

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

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 from their land, or culture from heritage, in what is collectively referred to as “cultural heritage” in national and international heritage law and policy. There is also no single agreed upon definition of “cultural heritage” in Canada.

The following definition developed by Indigenous peoples from around the globe and adopted in the *Final Report of Special Rapporteur: Protection of the Heritage of Indigenous Peoples*, UNESCO (1995) is used here:

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 this knowledge.¹

UNDRIP AND TRC CALLS TO ACTION

The Truth and Reconciliation Commission (TRC) and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) speak to the connection of Indigenous



Salmon spawning in B.C.

heritage to self-determination, recovery from colonization, reconciliation and respect for Indigenous rights. Four fundamental principles that inform UNDRIP, including those expressly aimed at Indigenous rights to heritage, are freedom from discrimination; self-determination of Indigenous peoples; free prior and informed consent (FPIC); and respect for inherent Indigenous rights, including to their lands, laws and institutions.

Most Canadian legislation impacting Indigenous heritage was enacted prior to the recognition of Indigenous constitutional rights in 1982, the recommendations of the TRC and National Inquiry into Missing and Murdered Indigenous Women and Girls, and UNDRIP. Review and reform of many Canadian laws, including those discussed in this summary, is necessary considering these developments.

¹ 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).

FEDERAL LAWS APPLICABLE IN B.C.

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. Pursuant to this regime, the federal government has enacted various laws that directly and indirectly affect Indigenous heritage.

UNDRIP AND BILL C-15

Bill C-15 (the United Nations Declaration on the Rights of Indigenous Peoples Act) commits Canada to take "effective measures" and to consult and cooperate 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 and monitor progress.

INTELLECTUAL PROPERTY LAW

Western and Indigenous conceptions of intellectual property (IP) may differ. For example, some Canadian intellectual property rights exist for a limited period. After that time, they are within the "public domain" – a term used to describe intangibles in which no one can establish or maintain property rights. The concept of the public domain does not consider Indigenous laws and practices such as those concerning stewardship, attribution, and communal and intergenerational rights and responsibilities.

There is ongoing engagement with Indigenous peoples in Canada on IP issues. Unlike some other countries, there have been no changes to Canadian IP laws to address Indigenous issues, although greater protections for Indigenous creators and inventors are being explored.

COPYRIGHT, PATENT AND TRADEMARKS

The most common IP rights are created by copyright, patent and trademark legislation. 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 sole right to adapt, produce, reproduce, publish, communicate, record and present to the public the



Lower Similkameen pictographs provided by Rheana Marchand

work in question. The duration of these rights is the life of the author plus an additional 50 years, at the end of which the work becomes part of the public domain.

The Copyright Act also protects a distinct set of 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. Neighbouring rights are those attributed to performers and producers.

The Patent Act 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. An invention is eligible for patent protection if it is new, useful and shows ingenuity. The first inventor to file a patent application is the owner.

The Trademarks Act protects distinctive words, designs and symbols. The Act also protects official marks, royal crests and international symbols such as the Red Cross. A trademark is deemed to be adopted upon its introduction and use in Canada or upon registration.

An example is the Igloo Tag trademark 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.



Moccasin Beadwork, image by Karen Aird

ACCESS TO INFORMATION AND PRIVACY LAW

Many public bodies must comply with access to information and privacy laws that balance rights of public access with privacy, including public museums, galleries, libraries and archives. However, some Canadian institutions have developed special policies to enhance Indigenous access and restrict public access to sensitive information where legislation allows.

The Privacy Act regulates the ways in which public bodies collect, use and disclose personal information. For example, it exempts from mandatory disclosure records containing confidential information that could harm intergovernmental relations with Indigenous and other governments.

The Access to Information Act protects information obtained in confidence, for example, from Indigenous governments, from disclosure without their consent. This could potentially include sensitive land, medicinal or other traditional ecological knowledge.

EXPORT AND IMPORT LAW

The Cultural Property Export and Import Act regulates the import and export of “moveable cultural property” as defined by the legislation. It does this through a system of export permits, tax benefits that encourage donations to Canadian institutions, and repatriation grants and loans. The Act establishes an export control list that includes archaeological material, as well as non-archaeological material at least 50 years old, made by someone no longer living and with a fair market value above \$3000.

Export of an item “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” may be delayed in order to find Canadian buyers, but there is no mechanism to prohibit export.

In 2018, a private members bill was introduced in Parliament proposing a national strategy for repatriation of ancestral remains and “cultural property.” It is unclear if or when similar legislation will be proposed in the future.

LANGUAGE

The Indigenous Languages Act is a response to UNDRIP and Calls to Action 13 through 15 of the TRC. 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. To do so, the Act calls for increased consultation, collaboration and funding.

