

UNDRIP AND INDIGENOUS HERITAGE

Catherine Bell & Melissa Erickson

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This report is designed to inform the reader about the potential applications of the *United Nations Declaration on the Rights of Indigenous peoples* (UNDRIP)¹ to Indigenous cultural heritage in Canada and non-Indigenous Canadian museums, archives, and galleries. It was developed as a resource to support the work of the Canadian Museums Association (CMA) and the CMA Reconciliation Council in its response to the Truth and Reconciliation Commission of Canada's call to action 67 to undertake a "national review museum policies and best practices to determine the level of compliance" with UNDRIP and make recommendations.² It is not intended to provide legal advice or to be a comprehensive or exhaustive explanation of all UNDRIP articles or potential applications.

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¹ UN General Assembly, United Nations Declaration on the Rights of Indigenous peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 [UNDRIP].

² Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 187-191, [TRC Report] and TRC, *Calls to Action* [Calls to Action]. Online: <<https://nctr.ca/records/reports/>>.

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1.0 WHAT IS UNDRIP?

UNDRIP is an international declaration endorsed by Canada. Recommended as the framework for reconciliation by the Truth and Reconciliation Commission of Canada (TRC),³ UNDRIP recognizes the individual and collective human rights of Indigenous peoples and sets out “minimum standards for the survival, dignity, and well-being of Indigenous peoples of the world.”⁴ It informs numerous important documents including, Principles Respecting the Government of Canada’s Relationship with Indigenous peoples,⁵ Truth and Reconciliation Commission of Canada: Calls to Action, Calls for Justice from the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG),⁶ and a range of federal, territorial, and provincial laws, policies, practices and initiatives aimed at its implementation.

UNDRIP was negotiated for more than 30 years and was the first UN instrument created in collaboration with Indigenous rights holders.⁷ The goals of Indigenous peoples “in articulating their human rights at the UN [were] to decolonize the colonized Indigenous peoples” and “to have colonizing nations recognize and respect [their] inherent rights to humanity and self-determination.”⁸ Its standards also apply to Indigenous individuals in relations with their own governments and relations of Indigenous Nations with other governments. Thus, Indigenous Nations are also implementing UNDRIP within their own institutions and according to their own methods including referencing UNDRIP in their constitutions, laws and policies directed at relations with their citizens, federal, territorial and provincial governments and non-governmental

³ Calls to Action, *ibid.* call 43.

⁴ UNDRIP, *supra* note 1, article 43.

⁵ Department of Justice Canada, *Principles: Respecting the Government of Canada’s Relationship with Indigenous peoples*, (2018) Her Majesty the Queen in Right of Canada, as represented by the Minister of Justice and Attorney General of Canada, online (pdf): <<https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>> [Principles].

UNDRIP was endorsed in 2007 by 144 States. Along with the United States, Australia, and New Zealand, Canada originally refused to endorse UNDRIP because of concerns relating to a number of articles. Canada endorsed it in 2010 as an aspirational document but in 2016 the Liberal government of Canada committed to its implementation including through review of laws, policies, and collaborative initiatives and actions. For a short history before the 2016 commitment see TRC Report, *supra* note 2 at 188-190.

⁶ E.g., UNDRIP along with other human rights instruments also inform the promotion of “self-determined solutions” appropriate for each Nation or community. See e.g., National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), *Volume 1a* at 181-221 [MMIWG vol 1a] and *Volume 1b* at 171 [MMIWG vol 1b] and call 1.2 online: <<https://www.mmiwg-ffada.ca/final-report/>>.

⁷ John Borrows, “Revitalizing Canada’s Indigenous Constitution: Two Challenges” in *UNDRIP Implementation*, 2017, *ibid* 20 at 25 [Borrows 2017].

⁸ James (Sa’ke’j) Youngblood Henderson, “The Art of Braiding Indigenous Peoples’ Inherent Human Rights into the Law of Nation States” in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws. Special Report* (Waterloo: Centre for International Governance Innovation, 2017) 10 at 13 online: <<https://www.cigionline.org/static/documents/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf>> [Youngblood Henderson, 2017]; [UNDRIP Implementation, 2017].

organizations.⁹ Non-governmental organizations, including institutions with cultural heritage mandates, have also been asked to use UNDRIP as a framework to respond to the TRC's Calls to Action.

UNDRIP is an expansive declaration consisting of 24 clauses in its preamble and 46 articles. As elaborated below in sections 1.1 and 1.2, at the time of writing only Canada and British Columbia (BC) had enacted specific UNDRIP legislation aimed at its implementation. UNDRIP's influence on Canadian law absent such legislation is a matter of debate.¹⁰ Although a declaration may incorporate standards contained in legally binding treaties and conventions, a declaration is a statement of intent. It reflects the commitment of States to apply certain principles and standards to future actions – “in this case in the field of human rights as it deals with Indigenous peoples.”¹¹ However, UNDRIP is viewed internationally as a solemn instrument embodying principles of great importance and compliance by States is expected,¹² including because the preamble and Article 1 expressly link UNDRIP to good faith fulfillment of human rights and fundamental freedoms as recognized in the Charter of the United Nations.¹³

UNDRIP may also form part of Canadian law in more implicit ways. For example, standards in a declaration may be binding as principles of international customary law. The Supreme Court of Canada (SCC) has applied customary international law in its decisions.¹⁴ What constitutes customary international law depends on the extent a State adheres to a particular international norm or practice and considers it law.¹⁵ UNDRIP “elaborates on existing international human rights instruments and clarifies how those rights apply to Indigenous peoples given ‘specific cultural, historical, social and economic circumstances’” and therefore

⁹ Borrows 2017, *supra* note 7 at 25 and for examples see Gray & Burrows, *infra* note 10.

¹⁰ See e.g. Sylvanus Barnabas, “The Legal Status of the United Nations Declaration on the Rights of Indigenous peoples” in *Contemporary International Human Rights Law* (2017) 6 Intl Hum Rts L Rev 242 [Barnabas]; Christina Gray & John Borrows, “Rights and Responsibilities Implementing UNDRIP in BC” [Gray & Borrows] *The UN Declaration on the Rights Of Indigenous Peoples in Canada: Lessons from BC* (Yellowhead Institute: December 2020) online:< <https://yellowheadinstitute.org/wp-content/uploads/2020/12/yellowhead-institute-bc-undrip-report-12.20-compressed.pdf>> [Yellowhead Institute 2020] at 9-10; Brenda L. Gunn, “Legislation and beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples” (2021) 53:4 UBC L Rev 1065 [Gunn, 2021]; and Naiomi Walqwan Metallic, “Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act” online:< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4232531> draft forthcoming in Richard Alpert, Wade Wright & Michael Pal, eds., *Rewriting the Constitution* (Toronto: University of Toronto Press) [Metallic]

¹¹ Gray & Borrows, *ibid* at 9.

¹² Brenda Gunn, “Beyond Van der Peet: Bringing Together International and Indigenous Constitutional Law” in UNDRIP Implementation 2017, *supra* note 10 at 32 [Gunn 2017]. Sheryl Lightfoot, “Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples” [Lightfoot] in UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws (Waterloo, Ontario: Centre for International Governance Innovation, 2018) 17 at 19 [UNDRIP Implementation 2018].

¹³ Federico Lenzerini, “Implementation of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples” (2019) 23 Intl Hum Rts at 55.

¹⁴ *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at paras 104-116.

¹⁵ Barnabas, *supra* note 10 at 245.

may reflect “existing customary international law.”¹⁶ Canadian courts have also used UNDRIP to interpret Canadian law and constitutional rights.¹⁷

UNDRIP may also benefit from the presumption of conformity. Under this presumption, Canadian laws are “presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them.”¹⁸ This presumption applies unless a specific law unequivocally states otherwise.¹⁹ Although there are instances when Canadian courts have not applied this presumption,²⁰ Brenda Gunn argues these are often based on inaccurate understandings of international law.²¹ Further, it can be argued that Canada’s *United Nations Declaration on the Rights of Indigenous Peoples Act*²² which expressly affirms UNDRIP “as a universal international human rights instrument with application in Canadian law” removes any remaining doubt about its use as an interpretive guide.

UNDRIP is to be read in conjunction with other international conventions. For example, with regard to international repatriation, a number of instruments dealing with illicit acquisition, trafficking and repatriation of cultural property may apply.²³ An example is *The Convention on the Means of Prohibiting and Preventing*

¹⁶Indigenous Bar Association, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook* (2011) (Winnipeg, Manitoba: University of Manitoba Faculty of Law and Indigenous Bar Association, 2011) at 7, citing international legal scholar and Special Rapporteur James Anaya. United Nations General Assembly. “Report of the Special Rapporteur on the rights of Indigenous peoples, James Anaya, The Situation of Indigenous Peoples in Canada.” <http://unsr.jamesanaya.org/docs/countries/2014-report-canada-a-hrc-27-52-add-2-en.pdf> at 196. [UNDRIP Handbook] and see e.g., Gunn, *supra* note 10; Gray & Borrows, *supra* note 10 at 9-10.

¹⁷See e.g., The Canadian Human Rights Tribunal held that domestic law “must be interpreted so as to be harmonious with Canada’s commitments expressed in international law including the UNDRIP.” See also *Catholic Children's Aid Society of Hamilton v H.* (G.), 2016 ONSC 6287; *Ross River Dena Council v Canada*, 2017 YKSC 59 paras 301-311 re UNDRIP as an aid to interpretation of domestic law and *Mitchell v. Minister of National Revenue*, 2001 SCC 33 at para 80-83 regarding its application in the interpretation of Aboriginal constitutional rights. For application regarding application to constitutional rights see Benjamin Oliphant, “Interpreting the Charter within International Law: Pitfalls and Principles” 2014 19 Appeal 105.

¹⁸ See e.g., *R v Hape* 2007 SCC at para 53 citing Ruth Sullivan & Elmer A Driedger, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 330. However, this assumption is not always applied, for example when it more narrowly construes constitutional rights. See e.g., Benjamin Oliphant, “Interpreting the Charter within International Law: Pitfalls and Principles” (2014)19 Appeal 105.

¹⁹ *R v. Hape*, *ibid.*

²⁰ See e.g., *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 in which the SCC held international obligations to which Canada is committed, such as treaties ratified by Canada, and that other international law instruments although not benefiting from this presumption may still be persuasive, particularly if they influenced the drafting of Canada’s Charter of Rights. For further discussion see Metallic *supra* note 10 at 16-19 who argues this does not necessarily mean the presumption is limited to international treaties and conventions.

²¹ Gunn, 2021, *supra* note 10 at 1088.

²² SC 2021, c 14 s 4(a) and see Metallic, *supra* note 10 at 19.

²³ UN Expert Mechanism on Rights of Indigenous Peoples, “Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples” (UN Doc A/HRC/45/35) online: <<https://digitallibrary.un.org/record/3876274?ln=en> > [UN Expert Mechanism Report].

the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970.²⁴ This Convention is a response to the challenges faced by States seeking to enforce their laws outside national borders, such as the Ortiz case in which the New Zealand government sought to prevent the sale of a rare Māori wooden carving smuggled out of the country contrary to New Zealand export control laws.²⁵ It calls on States, among other things, to take measures to prevent illicit trafficking of cultural property (as defined by the Convention and State law) contrary to State law and enter agreements concerning enforcement and repatriation. Another relevant UNESCO mechanism for international repatriations is “Return and Restitution” Intergovernmental Committee,²⁶ which has among its tasks mediation of repatriation disputes concerning Indigenous cultural property acquired before 1970.²⁷

A detailed review of the legal status of UNDRIP and related international instruments is beyond the scope of this report.²⁸ Its implementation in Canada is ongoing and involves numerous and varied mechanisms. Regardless of its legal nature, UNDRIP is being adopted as the framework for reconciliation and a measure to reform heritage law, policy and practice by Indigenous peoples and many governmental and non-governmental institutions and organizations with heritage mandates across Canada.

1.1 Bill 41: 2019: Declaration on the Rights of Indigenous Peoples Act

On November 26, 2019, the British Columbia legislature unanimously passed the *Declaration on the Rights of Indigenous peoples Act* (DRIPA).²⁹ Other provinces and territories are also conducting reviews of legislation, policy, and practice but have not enacted specific UNDRIP implementation legislation.³⁰ Section two provides that the three main purposes of DRIPA are “(a) to affirm the application of UNDRIP to the laws of British Columbia; (b) to contribute to the implementation of UNDRIP; and (c) to support the affirmation of,

²⁴ Adopted by the General Conference of UNESCO at 16th session, Paris, 14 November, (1970) 823 I.L.M. 189.

²⁵ *Attorney-General of New Zealand v. Ortiz* [1982] 3 W.L.R. 570 and see Catherine Bell & Robert K Paterson, “International Movement of First Nations Cultural Heritage in Canadian Law” in Catherine Bell & Robert K. Paterson, *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform* (Vancouver: UBC Press, 2009) [Bell & Paterson, Protection] 78 at 89-92.

²⁶ Formally known as the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP).

²⁷ UN Expert Mechanism Report, *supra* note 23 para 25.

²⁸ For further discussion of international and Canadian legal contexts for repatriation and other issues of Indigenous cultural heritage see e.g., Marie Battiste & James (Sa’ke’j) Youngblood Henderson. *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000); Bell & Paterson, Protection *Ibid*; James A R Nafziger, Robert Kirkwood Paterson & Alison Dundes Renteln eds., *Cultural Law, International, Comparative, Indigenous* (Cambridge University Press, 2010); Christoph B. Graber, Karolina Kuprecht, & Jessica Lai., eds., *International Trade in Indigenous Heritage: Legal and Policy* (Cheltenham: Edward Elgar Publishing, 2012); and Vanessa Tünsmeier, *Repatriation of Sacred Indigenous Cultural Heritage and the Law: Lessons from the United States and Canada*, vol 3 SAHLM (Cham: Springer International Publishing, 2022).

²⁹ Declaration on the Rights of Indigenous peoples Act, SBC 2019, c 44, s 1(2) [DRIPA].

³⁰ See e.g., see *The Path to Reconciliation Act*, 2016 C.C.S.M. c. R30.5; the *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1.

and develop relationships with, Indigenous governing bodies.” The Minister must report annually on progress made towards implementing the necessary measures and achieving the goals in the action plan.³¹

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 BC is unceded Indigenous territory that is not covered by negotiated treaties. As in other parts of Canada, *Indian Act*³² 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.

The enactment of DRIPA has important implications for heritage law, practice, and policy in BC. For example, amendments have been made to provincial environmental legislation that expressly reference UNDRIP, securing the right of Indigenous peoples to participate in decisions that affect their rights and lands and include consensus seeking processes. Among these processes are the potential for collaborative and Indigenous led assessments that include impact on heritage and agreements with Indigenous Nations that require their consent before a proposed project is allowed.³³ For example, in June 2022, the government of BC and the Tahltan Nation entered such an agreement concerning the re-opening of a mine.³⁴

The need to amend BC laws has also been identified in other heritage contexts such as access to archival records. In a recent ruling concerning the Royal British Columbia Museum (RBCM), whose responsibilities include the management of the BC Archives, the Information and Privacy Commissioner applied youth criminal justice law to uphold the RBCM’s decision to deny a request by an applicant to access a record related to her maternal grandmother’s incarceration in a juvenile reformatory in the 1940s. However, the Commissioner also emphasized that the case highlighted “legislative barriers facing individuals trying to access information in order to establish contact with their Indigenous communities and assert their Indigenous identity” as an area where UNDRIP, the TRC calls to action and DRIPA indicate law reform is required.³⁵ Although BC Archives was committed to responding to UNDRIP, the TRC and recommendations of the Canadian archival community discussed below, it was constrained by conflicting legislation.

Section 3 of DRIPA provides that “in consultation and cooperation with the Indigenous peoples of British Columbia, the government must take all measures necessary to ensure the laws of the province are consistent with UNDRIP.” Citing this section, the TRC, and articles 12, 15 and 34 of UNDRIP (elaborated below), the BC Supreme Court ruled against a petition by a parent asserting that demonstrations of Nuu-chah-nulth culture and spirituality at her children’s school constituted an infringement of religious

³¹ The criteria to produce such an action plan is set out at section 4(1) through (5) of the *Act* and holds section (2) ensures that the government must prepare the action plan in cooperation with the Indigenous peoples in British Columbia.

³² *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

³³ Catherine Bell & Sarah Lazin, *A Selected Review of Federal and Provincial Legislation Implicating Indigenous Heritage in British Columbia* (March 2022) online:<<https://fpcc.ca/stories/review-on-heritage-legislation/>> at 60-61 [Bell and Lazin].

³⁴ Kate Gunn, “Consent, Indigenous Rights and the Tahltan Agreement” 6 July 2022 online:<<https://www.firstpeopleslaw.com/public-education/blog/tahltan-agreement/>>.

