within context, used in a way that is procedurally fair and transparent, and only be used with appropriate permissions according to Indigenous laws, policies and practices.[158]

4.7 FORESTRY REGULATION

On June 1, 2021, the B.C. government announced its new vision for the province's forestry policy.

The guiding principles of the new policy are "increased sector participation, enhanced stewardship and sustainability, and a strengthened social contract to give government more control over management of the sector."[159] The proposed changes are outlined in a 2021 intentions paper[160] and include "a compensatory framework to redistribute forest tenures to Indigenous Nations, forest communities and small operators."[161] The Intentions Paper speaks to UNDRIP and references the "need to increase economic and land management opportunities for Indigenous Peoples."[162] In particular, it enables shared decision-making agreements to be negotiated and implemented with Indigenous governments and speaks to increased Indigenous consultation, including in relation to stewardship and protection of old growth and other sensitive areas.

In discussing the three guiding principles, the Intentions Paper speaks to Indigenous participation and consultation in a variety of ways. For example, the enhancing stewardship and sustainability principle holds that the provincial government:

- Is "committed to engaging with Indigenous leaders, industry, labour, environmental groups and communities to further identify potential deferral areas";[163]
- Intends "to move forward with changes like the proposed tactical planning approach of "Forest Landscape Plans" to better incorporate those values and ensure Indigenous peoples can be involved at the start of the forest planning process";[164]
- "Will work in cooperation, coordination and collaboration with Indigenous partners and stakeholders to re-integrate prescribed and cultural fire as a core part of our forest management toolkit";[165]
- "Will be looking to improve the apportionment process so that decisions can be made in a timely way which considers harvest sustainability, the interests of local Indigenous peoples and other stakeholders";[166] and
- "Will explore options to provide discretion in authorization decisions based on important forest values, such as water, wildlife and Indigenous heritage."[167]

5.0 CONCLUDING THOUGHTS AND CONTEMPORARY DEVELOPMENTS

In July 2017, the Government of Canada released a new statement of principles to inform its relationship with Indigenous peoples.[168] Included in the Preamble of this statement is the following commitment:

> The implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* requires transformative change in the Government's relationship with Indigenous peoples. The UN Declaration is a statement of the collective and individual rights that are necessary for the survival, dignity and well-being of Indigenous peoples around the world, and the Government must take an active role in enabling these rights to be exercised. The Government will fulfil its commitment to implementing the UN Declaration through a review of laws and policies, as well as other collaborative initiatives and actions. This approach aligns with the UN Declaration itself, which contemplates that it may be implemented by States through various measures.[169]
>
> – The Government of Canada

Many provincial governments and territorial governments have given similar commitments. As a consequence, federal, provincial and territorial governments are engaged with various levels of commitment to the process of reviewing legislation, policy and practices in light of UNDRIP, including some of the legislation discussed in this review. For example, Parks Canada is engaging with Indigenous peoples in a review of national parks legislation, policies and practices to better reflect "the spirit and intent" of UNDRIP and to advance "reconciliation as guided by" the TRC and "Section 35 rights, treaty obligations, and related commitments.[170] Parliamentary standing committees in Heritage and Industry, Science and Technology have heard submissions and made recommendations concerning Indigenous IP, and joint expert, Indigenous and government mechanisms have been initiated to explore further UNDRIP's implications for repatriation of belongings and ancestral remains- and reform of IP laws.

While some provincial governments have sought delay of federal adoption of UNDRIP and are reluctant to implement UNDRIP without greater understanding of its potential implications, B.C. has enacted DRIPA to monitor UNDRIP's implementation in that province, including in relation to heritage law and practices. Canada has enacted legislation similar to DRIPA and is exploring ways to better protect the rights of Indigenous artists (e.g., through a Canadian equivalent to the American Indian Arts and Crafts Act, which imposes criminal and civil sanctions for falsely identifying arts and/or crafts as being "authentic" Native American. It has also recently debated proposed national repatriation legislation, and the topic is being explored again in international and domestic discussions of repatriation.

While Canadian constitutional law is unclear on the extent governments must engage with Indigenous peoples in developing legislation and policy, UNDRIP is clear that such activities require good faith consultation and cooperation with Indigenous peoples in order to obtain their free, prior and informed consent. The provisions of B.C.'s DRIPA, including in relation to law reform; and contemporary federal practice, for example, in developing recent child welfare and proposed health care legislation, align with these principles. Although UNDRIP and the Calls to Action of the TRC have significant implications for laws and policies affecting Indigenous heritage, it is yet to be seen how far federal and provincial governments will go in the process of law review and reform in light of these national and international developments.

Pine Needle Harvest, Lower Similkameen, image by Rheana Marchand

6.0 RESOURCES ON LAW AND INDIGENOUS CULTURAL HERITAGE

Marie Battiste & James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich Publishing, 2000).

Tony Belcourt, Heather Igloliorte & Dylan Robinson (eds), *Promoting and Protecting the Arts and Cultural Expressions of Indigenous Peoples: A Compendium of Experiences and Action* (Department of Canadian Heritage, 2021) https://www.dylanrobinson.ca/promoting-and-protecting/.

Catherine Bell & Val Napoleon (eds), *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver: UBC Press, 2008).

Catherine Bell & Robert Paterson (eds), *Protection of First Nation Cultural Heritage: Laws, Policy and Reform* (Vancouver: University of British Columbia Press, 2008).

Simon Brascoupé & Karin Endemen, "Intellectual Property and Aboriginal People: A Working Paper" (Department of Indian Affairs and Northern Development and Intellectual Property Policy Directorate, Industry Canada, 1999) https://publications.gc.ca/collections/Collection/R32-204-1999E.pdf.

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David M. Schaepe, George Nicholas & Kierstin Dolata, "Recommendations for Decolonizing British Columbia's Heritage-Related Processes and Legislation" (First Peoples' Heritage, Language and Culture Council, 2020) https://fpcc.ca/stories/decolonizing-heritage/.

Standing Committee on Canadian Heritage, *Shifting Paradigms* (2019) https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/report-19/.

Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act (2019)* https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf.

Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Council of Canada* (2015) www.trc.ca/about-us/trc-findings.html.

Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015)

https://nccdh.ca/resources/entry/honouring-the-truth-reconciling-for-the-future.

United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly, Res 61/295, UNGAOR, 61st Sess, Sup No 53, UN Doc A/61/295 (2007) https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

WEBSITES

First Peoples Cultural Council
https://fpcc.ca/

Indigenous Heritage Circle
https://indigenousheritage.ca/

Indigenous Law Research Unit
https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php

Intellectual Property in Cultural Heritage
www.sfu.ca/ipinch

Telegraph Cove, Vancouver island, B.C.

APPENDIX A – MODERN TREATIES IN B.C.

MODERN-DAY TREATIES IMPLEMENTED THROUGH THE BC TREATY COMMISSION – STAGE 6

Nisga'a Nation

Final Agreement came into effect May 11, 2000

Other negotiation areas: clean energy, economic and community development, natural gas, wildlife harvesting

The Nisga'a Final Agreement was signed on behalf of the Nisga'a Nation and Her Majesty in right of British Columbia on April 27, 1999, and on behalf of Her Majesty in right of Canada on May 4, 1999, before coming into force on May 11, 2000. The Nisga'a Treaty was the first modern-day treaty in B.C., and was the fourteenth modern treaty to be negotiated in Canada since 1976.

The treaty provides that the Nisga'a Nation owns any Nisga'a artifact found (presumably by a non-Nisga'a individual) within Nisga'a Lands, "unless another person establishes their ownership of the artifact." Nisga'a artifacts found elsewhere in B.C. that are in the control of either the Government of British Columbia or Canada are to be loaned to the Nisga'a Nation. Subject to laws of general application, ancestral Nisga'a human remains uncovered from heritage sites are to be returned to the Nisga'a Nation.

The Nisga'a Treaty has been amended three times in the last two decades.

Maa-nulth First Nations

Final Agreement came into effect April 1, 2011

Member Nations: Huu-ay-aht, Ka:'yu:'k't'h'/Che:k'tles7et'h (Kyuquot), Toquaht, Uchucklesaht, Yuułu?ił?ath (Ucluelet)

The Maa-nulth Agreement was negotiated between the five Maa-nulth First Nations, the Government of British Columbia, and the Government of Canada. Under this treaty, "[e]ach Maa-nulth First Nation government can make laws applicable on its Maa-nulth First Nation Lands to preserve, promote and develop the Nuu-chah-nulth culture." The Agreement came into effect on April 1, 2011.

Chapters 20 and 21 of the Agreement focus explicitly on Indigenous cultural heritage: chapter 20 speaks to artifacts, heritage sites, and place names, while chapter 21 centres on culture and heritage more broadly. Under section 20.1.2, "[e]ach Maa-nulth First Nation owns Maa-nulth First Nation Artifacts discovered within a Heritage Site on its Maa-nulth First Nation Lands after the Effective Date, unless another person establishes ownership of that artifact." Section 20 further outlines custodial agreements regarding, and loans and returns of Maa-nulth artifacts currently held by museums or parks in B.C. Human remains are also to be returned to the applicable Maa-nulth First Nation at the request of that Nation, and in accordance with federal and provincial laws and policies. The Agreement also empowers each Maa-nulth First Nation government to develop, as they wish, processes to manage heritage sites on their lands, and to commence a collaborative re-naming project, wherein "the Maa-nulth First Nations and British Columbia will endeavour to agree on a list of key geographic features to be named or renamed in the Nuu-chah-nulth language in accordance with Provincial Law, policy and procedures."

The treaty provisions included in section 21 include Maa-nulth law-making, the harvesting of monumental cedar and cypress on provincial Crown land, and further negotiations regarding the cultural, recreational and environmental values on the Stopper and Diana Islands.

Tsawwassen First Nation

Final Agreement came into effect April 3, 2009

Member of Naut'sa mawt Tribal Council

The Tsawwassen Final Agreement was negotiated by the Tsawwassen First Nation, as well as the Government of British Columbia and the Government of Canada. The primary focus of this Agreement is the provision to the Nation of certain rights and benefits regarding land and resources, as well as self-government over its lands, resources, and members. The self-government provisions will also enable the Tsawwassen First Nation to make its own decisions on matters pertaining to the preservation of its culture (among other things).

Chapter 15 of the Agreement pertains directly to culture and heritage. Section 15.2 speaks to the ability of the Tsawwassen Government to make laws relating to the preservation, promotion and development of their culture and the Hun'qum'i'num language on Tsawwassen lands. Chapter 15 also includes a section on Tsawwassen artifacts. Under the Agreement, the Tsawwassen First Nation owns any Tsawwassen artifact discovered on Tsawwassen Lands (in an archaeological context) after the Effective Date. However, this term does not appear to be retroactive. For those Tsawwassen artifacts that are held by Canadian museums or public collections, at the request of the Nation, Canada may lend, transfer, or facilitate access by the Tsawwassen First Nation to Tsawwassen artifacts or archaeological human remains of Tsawwassen ancestry. The provisions in this section also include a payment by the B.C. government of one million dollars to establish a Cultural Purposes Fund. Similarly, section 15.26 requires the transfer back to Tsawwassen Lands of any archaeological human remains or associated burial objects, on the request of the First Nation. Interestingly, the Agreement speaks only to artifacts within Canada and does not appear to create any kind of obligation for Canada to assist the Nation in repatriating any artifacts currently located internationally.

Further, the Agreement speaks to the conservation, interpretation, management and protection of heritage sites that are of significance to the Tsawwassen First Nation, both outside and within the Tsawwassen Lands. Finally, the Agreement calls for the province of B.C. to adopt various Hun'qum'i'num place names.

Tla'amin Nation

Final Agreement came into effect April 5, 2016

Member of Naut'sa mawt Tribal Council

The Tla'amin Final Agreement was signed in the spring of 2014 by the Tla'amin Nation, the Government of British Columbia and the Government of Canada, and came into effect on April 5, 2016.

