

INTRODUCTION, METHODOLOGY AND THEMATIC OVERVIEW

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I. RATIONALE AND CONTENT OF RESEARCH

The last decade has witnessed an increased demand by indigenous peoples around the world for protection, repatriation, and control of cultural heritage in accordance with their laws and protocols, internal structures, and priorities.¹ The desire for increased control is inextricably linked to relationships with the land and is concerned with continuity, revival, and preservation of languages, spirituality, values, beliefs, and practices that help form a people's cultural and political identity.² In Canada, this demand has been acknowledged in modern land claims and treaty processes, negotiated agreements with government and private institutions, amendments to heritage conservation laws, policy initiatives, and in Alberta, provincial repatriation legislation. However, rights of ownership, protection, and control enforceable in Canadian courts are also regulated by federal, provincial, and territorial legislation enacted prior to recognition and judicial consideration of unique Aboriginal constitutional rights. Although some change has occurred in the administration of Canadian law and policy, particularly in northern Canada and throughout Canada in the context of archaeological sites and ancestral remains, most heritage conservation and cultural property legislation is dated and fails to expressly address unique legal and moral rights and interests of the Aboriginal peoples of Canada.

In its brief consideration of "Arts and Heritage," the Royal Commission on Aboriginal Peoples ("RCAP") emphasized the importance of protecting Aboriginal cultural heritage in the process of decolonization. It recommended that federal, provincial and territorial governments work

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in collaboration with Aboriginal organizations to review legislation affecting cultural heritage.³ Before RCAP, Canada engaged in some consultation concerning the creation of federal archaeological legislation. Similarly, to be more responsive to Aboriginal interests, British Columbia consulted on potential changes to its heritage conservation legislation.⁴ Recent decisions of the Supreme Court of Canada have also generated new consultation policies within governments regarding developments affecting Aboriginal interests in land. However, since RCAP, federal government research initiatives have largely concerned intangible heritage. For example, Canada has consulted and commissioned research on the opportunities and limits of protecting indigenous knowledge within the existing intellectual property regime independent of, and in cooperation with, initiatives of the World Intellectual Property Organization.⁵ More recently, Canadian Heritage produced a series of discussion papers and hosted regional workshops to discuss issues relating to indigenous knowledge, language, and intellectual property.⁶ Subject to these and a few other exceptions, little research and consultation has been conducted in Canada to include Aboriginal peoples' perspectives on cultural heritage law. These include questions regarding (1) the extent to which diverse cultural institutions, processes, priorities and perspectives can (or cannot) be partnered and respected within Canadian law; (2) and the benefits and detriments of engaging in heritage law reform within a pluralist democracy and Canadian legal system in which rights and interests of the broader Canadian public must also be taken into consideration.⁷

This book is the first of two volumes arising from a research program commenced in June 2000 to explore these issues through collaboration, consultation, and academic analysis. The research program was developed by Catherine Bell (principal researcher and coordinator) in response to concerns raised at First Nations' conferences and by the first "Protection and

Repatriation Project” sponsored by the U’mista Cultural Society (“U’mista”), the First Nation Confederacy of Cultural Education Centres, and the First Peoples’ Cultural Foundation. U’mista initiated research because of problems encountered seeking return of the Charles J. Nowell button and bead blanket exported for sale at Sotheby’s in New York.

The broad objectives of the initial repatriation research were to draft a position paper on the need for protective legislation for items of spiritual, cultural and historic importance to First Nations and recommend strategies for action towards this objective as well as preservation, maintenance and protection.⁸ Upon receipt of the preliminary strategy, education, and policy reports from Sonja Tanner Kaplash and Associates, it became apparent that more detailed research and diverse expertise was required to explore the legal environment in Canada and wide array of legal issues raised. As the primary concern for U’mista at the time was to address problems First Nations encounter in preventing exports of cultural items, the first project shifted its emphasis to examine in greater detail how the *Cultural Property Export and Import Act* might better serve the needs of First Nations.⁹ Some of the results of that work are discussed in volume two. Catherine Bell undertook to seek more funding for a broader research program to be informed by First Nation experiences and shaped in consultation with U’mista, the ‘Namgis Nation and other First Nation partners.

Developed in collaboration with First Nation partners in British Columbia and Alberta and scholars in law, anthropology, and archaeology, our research is informed in part by community case studies. Our community partners are the Ktunaxa Kinbasket Tribal Council (“KKTC”); the Mookakin Cultural Society (“Mookakin”) of the Kainai Nation (also known as the Blood Tribe, “Kainai”); the Old Man River Cultural Centre (in discussion with the *Knut-sum-atak* or Brave Dog Society) of the Piikani (Peigan Nation, “Piikani”); the Frog Clan (“Gitksan”) House of Luuxhon

(“Luuxhon”) and Gitanyow Hereditary Chiefs; the U’mista Cultural Society and ‘Namgis Nation (home to the U’mista Cultural Centre); and the Hul’qumi’num Treaty Group (“HTG”).¹⁰ The broad objectives of the research are to: (1) provide First Nation participants with the opportunity to identify, define, and articulate their own concepts of property and law, and their experiences relating to protection, repatriation, and control of their cultural heritage; (2) facilitate greater understanding and respect for diverse First Nation cultures, perspectives and experiences; (3) create reflective case study reports with the potential for diverse uses and means of dissemination; (4) assist First Nation partners collect data and develop practical resources on cultural heritage issues that are of concern in their communities; (5) disseminate information about the operation, impact and limits of the existing Canadian legal regime as it applies to First Nations’ cultural heritage; and (6) critically analyze domestic law within a broader international, social, political and legal context. Information gathered is also intended for use by our First Nation partners to develop strategies to address their cultural protection priorities.

Through case study methodology, volume one identifies a range of protection and repatriation issues faced by our First Nation partners and strategies within and external to Western legal frameworks to address concerns raised. The case studies represent a range of participant understandings of, and experiences with, cultural heritage, legislation, repatriation and protection, and indigenous laws and processes concerning belonging, responsibility, and control. The case studies are organized thematically around data derived primarily from discussion circles and interviews with elders, ceremonialists, spiritual leaders, community members engaged in conservation, repatriation and heritage protection activities, and others considered by their respective communities to be knowledgeable in cultural matters. An exception is Susan Marsden’s “Northwest

Coast *Adaawk* Study” which draws on the formal oral histories of the Gitksan and Tsimshian peoples. Also included is a review essay of repatriation and protection experiences across the country gathered from a review of literature and feedback generated from the project’s website.¹¹ The case studies do not represent a generalized First Nations’ perspective. Indeed all participants have emphasized the uniqueness of every First Nation in Canada and the need for more extensive consultation on these issues.

Also included in volume one are essays which more deeply reflect on two themes arising from the case studies—the role played by residential schools and discriminatory government policy in loss of cultural knowledge and the centrality of language to cultural preservation. Brian Noble’s essay offers a segue to the analytical essays in volume two by exploring what he identifies as a crisis in power and respect in Western law and property practices, and contrasting concepts of property, owning, and belonging within First Nations and Canadian legal contexts. All of the essays also begin to consider existing and potential legal responses to issues raised, the benefits and detriments of finding solutions in Canadian law, and other strategies for change.

In volume two, legislation affecting tangible and intangible cultural heritage is considered along with issues of law reform. The essays are informed by a range of sources in addition to the case studies; developments in domestic common law, international law, and policy; literature reviews; contemporary and emerging ethical principles and policies in archaeology, anthropology, museum administration and other relevant disciplines; and legal initiatives in other jurisdictions with colonial legal histories. Reflections on the revitalization of First Nations’ legal orders and laws, strategies for change outside the Western legal tradition, and critical commentary on the problems of using external legal mechanisms as a means to empower First Nations communities are also

important features of the second volume. We hope that together both volumes will generate an awareness of challenges faced by our First Nation partners and provide helpful information to other indigenous peoples within and outside of Canada. We also hope the volumes will form a platform for much needed intercultural dialogue on issues of law reform.

