

# Memorandum

**To** Canadian Research Knowledge Network  
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**From** Mike McDonald, Q.C.

**Date** August 26, 2020

**Re** Challenges of Indigenous Cultural Property in the CRKN Collection

***A Note on Terminology:***

**Privileged and Confidential**

In the interest of consistency, this memorandum uses the term “Indigenous cultural property” to refer to expressions of Indigenous culture to which various rights and obligations may attach. However, it should be noted that “cultural property” is an uncertain and broadly disputed term in the context of Indigenous peoples. Since the late 1990s, many scholars have preferred the term “Indigenous cultural heritage”, which does not import Western notions of private property such as alienability (i.e. the exclusive right to transfer ownership and possession) and exclusivity of possession (i.e. the right to stop others from possessing and using the property).<sup>1</sup> At the international level, “traditional knowledge” and “traditional cultural expressions” are also frequently used to refer to intangible Indigenous cultural heritage.<sup>2</sup> CRKN may want to consider using one of these terms as an alternative to “Indigenous cultural property” in any statement(s) regarding the materials in its collection.

## **1. Context**

The Canadian Research Knowledge Network (“**CRKN**”), as a non-public entity, is not subject to obligations that apply to states and state entities regarding Indigenous cultural rights. Nonetheless, the sources discussed below have significant normative force and speak to the ethical and professional responsibilities of bodies such as CRKN to appropriately manage Indigenous cultural property contained in their collections. Moreover, internationally recognized commitments like the *United Nations Declaration on the Rights of Indigenous Peoples* (“**UNDRIP**”) have entered into the Canadian legal system through legislation that is focused towards a process to bring domestic laws into alignment with UNDRIP such as the recently *BC Declaration on the Rights of Indigenous Peoples Act* (“**DRIPA**”), similar to a proposed act which has been tabled federally and has been a political promise from the current federal government.

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<sup>1</sup> See e.g. Tony Simpson, *Indigenous heritage and self-determination: the cultural and intellectual property rights of indigenous peoples* (Copenhagen, Denmark: International Working Group for Indigenous Affairs, 1997); Rosemary J Coombe, “The Expanding Purview of Cultural Properties and Their Politics” (2009) 5 *Annual Review of Law and Social Science* 383 at 401.

<sup>2</sup> See e.g. Rosemary J Coombe, “First Nations Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law” in Catherine E Bell & Robert K Paterson, eds, *Protection of First Nations cultural heritage: laws, policy, and reform* (Vancouver, BC: UBC Press, 2009) 247.

With the increasing recognition at the international commitments at the domestic level of the rights of Indigenous peoples with respect to their cultural property, there has been a growing concern about related responsibility of institutions holding Indigenous cultural property to acknowledge those rights. Thus the CRKN has raised the concern to address these potential issues with respect to their collections, and in particular, their Canadiana collection (the “**Collection**”).

This memo outlines the ever illusive definition of Indigenous Cultural Property, the international and domestic laws and norms that have developed, and some suggested guidance in respect of CRKN’s collections.

## **Recommendations**

Briefly stated, we outline the following recommendations:

1. Ensure CRKN key staff are informed about the law, norms and academic thought emerging in this area as current legal guidance is neither clear nor concise and requires careful thought. Getting out ahead of, and in anticipation, of these changes will be essential for the Collection. Simply put, UNDRIP is coming to museums, libraries, galleries and other collections which will dramatically change the historic requirements and approaches of various institutions;
2. Develop a policy on how cultural property is determined and potentially classified with a framework for images, stories, histories and other categories of cultural property or traditional knowledge;
3. Develop a general reconciliation statement for viewers, including Indigenous Peoples, of the Collection that the material may contain Indigenous cultural property or traditional knowledge and that the CRKN seeks to move towards adoption of UNDRIP and TRC Calls to Action with respect to the Collection;
4. Develop a statement and requirement in all transactions in respect of licensing or other related agreements for the Collection that the Collection may be subject to CRKN requirements and policies in respect of cultural property and traditional knowledge that may impair or affect the ability of CRKN to fully license one or more images or aspects of the Collection, particularly where repatriation is an outcome;
5. In July 2020, the TRC Taskforce published *A Reconciliation Framework for Canadian Archives* (the “**Reconciliation Framework**”) which includes Objectives 4 and 5 referencing ownership and use of archival materials in respect of Indigenous Peoples. Serious consideration should be undertaken as to whether CRKN should adopt these Objectives and develop policies accordingly; and
6. Finally, the above matters, particularly 3 to 5 should be developed in collaboration with Indigenous Peoples, including experts in Indigenous laws and norms, familiar with these issues and the archival context.