Chapter 14 of the Agreement is focused on culture and heritage. The Agreement empowers the Tla'amin Nation to make its own laws, applicable on Tla'amin Lands regarding the preservation, promotion and development of Tla'amin culture and language, as well as the cremation or interment of archaeological human remains found on Tla'amin Lands or returned to the Nation. The Agreement also holds that these Tla'amin-made laws will prevail if put into conflict with federal or provincial law (section 14.9).

Under the section pertaining to Tla'amin artifacts, it is established that the Tla'amin Nation owns any Tla'amin artifacts discovered on Tla'amin Lands after the Effective Date, unless another person establishes ownership of that artifact. The Agreement also sets out a framework for custodial agreements for the return of Tla'amin artifacts. The Agreement names the Royal BC Museum and the Canadian Museum of History in particular. Any custodial arrangements made must respect Tla'amin cultural traditions while also complying with federal and provincial law. At the request of the Nation, Canada must transfer artifacts or archaeological human remains back to the Nation, provided those items came into their possession after the Effective Date. Similarly, the province will be expected to negotiate with and assist the Nation in returning Tla'amin archaeological human remains and associated burial objects that are both found off Tla'amin Lands and are reasonably considered to be of Tla'amin ancestry (provided, again, they come into the permanent possession of B.C. after the Effective Date).

As with the Tsawwassen Agreement, this Agreement speaks only to artifacts within Canada, and does not appear to create any kind of obligation for Canada to assist the Nation in repatriating any artifacts currently located internationally. Neither Agreement set out any provisions regarding the return of artifacts or human remains obtained by the province or by Canada prior to the Effective Date.

MODERN-DAY TREATIES YET TO BE IMPLEMENTED THROUGH THE BC TREATY COMMISSION – STAGE 5

As of the date of this paper, the following agreements have been reached.

Ditidaht First Nation and Pacheedaht First Nation

Ditidaht and Pacheedaht Agreement-in-Principle (2019) Shares a treaty table with Pacheedaht First Nation

Hul'q'umi'num' Treaty Group

Transition to Stage 5 and Treaty Revitalization Agreements (2019).Member Nations: Cowichan Tribes, Halalt First Nation, Lyackson First Nation, Penelakut Indian Band and Ts'uubaa-asatx (Lake Cowichan First Nation)

K'ómoks First Nation (Comox Indian Band)

K'ómoks First Nation Agreement to Revitalize Treaty Negotiations (2019)

Ktunaxa Nation

Ktunaxa Nation Rights Recognition & Core Treaty Memorandum of Understanding (2018)

Laich-Kwil-Tach Council of Chiefs

We Wai Kai Incremental Treaty Agreement (2019).Member Nation: Wei Wai Kum Nation (Cape Mudge Band)

Lheidli T'enneh First Nation

Lheidli T'enneh Treaty (2018). Voted not to accept the original treaty agreement in 2007; voted again not to accept the treaty in a second ratification vote held in June 2018; final agreement continues to be negotiated

Northern Shuswap Tribal Council

Soda Creek Umbrella Agreement (2020). Member Nations: Stswecem'c Xgat'tem (Canoe Creek Indian Band), T'exelc (Williams Lake Indian Band), Tsq'escen' (Canim Lake Indian Band) and Xats'ull (Soda Creek Indian Band)
Other negotiation areas: forestry

Samahquam First Nation and Skatin Nations (Skookumchuck)

In-SHUCK-ch Agreement in Principle (2007). Members of Skatin Samahquam Negotiations Inc.

Stó:lō Xwexwilmexw Treaty Association

Stage 5 Treaty Negotiations Memorandum of Understanding (2018). Member Nations: Aitchelitz Band, Leq'a:mel First Nation (Lakahahmen), Skawahlook/Sq'ewá:lxw First Nation, Skowkale First Nation (Skulkayn), Tzeachten First Nation and Yakweakwioose First Nation

Te'mexw Treaty Association

Te'mexw Treaty Association Agreement-in-Principle (2015). Member Nations: Malahat Nation, Sc'ianew (Beecher Bay) First Nation, Songhees Nation, Snaw-naw-as (Nanoose First Nation) and T'Sou-ke Nation

Tsimshian First Nations

Kitselas Agreement-in-Principle (2015). Member Nations: Gitga'at Nation (Hartley Bay), Kitasoo/Xai'xais Nation (Klemtu), Kitselas First Nation, Kitsumkalum First Nation and Metlakatla First Nation.

Wei Wai Kum Nation (Campbell River Indian Band)

Most recently completed agreement: Wei Wai Kum First Nation (Campbell River Indian Band) / Kwiakah First Nation (Kwiakah Indian Band) Transition to Stage 5 and Treaty Revitalization Agreement (2019)

Wuikinuxw First Nation (Oweekeno)

Wuikinuxw First Nation Agreement-in-Principle (2015)

Yale First Nation

Final Agreement Act completed in 2013, implementation is being negotiated. Member of Naut'sa mawt Tribal Council

Yekooche First Nation

Yekooche First Nation Agreement-in-Principle (2005)

APPENDIX B – OTHER FEDERAL LEGISLATION IMPACTING INDIGENOUS HERITAGE AND CROWN–INDIGENOUS RELATIONS

Arctic Waters Pollution Prevention Act (RSC, 1985, c. A-12)

British Columbia Indian Cut-off Lands Settlement Act (SC, 1984, c. 2)

British Columbia Indian Lands Settlement Act (SC, 1920, c. 51)

British Columbia Indian Reserves Mineral Resources Act (SC, 1943-44, c. 19)

British Columbia Treaty Commission Act (SC, 1995, c. 45)

Canada Lands Surveys Act (RSC, 1985, c. L-6)

Canada Oil and Gas Operations Act (RSC, 1985, c. O-7)

Canada Petroleum Resources Act (RSC, 1985, c. 36 [2nd supp.])