II. INHERENT CONTRADICTIONS: DESIGN, TERMINOLOGY, ORGANIZATION, AND THE TRICKSTER

When discussing the role law might play in protecting First Nations' autonomy and cultural heritage, understandably, several participants were not familiar with legal barriers to their heritage protection goals and questioned the utility of Canadian law reform. Basically, their experiences with legislation directed at First Nation people (such as the *Indian Act*)¹² were of oppression and they saw a failure in the enforcement of general laws intended to protect heritage resources. Many desired to enforce, restore or enact their own laws concerning cultural property protection. Francis First Charger echoes the concerns of some participants when he cautions, "We are beginning to move to the direction of the white man's ways.... Once we start doing that, then we are undermining our own ways."¹³ However, greater First Nation control may require changing some features of the existing legal environment and restructuring relationships between First Nations, Canadian governments, and public institutions. Thus, despite reservations, the Mookakin Cultural Society and respected Kainai elders participated in developing Alberta's repatriation legislation and the Hul'qumi'num call not only for respect for customary laws concerning their archaeological heritage, but also reform and enactment of Canadian legislation. Other participants familiar with the inadequacies of legislation in specific areas, such as intellectual property and cultural export, also address the need for change. These examples demonstrate a tension running through our work. On the one hand, some

participants do not want to engage Canadian law unless necessary, preferring instead to rely on indigenous laws. On the other hand, participants also understand that statutory reform may be necessary to achieve First Nations' cultural heritage goals.

Case study participants were also reluctant to speak about cultural heritage in language and discrete categories familiar to Western legal thought such as tangible, intangible, moveable, immovable, land, object, intellectual, and material. It appears that the problem lies not with the answers given, but with the questions being asked. In order for research to be both manageable in scope and congruent with the Canadian legal system, subject areas and questions were developed in consultation with First Nation partners.¹⁴ The University of Alberta's ethics policy for conducting research with human participants also required prior approval of areas for questioning and intellectual categories for research. However, as Susan Marsden points out, despite the involvement of the First Nation partners in designing the research questions, "there is an inherent contradiction in the design of this project, namely that we have predefined the issues and the nature of the case studies in a non-Aboriginal context."¹⁵

The very terms "culture," "property," and "ownership" are Western legal, social, economic, and political constructs that are imposed on First Nations. Given the consistent use of these terms in the literature, the dynamics of cultural interaction, and First Nations' participation in the market economy, it is not surprising that most participants in this research now use and understand Western property terminology. However, to varying degrees and within specific contexts these terms are still incomprehensible (*i.e.*, no equivalent concept in First Nations' languages), inappropriate (*i.e.*, disrespectful of First Nations' concepts) or inadequate (*i.e.*, too narrow). Nevertheless, they continue

to be used, though with qualification and explanation, in order to simplify communication and give meaning to participant experience within a multi-cultural and legal pluralistic world.

The challenge of finding appropriate terminology is most pronounced in the discussion of defining “cultural property.” For example, in the Luuxhon report, the author explains how this concept “obscures Gitksan law”:

...[T]he concept of ‘cultural property’ obscures Gitksan 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. This perhaps would be less of a concern if there was a general familiarity with the indigenous legal system being considered, but this level of understanding has yet to be achieved.¹⁶

Similarly, from the *Poomaksin* report we learn that “intangible ‘property’ is also integrated and inalienable, one element from another. For example, the transferred song for a tipi design cannot be separated from the transferred Bundle for that design, nor from the design itself”—a point echoed by Francis First Charger in the *Kainai* study.¹⁷ To the Gitksan and Tsimshian, “[t]he term ‘property’ implies separation—this thing that I own is outside of me, is controlled by me and can be taken from me. There is no equivalent concept in Gitksan and Tsimshian thought.”¹⁸ Moreover, “there is no separation between people and the cultural ‘things’ collectively called heritage, nor is there a separation between people and the world they inhabit.”¹⁹ Whenever possible, context specific terminology is preferable. For example, as Reg Crowshoe explains “Nitsiitapii property” is far more appropriate than that of “cultural property” or even the very word “culture.” He adds, “I would say there is our Nitsiitapii properties, whether it’s cultural property or not, the word “culture” is a white

man's problem, not ours."²⁰ A similar disdain for the word "property" is acknowledged by Andrea Cranmer, who notes that the term is not used in the Big House or by the "well-versed cultural people in the community."²¹ The term "cultural heritage" is preferred.²²

After much deliberation, the phrase "cultural heritage," rather than "cultural property," is used in the titles of our books because it has meaning in a range of legal and extra legal contexts.²³ It is broad enough to cover differing cultural understandings and the subject matter in both volumes, but is succinct enough for use in a book title. It is also consistent with most of the participants' perspectives. However, we use this phrase with a sharp awareness of its limitations including how, in a Western legal context, importance is given to protection of rights characterized as proprietary in nature. Some authors continue to use the term "property" for this reason and to be clear in their references to particular laws and legal instruments.

Although we seek to communicate information in a manner that respects First Nation perspectives, we also seek to present our research in a way that is accessible to indigenous and non-indigenous readers, and has meaning in Canadian legal and policy contexts. The difficulties are evident not only in our choice of terminology, but also in how we have organized the material in volumes one and two. Since one of the objectives of publishing the case studies is to portray a wide array of individual First Nations' experiences and perspectives, the studies include extensive quotations. However, they were edited for publication and more detailed versions of some are on the project website. The case study reports are published independently so that the information shared is not obscured or lost in the legal academic analysis contained in volume two. In volume two, the essays are organized along more conventional lines according to the expertise of the academics involved: repatriation and trade in First Nations' material culture, heritage sites and

ancestral remains, intangible heritage, comparative contexts, human rights, and First Nations legal orders and law. These essays respond to volume one mainly through selection of topics to be examined and the use of examples from the case studies to illustrate points raised.

There is also a more fundamental question of whether Canadian law can help further First Nation goals without continuing the colonization of indigenous ways of knowing and being. As experienced in the administration of the *Native American Graves Protection and Repatriation Act*²⁴ in the United States, the administration of rules intended to benefit indigenous peoples can give rise to unanticipated effects. Given this, it is important to consider both the benefits and detriments of using Canadian law as a tool to address what is in essence a question of “respectful treatment of native cultures and indigenous forms of self-expression within mass societies.”²⁵ We also struggle to reconcile the belief that First Nations should be able to exercise jurisdiction over aspects of their own cultural heritage with consideration of interests of the broader Canadian public. Several participants recognized this dual approach and the need to build respectful co-existence. However, practical realities of the economic, legal and political landscape in Canada combined with the (1) vital role cultural heritage has in survival of a people, (2) consistent refusal by governments to recognize First Nations’ jurisdiction over heritage resources located off reserve lands and intellectual property, and (3) cost, time and complexity of negotiating jurisdiction over the range of areas raised in this research, all serve to bring us back to thinking about Canadian legislation and policy reform.

To remind us of the contradictions, tensions and limitations in our work, Val Napoleon introduces the intellectual instrument of the Trickster into both volumes. The Trickster “is a central figure in the myth worlds of many hunting and gathering societies. A divine figure, but deeply flawed and very human, the *Trickster* is found in myth cycles from the Americas, Africa, Australia,

and Siberia. ... The *Trickster* symbolizes the frailty and human qualities of the gods and their closeness to humans. These stand in pointed contrast to the omnipotent, all-knowing but distant deities that are central to the pantheons of state religions and their powerful ecclesiastical hierarchies.”²⁶ It is our intent that the Trickster will enable us to see the contradictions and perhaps even to intellectually straddle the cognitive dissonance in order to move our thinking along.

III. METHODOLOGY

First Nation participation at all stages of the research program has been an important aspect of this project. This has involved three key components: participation in research program design and preparation of funding applications; participation in case study research, design, development and authorship; and comment on, or authorship of, academic essays that draw on case studies and other sources. In particular, the case study methodology was informed by the following principles: production of practical and tangible benefits for First Nation partners; creation of reflective texts with the potential for diverse uses and broad dissemination; compliance with First Nations’ laws and protocols; active and meaningful participation by First Nation partners in design and development of research questions and outcomes; and regular communication throughout.²⁷ Research progressed in three stages over a period of six years: conceptualization and preliminary consultations, data collection, and finally, analysis and publication.