³⁵ Royal British Columbia Museum, BC Archives, 2021 BCIPC 38 CanLII at para 38.

freedoms.³⁶ The court also emphasized that curriculum reforms were developed as the result of agreements between the Nuu-chah-nulth Tribal Council and the school district³⁷ and in collaboration with First Nation representative institutions “to redress the legacy of residential schools and advance the reconciliation process, including a call to build student capacity for intercultural understanding, empathy, and mutual respect.”

At the time of writing this report, BC was consulting with Indigenous communities, governments, and organizations on reform to its heritage conservation legislation which, among other things, addresses protection, control, and alteration of archaeological and historic sites as well as cultural material and remains recovered from those sites.³⁸ While there have been previous initiatives to improve the heritage conservation framework, this is the first collaborative effort aimed at alignment with UNDRIP principles including self-determination, free, prior and informed consent, and Indigenous human rights to their heritage as outlined in sections 2.0 and 3.0 below.

1.2 UN Declaration on the Rights of Indigenous Peoples Act

Federally, the *United Nations Declaration on the Rights of Indigenous peoples Act* was affirmed through Royal Assent on June 21st, 2021. The purpose of this Act 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.³⁹ 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.⁴⁰ Importantly, while UNDRIP may be used to expand upon and interpret Indigenous and treaty rights protected under section 35 of Canada’s Constitution,⁴¹ measures to implement UNDRIP may not be done in such a way as to abrogate or derogate from section 35 Aboriginal and treaty rights.

The Act has a lengthy preamble that, among other things, describes UNDRIP as constituting the minimum standards for the survival, dignity, and well-being of Indigenous peoples and recognizes Canada’s obligation to implement UNDRIP. It also expressly references the need to include “concrete measures to address injustices, combat prejudice and eliminate all forms of violence and discrimination, including systemic discrimination, against Indigenous peoples and Indigenous Elders, youth, children, women, men, persons

³⁶ *Servatius v Alberni School District No. 70*, 2020 BCSC 15. And for discussion of this section and case see “UNDRIP Article 1 – Considering the Legal and Human Rights Framework for Achieving Consistency between the United Nations Declaration on the Rights of Indigenous Peoples to the Laws of British Columbia” Implementing UNDRIP in BC: A Discussion Paper Series, Indian Residential School History and Dialogue Centre, online:< <https://irshdc.ubc.ca/implementing-undrip/>>.

³⁷ *Servatius*, *ibid* at para 37.

³⁸ See for example British Columbia Heritage Conservation Act Transformation Project concerning alignment of Heritage Conservation Act, RSBC 1996, c. 187 with UNDRIP online:< <https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/archaeology/hca-transformation-project>>.

³⁹ *Supra* note 29 s 4.

⁴⁰ *Ibid*, Preamble and see Department of Justice Canada, “Bill C-15 – United Nations Declaration on the Rights of Indigenous Peoples Act” (2020), online:< https://www.justice.gc.ca/eng/declaration/un_declaration_EN.pdf> [Bill C-51].

⁴¹ See e.g., UNDRIP 2017, *supra* note 8 and *Metallic*, *supra* note 10.

with disabilities and gender-diverse persons and two-spirit persons.” While the BC legislation does not include such an express provision, this principle of non-discrimination is included in DRIPA through the adoption of UNDRIP.

There are several federal statutes that expressly reference UNDRIP. For example, Canada has enacted language and child welfare legislation in collaboration with Indigenous governments and organizations as part of its commitment to respond to UNDRIP and the TRC Calls to Action.⁴² There has also been limited federal law reform activity directed at Indigenous heritage sites, repatriation of belongings and ancestors, and archaeological heritage. Government departments such as Heritage Canada, Parks Canada, and Industry, Science and Technology have also been engaging in discussions with Indigenous peoples concerning reform of federal policies and practices to align with UNDRIP.

For example, the *Impact Assessment Act* expressly references UNDRIP in its Preamble and calls for early and regular Indigenous engagement and participation, consideration of Indigenous knowledge in the assessment process, and prohibits project developers from acting in a way that could impact Indigenous heritage without a decision by the Canadian Environmental Assessment Agency.⁴³ In 2018, Bill C-391, a private members bill, was introduced in partial response to Article 12 of UNDRIP (elaborated below).⁴⁴ It mandated Canada to work with First Nations, Inuit and Métis peoples and provincial and territorial governments to “implement a comprehensive national strategy to promote and support the return of Indigenous human remains and cultural property, wherever situated.”⁴⁵ The strategy was to include mechanisms to encourage consideration of traditional ways of knowing “rather than relying on documentary evidence” and to resolve conflicts “in a manner that is respectful of Indigenous traditional processes and forms of ownership.”⁴⁶ Although the Bill was passed by the House of Commons and received first reading by the Senate in February 2019, but failed to make it through Senate processes before the dissolution of government in advance of the 2019 Federal Election.

Canada also recently introduced Bill C-23, *The Historic Places of Canada Act*, into first reading.⁴⁷ Unlike the above legislation, the Bill does not expressly reference UNDRIP and can be criticized for not adequately addressing UNDRIP standards in some aspects including the extent of consultation and collaboration with

⁴² An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24 and Indigenous Languages Act, SC 2019, c 23.

⁴³ SC 2019, c 28 and see Bell & Lazin, *supra* note 33 at 42-44.

⁴⁴ Bill C-391, An Act respecting a national strategy for the repatriation of Indigenous human remains and cultural property, 1st Session, 42nd Parliament, 2019 (as passed by the House of Commons 19 February 2019) online: <<https://www.parl.ca/DocumentViewer/en/42-1/bill/C-391/third-reading>> and for Hansard discussions see <https://openparliament.ca/bills/42-1/C-391/> [Repatriation Bill]. The legislation aligns with research and recommendations of the author flowing from collaborative research with First Nations in Canada see Catherine Bell, “Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform” [Bell Restructuring] in Bell & Paterson, *supra* note 25, 15.–77.

⁴⁵ Repatriation Bill, *ibid*, s 3.

⁴⁶ *Ibid*.

⁴⁷ Bill C-23, An Act respecting places, persons, and events of national historic significance or national interest, archaeological resources and cultural and natural heritage, 1st Session, 44th Parliament, 2021 online: <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-23/first-reading> (accessed November 30 2022).

Indigenous peoples on its content prior to drafting and introducing the Bill into Parliament.⁴⁸ However, if enacted it will give Indigenous peoples more say in determining heritage considered to be of national and historic significance through Indigenous representation on the Historic Sites and Monuments Board of Canada, inclusion of Indigenous knowledge in determining what constitutes national and historic significance, the ability to register places of heritage value or significance to Indigenous peoples in a public register, and a potential role in enforcement of the legislation.

1.3 UNDRIP and the Truth and Reconciliation Commission (TRC)

The goals of the TRC were: (1) reveal the truth about what Canada has done to Indigenous peoples through its laws and policies aimed at assimilation, including violations of Indigenous rights and human dignity, and (2) to report on steps toward reconciling the relationship between Canada, Canadians and Indigenous peoples through inclusion, mutual understanding, and respect.⁴⁹ The process of reconciliation is described by the TRC as “confronting and reversing legacies of empire, discrimination, and cultural suffocation ...to build a social and political order based on relations of mutual understanding and respect.”⁵⁰

The TRC recognized the significant role institutions with cultural heritage mandates have in this process of reconciliation. Referencing UNDRIP and Indigenous constitutional rights, it calls for change in a range of areas including structures, policies, codes, and operations of museums, archives, and galleries as elaborated in section 5.0 below. For example the TRC calls for a review of museums and archives policies and best practices to determine UNDRIP compliance; adoption of UNDRIP by Library and Archives Canada as it relates to knowing the truth about what happened to Indigenous people and why; and for Canada to work in collaboration with survivors, Indigenous organizations and the arts community to develop a reconciliation framework for Canadian heritage and commemoration.⁵¹ The TRC contextualizes these calls to action within the broader movement to reconcile cultural loss and trauma brought about by colonization.⁵² The TRC and UNDRIP speak to the right of Indigenous peoples not to be subjected to “forced assimilation and destruction of their culture” and call for effective mechanisms for prevention and redress.⁵³

The connection and the importance of Indigenous stewardship and control over heritage in its various forms to self-determination and cultural loss and trauma brought about by colonization is pivotal in interpreting and

⁴⁸ UNDRIP, *supra* note 1, arts 18 & 19 recognize the right of Indigenous peoples to participate in decision making matters which would affect their rights and for States to cooperate and consult in good faith with Indigenous peoples to obtain their free, prior and informed consent before adopting and implementing legislation that may affect them.

⁴⁹ TRC Report, *supra* note 2 at 153.

⁵⁰ *Ibid* at 241.

⁵¹ Calls to Action, *supra* note 2 calls 66, 67 and 79.

⁵² TRC Report, *supra* note 2, at 246-264.

⁵³ UNDRIP, *supra* note 1, art 8.1.

meaningfully implementing UNDRIP.⁵⁴ As explained by the TRC, a State engages in cultural genocide “when it sets out to destroy political and social institutions of a targeted group” the land is seized and populations forcefully transferred, “families are disrupted to prevent the transmission of cultural values and identity from one generation to the next” spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed.”⁵⁵ For over a century the central goal of Canada’s Indigenous policy was “to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will.”⁵⁶ The TRC report details how Canada did all of this and used many tools to do it including property law, residential schools, instruction in Christianity, dismantling of traditional governments, banning ceremonies, and forcefully relocating communities from “valuable or resource-rich land onto remote and economically marginal reserves.”⁵⁷ The impact that assimilationist policies and lack of access to full social, economic, and political rights has had on relationships of people to their culture and the wellbeing of Indigenous individuals and communities is also a dominant theme in the research and calls for justice by the National Inquiry into Missing and Murdered Indigenous Women and Girls.⁵⁸

The federal and some provincial governments have enacted policies, practices, and in some instances legislation, to define and advance reconciliation as envisioned by the TRC. An example is Manitoba’s *Path to Reconciliation Act*, which affirms that the Government of Manitoba is “committed to reconciliation and will be guided” by the TRC Calls to Action, UNDRIP and the principles of respect, engagement, understanding and action.⁵⁹ It also calls on the Minister responsible for reconciliation to develop a strategy that builds on engagement with Indigenous peoples and provides for accountability through annual reporting. Reconciliation is defined by the legislation as “the ongoing process of establishing and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples in order to build trust, affirm historical agreements, address healing and create a more equitable and inclusive society.”⁶⁰

TRC Calls to Action 53 to 56 also call on Canada to create a National Council for Reconciliation to monitor and report on progress toward reconciliation and the implementation of UNDRIP. In 2017, the Prime Minister announced that an Interim Board would be established to advise the Minister of Crown–Indigenous Relations on options for creating the Council. In June 2022, Bill C-29 was introduced, and it has now gone

⁵⁴ For further discussion of how UNDRIP can help inform heritage policy, practice and law drawing on interviews with Indigenous heritage practitioners and legal scholars see Catherine Cole & Julie Harris, *Indigenous Heritage and the United Nations Declaration on the Rights of Indigenous Peoples* (Indigenous Heritage Circle, May 2022) online: <https://indigenousheritage.ca/wp-content/uploads/2022/05/IHC-UNDRIP-Report-EN-medium-res-May-2022-1.pdf> [Cole & Harris].

⁵⁵ TRC Report, *supra* note 2 at 1.

⁵⁶ *Ibid* at 3.

⁵⁷ *Ibid* at 1.

⁵⁸ See e.g., MMIWG, *supra* note 6 vol 1a chaps 4 & 5.

⁵⁹ *Supra* note 30 Preamble.

⁶⁰ *Ibid*, s 1(1).

through its second reading.⁶¹ It creates and sets out the mandate for an Indigenous-led, independent and permanent National Council for Reconciliation to among other things “monitor progress toward reconciliation in all sectors of Canadian society and by all governments in Canada, including efforts to implement” the TRC calls to action, “conduct research on promising practices that advance efforts for reconciliation” make recommendations to “promote, prioritize and coordinate efforts for reconciliation” and engage in public education.⁶²

⁶¹ Bill c-29, *National Council for Reconciliation Act*, 1st Session 44th Parliament (2022) online: <https://www.parl.ca/legisinfo/en/bill/44-1/c-29> (accessed online November 30, 2022).

⁶²*Ibid.* s7.

2.0 CORE PRINCIPLES OF UNDRIP

The Preamble and articles in UNDRIP are interrelated and meant to be read together as a whole. Self-determination is the cornerstone of UNDRIP and informs interpretation of all the rights contained therein. Other fundamental principles that are consistent with and flow from self-determination also inform UNDRIP's interpretation including the principles of freedom from discrimination; respect for Indigenous laws, traditions, customs, and land tenure systems; and free prior and informed consent (FPIC).

2.1 Human Rights, Equality and Freedom from Discrimination

UNDRIP is a human rights instrument which speaks to inalienable and inherent human rights of Indigenous peoples that are central to maintaining dignity as human beings. It explains how human rights apply to Indigenous peoples and sets out the minimum necessary to comply with international human rights standards. The persistent denial of Indigenous human rights, including “dispossession, colonization, and assimilation practices ... [has been] justified by using racist legal doctrines that did not apply international law and human rights to Indigenous peoples.” The rights in UNDRIP are grounded in the principles of justice, equality, and non-discrimination.⁶³

Articles 1, 2 and the preamble of UNDRIP recognize and affirm that Indigenous peoples are entitled to the same human rights as other peoples with one significant difference – as elaborated in 2.3 below, “UNDRIP explicitly draws on Indigenous peoples’ legal traditions, customs and institutions.”⁶⁴ Indigenous peoples have the right to “full enjoyment, as a collective or as individuals, of all human rights” recognized in international law including the right to be free from discrimination based on their “Indigenous origin or identity.” They also “possess collective rights which are indispensable for their existence, well-being and integral development as peoples” and are “equal to all other peoples”, while at the same time retaining rights to cultural identity – “to be different, and to be respected as such.” Article 9 recognizes that the right to identity includes “the right to belong to an indigenous community or nation in accordance with the traditions and customs of the community or nation concerned.” The right to identity as distinctive peoples is also central to articles speaking to “cultural” heritage discussed in section 3.0 below.

Article 46.3 provides that all provisions in UNDRIP are to be interpreted “in accordance with principles of justice, democracy, respect for human rights, equality, non-discrimination, good-governance, and good faith.” These principles are also articulated in specific contexts. For example, Article 17 states that Indigenous peoples enjoy all rights under international law including not to be “subjected to any discriminatory conditions of labour” and speaks to children’s rights including the importance of education and the obligations of the State to work in “consultation and cooperation” with Indigenous peoples to protect children from exploitation and harm. Article 22 speaks to “rights and special needs of Indigenous elders, women, youth, children, and persons with disabilities” and the need for States to take measures in conjunction with Indigenous peoples to ensure protection from violence and discrimination.

⁶³UNDRIP Handbook, *supra* note 16 at 8.

⁶⁴ Oonagh Fitzgerald & Risa Schwartz, “Introduction” in *UNDRIP Implementation*, 2017, *supra* note 8 at 3.

2.2 Self-Determination

A central and guiding principle in UNDRIP is the principle of self-determination. Self-determination generally means that Indigenous peoples have the right to decide for themselves what is best for them and their communities. UNDRIP defines the right to self-determination as the right of Indigenous peoples to “freely determine political status and to pursue economic, social and cultural development.”⁶⁵ Although self-determination informs all of UNDRIP, it has two key pillars: the right to autonomy “in matters relating to their internal and local affairs” and the right to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”⁶⁶ This dual aspect reflects that Indigenous peoples are autonomous yet also in relationship with other political and social structures, such as the nation-state and the global community.⁶⁷ Gunn argues it is a principle that also recognizes “Indigenous jurisdiction...where Indigenous political and legal institutions are intimately involved in decision making about matters that impact Indigenous peoples.”⁶⁸

Self-determination is not constrained by narrow legal definitions that confine Indigenous jurisdiction to powers exercised and integral to their distinctive cultures prior to European contact.⁶⁹ It is a broader right of Indigenous peoples to freely determine their own form of government and participate in the processes of power.⁷⁰ This includes the collective right to determine their own identity, who qualifies as a member according to their own customs and traditions,⁷¹ and what responsibilities community members have towards the community as a whole.⁷² Indigenous peoples also “have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”⁷³

⁶⁵ UNDRIP, *supra* note 1, art 3.

⁶⁶ *Ibid*, arts 4& 5.

⁶⁷ Dorothee Cambou, “The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective” *The International Journal of Human Rights*, 23:1-2, 34-50, DOI: 10.1080/13642987.2019.1585345 [Cambou].

⁶⁸ Brenda Gunn, “Self-Determination as the Basis for Reconciliation: Implementing the UN Declaration on the Rights of Indigenous Peoples” (2012) 7:30 *Indigenous L Bull* 22 at 23 [Gunn, 2012].