Canada-Yukon Oil and Gas Accord Implementation Act (SC, 1998, c. 5)

Canadian High Arctic Research Station Act (SC, 2014 c. 39, s. 145)

Caughnawaga Indian Reserve Act (SC, 1934, c. 29)

Claim Settlements (Alberta and Saskatchewan) Implementation Act (SC, 2002, c. 3)

Condominium Ordinance Validation Act (SC, 1985, c. 46)

Cree-Naskapi (of Quebec) Act (SC 1984, c. 18)

Déline Final Self-Government Agreement Act (SC, 2015, c. 24)

Department of Indian Affairs and Northern Development Act (RSC, 1985, c. I-6)

Dominion Water Power Act (RSC, 1985, c. W-4)

Eeyou Marine Region Land Claims Agreement Act (SC, 2011, c. 20)

Family Homes on Reserves and Matrimonial Interests or Rights Act (SC, 2013, c. 20)

First Nations Commercial and Industrial Development Act (SC, 2005, c. 53)

First Nations Elections Act (SC, 2014, c. 5)

First Nations Financial Transparency Act (SC, 2013, c. 7)

First Nations Fiscal Management Act (SC, 2005, c. 9)

First Nations Jurisdiction over Education in British Columbia Act (SC, 2006, c. 10)

First Nations Land Management Act (SC, 1999, c. 24)

First Nations Oil and Gas and Moneys Management Act (SC, 2005, c. 48)

Fort Nelson Indian Reserve Minerals Revenue Sharing Act (SC, 1980–83, c. 38)

Gender Equity in Indian Registration Act (SC, 2010, c 18)

Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act (SC, 1986, c. 23)

Gwich'in Land Claim Settlement Act (SC, 1992, c. 53)

Indian Act (RSC, 1985, c. I–5)

Indian Act Amendment and Replacement Act (SC, 2014, c. 38)

Indian Lands Agreement (1986) Act (SC, 1988, c. 39)

Indian Lands, Settlement of Differences (Ontario) Act (SC, 1924, c. 48)

Indian Oil and Gas Act (RSC, 1985, c. I–7)

Indian (Soldier Settlement) Act (RSC, 1927, c. 98)

James Bay and Northern Quebec Native Claims Settlement Act (SC 1976–77, c. 32)

Kanesatake Interim Land Base Governance Act (SC, 2001, c. 8)

Kelowna Accord Implementation Act (SC, 2008, c. 23)

Labrador Inuit Land Claims Agreement Act (SC, 2005, c. 27)

Land Titles Repeal Act (SC, 1993, c. 41)

Maanulth First Nations Final Agreement Act (SC, 2009, c. 18)

Mackenzie Valley Resource Management Act (SC, 1998, c. 25)

Manitoba Claim Settlements Implementation Act (SC, 2000, c. 33)

Manitoba Natural Resources Act (RS, 1930, c. 29)

Manitoba Supplementary Provisions Act (RSC, 1927, c. 124)

Mi'kmaq Education Act (SC, 1998, c. 24)

Natural Resources Transfer (School Lands) Amendment Act - (Manitoba, Alberta, Saskatchewan) (SC, 1960–61, c. 62)

Nelson House First Nation Flooded Land Act (SC, 1997, c. 29)

New Brunswick Indian Reserves Agreement Act (SC, 1959, c. 47)

Nisga'a Final Agreement Act (SC, 2000, c. 7)

Northern Canada Power Commission (Share Issuance and Sale Authorization) Act (SC, 1988, c. 12)

Northern Canada Power Commission Yukon Assets Disposal Authorization Act (SC, 1987, c. 9)

Northwest Territories Act (SC, 2014, c. 2, s. 2)

Northwest Territories Devolution Act (SC, 2014, c. 2)

Nova Scotia Indian Reserves Agreement Act (SC, 1959, c. 50)

Nunavik Inuit Land Claims Agreement Act (SC, 2008, c. 2)

Nunavut Act (SC, 1993, c. 28)

Nunavut Land Claims Agreement Act (SC, 1993, c. 29)

Nunavut Waters and Nunavut Surface Rights Tribunal Act (SC, 2002, c. 10)

Nunavut Planning and Project Assessment Act (SC, 2013, c. 14, s. 2)

Pictou Landing Indian Band Agreement Act (SC, 1995, c. 4)

Qalipu Mi'kmaq First Nation Act (SC, 2014, c. 18)

Railway Belt Act (RSC, 1927, c. 116)

The Railway Belt and Peace River Block Act (SC, 1930, c. 37)

Railway Belt Water Act (RS, 1927, c. 211; 1928, c 6, 44)

Safe Drinking Water for First Nations Act (SC, 2013, c. 21)

Sahtu Dene and Metis Land Claim Settlement Act (SC, 1994, c. 27)

Saskatchewan Natural Resources Act (SC, 1930, c. 41)

Saskatchewan Natural Resources Acts (SC, 1993, c. 51)

Saskatchewan Treaty Land Entitlement Act (SC, 1993, c. 11)

Sechelt Indian Band Self-Government Act (SC, 1986, c. 27)

Sioux Valley Dakota Nation Governance Act (SC, 2014, c. 1)

Songhees Indian Reserve Act (SC, 1911, c. 24)

Specific Claims Tribunal Act (SC, 2008, c. 22)

Split Lake Cree First Nation Flooded Land Act (SC, 1994, c. 42)

St. Peter's Indian Reserve Act (SC, 1916, c. 24)

St. Regis Islands Act (SC, 1926–27, c. 37)

Territorial Lands Act (RSC, 1985, T–7)

Tla'amin Final Agreement Act (SC, 2014, c. 11)

Tlicho Land Claims and Self-Government Act (SC, 2005, c. 1)

Tsawwassen First Nation Final Agreement Act (SC, 2008, c. 32)

Westbank First Nation Self-Government Act (SC, 2004, c. 17)

Western Arctic (Inuvialuit) Claims Settlement Act (SC, 1984, c. 24)

Yale First Nation Final Agreement Act (SC, 2013, c. 25)

York Factory First Nation Flooded Land Act (SC, 1997, c. 28)

Yukon Act (SC, 2002, c. 7)

Yukon Environmental and Socio-economic Assessment Act (SC, 2003, c. 7)

Yukon First Nations Land Claims Settlement Act (SC, 1994, c. 34)

Yukon First Nations Self-Government Act (SC, 1994, c. 35)