Academic research has been “applied” to First Nations for many years. Research has been an integral part of colonization that placed First Nation communities in the Petri dish as the research objects. Geared to primarily non-indigenous audiences, the standard premise was that research *on* Aboriginal peoples was of universal benefit so direct local impacts need not be considered. In

contrast, the collaborative approach to research that we have adopted is consistent (to the extent possible within the constraints imposed by universities and funding agencies) with what is referred to generally in the social sciences, as participatory action research (PAR).²⁸ Multi-disciplinary influences have characterized this research method as a “systematic inquiry that is collective, collaborative, self-reflective, critical and undertaken by participants in the inquiry.”²⁹ Meagan Gough outlines four themes in this methodology: “empowerment of participants; collaboration through participation; acquisition of knowledge; and social change.”³⁰ Gough continues, “When defined as a goal of research with collaboration of those involved, PAR can be used to assist in the reappropriation of cultural knowledge” by providing “the opportunity to reflect, maintain, and advance First Nation cultural values.”³¹ Critical questions that must be addressed in this methodology are: Whose research is it? Who owns it? Whose intentions does it serve? Who will benefit from it? Who has designed its questions and framed its scope? Who will carry it out? Who will write it up? How will the results be disseminated?³²

At the beginning of our research project we planned and developed our strategy, organized the research team, created an international bibliography on cultural heritage law, established First Nations partnerships, drafted the case study proposals and grant applications, and commenced the preliminary research. With funding provided by the University of Alberta, Catherine Bell and Heather Raven (Nakasheohow) visited First Nations communities in British Columbia and Alberta that had expressed concerns about cultural heritage or were engaged in repatriation and protection initiatives. Local meetings were held with cultural heritage staff, elders, society members, band councillors and other representatives responsible for overseeing cultural research in their communities. Topics discussed included research goals (broad and community specific) and

outcomes; phases and time lines; short-term community benefits and long-term benefits of research and publication; community research protocols and authorization processes; the role of the case studies; community resources for the project; budgets (for equipment and interviewers, translators, interpreters, other participants); research experience and training materials; culturally appropriate methods to gather and record information and consents; selection of participants; disposition of data on completion of research; copyright, data ownership and published outcomes; and potential risks of participation. Subject areas for the interview questions and processes involving human participants were also discussed with the understanding that questions could change to reflect local heritage protection priorities, practical community information needs, and differing cultural understandings.³³ Questions selected served as a general guide to structure dialogue, and allowed for more narrative responses and elaboration of topics participants thought most relevant to the broad subject areas.

Following the preliminary meetings, a detailed research proposal was prepared by Catherine Bell and Robert Paterson and provided to all First Nation partners for comment prior to submission for funding to the Social Sciences and Humanities Research Council of Canada (SSHRC). In kind and other funding commitments by First Nation partners helped support the research and were included in the application. Upon notification of SSHRC funding, each partner was contacted to confirm continued interest and invited again to modify case study questions to suit their particular research interests and methodologies. Mookakin, KKTC, and U'mista made minor modifications to their original question sets to accommodate the range and expertise of people interviewed and specific initiatives in their communities including language protection initiatives and enactment of repatriation legislation. For the Luuxhon study, a unique set of questions relating to intangible

possessions and laws about oral history were designed in an attempt to avoid “the imposition of western, state constructs of property and ownership.”³⁴

It was at this later point that HTG joined the research program because while the Hamatla Treaty Society continued to support the project, it had to withdraw due to unexpected developments in treaty negotiations. HTG developed a unique question set to address four specific objectives of their study. These were to articulate Hul’qumi’num customary laws relating to historically significant places, artifacts, and human remains; examine current problems relating to respect and enforcement of Hul’qumi’num customary laws; and explore how the legal environment might be changed.

The primary methods for gathering case study data were individual interviews and facilitated discussion circles. Where interviews were conducted in the First Nation’s language, community members were hired as translators and transcribers. Community case study coordinators and interviewers, or academics with existing relationships with the First Nation, conducted the interviews and facilitated the discussions. A training workbook was prepared and reviewed with all interviewers to ensure consistency of data collection and reporting, and compliance with University ethics requirements. Nevertheless, some transcripts were reformatted and tapes were compared to transcripts provided to the research team to ensure accuracy. While most case studies engaged between fifteen and twenty-five participants, the design for the Luuxhon and Kainai studies involved fewer people. With Luuxhon, only Luuxhon members or those closely related persons have the authority to speak on behalf of the House. Similarly, for the Kainai, only members of the Horn society (recognized among the Blood Tribe for its spiritual leadership in the Sundance) and members

of the Mookakin Cultural Society (established to promote and preserve the spiritual doctrine of the Blood Tribe and engaged in repatriation activities on behalf of the tribe) were interviewed.

The Blood Tribe, KKTC and U'mista had files and archival materials that were reviewed to help formulate questions and give context to information gathered. The HTG study drew on materials and experiences related to litigation and treaty negotiation. Electronic and printed community materials and some academic papers were also consulted in several of the case studies.

Data analysis began with Catherine Bell and her assistants reading a sub-set of interview transcripts from various communities to identify key words, phrases and themes contained within them. The case study authors also read all transcript data relating to their case studies to identify themes and organize individual participant responses. Where a large number of interviews were conducted, special software (Nudist 6) was used to code and organize transcript data according to the themes identified. The first drafts of the case study reports contained extensive quotes from transcripts. These drafts were provided to the originating communities, volume two authors, and upon approval, most were posted to our project website. One of the objectives of the initial drafts was to organize as much of the transcript data as possible for use at the community level and to include enough information in each study report to ensure that its evolution, purpose, and methodology were properly understood. As some of the original reports were quite lengthy and repetitive in places, they were edited for publication. The common methodology descriptions were removed and summarized in this introduction.

In our original vision, interviews and discussions were to be audio-visual recorded. Our hope was to produce audio tapes for each community archive derived from their specific case studies and an edited video of all case study interviews that might be used for educational or other purposes.

However, few participants felt comfortable with video recordings. Consequently, we did not obtain sufficient footage to achieve this latter goal. Although some participants interviewed want their information kept in local archives so that maximum control over use can be maintained, others have given permission for transcript data and tapes to be donated to a public archive to be determined in consultation with our First Nation partners.

Important questions in collaborative work are who will write it up and how will authorship be acknowledged? This project was built upon pre-existing relationships between academics and members of participant First Nation organizations. Thus the decision of who would write up the case study was determined by the First Nation early in the process. In all the case studies, the expertise of the case study authors and community coordinators, combined with the knowledge of local protocols, built a foundation of trust and helped to ensure appropriate community members were consulted. Authors for the academic essays in volumes one and two were approached to participate according to their areas of expertise.³⁵ Biographies of these people, plus the general area of research they intended to explore were provided to First Nation partners in our initial meetings. First Nation partners were also advised of changes in the research team. Community partner representatives and these researchers later met to discuss draft papers.

A more complicated question is how to acknowledge authorship in a manner that respects oral traditions and reflects a truly collaborative process. In the Kainai study, this issue is addressed by including Mookakin as an author. In other studies, this was dealt with by specifying that the studies were developed in consultation with a specific First Nation individual or organization. For practical reasons, it becomes difficult to name all people who made oral contributions to this project as authors. However, if requested we were prepared to do this despite the challenges it would have

created for publishing and making standard contract arrangements for authors' copies, copyright, and allocation of royalties. In the end, we decided that all participants who chose to be identified would be included in the acknowledgments; First Nation partner organizations or designated individuals from partner communities would hold joint copyright to case studies with the authors named to the exclusion of the publisher; every community would receive not only transcripts and tapes originating from their communities, but also free published volumes issuing from the research; and royalties would be donated to a First Nation organization in Canada.

Drafts of all transcripts and case studies were provided to participants and other authorities within the community for review and comment on use and analysis of transcript information. While an effort was made to maintain the actual words used and natural flow of thoughts, the transcripts were edited where necessary to clarify meaning. Authors attended meetings to review the case studies when requested. In the community review processes, no suggestions were made to change meaning or use of data, even when disagreement over points of view were raised. However, passages identifying people by name or circumstance were removed from some studies. Subject to this exception, all comments from First Nation partners and participants related to the control of information (discussed further below), accuracy of the transcript, typographical errors, and if interviews were conducted in languages other than English, matters of translation, spelling, conceptual understanding, and proper use.