⁶⁹ John Borrows 2017, *supra* note 7 at 23.

⁷⁰ Anaya, J., & Anaya, S. J., “*Indigenous Peoples in International Law*” (2004) Oxford U Press, USA, page 81 [Anaya & Anaya].

⁷¹ UNDRIP, *supra* note 1 art 33.

⁷² *Ibid*, art 35.

⁷³ *Ibid.*, art 34.

However, the right of self-determination does not refer to a right of secession. Several states refused to agree to UNDRIP unless it expressly affirmed the territorial integrity of States.⁷⁴ Accordingly, Article 46 states:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2.3 Respect for Laws, Traditions, Customs & Land Tenure Systems

The right to self-determination entails the obligation for States to recognize Indigenous legal and representative institutions. Indigenous law “refers not only to the systems of rules or precepts but also to the authority of Indigenous communities and nations to craft their own understandings of law and the particular form and content their legal orders may take on.”⁷⁵ For this reason implementing UNDRIP requires recognizing and respecting “strong legal pluralism and to work from that initial point.”⁷⁶ For example, in implementing UNDRIP Canada may choose to work with First Nations in the enactment and amendment of federal legislation. First Nations may choose to implement UNDRIP in different ways in accordance with their legal institutions. “In communities with clans and chief structures, they may use feasting to affirm their rights. If it’s a band council, they could take that Declaration and say that’s our constitution; that every member is guaranteed the rights in the Declaration, and this could be interpreted by a Cree, or Anishinaabe, or Haudenosaunee, or Mi’kmaq lens.”⁷⁷

Many articles in UNDRIP refer to Indigenous laws and institutions. For example, Article 40 calls on States to help make dispute resolution processes prompter and more accessible to Indigenous communities and recognizes the rights of Indigenous peoples to participate in the design of “just and fair procedures for resolution of disputes” giving “due consideration to the customs, traditions, rules, and legal systems of the Indigenous people concerned and international human rights.” Article 34 speaks to the right of Indigenous peoples to promote, develop, and maintain juridical systems and customs. Articles 18 and 27 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

⁷⁴ Erica-Irene A. Daes, “The Right of Indigenous Peoples to “Self-Determination” in the Contemporary World Order,” in *Self-Determination: International Perspectives*, ed. Donald Clark and Robert Williamson (New York: St. Martin’s Press, 1996), 49 at 53 [Daes].

⁷⁵ Gordon Christie, “Indigenous Legal Orders, Canadian Law and UNDRIP” in *UNDRIP Implementation 2017*, *supra* note 8 48 at 48 [Christie]. A second special report by the Centre for International Governance Innovation on implementing UNDRIP explores further Indigenous law and legal institutions and their relationship to implementing UNDRIP. See UNDRIP implementation 2018, *supra* note 12.

⁷⁶ Christie, *ibid* at 49.

⁷⁷ Gray & Borrows, *supra* note 10 at 10.

and customs.”⁷⁸ Together, these articles speak to respect for and revitalization of Indigenous law and Indigenous laws being more prominent in reconciling disputes – a principle also advocated by the TRC and Inquiry into MMIWG.

Self-determination also includes the rights of Indigenous peoples to maintain their identity and livelihoods and to manage traditional and natural resources.⁷⁹ Severing Indigenous peoples’ connection to their lands has contributed to the suffering, and affects the survival of, Indigenous societies.⁸⁰ Accordingly, UNDRIP includes several articles that point to the need for States to respect Indigenous peoples’ laws and land tenure systems. For example, Article 26 holds that States shall give legal recognition and protection to Indigenous peoples’ traditional lands, territories, and resources and that such recognition shall be “conducted with due respect to the customs, traditions, and land tenure systems of the Indigenous peoples concerned.” These customs and traditions are to be determined by Indigenous people themselves and include the right to keep their cultures, spiritual, religious, and knowledge traditions alive. Indigenous peoples also have the right to pass on their culture and traditions to their children.⁸¹

In short, UNDRIP calls for a weaving together of “international law, domestic law, and Indigenous law ... so that each one of those strands will support one another and nations are strengthened. Further, Indigenous peoples have the right to get help from the State to protect their lands.”⁸²

2.4 Free Prior and Informed Consent

Free, prior, and informed consent (FPIC) is a manifestation of indigenous peoples’ right to self-determine their political, social, economic and cultural priorities. It constitutes three interrelated and cumulative rights of indigenous peoples: the right to be consulted, the right to participate and the right to their lands, territories, and resources. Pursuant to the Declaration, free, prior, and informed consent cannot be achieved if one of these components is missing.⁸³

Indigenous peoples “have the right to be consulted and make decisions on any matter that may affect their rights freely, without pressure, having all the information and before anything happens.”⁸⁴ References to FPIC throughout UNDRIP emphasize “the importance of recognizing and upholding the rights of Indigenous peoples and ensuring there is effective and meaningful participation in decisions that affect them, their

⁷⁸ UNDRIP, *supra* note 1 art. 11.2

⁷⁹ UNDRIP Handbook, *supra* note 16 at 8-9.

⁸⁰ *Ibid* at 23.

⁸¹ Blackstock, Cindy, “United Nations Declaration on the Rights of Indigenous Peoples for Indigenous Adolescents” (9 September 2013), online < <https://heritagebc.ca/wp-content/uploads/2020/07/UNDRIP-for-indigenous-adolescents.pdf> > at 14 referencing art 13 [Blackstock].

⁸² *Ibid* at 18 referencing art 26.

⁸³ United Nations Human Rights Council, Office of the Human Rights Commissioner, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, (10-28 September 2018, Thirty-ninth session) online (pdf): <<https://www.ohchr.org/en/issues/ipeoples/emrip/pages/studyfpic.aspx>> [FPIC Report].

⁸⁴ Blackstock, *supra* note 81 at 12.

communities, and territories.”⁸⁵ It requires efforts to achieve consensus as parties work together in good faith on decisions that impact Indigenous rights and interests,⁸⁶ with special consideration for issues surrounding the management of natural resources.⁸⁷ Importantly, it signals the need for an ongoing relationship and dialogue between Indigenous peoples and Canadian governments and institutions.⁸⁸ This ongoing relationship is about “working together in partnership and respect” and requires seeking opinions of Indigenous peoples and working with them through their chosen representatives to obtain FPIC.⁸⁹

UNDRIP contains several provisions incorporating the language of FPIC. The most general is Article 19 which obligates States to “consult and cooperate in good faith with Indigenous peoples... in order to obtain their free, prior and informed consent before adopting and implementing legislative or other administrative measures that may affect them.” FPIC is also contained in other provisions in more specific contexts, including articles 10, 11, 18, 28, 29, and 32. The right to FPIC arises “prior to the approval of any project affecting indigenous peoples’ lands or territories or other resources, prior to the taking of any lands, territories and resources that Indigenous peoples have traditionally owned or otherwise occupied or used, prior to the storage or disposal of hazardous materials in the Indigenous peoples’ lands or territories, and prior to the taking of any cultural, intellectual, religious or spiritual property.”⁹⁰ The right arises “whenever an activity has the potential to significantly impact the physical and/or cultural well-being of an Indigenous community”⁹¹ and whenever “Indigenous peoples’ particular interests are at stake, even when those interests do not correspond to a recognized right to land or other legal entitlement.”⁹² It speaks to consensus driven good faith processes and includes ensuring the process itself is the product of consensus, addressing imbalances of power, and respecting Indigenous representative institutions.

The word “free” means the absence of coercion and outside pressure, including monetary inducements, and threats of retaliation.⁹³ The word “prior” means there must be sufficient time to allow information-gathering and sharing processes to take place, including the time it takes to create “translations into traditional

⁸⁵ Government of Canada, “Backgrounder: Bill C-15 – United Nations Declaration on the Rights of Indigenous Peoples Act” (2020) at 4 online : <https://www.justice.gc.ca/eng/declaration/un_declaration_EN.pdf> [Backgrounder].

⁸⁶ *Ibid.*

⁸⁷ S. Sadiq & A.J. Sinclair, “Understanding Free, Prior, and Informed Consent (FPIC) In the Context of Mining in Canada” (2020) *CIM Journal*, 11:1, 30-44 [“Sadiq & Sinclair”].

⁸⁸ Hannah Askew et al, “Between Law and Action: Assessing the State of Knowledge on Indigenous Law, UNDRIP and Free, Prior and Informed Consent with Reference to Fresh Water Resources,” (2017) *Soc Sciences and Humanities Research Council of Can*, online: <<https://www.protectthegreatbearsea.com/sites/default/files/publications/betweenlawandaction-undrip-fpic-freshwater-report-wcel-uBC.pdf>> [Askew et al].

⁸⁹ Backgrounder, *supra* note 85.

⁹⁰ Sarah Morales, “Binding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in *UNDRIP Implementation 2017* *supra* note 8, 63 at 69-70 referencing arts 32.2, 28, 29.2, and 11.2 [Morales].

⁹¹ *Ibid* at 71 citing a decision of the Interim American Court applying UNDRIP *Saramaka People v Suriname* (2007), Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 174.

⁹² Morales, *supra* note 09 at 72 citing James Anaya, Special Rapporteur on the rights of Indigenous peoples, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development, HRC Res6/12, UNHRC, 12th Session, UN Doc A/HRC/12/34(2009) para 44 [Promotion and Protection].

⁹³ *Ibid* at 72 citing Promotion and Protection para 51 and see UNDRIP Handbook, *supra* note 16 at 19.

languages and verbal disseminations as needed, according to the decision-making process of the Indigenous peoples in question.”⁹⁴ It also means consultation and agreement should occur before rights or interests are impacted. In some contexts, consensus seeking processes may be required at various stages of a project or course of action.⁹⁵

The word “informed” means that all relevant information is made available. This could include information about a potential project and its impacts, the input of Elders, spiritual leaders, traditional subsistence practitioners, and traditional knowledge holders. The decision-making process must allow adequate time and resources for Indigenous peoples to find and consider impartial, balanced information as to the potential risks and benefits of the proposal under consideration.⁹⁶

The word “consent” as applied to current and future activities of States means they must cooperate in good faith to obtain FPIC through full and effective participation of the internally chosen leaders, representatives, or decision-making institutions authorized by the Indigenous peoples themselves.⁹⁷ There is debate concerning whether FPIC anticipates a right of Indigenous peoples to veto a project or government action or decision if the State has consulted, cooperated, and participated in good faith negotiations to obtain consent. However, a decision that has a “significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go through without indigenous people’s consent.”⁹⁸ At a minimum FPIC affirms a right of good faith negotiation to obtain consent moving forward and for Indigenous peoples to oppose actions that could impact their lands and other significant cultural, intellectual, religious, or spiritual property.

⁹⁴ UNDRIP Handbook, *ibid* at 19.

⁹⁵ Morales, *supra* note 90 at 73 citing James Anaya, Extractive Industries and Indigenous Peoples, HRC Res 6/12 and 15/14, UNHRC, 24th session, UN Doc A/HRC/24/41[2013] para 65 [Extractive Industries].

⁹⁶ See e.g., discussion of Indigenous perspectives UNDRIP Handbook *supra* note 16 and Morales, *ibid* at 72-72.

⁹⁷ UNDRIP *supra* note 1 arts 18 & 19.

⁹⁸ Morales *supra* note 90 quoting Anaya, Promotion and Protection at para 47. As explained by, James Anaya, this is because FPIC and other rights articulated in UNDRIP, are human rights and as such they may only be limited “within certain bounds established by international human rights law” which in turn requires compliance with standards of “necessity and proportionality with regard to a valid public purpose defined within an overall framework of respect for human rights.

3.0 ARTICLES CONCERNING INDIGENOUS “CULTURAL HERITAGE”

3.1 What is Indigenous Heritage?

Indigenous values, beliefs, laws, institutions, and knowledge systems are diverse. Among Indigenous peoples there may be no conceptual or linguistic equivalent that separates people or land from what is collectively called cultural heritage (tangible and intangible). For example, Canadian law conceives of property in three distinct categories: land, moveable objects, and intellectual property. Indigenous concepts of property do not always fit neatly into these divisions.⁹⁹ Noble gives the example of Blackfoot tipi design transfers to illustrate this point.¹⁰⁰ The separation of certain designs from tipis makes no sense within Blackfoot legal traditions in which design and tipi are invariably transferred together in ceremony within the tipi on which the image is painted. Although there may be a form of payment involved, the payment and ceremony are not about acquiring and transferring ownership, nor do they enable the severance and transfer of designs, images, and symbols. Rather, Blackfoot tipi transfers increase connections between intangibles, the material world, and the people in it. The transferring person becomes a “grandparent” or elder to that tipi and is expected to be honoured in future activities. The design and tipi are always attached through rights and responsibilities to the lineage of previous and current holders.¹⁰¹

As objects, structures, and places are more easily observed, measured, and often used to identify and evaluate what may be considered “significant cultural” heritage by a State, intangible expression of Indigenous heritage may be at risk of receiving more limited protection. In many countries cultural heritage protection efforts are largely directed at ethnographic objects and archaeological sites and heritage. However, Indigenous concepts of heritage are much broader and include an amalgam of ideas, experiences, worldviews, objects, forms of expression, practices, knowledge, spirituality, values, kinship ties, and obligations to and relationships with each other and with other-than-human beings, places, and land.¹⁰²

In 2020, the Indigenous Heritage Circle (IHC) explored the meaning of Indigenous heritage in workshops across Canada. The following definition emerged from these sessions:

Indigenous heritage is complex and vibrant. Indigenous heritage encompasses ideas, experiences, belongings, artistic expressions, practices, knowledge, and places that are valued because they are culturally meaningful and connected to shared memory. Indigenous heritage cannot be separated from

⁹⁹ Catherine Bell, J. Lai & L. Skorodenski. “In/Tangible Heritage, Intellectual Property and Museum Policy: Methods for Respecting Indigenous Law” (2016) in *Intellectual Property and Access to Im/material Goods*, edited by Jessica C. Lai and Antoinette Maget Dominicé, (Cheltenham UK: Edward Elgar Publishing, 2016) 257 [Bell, Lai & Skorodenski].

¹⁰⁰ Brian Noble “Justice, Transaction, Translation: Blackfoot Tipi Transfers and WIPO’s Search for the Facts of Traditional Knowledge Exchange” (2007) 109: 2 *American Anthropologist*, 338-349.

¹⁰¹ *Ibid* at 343.

¹⁰² David M. Schaepe, George Nicholas, & Kierstin Dolata, “Recommendations for Decolonizing British Columbia’s Heritage-Related Processes and Legislation” (December 2020) at 7 online:<<https://fpcc.ca/wp-content/uploads/2020/12/FPCC-Decolonizing-Heritage-Processes-and-Legislation.pdf>> [Schaepe, Nicholas & Dolata].

either Indigenous identity or Indigenous life. It can be inherited from ancestors or created by people today.
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Adopting this definition, a more recent IHC study drew on interviews with Indigenous scholars and professionals working in the field of cultural heritage to explore how the principles and articles of UNDRIP can help inform practices, policies, and laws to better protect Indigenous heritage.¹⁰⁴ Common themes emphasized by interviewees were “the importance of land, place, language and identity” in their definitions and “giving communities opportunities to take more control of Indigenous heritage to allow living heritage to thrive in the future, not just as a means of preserving something that existed in the past.”¹⁰⁵

There is also no single national or international legal definition of Indigenous heritage. However, responding to input from Indigenous peoples from around the globe, member and former UN Special Rapporteur of the United Nations Working Group on Indigenous Populations (1984-2001), Dr. Erica Irene Daes proposed the following definition that has been adopted in UNDRIP and other international instruments which at the same time recognize that such divisions may exist in tension with Indigenous laws and concepts of property.

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.¹⁰⁶

Many articles in UNDRIP expressly reference “culture” including 5, 8, 11-15 and 31. These articles affirm that “Indigenous peoples suffer violations of their rights to religion, culture, spirituality, education and traditional knowledge when their cultural items, ancestral remains and intangible cultural heritage are improperly acquired, used and kept by others.”¹⁰⁷ The Report of the MMIWG for example, elaborates on how denial of cultural rights, appropriation and commodification of Indigenous peoples’ knowledge and denigration or destruction of their culture also constitutes a type of violence that exacerbates the existing social, economic, spiritual, and health challenges faced by contemporary Indigenous peoples.¹⁰⁸ With

¹⁰³ Indigenous Heritage Circle, 2020 Indigenous Heritage Engagement Sessions: Report From the Indigenous Heritage Circle to Parks Canada, online:<<https://indigenousheritage.ca/wp-content/uploads/2022/06/IHC-PCA-Report-EN.pdf>> at 8 & 9.

¹⁰⁴ Cole & Harris, *supra* note 54.