Yukon Surface Rights Board Act (SC, 1994, c. 43)

ENDNOTES

1 Catherine Bell is Professor Emerita, Faculty of Law, University of Alberta, a Visiting Professor in the Joint Indigenous Law Degree Program at the University of Victoria, Faculty of Law (2022) and serves on the board of the Indigenous Heritage Circle. Sarah Lazin is a Masters (LLM) student at the Faculty of Law, University of Ottawa (BA, 2018, JD, 2021). Catherine Bell, Heather Raven & Heather McCuaig, in consultation with Andrea Sanborn, the U'mista Cultural Society and 'Namgis Nation, "Recovering from Colonization: Perspectives of Community Members on Protection and Repatriation of Kwakwaka'wakw Cultural Heritage" in Catherine Bell & Val Napoleon (eds), First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives (Vancouver: UBC Press, 2008). There is often no distinction between "cultural heritage" and other forms of heritage in Indigenous contexts. The phrase is used here because of its adoption in law and policy that is the subject of this report.

2 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Final Report of the Special Rapporteur: Protection of the Heritage of Indigenous Peoples, UNESCO, E/CN.4/Sub.2/1995/26 (1995).

3 For example: Catherine Bell, "Ownership and Trade of Aboriginal Cultural Heritage in Canada" in Christoph B. Graber, Karolina Kuprecht & Jessica Lai (eds), International Trade in Indigenous Cultural Heritage: Legal and Policy Issues (Cheltenham, UK: Edward Elgar, 2012) 395 [Ownership and Trade].

4 Being Schedule B to the Canada Act, 1982 (UK), 1982, c. 11 [Constitution Act].

5 Truth and Reconciliation Commission of Canada, The Final Report of the Truth and Reconciliation Council of Canada, online: <www.trc.ca/about-us/trc-findings.html> [TRC].

6 UN General Assembly, Res 61/295, UNGAOR, 61st Sess, Sup No 53, UN Doc A/61/295 (2007) [UNDRIP].

7 Royal Commission on Aboriginal Peoples (RCAP), Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 167.

8 Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, at 1, online (pdf): <http://www.trc.ca/assets/pdf/Executive_Summary_English_Web.pdf>.

9 Historic Sites and Monuments Act, RSC, c. H-6.

10 For example: Truth and Reconciliation Commission of Canada, Calls to Action (Winnipeg, Truth and Reconciliation Commission of Canada, 2012), arts. 13–17, 67–70, 79, 84–85.

11 See, for example: UNDRIP, supra note 6, arts. 11, 12, 13, 18, 24, 25, and 31, respectively.

12 RSA 2000, c. F 14. For further discussion, see Catherine Bell, "Restructuring the Relationship: Domestic Repatriation and Law Reform" in Catherine Bell & Robert Paterson (eds), Protection of First Nations Cultural Heritage: Laws, Policy and Reform (Vancouver: University of British Columbia Press, 2008) 15 at 41.

13 SBC 2003, c.12, s. 5(7). Items and information in museum collections are also returned pursuant to museum repatriation and deaccessioning policies. See, for example, the Royal British Columbia Museum Indigenous Collections and Repatriation Policy https://royalbcmuseum.bc.ca/documents/105663/Indigenous-Collections-and-Repatriation-Policy.

14 In 1973, the SCC affirmed in Calder v. British Columbia (AG) [1973] SCR 313 the existence of an inherent common law right to Aboriginal title. Subsequent cases affirmed that source of title includes substantial connection to land as well as Indigenous legal institutions and land tenure. See Delgamuukw v. British Columbia [1997] 3 SCR 1010 at paras. 154–158.

15 Or, in the case of Métis, before effective European control. See R. v. Powley, 2003 SCC 43.

16 Brian Slattery, "The Generative Structure of Aboriginal Rights," (2007) 38 Sup Ct L Rev 595 at 600 [Slattery].

17 Ibid at 606.

18 Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 at para. 73 [Tsilhqot'in]. 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, supra note 14 at para. 128.

19 The Harper Conservative Government did not endorse UNDRIP until 2010. Among Canada's concerns was the potential for FPIC to give Aboriginal peoples in Canada a veto over resource development affecting Aboriginal and treaty rights, lands or resources (that is, complete and arbitrary power to refuse consent without balancing other interests). However, in 2010, Canada eventually gave a qualified endorsement that it would adopt UNDRIP as aspirational only. See: Indigenous and Northern Affairs, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples," online: Government of Canada <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>. In May 2016, following a change in government, Indigenous and Northern Affairs (INAC) Minister Carolyn Bennett announced to the United Nations that Canada would adopt and implement UNDRIP "in accordance with the Canadian Constitution" and elaborated on how FPIC is fulfilled through section 35 obligations. See "Fully Adopting UNDRIP: Minister Bennett's Speech at the United Nations," online: Northern Public Affairs <www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/>. In July 2017, Canada announced new "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples," which acknowledge that the commitment to secure FPIC goes beyond Canada's constitutional obligations to consult when Aboriginal rights are adversely impacted. Indeed, this commitment is strongest in the case of, but is not limited to, Aboriginal title lands – as such, Canada "will look for opportunities to build processes and approaches aimed at securing consent." See "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples," online: Government of Canada <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

20 See Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and indigenous peoples, UNGAOR, 24th Sess., UN Doc A/HRC/24/41 (2013) at paras. 31 and 32.

21 Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 [Haida]; with respect to treaties, see Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69 [Mikisew 1]. The consultation process does not dictate a particular process or outcome, but it may give rise to a duty to accommodate (e.g., avoid irreparable harm or minimize effects until the claim is resolved) if existing processes do not adequately address First Nations concerns, a strong prima facie case for Aboriginal rights or title exists or the government's proposed decision or action is the cause of potentially significant adverse effects to the claim.

22 See, for example, Eric McLay et al., "A'lhut tu tet, Sul'hweentst Respecting the Ancestors: Understanding Hul'qumi'num Heritage Laws and Concerns for Protection of Cultural Heritage" in Bell and Napoleon, supra note 1, at 150–202.