During the data gathering phase, we created a project website and contacted all First Nation cultural education centres, tribal councils, treaty organizations and other First Nation governments and organizations in Canada about our work.³⁶ We invited these groups to participate in the research by using outcomes posted on the website (such as case studies, bibliographies, and background

reports prepared for our research) and contributing their own thoughts through electronic submissions. A few electronic submissions were received from the United States, Nova Scotia, Ontario, the Yukon, British Columbia, Manitoba and Saskatchewan. Catherine Bell, Robert Paterson, and other research team members also participated in various international and national conferences and workshops at the invitation of First Nations and government officials in British Columbia, Saskatchewan, Quebec, Ontario, New Zealand, and the United States. We also received suggestions from people who visited our website and were involved in protection and repatriation initiatives discussed in our review essay. Information and feedback gathered from these processes is incorporated into the review essay in Part B and essays in volume two.

One response identified what was perceived to be an application of Canadian law to First Nations' spiritual matters. Although when explained fully, it was understood this was not our intent, this response underscores the importance of addressing issues of First Nations' jurisdiction and recognizing the diversity of First Nation perspectives on matters of external law reform. If reform occurs, it is also important to explore the possibility of optional legislative frameworks and how to incorporate different positions within them.

In the final stages of our research program, wide ranging literature and case reviews were completed and the academic essays for volumes one and two were prepared. Preliminary drafts were shared in a working group session with representatives from our First Nation partners and disseminated for comment. A thematic review of the case studies was prepared and distributed. The complete manuscript was offered for review by elders' councils and other local authorities. At this time, it was also submitted for review by the publisher.

IV. CHALLENGES IN MEETING OUR OBJECTIVES

We have already elaborated one of the biggest challenges in our work—communicating using terminology that respectfully incorporates First Nations’ understandings and is cognizable to the non-indigenous legal world. Many other challenges have arisen in our attempt to work in true partnership and collaboration. These challenges include reconciling academic independence and meaningful First Nation participation; working within university and funding policies; and limited resources and complex approval processes within First Nation communities. It is beyond the scope of this introductory essay to elaborate on all of the challenges we have faced. Our purpose in sharing these is not to discourage collaborative research, but to illustrate the commitment required and the importance of encouraging academic institutions, publishers, and funding agencies to negotiate new approaches to research and products of research that increase indigenous control of indigenous information. Our methodology is not perfect and will not work in all partnerships, but we hope it will generate some helpful lessons. In the end, each partnership must be negotiated independently to meet the needs of the parties involved.

There is often an assumption in mainstream academic research that objective truth can be discerned through impartial analysis of a range of data. Given this, credibility in academia means that conclusions are not influenced by the research subjects who may or may not agree with interpretation of data gathered from or about them. However, decolonizing research methodologies calls for participation and control by First Nations communities and researchers in the interpretation of data derived from their communities or lands. For most First Nations groups, this includes not only those participating in interviews and discussions, but also local or regional authorities charged with the task of overseeing any research initiatives that relates to the group.

For this project, the rights of the interview and discussion participants were governed by standard ethical procedures that allowed them to withdraw information provided at any time. Similar principles were applied to approving First Nations' authorities. To avoid potential problems where a participant might wish his or her information included in the research, but the authorizing First Nation did not, participants were advised of the approval processes that affected them and how any disagreements would be resolved. Participants were already aware of, and supported, these internal authorization processes. Although critics may argue that this could have influenced the information shared, First Nations' internal research protocols had to be respected. Further, such criticism assumes that a First Nations' authority might try to dictate what should be said or attempt to revise the reports to meet political goals—an assumption that proved false in our experience and in fact, ran contrary to the intent of local protocols applied to this work.

Ultimately we decided that all project participants and First Nations' authorities would be given copies of transcripts and case studies for comment, and as requested or required by local research protocols, drafts of all academic essays produced for publication in volumes one and two. In the event of disagreement about the use and interpretation of data in an academic essay by an approving authority, we agreed that the authors would not use the information in dispute, but different points of view on interpretation of the data would be clearly articulated. All authors were asked to agree to this process before case study data was given to them. We also agreed to make it clear in the introduction to both volumes that case studies represent perspectives of the participating community members, but the academic essays reflect the opinions of the authors and not necessarily all communities engaged in the project. First Nation partners also retained the right to withdraw use of portions or all of the case studies. In our experience, there has been a willingness of all involved

to respect academic independence. All academic essays were eventually discussed at a workshop with representatives from First Nation partners and/or circulated for comment. None of our partners identified areas of significant disagreement or chose to withdraw. Rather a wide range of voices are heard because of the time spent defining expectations, the independent publication of case studies, and the diversity of opinions offered in these volumes.

Two issues that arose in the initial and final phases of our research demonstrate the challenges of complying with community protocols and addressing the consequences of this within an academic and publishing environment. While it is important to obtain Band Council approval for research conducted in some communities, Band Councils are often not the appropriate entity to oversee and approve all forms of research. For example, the KKTC research protocol requires that research requests be reviewed by the Elders Group, the Ktunaxa Treaty Council, and the KKTC. The latter two bodies provide comments and advice, but the authority to approve or deny research remains with the Elders Group. Our research revealed that this process may need to be modified slightly depending on the length and nature of the publication (*e.g.*, not all members of an elders group may be able to read lengthy documents in English and summaries may be required). Complying with internal processes can also be time consuming and cause delay in publication of outcomes. Depending on the length, sensitivity and complexity of a manuscript and the methods of communication preferred by First Nation partners, several meetings may be required. This can cause problems in complying with granting agency time lines for expenditure of funds as well as recognition of academic work within institutions that evaluate performance based on annual publications. It also requires publishers to exercise flexibility in the review process and to acknowledge the importance of including First Nation processes in academic refereeing procedures.

Identifying the appropriate authority is more complex when official research protocols have not been developed. For example, among the Gitanyow, cultural information and entitlements are owned by the House groups. Given this, the proper authority to share and approve information is not the Gitanyow Hereditary Chiefs Office, but the Hereditary Chief, Luuxhon on behalf of the Luuxhon House members. Similarly, among the Piikani, only people with properly transferred rights to leadership and communal ceremonials have the authority to discuss matters raised in that study. It is therefore necessary to appreciate the appropriate authority structures within a First Nations group before preliminary consultations can even commence. The issue can be further complicated by changes in local government or internal conflicts between authority structures. Further, typical ethical procedures require written consents from participants, or where justified, recorded verbal consents. The latter is usually done through reading and recording a script and consent being recorded on tape. Under Piikani protocol, the fact that the Brave Dog Society Bundle holders hosted a meeting and agreed to be recorded indicates approval to use the information given.

Another example illustrates some of the challenges of trying to conduct collaborative research that respects First Nations' communication processes and interests in controlling accurate and respectful use of their cultural information. In a typical publishing contract, copyright is assigned to the publisher or retained by authors and editors with the publisher. In our study, we wanted First Nation partners to have greater control over issues of reproduction and royalties associated with copyright. Consequently, we decided that the copyrights to the case studies would be held jointly by the author, the editors of volume one, and the respective First Nation partner. Therefore, it was necessary to identify an individual or entity recognized in Canadian law. For example, the Luuxhon is an entity recognized within the Gitksan legal order, but not in Canadian

law. Finally, we needed to find a publisher willing to surrender copyright to the case studies in this fashion and to donate royalties to an organization of our choice.

Our approach to information control had to be reconciled with rules of funding agencies and universities with respect to ownership of data derived from research during the course of employment. It was our view that First Nation partners and participants should, to the extent possible, control use of transcripts and tapes issuing from their communities. We dealt with this in three ways: (1) requiring that all tapes and transcripts used by case study authors be returned to the research coordinator and kept at the University of Alberta unless participants agreed otherwise; (2) using ethics procedures approved by affected Universities to include the right of individual participants to determine disposition of data including data retained by the researcher and the provision of copies to partner organizations; and (3) where necessary, seeking other opinions on relevant contractual provisions to enable us to adopt this approach. We also advised participants and partners that any items deposited in a public archive would be clearly marked regarding its intended use for research and educational purposes only, but that we could not guarantee this use restriction.