¹⁰⁵ *Ibid* at 19.

¹⁰⁶ 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).

¹⁰⁷ UN Expert Mechanism Report *supra* note 23 at para 14.

¹⁰⁸ See MMIWG *supra* note 57 and see Schaepe, Nicholas & Dolata, *supra* note 102.

respect to intangible heritage, a recent report of the Expert Mechanism on the Rights of Indigenous Peoples under UNDRIP explains:

Indigenous peoples have suffered myriad human rights violations in the realm of intangible cultural heritage, including corporate exploitation of indigenous peoples' traditional ecological knowledge for patents on pharmaceuticals; fashion designers' appropriation of textile designs; and musical entertainers' sampling of indigenous spiritual songs. The appropriation of indigenous peoples' cultural heritage causes a range of spiritual, cultural, religious, and economic harm caused by others' appropriation. The same is true of unauthorized use of blood samples and DNA for scientific research.¹⁰⁹

UNDRIP calls on States to take measures to prevent further appropriation and exploitation of Indigenous peoples' heritage contrary to Indigenous laws, customs and traditions including through application of principles of self-determination and FPIC. It also calls for remedial measures if heritage has been appropriated in violation of these principles.

3.2 Preamble

The preamble to UNDRIP includes various affirmations and recognitions on behalf of the UN General Assembly. These affirmations set the tone for how the rest of the document should be read, interpreted, and implemented. For example, informing all of the articles in UNDRIP are the principles that Indigenous peoples "are equal to all other peoples" and to respect and promote Indigenous inherent rights derived from "their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies especially their rights to land and resources"; rights "affirmed in treaties, agreements and other constructive arrangements"; Indigenous control over "developments affecting them and their lands, territories and resources" and respect for "knowledge, cultures and traditional practices."

3.3 Articles

Article 5 - The Right to Institutions

Indigenous peoples have the right to conserve and reinforce their own political, judicial, economic, social, and cultural institutions while at the same time maintaining their right to fully participate, if they wish to do so, in the political, economic, social, and cultural decisions of the State.

Discussed earlier in relation to the right of self-determination, the right to maintain and strengthen institutions has many implications for Indigenous cultural heritage including understandings of what constitutes significant cultural heritage, who decides and what laws apply. Indigenous legal institutions may recognize different rights, and relationships and mechanisms to prove entitlements, responsibilities or resolve disputes. For example, in repatriation, Canadian law and policy has generally focused on certain classes of objects or ancestral remains and often involves meeting certain conditions. Indigenous legal institutions may provide different answers to questions such as to which person or Indigenous body an item should be returned,

¹⁰⁹ UN Expert Mechanism Report, *supra* note 23 at para 38.

obligations of the returning institution and recipient, and under what terms an item should be retained if not returned.

For example, Richard Overstall explains, the importance Gitanyow people attach to the use of crest images and how focus on property law concepts in identifying relationships of belonging and control obscures applicable Indigenous laws:

...[T]he concept of ‘cultural property’ obscures Gitxsan law through its implicit assumption that a part of an indigenous legal culture can be carved out for separate consideration. While this may be a valid approach to Canadian legal analysis—for example, looking at the obligations of museums to return certain artefacts or remains—it obscures the significance of objects, images, words, and inventions under Indigenous law. Besides being possessions in their own right, many of the objects, and particularly the images, words and music they contain, have a critical constitutional role in the indigenous law.¹¹⁰

Article 11 – The Right to Culture

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 11 speaks to the rights of Indigenous peoples to protect, maintain, and have access to culturally sacred sites, artifacts, designs, ceremonies, visual and performing arts, literature, spiritual and religious traditions, and customs and ceremonies.¹¹¹ States are to work with Indigenous peoples to ensure their property rights to the cultural knowledge, spiritual and religious traditions are respected and are to “provide redress through an effective mechanism, which may include restitution” for “cultural, intellectual, religious, and spiritual property” taken without the FPIC or in violation of their laws, traditions and customs.

Read together with Article 12, this includes access to and/or repatriation of ceremonial objects and ancestors.¹¹² The return and process used to make decisions about the return, must be developed with the involvement of the descendants and Indigenous peoples to whom the ceremonial objects belonged.¹¹³ As elaborated above in section 1.1. above and in section 5.0 below, these sections have implications for

¹¹⁰ “The Law is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow” [Overstall] in Catherine Bell & Val Napoleon, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) [Bell & Napoleon], 92-113 at 93.

¹¹¹ UNDRIP Handbook *supra* note 16 at 15.

¹¹² UNDRIP *supra* note 1 art 11.2.

¹¹³ UNDRIP Handbook, *supra* note 110.

environmental, parks and heritage conservations laws as well as institutions with cultural heritage mandates that have within their control Indigenous sites, items, ancestors and intangible heritage.

Article 12 – The Right to Spiritual and Religious Traditions and Customs

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs, and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

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

Article 12 protects the rights of Indigenous peoples to practice 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. What constitutes “religious,” “spiritual,” or “ceremonial” sites, objects, or information in this and other articles of UNDRIP are not defined. However, the principle of self-determination and references to Indigenous laws and customs in the heritage and other articles of UNDRIP make it clear these terms are to be interpreted in accordance with the laws, traditions, and customs of Indigenous peoples asserting the right.

Article 13 – The Right to Know & to Use Language, Histories, and Oral Traditions

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that Indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

An important issue for many Indigenous communities is the protection and promotion of Indigenous languages. Approximately “600 languages have disappeared in the last century, and they continue to disappear at a rate of one language every two weeks.”¹¹⁴ Ensuring the continued use of Indigenous languages is vital to continuity of identity and dignity.¹¹⁵ UNDRIP recognizes this in article 13 which holds Indigenous peoples have the “right to recover, use, and pass on to future generations their histories and

¹¹⁴ *Ibid* at 15.

¹¹⁵ *Ibid*. There are many writings on the importance of language to Indigenous identity, history, culture and connection to land. See e.g., Marianne and Ron Ignace, in Bell & Napoleon, *supra* note 110, 417-441 discussing themes arising in case studies on Indigenous laws and perspectives in that volume.

languages, oral traditions, writing styles, and literature” and to be heard and understood in their own languages.”¹¹⁶ They also have the right to use their own names for communities, places, and people.

Article 25 – The Right to a Spiritual Relationship with Traditional Land and Resources

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

UNDRIP recognizes that Indigenous peoples have a sacred and spiritual relationship to the land. Former UN Special Rapporteur Martinez Cabo explains this relationship as follows:

[T]he land is not merely a possession and a means of production. The entire relationship between the spiritual life of Indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.¹¹⁷

This is one of several articles that recognize wrongful dispossession of Indigenous lands and the rights of Indigenous peoples to maintain and strengthen their relationships and uphold intergenerational responsibilities to their traditional territories and significant places. References to Indigenous “lands, territories and resources” throughout the declaration are interpreted to include water.¹¹⁸

Articles 26- 29 – Rights to Lands, Territories, and Natural Resources

The preamble to UNDRIP affirms that legal doctrines, policies, and practices used to justify Crown title and take aboriginal lands without consent “based on or advocating superiority of peoples on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.” Many articles in addition to Article 25 speak to the continuing rights of Indigenous peoples to their lands, territories, and resources including lands that they may have acquired through treaty or other processes. As elaborated in section 2.3 above, self-determination includes the rights of Indigenous peoples to maintain their distinctive identities and livelihoods and to manage traditional lands and natural resources. States are to work with Indigenous peoples affected to establish processes to give legal protection to these rights in a manner that respects Indigenous peoples’ laws, ways and customs of using the land. Further as discussed in 2.4 FPIC is required before a project is approved that could potentially affect these rights and compensation and other forms of restitution may be required where FPIC has not been obtained.

Article 26

1. Indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired.

¹¹⁶ Blackstock, *supra* 81 at 14.

¹¹⁷ Cited in UNDRIP Handbook *supra* note 16 at 23.

¹¹⁸ Askew et al, *supra* note 88.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

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

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair, and equitable compensation, for the lands, territories, and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of Indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of Indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Indigenous knowledge and culture includes “inheritances from the past and from nature, such as human remains, natural features of landscapes, and naturally occurring species of plants and animals with which a people has long been connected.”¹¹⁹ A “strong and intimate connection to land” sometimes makes it challenging for Indigenous Nations to identify specific lands or sites in greater need of protection than others as “many areas hold aspects of their history and identity and are considered vital for the continuation of cultural practices and knowledge.”¹²⁰ Nevertheless, the above articles have significant implications for

¹¹⁹ Battiste and Youngblood Henderson, *supra* note 28 at 63.

¹²⁰ Introduction to Bell & Napoleon, *supra* note 110 at 23.

control and preservation of Indigenous heritage such as the role of Indigenous laws and institutions in what constitutes a significant heritage site for the purposes of designations, development, management, destruction, excavation, and preservation. Among strategies to preserve Indigenous heritage are sustainable forms of development such as eco museums¹²¹ and calls to reform federal and provincial heritage laws, policies and practices regulating designation, development, and preservation of archaeological sites (including burial grounds). UNDRIP also has implications for access (and restricted access) to and regulation of parks, for example for access to ceremonial places and for traditional hunting or gathering or for the purpose of exercising treaty rights. UNDRIP further supports FPIC of affected Indigenous communities and inclusion of Indigenous laws and processes as prerequisites for initiating such reforms.

Indigenous peoples have the right to the protection of the environment on their lands and territories and of their resources. Land and environmental protection have a vital role in transmitting cultural knowledge and sustaining living Indigenous societies including through land-based teachings, story based experiential learning and other means of knowledge transmission. The State is to assist Indigenous peoples with these conservation and protection efforts, without discrimination. For example, as elaborated in sections 1.1 and 1.2 above Canada and BC have made amendments environmental assessment processes to include greater participation in decision making and consensus seeking processes at various stages of the environmental impact assessment process in response to these rights.

Article 31 – The Right to Culture and Intellectual Property

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

2. In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Until recently, heritage law, management, and protection activity has focused largely on material aspects of culture. However, for many Indigenous people significance is anchored not only in the material aspects of their cultures but also in their intangible heritage, including the knowledge, meanings, relationships, rights, and responsibilities associated with objects, sites, and landscapes. A significant hurdle faced by Indigenous peoples “who seek to control access to information and other forms of intangible heritage is the fact that a large proportion is considered under Canadian and international law to be in the public domain, a term used to describe intangibles in which no one can establish or maintain proprietary interests.”¹²² The concept of the public domain does not take into account takings that today would be considered unethical or illegal under Indigenous laws. In this and other ways, Canada’s property laws and ongoing colonialism facilitate cultural

¹²¹ Dwight Peigan, Glenn Sutter and Amber Fletcher, “Indigenous Perspectives on Heritage Conservation and the Ecomuseum Approach: Initial Findings from Saskatchewan” (2022) 8 *Prairie History* 72.

¹²² Bell, Lai & Skorodenski, *supra* note 99 at 259.

appropriation and unauthorized uses of Indigenous knowledge, technology, science, agriculture, art, and culture.¹²³

Article 31 recognizes Indigenous rights to control intangible heritage and intellectual property rights. The first section of the article speaks to the right to maintain, protect and control a wide range of heritage (e.g. sciences, medicines, genetic resources, cultural expressions) and includes the right “to maintain, control, protect, and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”¹²⁴ Although lacking a precise, universally accepted definition, traditional knowledge encompasses issues of health, food, environmental, cultural, industrial, technological, self-government, and self-determination. It is a term of art meant to capture the substance that comprises Indigenous peoples’ cultural heritage and traditional cultural expressions.¹²⁵ States are obligated to take steps to achieve the full realization of these rights in cooperation with Indigenous peoples.¹²⁶ It is important that this obligation is viewed in conjunction with the self-determination rights afforded under articles 3, 4, and 5, and the participatory and consultative rights afforded under articles 18 and 19.

While some States have engaged in the reform of intellectual property law or created unique laws in alignment with UNDRIP,¹²⁷ Canada has only recently been exploring intellectual property law reform. However, Canada has engaged in dialogues aimed at identifying concerns and sharing information on how to effectively respect Indigenous laws and use Canadian laws to protect Indigenous intellectual property.¹²⁸ In May 2019, the Parliamentary Standing Committee on Canadian Heritage released a report entitled “Shifting Paradigms,”¹²⁹ and a month later, the Parliamentary Standing Committee on Industry, Science and Technology (IST) released its report, “Statutory Review of the Copyright Act.”¹³⁰ 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*.¹³¹ Among them were the following:

¹²³ Daniel W. Dylan "Implementation & Governance Challenges in Canada respecting UNDRIP Article 31" 70 (2019) U of New Brunswick L J, 63 at 61-87 [Dylan].

¹²⁴ *Ibid.* at 63.

¹²⁵ *Ibid.*

¹²⁶ UNDRIP, *supra* note 1 art 31.2.

¹²⁷ See e.g. World Intellectual Property Organization, *Compilation of Information on National and Regional Sui Generis Regimes for the Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions* online: <https://www.wipo.int/export/sites/www/tk/en/resources/pdf/compilation_sui_generis_regimes.pdf> and Dylan, *supra* note 123.

¹²⁸ Bell, Lai & Skorodenski, *supra* note 99.

¹²⁹ 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*].

¹³⁰ 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*].

¹³¹ 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/>>.

- 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”.
- 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.”¹³²

Although the Heritage Committee report references Indigenous submissions and notes that Canada has been working with international partners to develop norms to address Indigenous IP concerns, none of the recommendations directly address concerns raised. Of the 36 recommendations in the Industry, Science and Technology report, 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.”¹³³ It also calls for creation of an Indigenous arts registry and an Indigenous authority to manage traditional arts and cultural expression. The ninth recommendation calls for a collaborative investigation with Indigenous and governmental stakeholders to determine the feasibility of implementing a national artist’s resale right.¹³⁴

While the above concerns and recommendations have implications for reproduction, loans and sales of Indigenous images and designs (e.g. by galleries, archives, and museum shops) there are numerous other Indigenous intellectual property issues that arise in the context of heritage management and practice. For example, IP related issues arise in heritage site designation, archeological, archival, and museum research, practices, and policies.¹³⁵ More specific contexts include repatriation of material culture and associated information; repatriation of oral and other recorded material; co-management of information or cultural expressions that were (and are or have been) considered sensitive or sacred; access to sites and information, data and products of research derived from Indigenous peoples or conducted within their territories; and digitization.¹³⁶

¹³² Statutory Review, *supra* note 130 at 29.

¹³³ *Ibid* at 3-4.

¹³⁴ *Ibid* at 5.

¹³⁵ See e.g., Intellectual Property in Cultural Heritage (IPinCH) online: < <https://www.sfu.ca/ipinch/> > and 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,

¹³⁶ Bell, Lai & Skorodenski, *supra* note 99 at 258.

4.0 OTHER IMPORTANT ARTICLES

In addition to the articles discussed in section 2.0 above, the following articles also have implications for Canadian heritage law, policy, and practice.¹³⁷

4.1 Minimum Standards, Limits on Rights and Implementation

Articles 38 through 46 are concerned with the interpretation and implementation of UNDRIP and explain how endorsing States, the United Nations, and Indigenous peoples should work together to ensure the rights of all Indigenous peoples are protected. UNDRIP anticipates that States will implement UNDRIP in consultation and cooperation with Indigenous peoples, including through legislative measures. Indigenous peoples will have access to the financial and technical resources necessary for the enjoyment of their rights, as well as access to “prompt decisions through just and fair procedures for the resolution of conflict and disputes with States or other parties, as well as to effective remedies for infringements of their individual and collective rights.”¹³⁸ Key provisions are discussed here.

Articles 43 & 46 - Minimum Standards and Limitations on Rights

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

This article stipulates that the rights articulated in UNDRIP are the minimum content of the rights of Indigenous peoples, built on a foundation of various sources of international human rights law. As elaborated earlier in section 1.0 above, UNDRIP adds to existing international laws, instruments, and activities of the United Nations.¹³⁹ However, this article is also to be read with Article 46.2 which provides:

In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

Article 46.3 also provides that UNDRIP is to be interpreted “in accordance with principles of justice, democracy, respect for human rights, equality, non-discrimination, good-governance, and good faith.”

¹³⁷ Organization into these thematic sections is influenced by UNDRIP Handbook, *supra* note 16.

¹³⁸ UNDRIP, *supra* note 1 art 40.

¹³⁹ Felipe Gomez Isa, “The UNDRIP: An Increasing Robust Legal Parameter” 23:1-3 (2019) The International Journal of Human Rights 7-12.

Article 45 – Extinguishes No Rights

Nothing in this Declaration may be construed as diminishing or extinguishing the rights Indigenous peoples have now or may acquire in the future.