23 Delgamuukw, supra note 14 at para 115.

24 Catherine Bell, "First Nation Ownership and Control of Cultural Heritage Sites: Issues of Law, Policy and Reform," in James A. R. Nafziger (ed), Comparative Law and Anthropology (Cheltenham, UK: Edward Elgar, 2016) 55 at 60

25 It is beyond the scope of this paper to get into a detailed Aboriginal constitutional rights analysis. However, it is important to note that the notion of surrendering Aboriginal rights to be replaced by treaty rights is contested by Treaty Nations who understand treaties as jurisdictional arrangements and affirmations of Indigenous rights. For further development of these arguments by the author in various heritage contexts see ibid. See also: Catherine Bell, Jessica Lai & Laura Skorodenski, "In/Tangible Heritage, Intellectual Property and Museum Policy: Methods for Respecting Indigenous Law" in Jessica C. Lai and Antoinete Maget Dominicé (eds), Intellectual Property and Access to Im/material Goods (Cheltenham UK: Edward Elgar, 2016) 257; Catherine Bell, "Restructuring the Relationship," supra note 12; Catherine Bell & Robert K. Paterson, "Aboriginal Rights to Cultural Property in Canada" (1999) 8:1 Intl J Cultural Property 167.

26 By "associated intangible heritage," we refer to the knowledge, meanings, relationships, rights and responsibilities associated with objects, sites and landscapes covered in modern treaties, land claims and other heritage agreements. For a discussion of associated intangible heritage and the values informing heritage, see Carcross/Tagish First Nation et al., Yukon First Nations Heritage Values and Resource Management: Perspectives from Four Yukon First Nations – IPINCH Case Study Report, online (pdf): www.sfu.ca/ipinch/sites/default/files/resources/reports/yfn_ipinch_report_2016.pdf.

27 "News Release: Government of Canada and Inuit Heritage Trust Sign Franklin Artifact Memorandum of Understanding," online: Parks Canada <www.canada.ca/en/parks-canada/news/2019/04/government-of-canada-and-inuit-heritage-trust-sign-franklin-artifact-memorandum-of-understanding.html>.

28 "The Nunavut Agreement," online: Tungavik Federation of Nunavut <nlca.tunngavik.com/>.

29 For example, three Yukon First Nations have enacted their own heritage law. See "Guide to Heritage Stewardship for Yukon First Nation Governments" (2018), online at 14: Heritage BC <heritagebc.ca/wp-content/uploads/2018/04/YFN-heritage-guide-feb-21.pdf>.

30 Constitution Act, 1867 (UK), 30 & 31 Vict, c. 3, reprinted in RSC 1985, App. II, No. 5. Under s. 91(24), the term "Indians" includes Indians, Inuit and Métis peoples of Canada.

31 SOR/82-263

32 RSC 1985, c I-5, s.91.

33 RSBC 1996, c. 187.

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

35 Haida, supra note 21, as applied to treaties in Mikisew 1, supra note 21.

36 Tsilhqot'in, supra note 18 at para. 73.

37 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 of whether the legislation at issue has the potential to 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.

38 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].

39 SC 2019, c 24, Preamble.

40 Anna McKenzie, "26 Indigenous governing bodies are reclaiming authority over child welfare," Toronto Star (21 January 2021), online: <www.thestar.com/news/canada/2021/01/21/26-indigenous-governing-bodies-are-reclaiming-authority-over-child-welfare.html>. Canada also recently announced its intention to co-develop new health legislation with First Nations, Inuit and Métis governments. See Kris Ketonen, "Trudeau commits to Indigenous health care overhaul," CBC News (26 September 2019), online: <https://www.cbc.ca/news/canada/thunder-bay/trudeau-indigenous-health-care-1.5297959>.

41 Bill C-15, United Nations Declaration on the Rights of Indigenous Peoples Act, 2nd Sess., 43 Parl., (First Reading 3 December 2020) ["Bill C-15"].

42 Department of Justice Canada, "Bill C-15 – United Nations Declaration on the Rights of Indigenous Peoples Act" (2020), online: <www.justice.gc.ca/eng/declaration/about-apropos.html>.

43 For further discussion see Michael Asch, "UNDRIP, Treaty Federalism and Self-Determination" and James (Sa'ke'j) Youngblood Henderson, "UN Declaration on the Rights of Indigenous Peoples and Treaty Federalism in Canada" (2019) 24:1 Rev Con Stud at 1 and 17, respectively.

44 The doctrine of discovery is a principle in international law that the Crown used to claim sovereignty over Indigenous peoples and their lands, and the doctrine of terra nullius deems land to be legally vacant. Although the SCC has said terra nullius does not apply in Canada (see Tsilhqot'in, supra note 18 at para. 69), the doctrine of discovery has been maintained to restrict Indigenous land ownership and sovereignty over their peoples and territories. Both the TRC and UNDRIP call for these doctrines to be repudiated and no longer used to justify European sovereignty over Indigenous peoples. UNDRIP affirms that "all doctrines, policies and practices based on or advocating the 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," UNDRIP, supra note 6 at 2 (Preamble).

45 For further discussion of benefits, see Sheryl Lightfoot, "Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples" in UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws: Special Report, Centre for International Governance and Innovation (Waterloo, ON: 2018)

46 George Nicholas & Catherine Bell, "Intellectual Property and Archaeology: Research Concerns and Considerations" in I. Calboli & M.L Montagnani (eds), Handbook on Intellectual Property Research (Oxford University Press, 2020) 304 at 306.

47 For an overview, see "Canadian Intellectual Property Office," online: Government of Canada <www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02301.html>.

48 Copyright Act, RSC 1985 c. C-42, s. 5. For a discussion of the limits of copyright law, see Bell, Lai & Skorodenski, supra note 25 at 280–81.

49 RSC 1985, c. T–13.

50 Bell, Lai & Skorodenski, supra note 25

51 25 USC §§305-305(e).

52 25 USC §§305-305(e).