The subjects of copyright and publication also demonstrate the challenge of trying to communicate in a different cultural and linguistic context. For example, in preliminary meetings it was clear that Mookakin had an interest in ensuring that information gathered was used in a respectful way that promotes the preservation of Blackfoot culture. Although interest was expressed in copyright, copyright is inadequate to address responsibilities of individuals toward use of information and the understanding that “ownership” of information rests with the Creator. In the final stages of research it also became apparent that “publication” did not have the same meaning for the case study author and one of the partner representatives. This misunderstanding gave rise to

the impression that original goals had changed. Coupled with concerns over the ability to reuse words in their original form (an important issue in oral cultures) and the nature of copyright protection, these problems resulted in several meetings concerning publication of the Kainai study. It was ultimately decided that Mookakin would hold copyright to the study and the lead author would continue to work with Mookakin on legislative reform. It was also agreed that publication to an audience wider than the Blood Tribe was important to ensure voices of knowledgeable community members would be heard on matters of cultural heritage— not just the sometimes inaccurate and misleading interpretations of academics.

Happily, through creative thinking, good will, commitment and cooperation on the part of the affected universities, First Nation partners and participants, authors, SSHRC, and the University of British Columbia Press, we were able to overcome many of the challenges we faced. However, these challenges point to a need for more time and resources to develop and implement collaborative research initiatives and to the importance of a flexible regime to accommodate methodologies committed to increasing indigenous participation in, and control over, the products of research.

V. VOLUME ONE, PART ONE: OUR VOICES, OUR CULTURE

Case studies produced in this volume cover a wide range of topics. Although each has different emphasis, certain themes emerge. What follows is a thematic introduction to the case studies in this volume and the subject areas discussed in the academic essays in volumes one and two. We adopt this approach to highlight connections between the two volumes as well as introduce the content of this volume.

A. General Observations

A meta-theme running throughout is the need to restructure relations (some more than others) in a manner that acknowledges and respects unique First Nations' identities and is consistent with First Nations' values, beliefs, laws and practices. Such a paradigm shift involves acknowledging past injustices as well as embracing a dynamic concept of cultural heritage by supporting cultural continuity and revitalization both in word and deed. Though implicit in any discussion of First Nations' cultural heritage, several case studies explicitly address the damaging effects of colonialism, the notorious residential school system and, in particular, the *Indian Act* which sought to destroy indigenous culture through, among other things, bans on the potlatch and Sundance ceremonies. In the words of Diana Cote:

[T]he *Indian Act* took our culture away and as a result of that we are in the situation that we're in right now, which is we have unhealthy members in our community. We have lost our culture. We have sad families because it took that ability to be a family away. So it's probably the worst thing that ever happened to the First Nation people in Canada.³⁷

Equally as important as correcting past injustices, is the need to support and enhance cultural expression among present and future generations. The message in this volume is that while colonialism endeavored to destroy First Nations' cultures, they have survived by the sheer strength of resolve among the peoples. All community participants interviewed are committed to revitalizing their cultures and restoring that which Western society sought to colonize. Protection and repatriation of both tangible and intangible cultural heritage are viewed as important for revival and continuity of cultural knowledge, practices, laws and ultimately cultural awareness, identity and self-esteem among the peoples.

In advocating for respect and understanding of First Nations' identities, laws, practices and protocols, participants express frustration over the many hurdles in the form of biases and prejudices inherent in the Western world view. A fundamental affront expressed by many is the failure to recognize the distinctiveness of First Nations' cultures. There is also concern that First Nations' laws, which many feel should govern matters of cultural heritage, are not given equal standing in Canadian law and negotiations, and instead are constantly adapting to conform to Western legal concepts and values. In the courts, Western academic credentials are privileged over indigenous credentials. Experiences shared also demonstrate that similar challenges may arise in repatriation negotiations with some institutions wherein Western institutional knowledge is considered to be more accurate than First Nations' knowledge. Bias towards documentation may also undermine protection for sacred sites. As Arvid Charlie (Luschiim) explains, in keeping with Hul'qumi'num traditions, there are few written records of things sacred to the people. This can result in the erroneous conclusion that the Hul'qumi'num simply don't have sacred areas.³⁸

Participants also speak about relationships of belonging and responsibility to material culture which can have individual, familial and communal aspects. As Gloria Cranmer Webster explains in the U'mista study, "Our concept of ownership differs from that of other people in that while an object may leave our communities, its history and the right to own it remain with the person who inherited it."³⁹ Similarly, participants in the Ktunaxa study argue that based upon their cultural connection to a cultural item and irrespective of how an item was removed from the Ktunaxa territories, the Ktunaxa Nation may maintain a superior claim to the item over non-Ktunaxa citizens. Moreover, as the Kainai report authors note:

[T]he concept of communal property and the responsibilities that arise from individual relationships with spiritual objects extend to many forms of spiritual inheritance whether land, objects or intangible information making it difficult to use the term ownership in any context relating to cultural heritage. Rather individuals acquire rights and responsibilities of use through clearly defined transfer processes....⁴⁰

The Luuxhon report describes House relationships to tangible and intangible possessions noting that while it is the House chief who holds these items, the chief does not have a personal property right in the possessions *per se*. Rather, the chief has the responsibility to hold and protect the House's tangible and intangible property in trust on behalf of the House members.

Several participants are frustrated by how their relationships to cultural heritage are viewed by non-indigenous people. For example, participants are critical of non-aboriginals who romanticize the communal aspects of "ownership" among First Nations and wrongly assume that there are no family or individual entitlements and responsibilities. For some First Nations, strict transfer protocols regulate the passing on of rights and responsibilities of possession and use of everything from ceremonial bundles, names, songs, dances, and knowledge, to hunting and gathering territories, and sacred sites. Only those who possess the proper entitlement may make a transfer and failure to follow protocol results in an illegal transfer. It is on this basis that some seek repatriation of cultural items noting the irrelevance of deeds of title and receipts of payment according to their indigenous laws.

The effects of colonialism—epidemics, dwindling resources, Christian conversion and the *Indian Act*—have resulted in particular adaptation and undermining of indigenous laws (this is not to suggest that indigenous laws were unchanging). For example the U'mista report relates how the borrowing and singing of family songs by non-family members is common today, although

permission is sought and original ownership acknowledged. The KKTC report notes that the need to educate members and reverse cultural loss has resulted in the acknowledgment of a communal interest to items to which families of origin have primary entitlement.

B. Repatriation and Trade in Material Culture

Rationales for repatriation vary and are rarely offered in isolation, but some are emphasized more than others. For example, repatriation efforts of the Blood Tribe are explained as part of a broader struggle for recognition of religious and cultural freedoms. However, this emphasis on sacred and ceremonial objects does not reflect a lack of interest among the Blood for repatriation of other material culture. In contrast, participants in the U'mista and KKTC reports make it clear that ceremonial use, although important, is not the primary rationale for repatriation efforts in their communities. For the Luuxhon, possession and control of the use of images on certain items may be of greater significance than repatriation of the object itself.

Cultural continuity is a common refrain in discussing repatriation goals. Cultural knowledge of the objects, not only the objects themselves, is important. For example, Vi Birdstone explains when “cultural items were sold and placed in museums, we lost a lot of our traditional cultural knowledge.”⁴¹ She elaborates, knowledge is “placed far away, where most of our people will never get to and never see. And our children will never see them. So, they don't have a connection to the culture and that's, that's severed.”⁴² For her return of representative samples of material such as duck decoys and baskets are important because of the knowledge they represent. Participants in the U'mista study agree and also frame repatriation as a means of redress for injustices of the potlatch

ban. Repatriated cultural items are building blocks in restoring and strengthening the cultures that colonialism endeavored to destroy.