## ***The United Nations Declaration on the Rights of Indigenous Peoples***

This is, to date, the strongest affirmation at the international level of the cultural rights of Indigenous peoples. Adopted by the UN General assembly on September 13, 2007, UNDRIP outlines the inherent

rights of Indigenous peoples, which “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”<sup>3</sup>

Several of UNDRIP’s articles speak to the rights of Indigenous peoples with respect to cultural property:

*Article 3*

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

*Article 11*

1. Indigenous peoples have the right to practice 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 12*

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

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

*Article 31*

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

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

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<sup>3</sup> UNDRIP Article 43.

In short, UNDRIP affirms broad cultural rights for Indigenous peoples, including rights to control and protect a wide range of both tangible and intangible cultural property and, in some cases, a right to repatriation of cultural items that have been removed from Indigenous communities. Through Article 3, UNDRIP also establishes freedom to pursue cultural development as an aspect of the right to self-determination.

**(a) *The Truth and Reconciliation Commission Calls to Action***

In June 2015, the Truth and Reconciliation Commission released a report containing 94 calls to action intended to “redress the legacy of residential schools and advance the process of Canadian reconciliation.”<sup>4</sup> Calls to action 67 through 70 apply to Canadian museums and archives. In particular, Call to Action 70 reads:

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:

- i. Determine the level of compliance with the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Joint-Ortlicher 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.
- ii. Produce a report with recommendations for full implementation of these international mechanisms as a reconciliation framework for Canadian archives.

Pursuant to Call to Action 70, the Canadian Association of Archivists established a Truth and Reconciliation Taskforce of the Steering Committee on Canada’s Archives (the “**TRC Taskforce**”). The Reconciliation Framework, which was developed in collaboration with Indigenous communities, heritage professionals, and organizations across Canada, sets out a practical framework for Canadian archives to “begin redressing [their] colonial legacy.”<sup>5</sup>

Objective 4 of the Reconciliation Framework, which deals with “Ownership, Control, and Possession”, discusses the responsibilities of archives with respect to Indigenous cultural property:

Archives that hold materials created by or about Indigenous People(s) shall actively seek ongoing consultation and collaboration with the documented Indigenous communities to identify and address issues in acquisition and creation, repatriation and retention of reproductions, rights in possession and disposition, and custodial approaches to collections management. They shall work together to develop new, or build on existing, community-specific protocols and guidelines that ensure Indigenous rights over the ownership, control and possession of their documented heritage.<sup>6</sup>

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<sup>4</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, MB: Truth and Reconciliation of Canada, 2015) at 1.

<sup>5</sup> Truth and Reconciliation Taskforce of the Steering Committee on Canada’s Archives, *A Reconciliation Framework for Canadian Archives* (Ottawa, ON: The Association of Canadian Archivists, 2020) at 2 [Reconciliation Framework].

<sup>6</sup> *Ibid* at 17.

Objective 5, which deals with “Access”, adds additional responsibilities:

In addition to ownership, control and possession, recognizing Indigenous Peoples’ intellectual sovereignty over archival materials created by or about them means defending their right to know about these materials, as well as ensuring that they have complete control over who has access to these materials. Archives holding Indigenous- related materials have a professional responsibility to make their collections known to the Indigenous communities represented in their collections and to develop or amend use and access policies to ensure they respect the community-specific protocols, restrictions and rules. Archives shall also ensure that Indigenous communities retain complete control over the terms of access and continue to hold the rights to amend these terms in perpetuity as needed or desired.<sup>7</sup>

The Reconciliation Framework, while not legally binding on Canadian archives, is an authoritative statement on the professional responsibility of archives with respect to reconciliation. It also outlines concrete strategies for archives to meet each of the objectives set out in the Framework.

## 2. What is Indigenous Cultural Property?

Given the rights and responsibilities that attach to Indigenous cultural property, it is important to be able to identify cultural property or potential cultural property within archival collections. However, the concept of cultural property, and Indigenous cultural property in particular, has been notoriously difficult to define in international law. There are a couple of reasons for this. First of all, defining Indigenous cultural property necessarily involves the interface of Western and Indigenous worldviews and legal orders.<sup>8</sup> Any effective definition of Indigenous cultural property must leave room for Indigenous peoples to determine what has cultural significance to them as experts in their own laws and customs. Second, a universal definition must also account for the diversity of Indigenous cultures and understandings of cultural heritage.<sup>9</sup> Two Indigenous communities will not necessarily view the same things as culturally significant and in need of protection or repatriation.

Despite the inherent challenges in defining Indigenous cultural property, there have been several attempts to set out an operational definition of the term at international law. The most authoritative definition comes from the *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*<sup>10</sup>, developed by Dr. Erica-Irene Daes, then Special Rapporteur of the United Nations Working Group on Indigenous Populations (the “**WGIP Draft Guidelines**”):

### *Definitions*

[12] The heritage of indigenous peoples has a collective character and is comprised of all objects, sites and knowledge including languages, 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

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<sup>7</sup> *Ibid* at 20.