This article is tied closely with Article 43, in that UNDRIP reflects the minimum standard of rights afforded to Indigenous peoples. Article 45 holds that the rights Indigenous peoples hold outside of UNDRIP cannot be diminished now, or in the future, by UNDRIP. This ensures that the rights of Indigenous peoples are not frozen in time - a principle consistent with and that Borrows, and others argue animates interpretations of s. 35 Aboriginal rights.¹⁴⁰

4.2 Life, Liberty, Continuity and Security of Individuals and Peoples

Article 7 – Life, Liberty & Security

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 7 ensures that every Indigenous person is born with the right to life, to be able to live freely, and to be safe and secure. Collectively, Indigenous peoples have the right to “live freely together, to be safe and secure, and to not experience violence”¹⁴¹

Article 8 – Assimilation or Destruction of Culture

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

¹⁴⁰ Borrows, *supra* note 7.

¹⁴¹ Blackstock, *supra* note 81 at 14.

Combined with Article 7, Article 8 speaks to the rights of all Indigenous peoples to life, including the right to live as a distinctive group of people. Indigenous peoples are to be free from forced assimilation, genocide, violence, and the destruction of their cultures as experienced by Canadian Indigenous people and elaborated in the reports of the TRC and MMIWG discussed in 1.3 above. Freedom from assimilation means “they have the right not to be forced to take up someone else’s culture and way of life, and for their culture not to be destroyed.”¹⁴² The State should take steps to prevent actions that take away from cultural values or identities; actions that dispossess Indigenous peoples; any form of forced assimilation, relocation, or removal of Indigenous children; and information or stories about Indigenous peoples that lead to discrimination. As discussed earlier, Indigenous peoples also have a right to “belong to an Indigenous community or nation, in accordance with the traditions and customs of the community.”¹⁴³

4.3 Education and Public Information

Article 14 – Educational Systems & Access to Culturally Sensitive Education

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

Under Indigenous laws, language is recognized as a sacred, inalienable right.¹⁴⁴ Part 1 of Article 14 speaks to the rights of Indigenous peoples to set up and control their own schools and offer culturally appropriate education in their own languages, with their own traditional methods of teaching and learning. This right to education is broad and includes the right to integrate Indigenous perspectives, cultures, beliefs, values, and languages in mainstream education systems and institutions.¹⁴⁵ This right is to be considered along with other articles to be fulfilled. For example, given the connection of Indigenous knowledge to land and the centrality of land-based learning, fulfillment may include consideration of access to cultural sites, traditional medicines, and maintaining and strengthening spiritual relationships with the land.

An example is Wahkotowin Intensive: Miyowîcêhtowin Principles and Practice course offered by the University of Alberta Faculty of Law. This course gives students exposure to and experience with the Cree legal and governance concepts of *wahkohtowin* and *miyo-wîcêhtowin* – terms which roughly translate into

¹⁴² Ibid.

¹⁴³ UNDRIP, *supra* note 1 art 9.

¹⁴⁴ Lorena Sekwan Fontaine, “Our Languages are Sacred” in UNDRIP Implementation, *supra* note 8 89 at 90.

¹⁴⁵ UNDRIP Handbook *supra* note 22 at 17 citing the Expert Mechanism of the Rights of Indigenous Peoples, Expert Mechanism Advice No. 1 (2009) on the Rights of Indigenous Peoples to Education, annexed to the Study on lessons learned and challenges to achieve the implementation of the right of Indigenous peoples to education (A/HRC/12/33) at par 1.

interrelatedness and building good relations - through a variety of methods guided by professors, Elders and knowledge keepers. These methods include seminars, stories, language, land-based or nature-based teachings, experiential learning, reading, writing, and ceremonial experiences. The central pedagogy is structured around the traditional tanning of a moose hide and related activities.¹⁴⁶

Part two of Article 14 ensures that all Indigenous individuals, but especially Indigenous children, have the right to a full education under the State, without discrimination. This means Indigenous peoples have the right to access the same standard of education as all other Canadians. Part three of Article 14 ensures that the State, in working with Indigenous peoples, shall take effective measures to ensure all Indigenous peoples, regardless of their age or where they live, to obtain an education in their own culture and language.

Article 15 – Accurate Reflection of Indigenous Cultures in Education

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the Indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among Indigenous peoples and all other segments of society.

This article speaks to the rights of Indigenous peoples to have their cultures, traditions, histories, and aspirations appropriately reflected in education and public information. It also provides that the State is to work with Indigenous peoples to educate non-Indigenous people in a way that respects the dignity and rights of Indigenous peoples to promote a cohesive and harmonious society.¹⁴⁷ This means that “racist, culturally inaccurate, and discriminatory references to Indigenous peoples and their cultures must be removed from the curriculum and all government information.”¹⁴⁸

Article 15 also calls for effective measures to combat prejudice and for these measures to be done in cooperation and collaboration with Indigenous peoples concerned. Along with Article 18 it recognizes the rights of Indigenous people to participate in decision making about education programs, exhibits, installations, commemorations and other activities that affect them and the identification, naming, and interpretation of heritage sites, parks or other designations concerning them. Further, UNDRIP compliance calls for consensus seeking processes with Indigenous peoples concerning enactment or changes to archaeological, historic or other site protection or management legislation concerning them.¹⁴⁹ Another article that speaks to ensuring respectful and accurate representation in public information is Article 16 which speaks to the rights of Indigenous peoples to establish their own media.

¹⁴⁶ See 2022/2023 course descriptions: “LAW 589 Wahkotowin Intensive: Miyowícêhtowin Principles and Practice.” Online: <https://sites.google.com/ualberta.ca/law2022coursedescriptions/589-seminars/589-wahkohtowin?authuser=0> (accessed November 30, 2022). See also Priscilla Popp, 04 Aug 2017 “Learning law and governance on the land with the Wahkohtowin Project.” Online: <https://www.ualberta.ca/law/about/news/2017/8/wahkohtowin.html> (accessed November 30, 2022).

¹⁴⁷ Blackstock, *supra* note 81 at 16.

¹⁴⁸ UNDRIP Handbook, *supra* note 16 at 17.

¹⁴⁹ UNDRIP *supra* note 1, arts 18 & 19

Article 16 – Media

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 16 affirms Indigenous peoples have the right to create their own TV, radio, newspapers, and other forms of media in their own languages, while also having a right to access all other non-Indigenous media without discrimination. States shall ensure all government-owned media reflects Indigenous cultural diversity and are also to encourage private media to do the same.¹⁵⁰

4.4 Economic and Social Rights

Article 23 – Priorities & Strategies for Development

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

Indigenous peoples have the right to develop their economic, social, cultural, legal, and other institutions and programs affecting them and to run their own organizations and services. This includes improving standards of education, employment, housing, basic services (for example, sanitation), health, and social security. Article 23 speaks to the right of Indigenous peoples to determine and develop their own priorities and strategies for exercising their right to development.

The right of development is not limited to traditional activities. Indigenous people have the right to engage in new forms of economic development such as cultural tourism and to administer these programs through their own institutions.¹⁵¹ Examples include Indigenous designed and run cultural education centres, museums, and advocacy organizations such as the Indigenous Heritage Circle. Founded in 2016, the IHC is an Indigenous-designed and Indigenous-led organization “dedicated to the advancement of cultural heritage priorities that are of importance to Métis, Inuit, and First Nations Peoples in Canada and promoting “[h]ealthy and vibrant Indigenous communities in which Indigenous Peoples are supported and recognized in their role as the caretakers of Indigenous heritage in all forms.”¹⁵²

¹⁵⁰ UNDRIP Handbook, *supra* note 16 at 16-17.

¹⁵¹ UNDRIP Handbook, *supra* note 16 at 20

¹⁵² See e.g., online: <<https://indigenousheritage.ca/>>.

4.5 Lands and Territory

Article 30 - The Military

1. Military activities shall not take place in the lands or territories of Indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the Indigenous peoples concerned.

2. States shall undertake effective consultations with the Indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 30 ensures that no military activities will take place on Indigenous lands or territories unless the military activities are justified for the well-being of all of society, or without the FPIC of Indigenous peoples. The State shall consult with a representative identified by the Indigenous peoples in question before the military activities taking place.

4.6 Treaties, Agreements and Other Constructive Arrangements

Article 37 - Recognition, Observance & Enforcement of Treaties & Agreements

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of Indigenous peoples contained in treaties, agreements and other constructive arrangements.

Sakej Youngblood Henderson, a leading Indigenous law expert involved in developing UNDRIP explains: "To renew and live in accordance with concepts of Indigenous humanity, law and human rights, both collectively and individually, is the meaning and goal of UNDRIP."¹⁵³ This meaning has implications not only for understanding "existing treaties and agreements of Indigenous peoples but also the fundamental rights of Indigenous peoples, according to their indigenous knowledge, legal systems and new agreements."¹⁵⁴ Indigenous peoples have the right to have treaties and agreements that have been made with governments honoured, recognized, observed, and enforced. Implementing UNDRIP through new and existing treaties,

¹⁵³ Youngblood Henderson, *supra note 8* at 14-15.

¹⁵⁴ *Ibid* at 15.

agreements and other negotiated arrangements and interpreting such instruments according to their spirit and intent and with equal emphasis on Indigenous law and understandings of these arrangements.¹⁵⁵

UNDRIP's rejection of racist doctrines, such as the doctrine of discovery, affirmation of Indigenous legal institutions, and recognition of the right to observance of treaties shifts emphasis away from Crown sovereignty and written treaty texts in the interpretation of treaties to equal consideration of Indigenous understandings. From this perspective UNDRIP compliance is not so much about creating new or amending existing laws and policies to recognize Indigenous rights to cultural heritage as it is about respecting treaty jurisdictions and partnerships. For example, there is no evidence that during the negotiation of the Georgian (Eastern Canada 1693-1930) and Victorian treaties (made after 1871 in the Prairies), the Crown requested, or First Nations relinquished, sovereignty or transfer jurisdiction over their territories. Rather, "the Crown understood that there would be a nation-to-nation relationship between First Nations and Canada based on sharing the land"¹⁵⁶ – a form of shared jurisdiction known as "treaty federalism."¹⁵⁷

Treaty federalism was "concerned with: (1) protection of inherent Aboriginal rights; (2) distribution of shared jurisdictions; (3) territorial management; (4) human liberties and rights; and (5) treaty delegations."¹⁵⁸ Those Indigenous rights not delegated to the Crown through treaty continue as inherent rights of First Nations. While none of the Georgian or Victorian treaties include express terms like "heritage", "cultural objects" or other language that forms part of contemporary Canadian heritage law and policy, this understanding of treaty federalism is contrary to federal and provincial assumption of legislative authority over Indigenous cultural heritage based on its assertion of sovereignty and jurisdiction over Indigenous peoples.¹⁵⁹

Further the language of kinship used in negotiation and in the text of the treaties affirms the intention to create "a permanent living relationship beyond the particular promises"¹⁶⁰ and to establish a "partnership guided by the principle that settlement would cause no harm."¹⁶¹ Reconciliation advocated by the TRC

¹⁵⁵ *Ibid.* See also James [Sa'ke'j] Youngblood Henderson, "UN Declaration on the Rights of Indigenous Peoples and Treaty Federalism in Canada" (2019) 24(1) *Review of Constitutional Studies/Revue d'études constitutionnelles* 17 [Youngblood Henderson 2019] and by TRC Commissioner and former member of the UN Expert Mechanism on the Rights of Indigenous Peoples, Chief Wilton Littlechild, "Consistent Advocacy: Treaty Rights and the UN Declaration" in J. Hartley, P. Joffe & J. Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (Saskatoon: Purich Publishing Ltd., 2010) .

¹⁵⁶ "Treaty Relations as a Method of Resolving IP Issues, Project Summary online (pdf):< https://www.sfu.ca/ipinch/sites/default/files/resources/reports/treatyrelations_projectssummary_2014.pdf> [Treaty project summary] and for the full report see Siku Allooooloo, Michael Asch et. al., Final Report, *Treaty Relations as a Method of Resolving IP and Cultural Heritage Issues* (An Intellectual Property in Cultural Heritage Community Based Initiative 2014) online (pdf)< https://www.sfu.ca/ipinch/sites/default/files/resources/reports/treatyrelations_finalreport_2014.pdf> [Allooooloo, Asch, et. al.] and see e.g., accounts of Indigenous Elders in Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is that Our People Will One Day be Clearly Recognized as Nations* (Calgary Alberta: University of Calgary Press, 2000) [Cardinal and Hildebrandt].

¹⁵⁷ James [Sa'ke'j] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 *Saskatchewan Law Review* 241 [Youngblood Henderson 1994].

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.* at 267.

¹⁶¹ Treaty Project Summary, *supra* note 156.

speaks to significant harm caused by among other things prohibition of ceremonies, taking of cultural belongings and forced assimilation harm as violations of the treaty relationship. Reconciliation is viewed by many Indigenous Treaty Nations as “an opportunity to affirm their own sovereignty and return to the ‘partnership’ ambitions they held at Confederation.”¹⁶² However, as the TRC points out in its executive summary report, Canada’s approach to interpreting treaties continues to assume the validity of Crown sovereignty and parliamentary supremacy, a “very different and conflicting view of what reconciliation is and how it is best achieved.”¹⁶³

Nevertheless, when interpreting treaties Canadian courts must seek to identify the common intention of the parties at the time a treaty was signed by considering treaty text and oral understandings. In doing so they must resolve ambiguities in favour of First Nation signatories, presume the honour and integrity of the Crown, and the treaty in a way that allows purposive fulfillment.¹⁶⁴ Adopting these principles, cultural continuity and self-determination over cultural heritage can also be persuasively argued as a treaty right in Canadian law. For example, elder accounts of negotiations, the emphasis placed by Commissioners on safeguarding “ways of life”, and express terms in the treaty document consistent with this general purpose such as the right to “pursue traditional avocations of hunting, trapping and fishing” suggest a right of cultural continuity formed part of the common intention of the parties to Treaty Four¹⁶⁵ Further use of cultural items and representative imagery at the time of treaty negotiations and within the text of the treaty itself reflect a common intention not to interfere with cultural and spiritual beliefs and practices. An integral part of the treaty making process on the prairies was the pipe ceremony and other symbolic representation of the sacred and enduring nature of treaties. Participation in and respect for spiritual beliefs and ceremonies of First Nations by treaty negotiators can be taken as evidence of the dominant intent not to interfere with ceremonies and control over the use of items integral to them. The existence of promises in treaties of peace and friendship in eastern Canada that expressly provide for “free exercise of religion and customs” support this interpretation.”¹⁶⁶

Many modern treaties and land claims include chapters relating to ownership, control, and management of land and other Indigenous heritage. 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, parks, sites, monuments, and natural resources. They also contain terms specific to Indigenous sites, objects and associated intangible heritage, repatriation of cultural belongings and ancestral remains, ownership and control of archaeological and ethnographic heritage, and other heritage matters.¹⁶⁷ An example is the Chapter 13 Yukon First Nations Land Claim Agreement (1993), which covers a wide range of heritage matters. Yukon First Nations own and have responsibility for managing heritage resources on their settlement lands, while Canadian governments (Yukon and Canada) have responsibility for managing heritage resources on other lands in the Yukon

¹⁶² TRC Report, *supra* note 2 at 241.

¹⁶³ *Ibid.*

¹⁶⁴ *R v Marshall*, [1999] 3 SCR 456.

¹⁶⁵ See Cardinal and Hilderbrand, *supra* note 156.

¹⁶⁶ *R v Sioui*, [1990] 1 SCR 1025

¹⁶⁷ See e.g., Bell and Lazin, *supra* note 33 at 12 and 67-73.

Territory.¹⁶⁸ Significant control has also been obtained through the negotiation of public governments, such as Nunavut, in which the Inuit are the significant majority, including the transfer of jurisdiction over all forms of tangible cultural heritage previously enjoyed by the territorial government and the ability to displace existing territorial legislation.¹⁶⁹ Departments of federal, provincial, and territorial governments have also entered into agreements with Indigenous peoples concerning stewardship and use of parks, historic sites, and other forms of Indigenous cultural heritage.

¹⁶⁸ For e.g., see Carcross-Tagish First Nation, Champagne & Aishihik First Nations, Ta'an Kwach'an Council, Tr'ondek Hwech'in First Nation, Sheila Greer, and Catherine Bell, "Yukon First Nations Heritage Values and Resource Management – *Perspectives from Four Yukon First Nations: IPinCH Case Study Final Report*" (2016), Online (electronic document): <https://issuu.com/ipinch/docs/yfn_ipinch_report_2016>.

¹⁶⁹ Nunavut Tunngavik Inc. & Indian and Northern Affairs Canada, "Agreement Between the Inuit of Nunavut Settlement Area and Her Majesty the Queen in Right of Canada", (25 May 2018) Article 33 - Archaeology, online: <<https://nlca.tunngavik.com/>>.