Participants express mixed emotions concerning museums. Several express gratitude to museums for preserving their material culture, and some insist that such measures would not have been necessary had their culture not been taken from them in the first place. Until full repatriation is achieved, and regardless of whether repatriation is pursued, a common sentiment is that museums and First Nations need to work as equal partners in caring for, displaying and interpreting cultural items. An example of this is the partnership between the Mookakin Foundation and the Glenbow Museum for the use and ultimately full repatriation of ceremonial items, and co-management or complete control over specific uses and treatments of other material, depending on its nature, that the Glenbow continues to hold. There are many other examples of positive partnerships between museums and First Nations.

The case studies also indicate that relations between museums and First Nations have substantially improved, and a new ethic of collaboration has been adopted in Canada. Positive relations hinge on respect, mutual understanding, open communication and compromise. To achieve this, First Nations have been working hard to educate museum personnel and museums have been developing responsive programs and policies. However, there are still significant barriers to overcome. For example, the Piikani report notes that *how* museums return items is equally as important as *that* they return items.⁴³ Lack of respect for elders and subordination of community knowledge of their own culture by museum personnel still arises. Emphasis on documentation and independently verifiable sources is viewed by participants who speak to this issue as evidencing a lack of respect for community experts and oral traditions. The discretionary nature and diversity of

museum repatriation policies, scope of items eligible for return and conditions imposed on return of non-ceremonial items are other examples given to illustrate how museums have more power in negotiations. The Kainai and U'mista reports note that underlying sources of fear, museum mandates, and issues of legal liability may affect “the tone of negotiations, direct the actions of the parties involved or alter the spirit of communication surrounding repatriation discussions.”⁴⁴

Funding is always a concern. Costs associated with locating items, negotiating and facilitating their return are significant. Despite assistance, museums seek to provide the cost of constructing and operating museum-like facilities and training staff places repatriation beyond the realm of possibility for many First Nations and is viewed as inappropriate for certain materials by others. International repatriations add additional costs and difficulty in locating items as do private repatriations. This of course assumes that the private collector actually agrees to sell, since there are no laws requiring them to part with the items. Like domestic repatriations, international repatriations may also generate unique challenges such as laws which forbid repatriation, and positions that regard collections as part of the heritage of humankind wherein preservation in museums ensures maximum access. Specific concerns include poor communication and lack of notification; the necessity of purchasing and the significantly inflated prices of cultural items a First Nation is fortunate to discover is intended for export; and lack of sufficient funding to make such purchases.

C. Repatriation of Ancestral Remains

Repatriation of ancestral remains is a theme common to the Hul'qumi'num, KKTC and Kainai case studies. All describe it as an emotionally charged issue. While protocols surrounding the care for ancestors vary among these groups, there is a common sentiment that human remains

and the land surrounding them are to be left undisturbed. Respect for one's ancestors is the value that grounds the requirement for following proper protocols when handling ancestral remains. Respect is also what makes repatriation a necessity.

It should come as no surprise that participants who discuss ancestral remains consider the storage and mistreatment of remains as contrary to concepts of human dignity and respect for the dead. Some call for equal rights so that First Nation remains will be treated with the same degree of respect as afforded to non-Aboriginal remains. Nothing more, nothing less. This should apply equally to museums that store human remains in drawers and private citizens who showcase human skulls as candle holders. As Chris Horsethief explains:

I don't care who has them or where they came from. I don't care if they came out of a National Park. If they're human remains and you know where they came from...then they have to be returned. And that's got to be a right. Somebody has got to come forward and say this is a basic human right. ... Our people are in boxes. They're labelled with numbers.⁴⁵

Museums have been very responsive to requests to repatriate human remains, but problems remain. For example, internal laws prevent the Blood Tribe from viewing or handling remains. At the other end of the spectrum, Hul'qumi'num participants discuss their customary laws regarding the inherited right to care for the dead. Similarly, a Ktunaxa participant explains that certain individuals hold specialized knowledge concerning protocol that must also be followed. Both the HTG and KKTC reports address the issue of funerary material and insist that such items cannot be separated from the remains and must also be repatriated. There are also fears that interfering with the dead can have spiritual and physical repercussions in the here and now. However, most participants do not speak specifically to this issue.

More generally, as with repatriation of material culture, resources and community readiness to receive repatriated remains are common concerns. Escorting remains home and reburial according to First Nation protocol is costly. Who should pay is subject of discussion in both museum and the private sector (*i.e.*, land developer, collector) contexts.

D. Heritage Sites

A strong and intimate connection to the land is a theme common in all of the case study reports. So strong is that connection that when asked what sites need to be protected a common answer is “all of them”. Many participants struggle with the notion that specific sites can be earmarked for special protection because many areas hold aspects of their history and identity and are considered vital for the continuation of cultural practices and knowledge. An exception is the HTG report which focuses on burial grounds. “In fact, the subject of burials dominates discussions of heritage issues, almost to the exclusion of all other types of archaeological features. If other site types are mentioned during the interviews, it is usually only as an indirect reference to these sites’ importance as burial locations.”⁴⁶ When asked, other First Nations partners concur that burial grounds are particularly important, along with sacred sites, and are most in need of special consideration and protection.

Serious concerns are expressed over the lack of respect given to First Nations’ cultural heritage and burial sites by the general public, government officials, developers, and some archaeologists. The HTG report, in particular, places significant emphasis on this point. The Hul’qumi’num people express a strong conviction that their ancestors and ancestral places must be respected, but perceive that their heritage is “not publicly valued in British Columbia.”⁴⁷ The

message is that First Nations' burial grounds should receive the same respect as non-aboriginal cemeteries.

Failure to enforce heritage protection legislation is commonly cited as evidence of the low value placed on First Nations' cultural sites and burial grounds. The perception is that lack of public, and therefore political, will is what lies behind this inactivity. Private interests are seen to continually supersede First Nations' protection efforts and development is the trump card against which First Nations have little recourse. For example, some Hul'qumi'num elders are convinced that the roots of this disrespect may be found in colonialism and the continued public disdain for Aboriginal title claims to Hul'qumi'num territory.

Knowledge of indigenous legal orders and law, protocols, sincerity and spiritual connection are prerequisites for proper site protection and according to some interviewees, may only be found within the First Nations. Some participants explain that unfettered access to ceremonial places, traditional hunting and gathering territories, and rights of removal are also needed both on private lands and in parks. Moreover, First Nations must have a role in interpretation of cultural sites, receive proper external acknowledgment of their connection to the land, and have the power to restrict access to sacred places.

Participants who spoke to the utility of heritage protection legislation emphasize the inadequacy of existing laws and in particular lack of enforcement. When sites are disturbed, notification to affected First Nations is not always given. In general, the impression is left that First Nations are only given a minor consultative role in heritage management. Moreover, sacred sites are not easily protected by conventional legal approaches because site identification may conflict with confidentiality requirements and identification increases the risk of exploitation.

E. Language as the Core

Given the oral nature of First Nations' cultures, it is not surprising that language is identified for the primary role it plays in shaping First Nations peoples' identities, culture, history and connection to their land. According to William Wasden Jr., "It's what makes us *Kwakwaka'wakw*. The name says it all, *Kwak'wala*, speaking people. And I don't know what we are going to call ourselves after if we don't, if we're not speaking our language."⁴⁸ Without the language one's history is lost. As John Brown, Kwiiyeehl of the *Gisgahaast* (Fireweed) clan of the Kispiox tribe of the Gitksan, explains:

It was customary to transmit the *adawx* so that they may be preserved. A group that could not tell their *adawx* would be ridiculed with the remark, 'What is your *adawx*?' And if you could not give it you were laughed at. 'What is your grandmother's name? And where is your crest? How do you know of your past, where have you lived? You have no grandfather. You cannot speak to me because I have one. You have no ancestral home. You are like a wild animal, you have no abode. *Niye'e* and *adawx*, grandfather and history are practically the same thing.'⁴⁹

Without that oral record, identification of traditional territories and ownership rights are jeopardized. Transmission of traditional knowledge, rights and entitlements is also stymied by one's inability to understand and speak the language. Language revitalization is identified as a prerequisite for all other aspects of cultural continuity and restoration. For example, the central role of songs in ceremonial practice and transfer protocol is premised on an understanding of the language. Elizabeth Gallant explains this inter-relationship:

[T]hat's what's so important, when they can understand the language and sing the songs. The spirits that come to us do not understand English, they don't sing in English, but they do understand Blackfoot language and songs and that's why it's so important that Blackfoot be learned. That's when we can go back to our way of life

and our religion. And this is how they will learn as they grow (children), and will know our way of life.⁵⁰

Given the central role language plays in First Nation cultures, increasing the number of language speakers is a primary concern along with the need to transmit and record cultural knowledge before knowledgeable elders pass on. Participants agree that it is important that all members of the community receive language training and education, however, the reports note a particular emphasis on training the youth.