53 See South Africa's Intellectual Property Laws Amendment Act 28 of 2013 and other instances of law reform: "Compilation of Information on National and Regional Sui Generis Regimes for the Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions" (2021), online: World Intellectual Property Organization <www.wipo.int/export/sites/www/tk/en/resources/pdf/compilation_sui_generis_regimes.pdf?utm_source=WIPO+Newsletters&utm_campaign=3f1afe4971-EMAIL_CAMPAIGN_2020_07_24_01_20&utm_medium=email&utm_term=0_bcb3de19b4-3f1afe4971-256848429>.

54 See Simon Brascoupé & Karin Endemen, "Intellectual Property and Aboriginal People: A Working Paper" (Department of Indian Affairs and Northern Development and Intellectual Property Policy Directorate, Industry Canada, 1999), online: <https://publications.gc.ca/collections/Collection/R32-204-1999E.pdf>. See also: Brian Thom & Don Bain, "Aboriginal Intangible Property in Canada: An Ethnographic Review" (2004), online: <www.academia.edu/20961361/Aboriginal_Intangible_Property_in_Canada_An_Ethnographic_Review>.

55 "Indigenous peoples and intellectual Property," online: Government of Canada <www.ic.gc.ca/eic/site/108.nsf/eng/00004.html>.

56 Bulun Bulun and Anor v. R&T Textiles Pty Ltd (1998) 41 IPR 513 (FCA). Orphan works defined generally as works with unknown authors (see Berne Convention for the Protection of Literary and Artistic Works (1886), art. 15[4][a]), raise further complications beyond the scope of this article.

57 Brascoupé & Endemen, supra note 54 at 15.

58 RSC 1985, c. C 51.

59 Standing Committee on Canadian Heritage, Shifting Paradigms (Ottawa, 2019), online (pdf): <www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf> [Shifting Paradigms].

60 Standing Committee on Industry, Science and Technology, Statutory Review of the Copyright Act (Ottawa, 2019) online (pdf): <www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf> [Statutory Review].

61 Tony Belcourt, Heather Igloliorte & Dylan Robinson (eds), Promoting and Protecting the Arts and Cultural Expressions of Indigenous Peoples: A Compendium of Experiences and Action (Department of Canadian Heritage, 2021), online: <https://www.dylanrobinson.ca/promoting-and-protecting/>.

62 Statutory Review, supra note 60 at 29.

63 Shifting Paradigms, supra note 59 at 12.

64 Statutory Review, supra note 60 at 3-4.

65 Ibid at 5.

66 Patents relating to medicinal agreements may be extended for two years from the expiry date if certain conditions are met s 116(3).

67 Brascoupé & Karin Mann, supra note 54 at 25.

68 Ibid.

69 Convention on Biological Diversity, 5 June 1992, 1760 UNTS 69, art 8(j).

70 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, 29 October 2010, UNEP/CBD/COP/DEC/X/1 (entered into force 12 October 2014).

71 Merle Alexander et al., "Squaring the Circle – Indigenous Intellectual Property and the Canadian Trademark System," online (blog): Miller Titerle <millertiterle.com/what-we-say-article/squaring-the-circle-indigenous-intellectual-property-and-the-canadian-trademark-system/>.

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74 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972).

75 Canadian Cultural Property Export Control List, CRC, c. 448.

76 For more in-depth discussion, see Catherine Bell & Robert Paterson, "International Movement of First Nations Cultural Heritage in Canadian Law" in Catherine Bell & Robert Paterson (eds), Protection of First Nation Cultural Heritage: Laws, Policy and Reform (Vancouver: UBC Press, 2008) at 15.

77 See Catherine Bell, "Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate" (1992) 17:2 Am Indian L Rev 457 at 469-471.

78 Bill C-391, An Act Respecting a National Strategy for the Repatriation of Indigenous Human Remains and Cultural Property (third reading), online: <parl.ca/DocumentViewer/en/42-1/bill/C-391/third-reading>.

79 Under the Native American Graves Repatriation Act 25 U.S.C. §§ 3001–3013 (2000), it is illegal to traffic in Native American human remains and cultural items obtained in violation of the Act.

80 "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" (UN Doc A\HRC\45\35), online: <undocs.org/A/HRC/45/35> [UN Repatriation].

81 RSC 1985, c. P-21.

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83 RSC, 1985, c. A-1.

84 s. 5.

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86 Ibid, s. 6(1)(d).

87 Ibid; see s. 6(2) for restrictions facing the National Gallery of Canada.

88 Thomas V. Hill, "Notes For Remarks" in Mille Gabriel & Jens Dahl (eds), Umitmut, Past Heritage – Future Partnerships (International Working Group for Indigenous Affairs and Greenland National Museum and Archive, 2008) at 152.

89 "Canadian Museums Association Reconciliation Program," online: <museums.ca/site/aboutthecma/reconciliationprogram>.

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92 "CFLA-FCAB Truth and Reconciliation Committee," online: <cfla-fcab.ca/en/indigenous/trc_report/>.

93 "CFLA/FCAB Position Statement: Indigenous Knowledge in Canada's Copyright Act," online: <web.archive.org/web/20200113121409/http:/cfla-fcab.ca:80/wp-content/uploads/2018/05/CFLA-FCAB_Indigenous_knowledge_statement.pdf>.

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96 Catherine Bell et al., "First Nations Cultural Heritage: A Selected Survey of Issues and Initiatives" in Catherine Bell & Val Napoleon, supra note 1, 367 at 380–382.

97 See, for example, the discussion by Bell et al. of the Stó:lo- Heritage Policy Manual, ibid at 390–392.

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99 "Finders Keepers?" (30 March 2017), online: Parks Canada <pc.gc.ca/en/docs/r/pfa-fap/sec7/decouv_discov5>. See also Bruce Ziff, Principles of Property Law, 4ed (Thompson Carswell: 2006) at 135–136.

100 See "Archaeological Heritage Policy Framework" (1990), online: Parks Canada <pc.gc.ca/en/docs/pc/poli/arch>.

101 "What We Offer," online: Indigenous Heritage Circle <indigenousheritage.ca/our-work-to-date/>.

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103 "Indigenous Relations at Parks Canada," online: Parks Canada <pc.gc.ca/en/agence-agency/aa-ia> [Indigenous Relations].