5.0 UNDRIP, MUSEUMS & OTHER CULTURAL MEMORY INSTITUTIONS

Mandated to report on the history, purpose, operation, and supervision of residential schools for First Nation, Inuit, and Métis children, the TRC did so within the wider context of colonization and the legal and policy frameworks for the forced assimilation of Indigenous peoples into Canadian society. Throughout this time Indigenous items, intangible heritage (e.g., images, recordings) and ancestral remains came to be within the control of museums, galleries, archives, libraries (cultural institutions) and other institutions (e.g., universities). As holders of this material and sites of public memory the TRC recognizes the significant roles that cultural institutions have in the process of reconciliation.

TRC Calls to Action 67 -70 are directly aimed at cultural institutions.

67. *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 [UNDRIP] and to make recommendations.*

68. *We call upon the federal government, in collaboration with Aboriginal peoples, and the Canadian Museums Association to mark the 150th anniversary of Canadian Confederation in 2017 by establishing a dedicated national funding program for commemoration projects on the theme of reconciliation.*

69. *We call upon Library and Archives Canada to:*

Fully adopt and implement [UNDRIP] and the United Nations Joint-Orientlicher Principles, as related to Aboriginal peoples' inalienable right to know the truth about what happened and why, with regard to human rights violations committed against them in the residential schools.

Ensure that its record holdings related to residential schools are accessible to the public; and

Commit more resources to its public education materials and programming on residential schools.

70. *We call upon the federal government to provide funding to the Canadian Association of Archivists to undertake, in collaboration with Aboriginal peoples, a national review of archival policies and best practices to:*

Determine the level of compliance with [UNDRIP] and the United Nations Joint-Orientlicher Principles, as related to Aboriginal peoples' inalienable right to know the truth about what happened and why, with regard to human rights violations committed against them in residential schools;

Produce a report with recommendations for full implementation of those international mechanisms as a reconciliation framework for Canadian archives.

Principles derived from the Canadian Museum Association (CMA) and Assembly of First Nation (AFN) *Task Force Report on Museums and First Peoples*, and the International Code of Museum Ethics 2004¹⁷⁰ (ICOM) inform contemporary policy and practices of Canadian museums but in different ways and to varying degrees.¹⁷¹ Aimed broadly at developing an ethical framework and principles for museums to work together with Indigenous peoples, the recommendations of the CMA/AFN Task Force touch on a range of areas including interpretation of and access to collections and repatriation of Indigenous belongings and remains. The principles call on museums and Indigenous people to work together to correct inequities and, in a partnership, involving mutual appreciation of the knowledge and interests of both. Prior to this the 1996 *Report of the Royal Commission on Aboriginal Peoples* also made recommendations concerning development of ethical guidelines for Indigenous collections and relations; collaboration with Indigenous peoples in developing these guidelines, cataloguing, use and display; and creation of, and accessibility to, inventories of Indigenous belongings and remains in their possession.¹⁷²

Alongside these developments, some Canadian museums have developed policies and practices that align with principles and rights articulated in UNDRIP. For example, as elaborated below, cultural institutions have worked in partnership with Indigenous peoples to develop exhibition, collections management, digital resource and other policies that respect Indigenous laws and protocols concerning stewardship, access, care and use of sacred/ceremonial objects, images and information.¹⁷³ UNDRIP expressly affirms principles articulated by the CMA/AFN Task Force as Indigenous human rights and adds to them, among others, the rights to maintain, protect, develop, use and control “past, present, and future manifestations of their cultures” such as heritage items, cultural expressions and sites and reparation for violations of their “laws, traditions, and customs.”¹⁷⁴

The following section is an overview of some examples of policies and practices of cultural institutions in Canada that align with the calls to action of the TRC and UNDRIP. It is organized according to themes identified in 2021 by the previous CMA Reconciliation Program Director, Barbara Filion, in her initial review of UNDRIP museum policy and practices. In providing these examples we are not suggesting that they are the only or best ones, fit only within one of the articulated themes, or that the cultural institutions mentioned align with UNDRIP in all areas of governance, administration, policy and practice or that the examples given are the only ones.

¹⁷⁰ International Council of Museums (ICOM), “Code of Ethics for Museums”, (2017) Paris, France, online (pdf): <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf> [“ICOM Code of Ethics”].

¹⁷¹ Task Force Report on Museums and First Peoples, *Turning the Page: Forging New Partnerships between Museums and First Peoples* (Canadian Museum Association and Assembly of First Nation 1992) online:< https://museums.in1touch.org/uploaded/web/docs/Task_Force_Report_1994.pdf> [Task Force Report].

¹⁷² Volume 3, *Gathering Strength* (Ottawa: Minister of Supply and Services Canada, 1996) at 599.

¹⁷³ See e.g., Bell, Lai and Skorodenski, *supra* note 99.

¹⁷⁴ UNDRIP, *supra* note 1 Article 11.

5.1 Welcoming Space

5.1.1 Bias, Racism and Discrimination

Article 2 states “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, and in particular that are based on their Indigenous origin or identity.” Article 13(2) further holds that “in conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights” including the right to maintain, control, protect and develop cultural heritage, traditional knowledge, and traditional cultural expressions. These articles call on all cultural institutions in Canada to provide welcoming and safe spaces free from bias, racism, and discrimination.

At a most basic level unconscious, intentional and systemic bias and discrimination undermine what are otherwise well-intentioned policies, programs and strategies aimed at reconciliation. As the TRC emphasized in its work, despite the discomfort, such truths need to be told before meaningful reconciliation can occur. This issue has come to the forefront again in museum contexts¹⁷⁵ at a time when movements such as Every Child Matters have highlighted ongoing issues of racism in other Canadian institutions. Allegations of harassment, discrimination, micro aggressions, and toxic work environments have been raised, for example, at the Royal British Columbia Museum, the Royal Alberta Museum, the Canadian Museum of History (formerly the Canadian Museum of Civilization), the Montreal Museum of Fine Arts and the Canadian Museum for Human Rights.¹⁷⁶

In research for the Yellowhead Institute, an Indigenous-led Research and Education Centre at Ryerson University, on UNDRIP and arts institutions in Canada, Nixon outlines several examples of tokenism and marginalization in the workplace experienced by Indigenous employees. Interviewees were almost universally quick to relay relationships between Indigenous cultural workers and Canada’s cultural institutions was one of tokenization - a kind of tokenization that benefits the cultural institution materially, such as in grant writing and funding requests. Some interviewees experienced social isolation and intentional non-integration into the organizational structures and felt that opportunities for advancement were

¹⁷⁵ As it did for example in 1988 with the Lubicon Lake First Nation’s boycott of the Glenbow Museum’s “Spirit Sings” exhibition to highlight Indigenous rights issues. When the exhibit opened in Ottawa a symposium on issues between museums and Indigenous peoples was held giving rise to the CMA AFN Task Force. See *Task Force Report*, *supra* note 171 at 1.

¹⁷⁶ Recent examples include the resignation of a member of the Haida Nation and head of the First Nations Department and Repatriation Program at the Royal British Columbia Museum (RBCM) and human rights complaints brought by a member of the Samson Cree First Nation and former Indigenous liaison officer, against the Royal Alberta Museum. See e.g., Marsha Ederman, “Royal BC museum responds to accusations of racism” (12 September 2020) online: <<https://www.theglobeandmail.com/arts/article-royal-bc-museum-responds-to-accusations-of-racism/>> Omar Mosleh, “I’m not your token’: Indigenous employee accuses Alberta museum of systemic racism” (27 June 2020) Toronto Star, online: <<https://www.thestar.com/news/canada/2020/06/27/im-not-your-token-indigenous-employee-accuses-alberta-museum-of-systemic-racism.html>>. See also Pat Gessell, “Harassment allegations at the Canadian Museum of History are no surprise to former employees” (26 September 2020) Ottawa Citizen, online: <<https://ottawacitizen.com/news/local-news/harassment-allegations-at-the-canadian-museum-of-history-are-no-surprise-to-former-employees>>.

limited because of this marginalization.¹⁷⁷ Nixon identifies this as an essential shortcoming of Indigenous cultural management in Canada.¹⁷⁸

5.1.2 Institutional Change and Decision Making

Museum policies and practices, in the areas of repatriation and community engagement, are often cited as examples of respectful relationships and practices that align with contemporary law and ethics.¹⁷⁹ However, honouring the Task Force Report, TRC Calls to Action, and UNDRIP also requires avoiding tasking the decolonization process to particular policies, departments and people and reviewing deeply entrenched organizational structures, ideologies and systems that intentionally and unintentionally prioritize colonial thought over Indigenous peoples and knowledge. This point is a common theme running through a 15-point guide on “Standards of Achievement for the Relationship Between Indigenous Peoples and Cultural Institutions in Canada” released by the Yellowhead Research Institute, in the report discussed above.¹⁸⁰ The recommended standards flow from a special report that considers UNDRIP principles and “draws on the history of the relationship between Indigenous people in the Arts as well as anonymous interviews completed recently with Indigenous cultural workers across Canada, from diverse regions, positions, and backgrounds.”¹⁸¹ The standards, to be “pursued in a spirit of partnership and mutual respect” include among them “No more Indigenous advisory committees. Integrate diverse Indigenous peoples and knowledges throughout corporate structures, on both the creative and business side of organizations, and not just in moments of increased fiscal attachment to monetized identity politics.”¹⁸²

Indigenous-led representation and meaningful participation in decision making is a recurring theme in UNDRIP.¹⁸³ The TRC has also made it clear that assessing and acknowledging history, colonialism and its impacts on contemporary institutional ideology, structure and operations are important for reconciliation. In many instances representation in museum contexts has taken the form of Indigenous departments, hiring Indigenous employees including community liaisons, and establishing Indigenous advisory committees. An

¹⁷⁷ Lindsay Nixon, *A Culture of Exploitation: “Reconciliation” and Institutions of Canadian Art* (Toronto: Yellowhead Institute, 2020) at 19 online: < <https://yellowheadinstitute.org/wp-content/uploads/2020/08/l-nixon-special-report-yellowhead-institute-2020-compressed.pdf> > [Nixon].

¹⁷⁸ *Ibid* at 11.

¹⁷⁹ See e.g., recent amendments to RBCM repatriation policy provide anything acquired during time of anti potlatch laws will be considered for repatriation given this was a period of great duress and they no longer collect, or study remains. See Royal British Columbia Museum. 2018. *Indigenous Collections and Repatriation Policy*. Online (pdf): <https://royalbcmuseum.bc.ca/sites/default/files/documents/indigenous_collections_and_repatriation_policy.pdf> [RBCM Collections Policy].

¹⁸⁰ Nixon, *supra* note 177 at 17-20.

¹⁸¹ *Ibid* at 177 at 5.

¹⁸² Nixon, *supra* note 177 at 17 and 18.

¹⁸³ See e.g., UNDRIP, *supra* note 1, articles 3, 8, 14, 15, 18, 10, 30, 31, 32 and 36.

example is the BC Museums Association's Advisory Committee comprised of leaders from First Nations and museums that have shown excellence and innovation in working with Indigenous communities.¹⁸⁴

However, principles of equality, self-determination and FPIC call for executive, governing and advisory boards of cultural institutions in Canada to be restructured to include more authoritative Indigenous decision making. They also speak to the need for institutions with cultural heritage mandates to review policies and practices to proactively support Indigenous led cultural heritage organizations, cultural centres and museums and avoid practices that undermine their development and success. Less obvious but equally important in this regard are acquisition, donation, sales, and fundraising policies that undermine contemporary Indigenous initiatives for greater cultural autonomy, such as competing for funds that clearly fall within the mandate of Indigenous cultural institutions.

The latter issue of funding was brought to the forefront recently in controversy surrounding the allocation of \$789 million dollars by the province of British Columbia to redevelop the RBCM with some First Nations urging that some of the money should have been allocated to repatriation and development of spaces in First Nation communities to house significant belongings. These concerns as broader public concerns about insufficient funding to other priority areas for electors led to postponement of museum renovation funding until further engagement with the public can be completed and allocation of funds for research and a cost analysis on repatriation needs of BC First Nations.¹⁸⁵

Many publicly funded institutions with cultural heritage mandates have, or are in the process of reviewing, their governance structure, policies, and programs in response to the TRC calls to action. For example, The Canadian Federation of Libraries Associations (CFLA) established a Truth and Reconciliation Committee to promote and support reconciliation including through identification of best practices. One of its overarching recommendations is to "Decolonize Access and Classification by addressing the structural biases in existing schemes of knowledge organization and information retrieval arising from colonialism by committing to integrating Indigenous epistemologies into cataloguing praxis and knowledge management."¹⁸⁶ Some of its key recommendations at the institutional level include:

- Acknowledging the structural biases and inadequacies in existing schemes of knowledge organization and information retrieval arising from colonialism;
- Adopting an ethic based upon the commitment to integrating Indigenous and Western knowledge into access, arrangement, description, classification and cataloguing praxis;
- Engaging with the user communities, particularly Indigenous communities, in integrating regionally-relevant Indigenous knowledges into their cataloguing practice, arrangement, description, etc. including descriptive metadata;

¹⁸⁴ BC Museums Association, "About Us: The BC Museums Association is Proud to Receive Guidance and Support from the BBCMA Indigenous Advisory Committee" (undated) online (website): <<https://indigenous.museumsassn.BC.ca/about-us>>.

¹⁸⁵ Nina Grossman, "I made the wrong call: Premier halts \$789M Royal BC Museum project" (23 June 2022) online: <<https://www.timescolonist.com/local-news/premier-to-announce-update-on-789-million-museum-rebuild-5507212>>.

¹⁸⁶ Canadian Federation of Library Associations, *Truth and Reconciliation Report and Recommendations*, online: <<http://cfla-fcab.ca/wp-content/uploads/2018/10/Truth-and-Reconciliation-Committee-Report-and-Recommendations-ISBN1.pdf>> at 6 ["CFLA Report"].

- Providing staff training on culturally responsive access praxis, including the incorporation of Indigenous knowledges into library subject guides, archival finding guides special collections and digital infrastructure; and
- Ensuring that these efforts occur at the local, regional, provincial, national, and international levels.¹⁸⁷

The challenge of decolonization affects “everything from a museum’s human resources policies to its architecture.”¹⁸⁸ Budget cuts and staff changes can have a significant impact on relationships reducing connectivity, understanding and responsiveness to communities of origin. According to Jennifer Kramer, curator and associate professor at the Museum of Anthropology at the University of British Columbia, decolonization goes to the core of how museums define themselves. They “should no longer think of themselves as giant display cases holding treasures from the past” but as “active places today that inspire the future.”¹⁸⁹ Decolonization is about healing, acknowledging the impacts of colonization and respect for human rights. This means museums need to respect the rights of Indigenous peoples to interpret, access, and use. “[w]histles need to be blown” and “button blankets need to be worn.”¹⁹⁰ Significantly, “decolonizing museums should not be left to the handful of Indigenous people that work in museums” states Lucy Bell, former head of the First Nations Department and Repatriation Program at RBCM. “It’s like it’s piled on, do my job and then decolonize the museum as well... It’s got to be the whole institution. It has to be the people who think it’s not their job.”¹⁹¹

5.1.3 Respect for Indigenous Law and Legal Process

UNDRIP calls for consideration of Indigenous laws and meaningful Indigenous participation in decision making that affects their heritage. An example is the agreement entered between the Canadian Museum for Human Rights and Carey Newman concerning stewardship of the Witness Blanket, a large-scale installation created by Mr. Newman as a national monument to “recognize the atrocities of the Indian Residential School era, honour the children, and symbolize ongoing reconciliation.”¹⁹² The agreement is composed of written obligations and “the performance of, and joint participation in, ceremony observed, understood and remembered by Witnesses”¹⁹³ in accordance with the laws of the artist’s Kawakwaka’wakw community. It contains an explanation of Kwawkwaka’wakw social and legal institutions concerning the sharing of rights

¹⁸⁷ *Ibid* at 28.

¹⁸⁸ “Carrie Tait, “Decolonization tops agenda at Glenbow meetup” *The Globe and Mail* (4 June 2022) [Decolonizing] quoting President of the Board of Directors, Nicholas Bell.

¹⁸⁹ *Ibid*.

¹⁹⁰ *Ibid*.

¹⁹¹ Christopher Read, “Ripping the band aid off: Resignations and repatriations on the road to museum decolonization” (9 April 2021) online: <<https://www.aptnnews.ca/investigates/decolonizing-museums-museum-decolonization-part-2-investigations/>>.

¹⁹² An Agreement Concerning the Stewardship of the Witness Blanket – A National Monument to Recognize the Atrocities of Indian Residential Schools: online: <<https://reconciliationsyllabus.files.wordpress.com/2020/01/witness-blanket-stewardship-agreement-v04.4.pdf>>.