F. Cultural Appropriation and Copyright

Questions fashioned in consultation with First Nation partners concerned with this issue focus much of the discussion on proper use of, and entitlement to songs, names, designs and crest images. Examples of appropriation take various forms such as improper access to sacred information or songs and unauthorized taking, use, modification, reproduction or recording contrary to the indigenous laws of the First Nation. For example, Troy Hunter notes:

A good example of that is the use of the word *Nipika*. That's our um, word for [the] Creator. And there's companies that use that word. One was mountain biking adventures and the other one is the, a wilderness lodge bed and breakfast. ...[T]o me it's no different than if we were to call the casino that we just opened up say the 'Holy Mary Jesus Christ Casino' or something like that.⁵¹

While commercial enterprises are frequent offenders, appropriation by academics is also a serious concern. Further, the Canadian intellectual property regime fails to address First Nations' concepts and law surrounding ownership and control of intangible cultural heritage. Rather than assist in protection, copyright law is seen by some participants to facilitate cultural appropriation

by non-aboriginals and even, ultimately, to restrict the ability of First Nations to practice their own culture.

G. Strategies for Repatriation and Protection

The case study reports stand for the proposition that First Nation partners want control over their culture, in all its manifestations, for the simple reason that it is theirs and they are best equipped to care for and protect it. Some participants explain that they are tired of adapting to non-indigenous structures and having the government dictate their culture to them. As Allan Hunter elaborates, some participants want jurisdiction over their cultural heritage, seek the ability to enact laws where First Nation laws do not exist, and to have those laws fully recognized:

Right off the bat, Ktunaxa law we need to create our own laws and, and then have them recognized by other governments and have them incorporate it into their laws. Something like that but rather than changing their laws and looking at their laws and how we want their laws to fit us. We need to create our own laws.⁵²

In addition to freeing themselves from government control, participants also comment on the need to free themselves from reliance on outside “experts” and to reclaim faith and trust in their own communities to protect their culture. There is a recognition that dependency on Western ways is undermining their own ways. As Andrea Cranmer explains:

Action needs to be taken, enough asking, enough of having people come and telling us what they think we should do, non-native people and linguists, and you name it. We don’t need that. We know what we need to do. We need to put our trust into our own people [so] that we can do the job of saving our language, of teaching our children, of preserving our history, of keeping the U’mista Cultural Centre open, because it’s important. And we don’t need people coming in to tell us that. And what really irritates me is that we pay them such big dollars to do that. It’s so silly.⁵³

Increasingly, First Nations are controlling research by assuming the role of researcher and implementing research protocols and codes of conduct. Formal written protocols are discussed in the Kainai, U'mista and KKTC studies. Central to these protocols is a concern for parity between researchers and the First Nation, and to ensure that the First Nation benefits from the research. Guidelines must allow First Nations to act as gatekeepers to control the use of their knowledge and to correct misunderstandings and misrepresentation of their culture.

Building positive relationships with museum personnel, the scientific community, and resource developers and others and educating them in First Nations law and practices are essential steps to protection and repatriation. Ideally these will be lasting relationships built on moral responsibilities, but participants acknowledge that power imbalances can prevent negotiating positive relationships. The general consensus is that existing Canadian law is ineffective. Reluctance by some participants to rely on Western law reform to address these problems is caused, in part, by the tendency of Western law to ignore distinctions among First Nations' cultures and a perception that legislation will impose inflexible rules that hamper relationship building. Acceptance of legislative reform hinges on First Nations having an active role in its creation and implementation rather than simply receiving a copy of the draft law prior to first reading in the name of "consultation." For those participants emphasizing the importance of respecting First Nations' laws, successful legislative proposals will be those that validate, enable and enforce First Nations' laws. In essence, what is called for is an intercultural dialogue between First Nations' law and Canadian law.

Repatriation, cultural revitalization and heritage protection is costly. Participants are unanimous in their calls for more resources to assist with protection and repatriation efforts.

Participants speak about the significant costs associated with location, negotiation, and return of cultural items and remains. In their view, these costs are properly born by, or at least contributed to by, the government that forced them to hand over their cultural items, the museums who acquired and benefited from their removal and the developers and other private parties who have uncovered First Nations' ancestors and disturbed cultural sites in their exploitation of the land. A similar sentiment is shared with respect to funding for language training. First Nation communities would not be incurring great cost to save their language if not for the assimilative policies of the government.

NOTES

1. In 1995, United Nations Special Rapporteur Dr. Erica Irene Daes proposed a definition of heritage for the purpose of developing international principles and guidelines for protection of indigenous heritage. See 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, 47th sess. E/CN.4/Sub.2/1995/26 (1995). First Nation cultural heritage includes land, language, objects, and knowledge pertaining to a particular First Nation or its territory. Marie Battiste and Sakej Henderson explain in *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich Publishing, 2000) at 65 that indigenous understandings of cultural heritage are not restricted to historical manifestations of knowledge or material heritage and is best understood as that which “belongs to the distinct identity of a people.” This definition is consistent with the range of issues and understandings of “cultural property” raised by participants in the research leading to this volume. The struggle of finding appropriate terminology that respects First Nation understandings and has meaning within a Canadian legal context is addressed in further detail below and in most of the studies in this volume.
2. See e.g. Miriam Clavir, *Preserving What is Valued: Museums, Conservation, and First Nations* (Vancouver: UBC Press, 2002); Tamara Bray, ed. *The Future of the Past: Archaeologists, Native Americans, and Repatriation* (New York: Garland Publishing, 2001); Marie Battiste and J. (Sa’ke’j) Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich Publishing, 2000) [Battiste & Henderson]; Teri Janke, *Our Culture: Our Future. Report on Australian Indigenous Cultural and Intellectual Property Rights* (Sydney: Australian Institute of Aboriginal and Torres Strait Islanders and the Torres Strait Commission, 1998) [Janke]; and Bruce Ziff & Pratima Rao, eds. *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick N. J.: Rutgers University Press, 1997) [Ziff & Rao].
3. Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (Ottawa: Supply and Services Canada, 1996) at 599-601.
4. *Proposed Act Respecting the Protection of Archaeological Heritage in Canada* (Communications Canada, 19 December 1990). The proposed Federal legislation was never enacted for a variety of reasons including concerns raised by Aboriginal organizations about insufficient consultation and failure to include Aboriginal ownership of archaeological resources. Again issues concerning First Nation ownership and jurisdiction resulted in disagreement in the BC review. In the end a section was included in the amended legislation to enable agreements between First Nations and the province concerning cultural preservation and protection of sites and objects. See *Heritage Conservation Act*, R.S.B.C. 1996, c. 87. For further discussion see Catherine Bell, “Aboriginal Claims To Cultural Property in Canada: A Comparative Analysis fo the Repatriation Debate” (1992) 17 Am. Indian L. Review 457 at 495-497, Catherine Bell & Robert Paterson, “Aboriginal Rights to Cultural Property in Canada” (1999) 8:1 Int’l J. of Cult. Prop. 167 at 187 and 192-193.