104 "Promising Pathways," online: Parks Canada <pc.gc.ca/en/agence-agency/aa-ia/parcours-pathways>.

105 In 2018, Parks Canada collaborated with the IHC to host national gatherings designed to facilitate dialogue on issues and relationships, ultimately leading to the creation of the Parks Canada Indigenous Heritage Advisory Council. Among the purposes of these gatherings was the intention to develop a deeper understanding of "Indigenous perspectives on cultural heritage"; "how Parks Canada can better acknowledge Indigenous peoples and their histories, heritage values and memory practices"; "where Indigenous peoples may wish to assume leadership in these areas"; and to "establish respectful practices of engagement with Indigenous peoples." See IHC, Report on Parks Canada Indigenous Engagement Sessions (June 2019) and Parks Canada, Report on Gatherings on Indigenous Cultural Heritage (March 2019), online: <indigenousheritage.ca/wp-content/uploads/2020/08/IHC-Report-on-PC-Engagement-Session-Final-EN.pdf>.

106 Indigenous Relations, supra note 103

107 SC 2019, c. 28; SC 2019, c. 28; RSC 1985, c. N-22, respectively.

108 Supra note 19.

109 Bryn Gray & Stephanie Axmann, "Indigenous Implications of Bills C-69 and C-68 – Worth a Second Look" (19 September 2019), online (blog): McCarthy Tetrault <mccarthy.ca/en/insights/blogs/canadian-era-perspectives/indigenous-implications-bills-c-69-and-c-68-worth-second-look>.

110 "Parks Canada Guiding Principles and Operational Policies: Part II – Activity Policies" (1994) at paras. 1.2.3, 1.3.2, and 1.4.11, online: Parks Canada Agency <pc.gc.ca/docs/pc/poli/princip/part2/part2a3_E.asp>.

111 "National Historic Sites of Canada: System Plan" (2000), online (pdf) at 39: Parks Canada <parkscanadahistory.com/publications/historic-sites-system-plan-e-2000.pdf>.

112 David M. Schaepe, George Nicholas & Kierstin Dolata, "Recommendations for Decolonizing British Columbia's Heritage-Related Processes and Legislation" (First Peoples' Heritage, Language and Culture Council, 2020) at 25, online: <fpcc.ca/resource/recommendations-for-decolonizing-b-c-s-heritage-related-processes-and-legislation/>.

113 IHC, Report on Parks Canada's Indigenous Engagement Sessions, supra note 105 at 9.

114 Brian Platt, "Six provinces object, but Liberals still move ahead with UN declaration on Indigenous rights" National Post (3 December 2020), online: <https://nationalpost.com/news/politics/bill-to-enshrine-un-declaration-on-the-rights-of-indigenous-peoples-in-canadian-law>.

115 Schaepe, Nicholas & Dolata, supra note 112.

116 Paquet, supra note 94 at 4.

117 See, for example, Limitations Act, SBC 2012, c. 13.

118 Catherine Bell, "Limitations, Legislation and Domestic Repatriation" (1995) Special Issue, UBC L Rev 149.

119 See, for example, McLay et al., supra note 22.

120 P580/88 High Court of New Zealand, Wellington, 19 May 1988, Greig J. (unreported decision).

121 [1999] SASC 125.

122 For a more detailed discussion on Canadian law concerning ancestral remains, see Robert K. Paterson, "Ancestral Remains in Institutional Collections: Proposals for Reform" in Catherine Bell & Robert K. Paterson (eds), Protection of First Nations Cultural Heritage: Laws, Policy, and Reform, (Vancouver: UBC Press, 2009) 55.

123 See George Nicholas et al., "Intervention as a Strategy in Protecting Indigenous Cultural Heritage," (2015) SAA Archaeological Record 41 at 41, 43.

124 Criminal Code of Canada, RSC 1985, c. C-46, s. 182.

125 UN Repatriation, supra note 80.

126 Defined as entities that are authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the Constitution Act, 1982, supra note 4.

127 Kate Gunn & Jesse Donovan, "Bill 41: Declaration on the Rights of Indigenous Peoples (14 November 2019), online (blog): First Peoples Law <firstpeopleslaw.com/public-education/blog/bill-41-declaration-on-the-rights-of-indigenous-peoples-act>.

128 "Declaration on the Rights of Indigenous Peoples Act: 2020/2021 Annual Report" at 6, online: Government of BC <gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/declaration_act_annual_report_30jun21_final.pdf>. Article 19 of UNDRIP speaks to the need for consultation and cooperation to obtain consent before implementing legislative measures that may affect Indigenous peoples, supra note 6.

129 The mandate includes to protect, revitalize, enhance and increase understanding of First Nations heritage, language, culture and arts see Preamble to the Act.

130 "First Peoples' Cultural Council," online: FPCC <fpcc.ca/about-us/overview/>.

131 "About Us: Advisory Committee," online: FPCC <fpcc.ca/about-us/advisory-committee/>.

132 RSBC 1996, c. 326.

133 RSBC 2003, c. 12, s. 2.

134 "The Cultural Precinct will be a showcase area for displaying, exhibiting and advancing the culture(s) and history of our province": see "Royal BC Museum", online: BC Archives <bcarchives.gov.bc.ca/index.html>.

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139 Supra, note 134.

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141 RSBC 1996, c. 165.

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143 Bell & Paterson, supra note 25 at 193.

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151 Ibid at 15.

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154 "Free, Prior and Informed Consent: A Human Rights-Based Approach" (UN Doc A\HRC\39\62), arts. 3, 5, online: <undocs.org/A/HRC/39/62>.

155 Guide to Consensus, supra note 153 at 6.

156 Ibid.

157 "Guide to Indigenous Knowledge in Environmental Assessments" (2020), online: Environmental Assessment Office <gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/2018-act/guide_to_indigenous_knowledge_in_eas_v1_-_april_2020.pdf>.

158 Ibid at 6–7.

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161 "Vision," supra note 159.

162 Intentions Paper, supra note 160 at 5.

163 Ibid at 17.

164 Ibid.

165 Ibid.

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169 Ibid [emphasis added].

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