MUSEUM AND ARCHIVES LAW

Federal museum, archive and library collections contain ancestral remains, archaeological heritage, and audio-visual and other material originating from B.C. that have been obtained through various means. The Museums Act governs six museums with the purpose of preserving and promoting the heritage of Canada.

Museums may for various reasons lend, sell, exchange, give away, destroy or otherwise dispose of works of art or other material in their collections. However, these institutions



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

cannot deal with property otherwise than in accordance with the terms on which it was acquired or is held. In exercising the Act's functions, federal museums must also consider their statutory and common law obligations to the public they are intended to serve.

While the Museum Act does not address Indigenous belongings and remains – for example regarding access, interpretation and repatriation – policies, practices and guidelines have been developed by many museums in alignment with principles derived from the 1992 Canadian Museum Association (CMA) and Assembly of First Nations *Task Force Report on Museums and First Peoples*. More recently, 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

Similarly, the Library and Archives of Canada Act does not expressly address Indigenous information and records. However, specific policies and services have been developed at the institutional level. These policies touch upon staff capacity and training, cataloguing, programming, and collecting and access to materials in a manner respectful of Indigenous knowledge, laws and rights.

RESERVE LANDS

First Nations use a wide range of strategies to protect heritage sites, including through land use plans and designations. Some of these strategies engage by-law and land use management strategies available under federal Indian legislation such as the Indian Act and First Nations Land Management Act. For example, jurisdiction over access to reserve land can be used to control research conducted on those lands.

The Indian Act addresses the administration of Indian reserve lands, Indian moneys and rights arising from Indian status. Section 91 of the Indian Act provides that in the absence of written consent of the Minister, “no person may...acquire title to...(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. However, items “manufactured for sale” are exempt from these provisions.

PARKS, SITES AND MONUMENTS

The Canada National Parks Act establishes and maintains national parks and park reserves. Its application may be limited by terms and conditions set out in modern treaties and land claims, for example, relating to access for resource harvesting activities and the nature and extent of Indigenous participation in park planning and management. The Minister must table management plans and reviews for parks every five years and provide opportunities for public consultation, including with Indigenous organizations.

The Act also addresses designating Indigenous archaeological sites and historic lands as national parks. Internal operational policies provide for consultation with Indigenous peoples in this process. The Act also provides for protection of the natural elements of a park, as well as its cultural, historical and archaeological resources, and makes it an offence to threaten the protection of cultural, historical or archaeological resources.

Parks Canada also has in its possession and control Indigenous belongings, burial items and remains recovered from national parks. Specific policies concern the conservation, management and repatriation of these items. Parks Canada policy calls for Indigenous participation in protection, management and interpretation 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 understand and implement UNDRIP.

The Historic Sites and Monuments Act sets out criteria for designating historic places and monuments. These criteria include Indigenous origin or significance. However, concern has been raised that value-based management of historic sites may inadvertently overlook Indigenous values (e.g., spiritual or community sites) in favour of western values (historical, aesthetic or scientific sites).

ENVIRONMENTAL REGULATION

The Impact Assessment Act (IAA) regulates the federal environmental assessment process. Projects that trigger environmental assessments also trigger issues of Indigenous rights and wide range potential impacts to



Pole in Gitwagak, image by Karen Aird

Indigenous heritage. The broad purpose of the 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 recognizes and affirms Indigenous constitutional rights, references UNDRIP, and speaks to “fostering reconciliation and working in partnership” in its preamble. It introduces measures to increase opportunities for Indigenous participation in the assessment process. For example, it creates an Indigenous Advisory Committee, a funding program for Indigenous participation. In the approximately 20 factors that must be considered in assessing impact, the Act includes Indigenous rights; 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 impacts on Indigenous women (e.g., work camps).

PROVINCIAL LEGISLATION

Provinces have jurisdiction over provincial Crown lands and property and civil rights within their provincial boundaries. Like many federal laws, most provincial laws impacting Indigenous heritage predate UNDRIP and express recognition of Indigenous constitutional rights in the Canadian constitution.

B.C. LEGISLATION

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT (DRIPA)

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 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.

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 not covered by negotiated treaties. Indian Act band councils and traditional governments may exercise jurisdiction within Indigenous traditional territories.

FIRST PEOPLES' HERITAGE, LANGUAGE AND CULTURE ACT

This Act sets out the mandate for what is now the First Peoples Cultural Council (FPCC) and the First Peoples' Advisory Committee. FPCC was created to assist in the revitalization of Indigenous languages, arts and cultures. The FPCC Heritage Advisory Committee was created to connect Indigenous communities with FPCC to support community-based research and advocacy.