5. See for example, Simon Brascoupe and Howard Mann, *A Community Guide to Protecting Indigenous Knowledge* (Ottawa: Research and Analysis Directorate, Department of Indian Affairs and Northern Development, 2001).
6. Discussion Papers, Prepared for *Traditions: National Gatherings on Indigenous Knowledge*, 2005) available through online: Canadian Heritage <www.traditions.gc.ca/docs/docs_disc_e.cfm>.
7. A few books have been published in Canada that critically assess the extent to which the rights, needs and interests of indigenous peoples are addressed through Canadian courts, domestic and international heritage laws, and law reform. See *e.g.* Michael L. Ross, *First Nations Sacred Sites in Canada's Courts* (Toronto: University of British Columbia Press, 2005); Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham, N.C.: Duke University Press, 1998); and Battiste & Henderson; and Ziff & Rao, *supra* note 2 also discuss Canada's legal regime within a broader discussion of international law and experiences of indigenous people. In 1992 the Canadian Museums Association and Assembly of First Nations also released a report which considered input from museums and First Nation organizations and made recommendations relating to improving relations between museums and first peoples, including recommendations for repatriation. See *Task Force Report on Museums and First Peoples (Turning the Page: Forging New Relationships Between Museums and First Peoples)* (Ottawa: Canadian Museums Association, 1992). There are many books, articles and reports on indigenous cultural heritage issues and several that critically assess the application and reform of international laws and domestic laws in the United States and Australia. See *e.g.* Michael Brown, *Who Owns Native Culture?* (Cambridge Massachusetts: Harvard University Press, 2003) [Brown] which also contains a list of sources on "Indigenous Cultural Rights" at 299 and Terri Janke, *supra* note 2. Of these Terri Janke's work is framed by consultations and collaboration with indigenous peoples and organizations in Australia. A bibliography of some of the sources used in this work can be found on the project website *infra* note 11.
8. The Aboriginal peoples in Canada include Indian, Inuit and Metis peoples. Our research is concerned with Indian Nations, also referred to in Canada as First Nations. Sonja Tanner-Kaplash and Associates Inc. was hired to conduct the initial research and Catherine Bell was retained as an advisor to U'mista and the research team which included Val Napoleon, co-editor of this volume, Dr. Eldon Yellow Horn and Brenda Beck.
9. R.S.C. 1985, c. 51.
10. The Hamatla Treaty Society and Nedo'at Hereditary Chiefs were also original partners in this study but had to withdraw as a result of other unexpected priorities that arose in their communities.
11. See <<http://www.law.ualberta.ca/research/aboriginalculturalheritage>>. This website contains among other things more detailed community versions of case studies, background research documents including a review of Canadian legislation, workshop proceedings, and original

case study proposals.

12. R.S.C. 1985, c. I-5. Earlier versions expressly ban cultural practices such as the Sundance and Potlatch. See Dale Cunningham, “Canada’s Policy of Cultural Colonization: Indian Residential Schools and the *Indian Act*” in this volume at [GREEN 624-625].
13. Catherine Bell *et al.*, “Repatriation and Heritage Protection: Reflections on the Kainai Experience” at 10.
14. See Appendix One.
15. Susan Marsden, “Northwest Coast *Adawk* Study” at 1.
16. Richard Overstall, in consultation with Val Napoleon and Katie Ludwig, “The Law is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow” at [GREEN 126-127].
17. Brian Noble, in consultation with Reg Crowshoe and in discussion with the Knut-sum-atak Society, “*Poomaksin: Skinnipiikani—Nitsiitapii* Law, Transfers, and Making Relatives—Practices and Principles for Cultural Protection, Repatriation, Redress, and Heritage Law Making with Canada” at [GREEN 371] [Noble]; *supra* note 13 at [GREEN 311].
18. *Supra* note 15 at [GREEN 159].
19. *Ibid.* at [GREEN 160].
20. Noble, *supra* note 17 at [GREEN 395] “*Nitsiitapii*”: ‘real people’ is a term designating how Blackfoot recognize themselves by their practices, laws and relationships with the Creator....” at [GREEN 353].
21. Catherine Bell *et al.*, in consultation with Andrea Sanborn, the U’ mista Cultural Society, and the *Namgis* Nation, “Recovering From Colonization: Perspectives of Community Members on Protection and Repatriation of *Kwakwaka’wakw* Cultural Heritage” at [GREEN 56].
22. *Ibid.* For further discussions of issues of terminology, see Lyndel V. Prott & Patrick J. O’Keefe, “‘Cultural heritage’ or ‘Cultural property’?” (1992) 1:2 Int’l J. Cult. Prop. 307.
23. See *e.g. supra* notes 1 and 2.
24. 25 U.S.C.A. paras. 3001-3013 (West supp. 1991).
25. Brown, *supra* note 7 at 10. Focusing on controversies concerning sacred sites and intangible expressions of indigenous heritage, Brown emphasizes this goal is best advanced through approaches that acknowledge the “inherently relational nature of the problem” including “judicious modification of intellectual property law, development of workable policies for protection of cultural privacy, and reliance on the moral resources of civil society.” For

- discussion of potential negative effects of law reform and NAGPRA see *e.g.* Brown at 213; the Kainai case study, *supra* note 13 at [GREEN 299 and 306] (Frank Weasel Head). This issue is also discussed in several essays in volume two, Catherine Bell & Robert Paterson, eds. **[Publisher complete reference to volume two.]**
26. Richard Lee & Richard Daly, eds., *The Cambridge Encyclopedia of Hunters and Gatherers* (Cambridge: Cambridge University Press, 1999) at 4-5.
 27. Particulars relating to modification of case study methodologies are discussed in the relevant studies in this volume.
 28. See *e.g.* Linda Smith, *Decolonizing Methodologies* (New York: Zed Books, 1999).
 29. R. Rappoport, “Three Dilemmas in Action Research” 23:6 *Human Relations* at 499 as cited in James McKernan, *Curriculum Action Research. A Handbook of Methods and Practices for the Reflective Practitioner* (London: Kogan, 1991) at 4.
 30. Ortrun Zubert-Skerritt, *Improving Learning and Teaching Through Action Learning and Action Research* (Paper presented to the HERDSA Conference, 1992, University of Queensland) [unpublished] at 2 cited in Meagan Gough, *Repatriation as Reflection of Stó:lô Cultural Values: Tset Tha`yeltxwem Te l`ale`n S`olh etawtxw (We are Building a House of Respect)* (Master of Arts Thesis, Department of Sociology and Anthropology, Carleton University, 2004) [unpublished] at 2.
 31. Gough, *ibid.* at 30.
 32. *Supra* note 28 at 10, cited in Gough, *ibid.* at 14.
 33. *Supra* note 14.
 34. *Supra* note 16 at [GREEN 129].
 35. Unfortunately indigenous legal scholar, June McCue (University of British Columbia) had to withdraw. We acknowledge and appreciate her contributions in the earlier phases of this research program. Kelly Russ (Haida lawyer and member of the Canadian Human Rights Commission) participated in our research symposium but was unable to contribute to the publication.
 36. *Supra* note 11.
 37. Catherine Bell & Heather McCuaig, in consultation with the Ktunaxa/Kinbasket Tribal Council and Ktunaxa/Kinbasket Traditional Elders Working Group, “Protection and Repatriation of Ktunaxa/Kinbasket Cultural Resources: Perspectives of Community Members” at [GREEN 479].

38. Eric McLay *et al.*, “‘A’lhut tu tet Sul’hweentst ‘Respecting the Ancestors’: Understanding Hul’qumi’num Heritage Laws and Concerns for Protection of Archaeological Heritage” at [GREEN 208].
39. Gloria Cranmer Webster, “The Potlatch Collection Repatriation” (1995) Special Issue U.B.C. L. Rev. 137 at 141, as cited in *supra* note 21 at [GREEN 94].
40. *Supra* note 13 at [GREEN 307].
41. *Supra* note 37 at [GREEN 429].
42. *Ibid.*
43. This is also emphasized in the HTG and KKTC reports in relation to the return and internment of ancestral remains.
44. *Supra* note 13 at [GREEN 316].
45. *Supra* note 37 at [GREEN 473].
46. *Supra* note 38 at [GREEN 217].
47. *Ibid.* at [GREEN 237].
48. *Supra* note 21 at [GREEN 60].
49. *Supra* note 15 at [GREEN 161].
50. *Supra* note 17 at [GREEN 372].
51. *Supra* note 37 at [GREEN 446].
52. *Ibid.* at [GREEN 482].
53. *Supra* note 21 at [GREEN 83].