¹⁹³ *Ibid*.

and responsibilities and maintaining relationships and seeks to “bring together Indigenous and Western legal principles in a manner of mutual respect.”¹⁹⁴

Consideration of Indigenous laws and processes is relevant to many other areas of museum policy and practice such as assessing relationships of belonging, validity of title and responsibility, disposition, preservation, care, and replication of Indigenous belongings and information, and resolution of disputes. An example is the Manitoba Museum Indigenous “connections” policy concerning Indigenous belongings. It “consults with Indigenous Elders and knowledge keepers on the care, storage and exhibition protocols related to Indigenous collections” and has a sacred storage space program for “sensitive and significant Indigenous artifacts.”¹⁹⁵ Another example is found in the United States the *Native American Graves Protection and Repatriation Act*¹⁹⁶ which looks to “tribal laws to determine the individual or communal nature of an item and the validity of its disposition at the time of separation from the community.”¹⁹⁷ If it is communal, principles of national property law apply to render it inalienable by individuals.

Principles of self-determination and FPIC also speak to access to culturally sensitive items or information and ancestors. For example, when the visible storage was re-conceptualised and renovated at the Museum of Anthropology, curators worked with Indigenous communities to decide what would be on display, how it should be organized and what should not be on display. At that time, concerns were communicated concerning display of winter dance materials used for cleansing and danced at marriages, women’s coming of age ceremonies, funerals, and memorials. Under Coast Salish laws, these masks and accompanying songs are passed down through family lines and can only be used by these families. Consequently, the materials were removed. In their place were fuzzy outlines of images and public sharing of the reasoning behind the current display.¹⁹⁸

Other examples of respect for Indigenous laws and protocols are included in the recommendations of the Steering Committee on Canada’s Archives created in response to the TRC’s calls to action. Among its many recommendations are to:

2.1.1 Take action in support of the comprehensive implementation of the United Nations Declaration on the Rights of Indigenous Peoples and advocate for accessible, equitable, and sustainable funding programs on ownership, control, and possession that meet the requirements of diverse First Nations, Inuit, and Métis governments, communities, and organizations. Such programs must defer to communities’ cultural Protocols for the protection of their Traditional Knowledge, cultural expressions, and documented heritage. This may

¹⁹⁴ Ibid.

¹⁹⁵ <https://manitobamuseum.ca/about-us/indigenous-connections>

¹⁹⁶ 25 U.S.C. 3001-3003(West Supplement 2001).

¹⁹⁷ Catherine Bell, “Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform” [Bell 2009] in Catherine Bell & Robert K. Paterson, eds. *Protection of First Nation Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009) [Bell & Paterson 2009] 15 at 30.

¹⁹⁸ Bell, Lai & Skorodenski, *supra* note 99 at 65 at 274-275.

*involve eliminating the requirement for full public online access to digitized materials and the requirement for content to be in English or French.*¹⁹⁹

5.1.4 Physical Location and Environment

Culturally appropriate space planning, interior design, signage, art installations, and territorial acknowledgements are all important strategies in decolonizing and designing spaces. Land, territorial, or treaty acknowledgements are used increasingly by cultural institutions as a way of connecting the physical location with the Indigenous geography of its location and paying respect to the original inhabitants who may or may not be reflected in the exhibits and collections.²⁰⁰ Reconciliation with Indigenous peoples is the goal of acknowledgement, and is a one way cultural institutions are responding to the TRC.²⁰¹ Another way is through admission fee policies applicable to Indigenous peoples on whose territories the institution is located. An example is the Royal Alberta Museum (RAM) which rests on Treaty 6 territory. In the spirit of reconciliation, and to honour the unique relationship between Indigenous Peoples of Alberta and the Crown, in 2018 the Province of Alberta announced Indigenous guests would receive free admission to the newly constructed RAM.²⁰² This policy has been adopted by many museums in Canada and its rationale explained on their various websites.

Design of new exhibit, education, and spaces for interactions with Indigenous peoples is also important. For example, Qaumajuq, an expansion to the Winnipeg Art Gallery (“WAG”) dedicated to Inuit art features an architectural design inspired by northern landscapes. Visitors to the space can see a building exterior that appears to be a white wave of tundra snow. Inside, a three-story glass vault displays carvings viewable from all sides, and as well as a 90-seat theatre capable of showing films and presentations from elders, performers, and storytellers. There is also a carving area, library and learning commons for education, development, research and curatorial internships and arts workers.²⁰³

Of particular importance are spaces for Indigenous spiritual and cultural practices. An example is the *Storied Objects: Métis Art in Relation* exhibit (2022) at the Remai Modern in Saskatoon curated by Métis curator Tarah Hogue. The term storied objects is consistent with Indigenous principles that “objects have their own

¹⁹⁹ Steering Committee on Canada’s Archives, Reconciliation Framework (2022) at 29-30 online:<
<https://archives2026.com/response-to-the-report-of-the-truth-and-reconciliation-commission-taskforce/>>.

²⁰⁰ Kenneth Favrholt, “Acknowledgement Statements: A First Step in Reconciliation” (undated) Canadian Museums Association, online (electronic source):
<https://museums.ca/site/reportsandpublications/museonline/janfeb_acknowledgementstatements> [Favrholt].

²⁰¹ Favrholt, *ibid*.

²⁰² Kibry Bourne, “Free Admission One Way New Royal Alberta Museum Will Honour Indigenous People” (28 Sept 2018) Global News, online: <<https://globalnews.ca/news/4497155/free-admission-one-way-new-royal-alberta-museum-will-honour-indigenous-people/>>.

²⁰³ Bryce Hoye, “This is a Game-Changing Museum: Winnipeg Art Gallery Expansion Promises to Vault Inuit Art to New Heights” (17 March 2019) CBC, online: <<https://www.cbc.ca/news/canada/manitoba/inuit-art-centre-winnipeg-art-galleru-1.5055433>>.

<https://www.wag.ca/about/qaumajuq/>

life force and power” and draws on the scholarship of Métis art historian Sherry Farrell Racette.”²⁰⁴ Among the installations is “The Elders Say We Don’t Visit Anymore” which includes table, benches, and shelves from recycled barn wood, cups, tea, medicinal plants and invites visitors to sit and have tea. Information accompanying the exhibit explains that visiting among Indigenous peoples is important way teachings are shared and learned. The installation is open to use by community members for small gatherings and in the winter elder and author Maria Campbell and Cheryl Troupe host story telling events.

5.1.5 Exhibits and Commemoration

Both UNDRIP and the *TRC* also call on cultural institutions to take a leading role in public education including through combatting stereotypical representations of Indigenous cultures by ensuring that Indigenous content is created with Indigenous peoples. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories, and aspirations appropriately reflected in education and public information. One way is for museums and galleries to make space for Indigenous-led institutions and exhibits, such as in the *Storied Objects* exhibit discussed above.

Indigenous ancestral connection of curators and acknowledgement of their work is important in decolonizing cultural institutions. This involves centering Indigenous voices; in their own languages, explanations, stories, and words, in display and interpretation - a practice which has received significant support by Canadian museums and galleries.²⁰⁵ An example is the *We Are All Treaty People* permanent exhibit at the Manitoba Museum which was designed in collaboration with the Elders Council for the Treaty Relations Commission of Manitoba and underlines First Nation’s perspectives by pairing the eight Treaty medals with pipes and pipe bags signifying First Nations’ commitment to the Treaty as permanent and sacred undertaking.²⁰⁶

The TRC also calls on cultural institutions to convey the complex colonial history of Canada honestly with all its hard truths. An example is the Kent Monkman exhibit *Shame and Prejudice: A Story of Resilience*. The website of the McCord Museum described this exhibit as follows:

At its core, *Shame and Prejudice: A Story of Resilience* is a celebration of Indigenous resilience. The exhibition uses humour and critical insight to create a troubling retrospective of what Monkman refers to as “the most devastating period of First Peoples.” Monkman’s works shock and demolish popular beliefs; challenge heteronormativity and gender binaries; contrast the glorification of Roman Catholicism with the deep distress it causes; scorn the opulence of colonialism on Indigenous lands; and recall the effects of the treaties that forever changed the course of history.²⁰⁷

The TRC also speaks to the importance of Indigenous peoples developing and implementing their own commemoration initiatives. The Legacy Archive established by the MMIWG is an example. The archive

²⁰⁴ *Storied Objects* – Remai Modern, online: <<https://remaimodern.org/program/exhibitions/exhibition/storied-objects-metis-art-in-relation>>.

²⁰⁵ Sarah Carr-Locke, “Indigenous Heritage and Public Museums: Exploring Collaboration and Exhibition in Canada and the United States” (2015) Simon Fraser University, at page 188 [“Carr-Locke, 2015”].

²⁰⁶ Manitoba Museum, “Indigenous Connections” (undated) online (website): <<https://manitobamuseum.ca/main/about-us/indigenous-connections/>>.

²⁰⁷ McCord Museum, “Kent Monkman – Shame and Prejudice: A Story of Resilience” (undated) online (website): <<https://www.musee-mccord.qc.ca/en/exhibitions/kent-monkman/>>.

recognizes that “commemoration, art, and education are all essential parts of truth gathering, healing, and reconciliation.”²⁰⁸ It consists of “artistic expressions, either through donations (from family members of missing and murdered loved ones, intergenerational survivors and those working towards reconciliation), education projects or acquisitions from artists and storytellers with an interest in the subject.”²⁰⁹ The guiding principles informing the archive are those set out by the TRC including:

- Survivors should be active participants who can advise and make recommendations on projects;
- Projects should strengthen family and community memory and make the history and legacy of residential schools a part of Canada’s history; and
- Projects should support Indigenous peoples’ healing as they reclaim their identities and revitalize their land-based cultures.²¹⁰

Ensuring that the voices of Indigenous women and youth are included is also an important consideration flowing from the TRC and UNDRIP. An example is the “*Claiming Space: Voices of Urban Aboriginal Youth*” at the Museum of Anthropology which looked at the diverse ways urban Aboriginal youth are asserting their identity and affirming their relationship to both urban spaces and ancestral territories. The exhibit was promoted as leaving visitors with the understanding that today’s urban Aboriginal youth are not only acutely aware of the ongoing impacts of colonization but are creatively engaging the decolonizing movements through new media, film, fashion, photography, painting, performance, creative writing, and traditional art forms.²¹¹

Language is “at the core” of Indigenous identities, culture, histories, and connection to land. However, the vast majority of approximately sixty languages of Inuit, Métis, and First Nations peoples are in a precarious and endangered state.²¹² Article 13(1) of UNDRIP holds that Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.”²¹³ The significant role museums and their collections have to play in language revitalization is underscored in the following quote by Gwaaganad (Diane Brown) discussing the Haida Project at the Pitt Rivers Museum and the British Museum:

The Haida culture is so much of the land, it’s our relationship with the land, it’s our relationship with our ancestors, it’s our relationship with the animals, the fish, the birds, and that’s best described and talked about in Haida. It’s one of the main things that makes us who we are. If we lost the language completely, that would be huge. One Elder said something that floored me during my eleven years with the immersion school and that was: “If there’s no more Haida language, who will talk to our ancestors?” ... In the museum,

²⁰⁸ Commemoration, Art and Education, online: <<https://www.mmiwg-ffada.ca/commemoration-art-and-education>> [Commemoration].

²⁰⁹ Legacy Archive, online: <<https://www.mmiwg-ffada.ca/commemoration-art-and-education/legacy-archive/>>.

²¹⁰ Commemoration, *supra* note 208.

²¹¹ MOA, “Claiming Space: Voices of Urban Aboriginal Youth” (2015) University of British Columbia, online (website): <<https://moa.ubc.ca/exhibition/claiming-space-voices-of-urban-aboriginal-youth/>>.

²¹² Marianne Ignace and Ron Ignace, “Canadian Aboriginal Languages and the Protection of Cultural Heritage” in Bell & Napoleon, 2008 [“Ignace & Ignace”].

²¹³ UNDRIP, *supra* note 1, Article 13(1).

I found it really easy to think just in Haida. It just was there. It came easier, the language came easier and quicker to me in the museum. I thought in Haida, I could express myself in Haida... Your spirit wants to know. And the best way to describe and feel things like that is in Haida. It's not quite the same in English.²¹⁴

Standards for “responsible exhibition and collection” released by The Museums Association of Saskatchewan in 2017 speak to many of the points made above. They identify key outcomes including:

- To promote reconciliation the decolonization even if this presents uncomfortable truths for the local dominant (settler) communities.
- To present historical events from different points of view using authentic Indigenous primary sources.
- To show visitors the impact decisions made by settler colonial administrators have had on Indigenous communities.²¹⁵

To achieve this, the guidelines call for use of contemporary terminology and avoidance of biased, stereotypical, and dated presentation of Indigenous communities. Other standards include:

- Use the relevant Indigenous language(s) to refer to objects, materials and techniques. Indigenous languages present their own culture using their own concepts and worldviews which are essential for accurate transmission of knowledge through objects.
- When translating from Indigenous languages into English retain the wording and way of speaking so the authenticity of the Indigenous voice is retained, rather than edited into grammatically perfect English;
- Ensure texts present the point of view of Indigenous communities and that historical events are told from their perspective.
- Place the exhibit content in a context that takes the point of view of the Indigenous community into account.
- Texts and labels should be presented in the language(s) of the relevant Indigenous communities.
- Curatorial partners from the relevant Indigenous communities should be contracted to advise on the text and label content.
- Include quotes from Elders and relevant community cultural advisors as the experts on their own culture rather than external points of view from non-Indigenous experts (including non-Indigenous anthropologists).
- Recognize and respect that not all Indigenous knowledge, traditions and beliefs can be shared for consumption by outsiders.²¹⁶

Language revitalization is also supported through exhibits that highlight the importance of Indigenous languages and the work communities are doing to revitalize them. An example is the “Our Living Languages Exhibit” developed by the RBCM and First Peoples’ Cultural Council– an interactive exhibition featuring

²¹⁴ Gwaaganad, Diane Brown as cited by Cara Krmpotich & Laura Peers, *This Is Our Life: Haida Material Heritage and Changing Museum Practice* (Vancouver: UBC Press, 2014) at page 175-176 [Krmpotich & Peers].

²¹⁵ Laura Phillips, “Responsible Exhibit and Interpretation of Indigenous Artifacts” Museums Association of Saskatchewan at1 online: <<https://indigenous.museum.bc.ca/files/museums-association-of-saskatchewan-s-responsible-exhibit-and-interpretation-of-indigenous-artifacts-guide.pdf>>.

²¹⁶ *Ibid* at 5.

original First Nations artwork, video, audio and an opportunity for interaction, discussion, and engagement. It provided visitors an opportunity to learn about the history of disrupted languages of First Nations, the complexity of these languages, and the communities who are working tirelessly to document and revitalize them.²¹⁷

Another example is found in the Haida Gwaii Museum, which includes ancient stories of creation, natural history and environmental change, as well as the recent retellings of these stories through Saahlinda Naay speaking with the Haida voice and sharing Haida worldview through multiple ways of knowing. Dominant western narratives are challenged by including Haida knowledge-holders and scholarly community voices, and throughout the museum labeling and interpretation are done in *Xaayda Kil* (Haida Language) first, and then in English. Elders and fluent *Xaayda Kil* speakers and the Skidegate Haida Immersion Program are consulted to ensure proper spelling and interpretation for the museum.²¹⁸

Employment and leadership strategies and opportunities are also important in incorporating Indigenous perspectives into knowledge, exhibitions, education, and programs. Since the AFN/CMA Task Force there have been increased opportunities for training including increased support for the Indigenous Internship Program at the Canadian Museum of History.²¹⁹ Some museums have also developed programs aimed at youth. For example, the Museum of Anthropology has established a Native Youth Program for Indigenous youth between the ages of 15 and 18 which provides summer employment with a goal to produce Indigenous leaders, provide meaningful direction and mentoring, enhance employment opportunities, and promote public understanding of the diversity and richness of Indigenous cultures within the UBC community.²²⁰ The CFLA Report also recommends enhanced opportunities for Indigenous library, archival and information professionals as well as the inclusion of Indigenous epistemologies in the Canadian library and archives profession through culturally appropriate pedagogy, recruitment practices, professional and continuing education and cross-cultural training in collaboration with local Indigenous stakeholders and partners.²²¹ However, the need for more funding and training for Indigenous museum and heritage workers is a widely acknowledged as a needed.

While many cultural institutions have initiated Indigenous advisory committees and have hired Indigenous staff to help guide interpretation and ensure there is inclusion of Indigenous perspectives, it is important to recall that UNDRIP asks who ultimately controls the depiction of peoples and their stories, who has the

²¹⁷ Our Living Languages Exhibition, online: <<https://fpcc.ca/stories/our-living-languages-exhibition/>>

²¹⁸ Gid yahk'ii (Sean Young), "Suuda Ganunsid, ad gina waadluuxan gan yahguudang Xaayda Gwaay.yaa iiji: To Inspire Undertakings and Respect for All That Haida Gwaii Is" (undated) United Nations Educational, Scientific and Cultural Organization and Canadian Commission for UNESCO [Gid yahk'ii, Sean Young].