LIMITATION PERIODS

Limitation periods that prevent legal actions from being brought before Canadian courts to recover property affect claims concerning Indigenous heritage. Provincial and federal legislation provide that court actions must be brought within a specified period. 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, 1982.”

MUSEUMS AND ARCHIVES

The Museums Act stipulates how the Royal British Museum (RBCM) and institutions within its control should approach issues such as the acquisition and preservation of objects and archival materials. It also speaks to the repatriation of Indigenous objects through the modern treaty process, requiring the transfer of title and possession upon request of the provincial government.

As with other museums, much of the relationship between the RBCM and First Nations is navigated through policy, practice, programs and agreements. In August 2016, RBCM released a formal public response to the TRC's Calls to Action. It speaks to several areas where RBCM can respond, 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 considering 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.

The RBCM has the role of the provincial archivist and provides research access to records in B.C. It has several 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 descriptive standards with a view to incorporate traditional knowledge, cultural restrictions and Indigenous language.



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

The Information Management Act governs the province's digital information storage and management practices and establishes digital archives. The information held by the RBCM falls within this Act's purview.

INFORMATION AND PRIVACY

The Freedom of Information and Privacy Act addresses how public bodies may collect, use and disclose personal information. Certain information is exempted from public access. For example, the Act exempts from mandatory disclosure court records that contain confidential information that could harm relations with Indigenous governments. The Act also allows public bodies in B.C. to refuse to disclose information that could result in damage or interfere with sites of anthropological or heritage value.

HERITAGE CONSERVATION ACT

Indigenous ancestral burial places often fall within the definition of archaeological sites in provincial law. All Canadian provinces have legislation concerning archaeological and historical sites and items located on or recovered from public or private provincial lands. These laws strive to balance the benefits of economic development and scientific study against the importance of preserving heritage.

Many provinces vest title to archaeological property in the Crown, whether found under or on both private and public

land. B.C. legislation is silent on this point; instead, the Heritage Conservation Act (HCA) provides that heritage conservation organizations (including museums) that have possession of an object they do not own, or are uncertain as to whether they own, may apply to the Supreme Court for an order vesting ownership.

Heritage sites may be protected under the HCA because of historical, archaeological or other heritage value through designation and a site alteration permit system. It also protects certain "heritage objects" from damage, alteration, desecration and removal from the province.

Consultation before issuing permits is not required under the Act, but some consultation before issuing permits occurs as a matter of practice and pursuant to agreements with First Nations. Consultation with First Nations to define the extent of, or to exempt from protection, automatically protected First Nation sites such as burial, rock art and pre-1846 archaeological sites is addressed in the Act. The Minister may also negotiate agreements with respect to the heritage of a First Nation and to further specific objectives of the Act. An example is the agreement with the Hul'qumi'num Treaty Group in 2007.

The HCA was 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 and enhanced powers of the ministry to refuse, amend, suspend and cancel permits.

PARKS AND ECOLOGICAL RESERVES

BC Parks is responsible for protecting and managing park lands as well as a system of ecological reserves. Through the Park Act, B.C. has established a range of classifications for parks, the most recent of which (the “Conservancy” designation) explicitly recognizes “the importance of these areas to First Nations for social, ceremonial and cultural uses.”

Parks policy and practices state that they are informed by recognition of Indigenous people’s connection to ancestral lands. BC Parks has also 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.

The Ecological Reserve Act establishes and manages ecological reserves in the province. Ecological reserves are highly protected, and the Act does not provide for cultural uses of the land by Indigenous communities. However, the reserves may be accessed for some research and educational purposes.

ENVIRONMENTAL REGULATION

In 2018, new legislation was enacted in B.C. that expressly references UNDRIP and the role of the Environmental Assessment Office to support the process of reconciliation. It provides more mechanisms for Indigenous participation and collaborative approaches to assessing projects and provincial decision making – an approach B.C. sees as consistent with FPIC “which emphasizes the importance of the process of dialogue and negotiation over the course of a project from planning to implementation.” Among these processes are the potential for collaborative and Indigenous lead 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. However, the final decision lies with the Minister.

The Environment Assessment Act also addresses use of Indigenous knowledge. For example, the Act requires the consideration and use of the best available Indigenous

Traditional Knowledge, science and local knowledge in decision-making. Pursuant to these (and other) provisions, B.C. has created the *Guide to Indigenous Knowledge in Environmental Assessments*, which provides guidance on both the protection and inclusion of Indigenous knowledge at various stages of the process.

FUTURE DEVELOPMENTS

Federal, provincial and territorial governments are engaged with various levels of commitment to the process of reviewing legislation, policy and practices considering UNDRIP. While some provincial governments are reluctant to implement UNDRIP through legislation without greater understanding of its potential implications, B.C. has enacted DRIPA to monitor UNDRIP’s implementation. 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 to obtain their FPIC.



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