<sup>8</sup> Christoph B Graber, “Stimulating trade and development of indigenous cultural heritage by means of international law: issues of legitimacy and method” in Christoph B Graber, Karolina Kuprecht and Jessica C Lai, eds, *International trade in indigenous cultural heritage: legal and policy issues* (Cheltenham, UK: Edward Elgar, 2012) 3 at 10.

<sup>9</sup> *Ibid*.

<sup>10</sup> ECOSOC, Commission on Human Rights, *Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people*, UN Doc E/CN.4/Sub.2/2000/26, June 2000.

of traditional natural use. The heritage of indigenous peoples also includes objects, sites, knowledge and literary or artistic creation of that people which may be created or rediscovered in the future based upon their heritage.

[13] The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic creation such as music, dance, song, ceremonies, symbols and designs, narratives and poetry and all forms of documentation of and by indigenous peoples; all kinds of scientific, agricultural, technical, medicinal, biodiversity-related and ecological knowledge, including innovations based upon that knowledge, cultigens, remedies, medicines and the use of flora and fauna; human remains; immoveable cultural property such as sacred sites of cultural, natural and historical significance and burials.

[14] Every element of an indigenous peoples' heritage has owners, which may be the whole people, a particular family or clan, an association or community, or individuals, who have been specially taught or initiated to be such custodians. The owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices.<sup>11</sup>

As the WGIP Draft Guidelines were developed by the Working Group on Indigenous Populations simultaneously with the drafting of UNDRIP<sup>12</sup>, their definition of cultural property is arguably the closest to what is envisioned by UNDRIP. Notably, the definition is very broad, encompassing both tangible and intangible aspects of culture and leaving room for Indigenous peoples' own customs, laws, and practices to play a role in determining ownership. The wide scope and flexibility of the definition is reflective of the overarching principles of the WGIP Draft Guidelines, which affirm that "the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination" and that "[i]ndigenous peoples should be the source, the guardians and the interpreters of their heritage".<sup>13</sup>

The World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the "**WIPO IGC**") has also developed working definitions of "traditional knowledge" and "traditional cultural expressions" for the purposes of providing greater intellectual property protection for Indigenous cultural heritage at international law.

The WIPO IGC's latest *Draft Articles on the Protection of Traditional Cultural Expressions*<sup>14</sup> (the "**TCE Draft Articles**") define "traditional cultural expressions" as follows:

Traditional Cultural Expressions are any forms in which traditional culture practices and knowledge are expressed... by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.<sup>15</sup>

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<sup>11</sup> *Ibid* at 13.

<sup>12</sup> Ana Filipa Vrdoljak, "Indigenous Peoples, World Heritage, and Human Rights" (2018) 25:3 *International Journal of Cultural Property* 245 at 254.

<sup>13</sup> ECOSOC, *supra* note 10 at 12.

<sup>14</sup> *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO IGC, 40th Sess, Annex, Agenda Item 7, WIPO Doc WIPO/GTRKF/IC/40/19 (2019).

<sup>15</sup> *Ibid* at 4.

While the definition is, again, very broad, the footnotes of the TCE Draft Articles provide more concrete examples of what may be encompassed within it:

- Verbal forms: stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.
- Musical forms: songs, rhythms, and instrumental music, the songs which are the expression of rituals.
- Expressions by movement: dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.
- Tangible forms of expression: material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.<sup>16</sup>

Additionally, the WIPO IGC's most recent *Draft Articles on The Protection of Traditional Knowledge*<sup>17</sup> (The "TK Draft Articles") define "traditional knowledge" as follows:

Traditional Knowledge refers to knowledge originating from indigenous [peoples], local communities and/or [other beneficiaries] that may be dynamic and evolving and is the result of intellectual activity, experiences, spiritual means, or insights in or from a traditional context, which may be connected to land and environment, including know-how, skills, innovations, practices, teaching, or learning.<sup>18</sup>

The TK Draft Articles do not list what may fall within this definition. However, WIPO IGC has also published a *List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May be Found*.<sup>19</sup> The document provides a non-exhaustive list of contexts in which traditional knowledge may be found, including traditional knowledge related to methods of governance, architecture, medicine, environmental and biodiversity conservation, and agriculture.<sup>20</sup>

As the above definitions demonstrate, the concept of Indigenous cultural property in international law is broad and open-ended. This suggests that CRKN should err on the side of inclusion in considering what items in its collection may contain or constitute Indigenous cultural property. Moreover, any approach CRKN does take to addressing cultural property in its collection should leave room for the communities concerned to assert what has cultural significance to them based on their own laws, customs, and traditions.