²¹⁹ Canadian Museum of History, "RBC Indigenous Internship Program" (undated) online (website): <<https://www.historymuseum.ca/learn/research/rBC-aboriginal-training-program-in-museum-practices/>>.

²²⁰ UBC MOA "Native Youth Program" (undated) online (website): <<https://moa.ubc.ca/indigenous-access-and-engagement/nyp/>>.

²²¹ CFLA Report, *supra* note 186 at 6.

authority over the creative process, and who is able to interpret the historical narrative to match their conceptual understanding or knowledgebase.²²²

5.2 Belongings – Access, Care, Repatriation

5.2.1 – Access to Collections and Ancestors

Indigenous rights extend beyond belongings to ancestral remains and associated information, such as the results of research, photographs, works of art, and any other information related to the culture and histories of Indigenous peoples. “Access” includes not only physical access to collections for the purpose of viewing, research, making reproductions and ceremonial use, but also access to funding sources, policy development, implementation activities, and training and employment in cultural institutions.²²³ Access to intangible cultural heritage is particularly important for Indigenous peoples who are advancing language and cultural revitalization programs.

Much of Indigenous archival and other recorded material has come into the hands of museums directly or indirectly through application of intellectual property laws that have failed to meaningfully recognize Indigenous rights and interests in their knowledge and cultural expressions and that vest ownership in person(s) who “created” the film, sound recording, photographs, or manuscripts that make up these traditional cultural expressions.²²⁴ In recognition of this fact and the importance of this material to Indigenous peoples some museums waive reproduction fees. Labelling also plays a significant role in access to information. One of the recommendations of the Canadian Federation of Libraries Truth and Reconciliation Committee is to “Decolonize Access and Classification by addressing the structural biases in existing schemes of knowledge organization and information retrieval arising from colonialism by committing to integrating Indigenous epistemologies into cataloguing praxis and knowledge management.”²²⁵ For example, it may make more sense for material to be organized within the context of a legend or ceremony, rather than “like” categories (such as masks all together, or songs all together).²²⁶

Traditional cultural expression collections possess certain qualities that make them fundamentally different from other collections, often assembled by researchers from outside the community and sometimes without consent from the appropriate Indigenous authority. Collections may also contain secret, sacred, or confidential material that may be subject to restricted use under customary laws and practices.²²⁷ With respect to this material, some cultural institutions and professional organizations have policies that align

²²² Jodi Simkin, “Creating a New Reality: Repatriation, Reconciliation and Moving Forward” (April 2020) Ottawa, ON: Canadian Commission for UNESCO’s IdeaLab, at 9 <<https://indigenousheritage.ca/wp-content/uploads/2020/08/IndigenousCulturalHeritageRepatriation.pdf>> [Simkin].

²²³ Task Force Report, *supra* note 171 at 4.

²²⁴ See e.g., Torsen, Molly, and Jane Anderson. “Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives” (Geneva: WIPO, 2010), at 11 online: <<https://www.wipo.int/publications/en/details.jsp?id=235&plang=EN>> [Torsen & Anderson].

²²⁵ CFLA Report, *supra* note 186 at 6.

²²⁶ Bell, Lai, & Skorodenski, *supra* note 99 at page 272.

²²⁷ Torsen & Anderson, *supra* note 224 at 162.

with PIC. An example is the UBC Museum of Anthropology policy for behind-the-scenes access photography and filming of museum objects. It provides “[i]f researchers request access to, or photography/filming of, objects deemed to be sacred or culturally-sensitive, they may be asked to provide proof of permission to do so. Permission may also be required if such access or photography/filming may infringe upon hereditary rights of particular objects.”²²⁸

The Reciprocal Research Network (“RNN”) is an example for dealing with digitized or virtual collections that seeks to respect Indigenous ways of knowing and legal traditions. The RNN is an online tool co-developed by the Musqueam Indian Band, the Stó:lō Nation/Tribal Council, the U’mista Cultural Society, and the Museum of Anthropology. The RNN contains records, photographs, and images of items in collections, and other information from 29 cultural institutions across Canada, and enables users to “build their own collections, collaborate on shared projects, record stories, upload files, hold discussions, research museum collections, and create social networks.”²²⁹ Indigenous communities and individuals can share cultural information, yet still limit access to sensitive material as it allows for culturally sensitive images and information to be seen only by certain parties, and inaccurate information can be addressed and corrected through the ability to upload files and facilitate communication between the parties.²³⁰

5.2.2 – Care of Belongings and Ancestors

Cooperative management and care of Indigenous collections in accordance with Indigenous laws and protocols has been an increasingly dominant practice in publicly funded museums. For example, the Ethnology Reserve Collection at the Royal Saskatchewan Museum is a special collection that presently contains sacred and ceremonial objects. It is kept separate from the main ethnology collection. Special permission must be obtained from appropriate Indigenous authorities to replicate this material or access it for educational or artistic research. The process to obtain permission is determined by the “Treaty area and/or location of origin of the sacred object(s), and the protocols, procedures and ceremonies required to use the sacred object(s) in such a manner.”²³¹ Museums also have policies to store sacred and sensitive items for communities. For example, as discussed earlier, the Manitoba Museum “provides a sacred storage space for sensitive and significant Indigenous artifacts and has also welcomed requests from communities and individuals who bring these precious objects to the Museum for safekeeping and respectful care.”²³²

Of particular concern is the care and responsibility for ancestral remains. As Gid yakh’ii (Sean Young) explains “(o)ur Ancestors are our relatives and we have a deep connection to them. We are who we are today because of them. We believe that as long as the remains of our Ancestors are stored in museums and other unnatural locations far from home, that the soles of these people are wandering and unhappy. Once they are returned to their homeland of Haida Gwaii and are laid to rest with honour, the souls can rest and

²²⁸ Museum of Anthropology, “Behind-the-Scenes Access, Photography, or Filming of Museum Objects” online (pdf): <https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/museum_anthrop_licensing.pdf> at 2.

²²⁹ About the RNN, Reciprocal Research Network, online: <https://www.rnncommunity.org/pages/about#about_rnn>

²³⁰ Bell, Lai, & Skorodenski, *supra* note 99 at 272.

²³¹ RSM, Policy for the management and repatriation of sacred and culturally sensitive objects of Aboriginal origin (14 July 2010) online (pdf): <<https://www.royalsaskmuseum.ca/pub/documents/rsm-repatriation-policy-booklet.pdf>>.

²³² Manitoba Museum, “Indigenous Connections: B. Collections & Conservation” (undated) online (website): <<https://manitobamuseum.ca/main/about-us/indigenous-connections>>.

our communities may heal a bit more.”²³³ Indigenous survivors of state-led colonial violence are further spiritually harmed by collections holding Indigenous remains in provincially and nationally funded institutions across Canada.²³⁴ In recognition of this the Yellowhead Institute Standards of Achievement discussed above in 5.1, call for “expert and Indigenous-led audits of collections to assess what exists in collections; the primary goal being to find sensitive materials such as bodies.”²³⁵ In furtherance of its commitment to UNDRIP, RBCMs new Indigenous Collections and Repatriation Policy is also clear they no longer collect, store and study remains and they discourage it.²³⁶

5.2.3 – Repatriation

Although there are some examples of repatriation before the release of the CMA/AFN Task Force report in the early 1990s, since then some museums developed more extensive and transparent policies while others continue to return items on a case-by-case basis under broad discretionary deaccessioning powers. For example since the 1990s the Museum of History has provided for repatriation in “response to requests received from First Nations, the Sacred Materials project (which provides First Nations with an opportunity to review collections held by the Corporation, identify objects requiring special care, and discuss repatriation, as required), and the treaty process.”²³⁷ Pursuant to its repatriation policy, the Museum of History has repatriated ancestral remains, wampum, medicine bundles and belongings to First Nations and as part of the modern treaty process, it has reached repatriation agreements with the Nisga’a and the Labrador Inuit Association.

In 2017 RBCM hosted a repatriation symposium with national and international participants. Participants identified numerous barriers to repatriation of belongings and remains including insufficient funding; the need to ensure terms and conditions of repatriation recognize and respect Indigenous laws and to understand cultural material may be a “physical embodiment of their ancestors and hold as much power and meaning as ancestral remains;” for trust, mutual respect and the process to respect nation to nation relation; access to and ownership of intangible heritage; lack of understanding around the process of repatriation; and more work needing to be done to provide access to detailed information about collections to ensure it is as easy as possible to identify the location and origins.²³⁸

Following the symposium, the RBCM and Haida Gwaii Museum at K̓ay 'Llnagaay produced the *Indigenous Repatriation Handbook* to support “communities and museums that are in the beginning stages of planning repatriation in BC and at national and international levels.”²³⁹ Topics covered including organizing a claim,

²³³ [Gid yahk’ii, Sean Young], *supra* note 218 at 10.

²³⁴ Nixon, *supra* note 177 at 7.

²³⁵ *Ibid.*

²³⁶ RBCM “Indigenous Collections and Repatriation Policy” (Aug 2018) online: <<https://royalbcmuseum.bc.ca/documents/indigenous-collections-and-repatriation-policy>>.

²³⁷ “Repatriation” online: <<https://www.historymuseum.ca/learn/research/repatriation/#tabs>> [CMH Policy].

²³⁸ Jack Lohman, “Key Findings of the Indigenous Perspectives on Repatriation Symposium” (14 July 2017) online: <<https://royalbcmuseum.bc.ca/indigenous-perspectives-repatriation-moving-forward-together>>.

²³⁹ Jisganag Nika Collison, Sdaahl K’awaas Lucy Bell, *Indigenous Repatriation Handbook* (Victoria, BC: Royal British Columbia Museum, 2019) at 1 [Repatriation Handbook].

conducting research, repatriation from the RBCM and other institutions, steps for institutions wishing to repatriate, contact information for Indigenous museums and cultural centres in Canada and Canadian and international museums, libraries and archives with Indigenous collections, case studies, funding resources, educational resources and frequently asked questions. It also includes helpful templates and other tools for communities seeking repatriation of belongings from institutions within and outside Canada.”²⁴⁰

Some Canadian museums have specific policies on repatriation of ancestral remains. For example, the Canadian Museum of History “Repatriation Policy” discussed above defines “human remains” as human skeletal remains from archeological sites in Canada, and includes direction for repatriation requests, repatriation criteria, and custodial arrangements.²⁴¹ Such policies should be reviewed again in light of UNDRIP, for example, a museum policy may emphasize biological ancestral connection where an Indigenous legal order may also attribute responsibilities based on territory where remains are discovered. As elaborated above in s 2.3 review of repatriation policies should be developed in conjunction with affected Indigenous peoples and consider power imbalances, the application of Indigenous laws and the right of Indigenous peoples to participate in design of just and fair procedures for resolution of disputes where there is disagreement. Researching and documenting Indigenous belongings to gain a clear understanding of what the institution holds, how the belongings came to the institution and who in originating communities needs to be made aware that these belongings reside in the museum is an important step in developing Indigenous repatriation policy. For example, within “the originating Indigenous culture, access to objects of this sort is frequently restricted upon the basis of age, sex, achievement or prior initiation.”²⁴²

UNDRIP also speaks to repatriation of items and information acquired in violation of Indigenous laws, Canadian laws, or at a time when Canadian law discriminated against Indigenous peoples and facilitated loss and taking. For example, RBCM’s new Indigenous Collections and Repatriation Policy extends to include items acquired during the anti-potlatch bans as it was a time of great discrimination, duress and extortion. Another example is the return of Treaty medal 6 to the Red Pheasant First Nation. “The medal was stolen from the body of Chief Red Pheasant by an Indian Agent before his funeral in 1885. It was acquired by the Hudson’s Bay Company in the 1950s and ended up among more 25,000 artifacts in the Manitoba Museum’s Hudson’s Bay Company Collection.”²⁴³ Further, justice and reparation for past and ongoing injustices through repatriation should not result in costs of repatriation being borne by the Indigenous peoples.²⁴⁴

More recent reform, by the government of Saskatchewan, legislates change in the area of sacred and culturally sensitive objects and calls on the Royal Saskatchewan Museum to develop policy for addressing concerns relating to care, use and repatriation of sacred and culturally sensitive objects in consultation with

²⁴⁰ UNDRIP, *supra* note 1, Preamble, and Articles 1 and 2.

²⁴¹ CMH Policy, *supra* note 237.>

²⁴² John Moses, “Traditional Care of Sensitive Canadian Indigenous Materials” as cited by Laura Philipps, “Responsible Exhibition & Interpretation of Indigenous Artifacts” (Dec 2017) Museums Association of Saskatchewan online (pdf): [https://saskmuseums.org/files/WEB - Responsible Exhibition and Interpretation of Indigenous Artifacts v 2.pdf](https://saskmuseums.org/files/WEB_-_Responsible_Exhibition_and_Interpretation_of_Indigenous_Artifacts_v_2.pdf) [“Phillips, 2017”].

²⁴³ Amanda Short, “Treaty 6 medal repatriated to Red Pheasant Cree Nation after 134 years” 03 July 2019 Star Phoenix online:< <https://thestarphoenix.com/news/local-news/treaty-6-medal-repatriated-to-red-pheasant-cree-nation-after-134-years> >.

²⁴⁴ Simkin, *supra* note 222 at 11.

peoples represented in their collections.²⁴⁵ Culturally sensitive objects are defined as any object that “(i) has been used in an Aboriginal ceremony; (ii) reflects the spiritual power of an Aboriginal person; (iii) was left as an offering in an Aboriginal ceremony or practice; or (iv) has ongoing historical or cultural importance to an Aboriginal community.”²⁴⁶ However, the legislation does not apply to other museums in Saskatchewan who may nevertheless look to this legislation to set a standard.

Alberta also has repatriation legislation. The *First Nations Sacred Ceremonial Objects Repatriation Act* was originally intended to aid specific repatriation negotiations between the Blackfoot people of Alberta and the Glenbow Institute.²⁴⁷ However, it also applies to the Royal Alberta Museum (RAM) and all First Nations in Alberta. It is intended to return and recognize First Nation ownership over sacred ceremonial objects and “to harmonize the role museums play in the preservation of human heritage with the aspirations of First Nations to support traditional values...”²⁴⁸ The Act facilitates return by relieving the Glenbow, RAM and the Province of legal liability arising from a repatriation done in good faith pursuant to it. As a result, title to 251 cultural items previously on loan to the Blackfoot were transferred to them free of conditions.²⁴⁹

More detailed regulations and policies may accompany such legislation. For example, under the Alberta legislation, specific requirements of the repatriation process are contained in regulations negotiated with affected communities. The Royal Saskatchewan Museum has also developed repatriation policies that build on existing collaborative policy and practice. Options include shared stewardship, requests for repatriation, and requests for replication for educational or artistic research. In administering its collections and in developing repatriation and collections policy the museum is to consider the following principles:

- Aboriginal peoples have a connection to Aboriginal sacred and culturally sensitive objects, regardless of where those objects are held;
- Aboriginal sacred and culturally sensitive objects in the collection are vital to the maintenance of traditional ways;
- the deeper meanings associated with Aboriginal sacred and culturally sensitive objects are known only to Aboriginal members of their cultures of origin.²⁵⁰

²⁴⁵ *Royal Saskatchewan Museum Act*, 2007 c. R-23.1, s. 6 [RMA].

²⁴⁶ *Ibid.* s 2(a).

²⁴⁷ RSA 2000, c F-14.

²⁴⁸ Preamble, *ibid.* Sacred ceremonial artifacts are defined by the legislation as “used by a First Nation in the practice of sacred ceremonial traditions, vital to the practice of the First Nation’s sacred ceremonial traditions” and in the possession of RAM, the Glenbow – Alberta Institute or the Crown.

²⁴⁹ For more detailed discussion see Bell Restructuring, *supra* note 44 at 41-43.

²⁵⁰ RMA, *supra* note 245.

6.0 CONCLUSION

The TRC calls on governments to fully adopt and implement UNDRIP as the framework for reconciliation. The purpose of this paper has been to explain what this might mean in the context of Indigenous heritage and to provide some examples within the context of Canadian museums, archives and galleries. As highlighted in the companion to this report, *Moved to Action: Activating UNDRIP in Canadian Museums*, there are many potential ways in which museums and other cultural memory institutions can continue to strengthen relations with Indigenous peoples using UNDRIP as a measure for change.²⁵¹ The fact that the right to self-determination is the cornerstone of UNDRIP also means that the jurisdiction, laws and institutions of Indigenous groups are to be recognized and respected in the process of reform moving forward.

²⁵¹ Moved to Action: Activating UNDRIP in Canadian Museums, online: <<https://museums.ca/site/movedtoaction>>.