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<sup>16</sup> *Ibid* at nn 1-4.

<sup>17</sup> *The Protection of Traditional Knowledge: Draft Articles*, WIPO IGC, 40th Sess, Annex, Agenda Item 7, WIPO Doc WIPO/GRTKF/IC/40/18 (2019).

<sup>18</sup> *Ibid* at 5.

<sup>19</sup> *List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May be Found*, WIPO IGC, 17th Sess, Annex, WIPO Doc WIPO/GRTKF/IC/17/INF/9 (2010), online, WIPO <[https://www.wipo.int/edocs/mdocs/sct/en/wipo\\_grtkf\\_ic\\_17/wipo\\_grtkf\\_ic\\_17\\_inf\\_9.pdf](https://www.wipo.int/edocs/mdocs/sct/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_9.pdf)>.

<sup>20</sup> *Ibid* at 2-3.

### 3. Options for how to address cultural property found in CRKN's collection

The Reconciliation Framework published by the Association of Canadian Archivists sets out a number of best practices for addressing Indigenous cultural property in archival collections. Some of the recommendations that may be relevant to CRKN include the following:

- Identify all archival materials created by or about Indigenous communities or individuals, and promote their existence and availability to the communities or individuals documented in them. Use communication methods preferred by the community, which could include, but are not limited to, in- person meetings, online submissions, and hard copies of file inventories.<sup>21</sup>
- Establish culturally appropriate restrictions on access and use where issues arise concerning the original acquisition and circumstances of ownership.<sup>22</sup>
- Ensure that representatives from the documented Indigenous community remain active partners in all processes pertaining to their community's archival materials, including, but not limited to, re- description, appraisal, determination of access protocols, community outreach programming, digitization and grant applications.<sup>23</sup>
- Involve members of the documented Indigenous community in the processing of archival materials to ensure the materials are accurately contextualized within the community's knowledge traditions. Collaboratively develop description practices that are inclusive of Indigenous languages, knowledge, histories and taxonomies.<sup>24</sup>

CRKN may wish to develop an official cultural property policy in accordance with the Reconciliation Framework and the provisions of UNDRIP relating to cultural property. Such a policy may need to include specific procedures for handling repatriation requests. We note that repatriation is yet another significant issue beyond the scope of this memorandum and our engagement with CRKN. At a minimum, repatriation will be the most challenging aspect of adopting UNDRIP in respect of cultural property where legal frameworks in Canada (and much of the Western world) are based on property rights of exclusive use, ownership and control.

### 4. Culturally sensitive materials

In addition to its responsibilities regarding cultural property in its collection, CRKN may also have professional and ethical obligations relating to material in its collection that is discriminatory, derogatory, or offensively inaccurate in its portrayal of Indigenous peoples. While these are not legal duties per se, they will have a great deal to do with the collaboration and ongoing relationship the CRKN may build with Indigenous Peoples over time with respect to the Collection.

Article 15 of UNDRIP affirms that "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." If in fact Article 15 is adopted across the country, as it may be soon adopted in BC through DRIPA, this may no longer be an ethical but legal imperative. Again our suggestion to move into

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<sup>21</sup> Reconciliation Framework, *supra* note 5 at 18.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* at 19.

<sup>24</sup> *Ibid* at 22.

this space in anticipation of UNDRIP becoming common place expressions of expected behavior of the holders of archival materials.

The Association of Canadian Archivists Reconciliation Framework provides the following recommendation for addressing offensive terminology in archival descriptions:

Maintain parallel descriptions and historical contexts related to the creation and use of the archival materials. Consider retaining recorded racist terminology and annotations as a note rather than within the main fields of description, along with a general disclaimer to indicate that this documentation may cause offence. Retaining original, biased descriptions may acknowledge past professional complicity in colonial policies and demonstrate a conscious effort to change current description practices.<sup>25</sup>

As repositories of public information, archives would be wise to begin to adopt policies as though they had a responsibility to respond appropriately to the existence of offensive materials. This does not necessarily mean removing these materials from the public record, as offensive or outdated materials can play an important role in helping people reconstruct the past and understand historic and systemic racism. But it may require archives like CRKN to acknowledge, contextualize, or warn of potentially offensive content in their collections. This sensitivity is best developed in close collaboration of Indigenous Peoples who would be likely more familiar with potentially offensive depictions or materials based on their personal and professional experience and culturally competent expertise.

CRKN may wish to develop a general cultural sensitivity statement acknowledging that certain materials in its collection may be offensive or add context to the descriptions of culturally sensitive materials, ideally in collaboration with the particular communities concerned.

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<sup>25</sup> Reconciliation Framework, *supra* note 5 at 23.