

Considering the Legal
and Human Rights
Framework for
**Addressing Mass
Graves Connected
to Indian Residential
Schools**

BY THE INDIAN RESIDENTIAL SCHOOL HISTORY AND DIALOGUE CENTRE

On May 28, the Tk'emlúps te Secwépemc First Nation announced the discovery of a mass grave with 215 unmarked burials at the former Kamloops Indian Residential School. Only one month later, the Cowessess First Nation announced they had discovered 751 unmarked burials on the site of the former Marieval Indian Residential School. Both of these discoveries refute currently accessible official records, in which minimal deaths were recorded for the schools – 50 at Kamloops and 8 at Marieval. We have been reminded of the importance of Survivor testimony, as Elders, Knowledge Keepers and Survivors have provided information on mass graves and unmarked burials at sites across Canada. This news is distressing but unfortunately not shocking: these discoveries are similar to findings emerging from communities across Canada and stories of student deaths have been shared and well documented by Survivors.

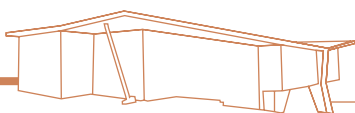
For decades truth-telling and proper investigation of missing children in relation to residential schools has been largely ignored or left to Survivors and communities to advance. This is an enormous burden. Indigenous Peoples must be respected in their territories and Indigenous governments must have the space to shape how this work will now unfold.

The Indian Residential School History and Dialogue Centre at the University of British Columbia will support Survivors and Indigenous communities as the work of investigation, redress, restorative justice, and healing unfolds. It is in this spirit that this paper is being released. The paper proposes some of the legal and policy issues that governments must address, in consultation and cooperation with Indigenous peoples, if a proper and serious framework for addressing unmarked burials and mass graves in Canada is to be established. Canadian law has no established understanding or standards of how to approach the discovery of mass graves or other unmarked burials. This discussion paper explores some of the considerations for a legal and human rights framework for mass graves by examining international approaches and applying them to the Canadian context.

We know this is a time of incredible suffering, pain and loss. For Survivors, families, and communities we must deploy all of our resources and expertise, such as that available at the University of British Columbia, to inform and support the efforts they will lead.

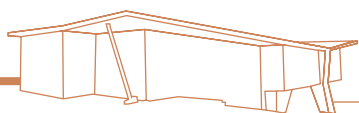
The Centre stands in support of the Tk'emlúps te Secwépemc First Nation, the Cowessess First Nation, and shares in the collective grief being felt across the country. We recognize that this work of recovering and identifying remains of children who were at residential schools is difficult, but it will not be pushed aside.

The Indian Residential School Survivors Society offers emotional, mental and cultural support for residential school Survivors and their families. **A National Residential School Crisis Line has been set up to provide support to former students. This 24-Hour Crisis Line can be accessed at: 1-866-925-4419.**



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Considering the Legal and Human Rights Framework for Addressing Mass Graves Connected to Indian Residential Schools

Amongst the responses to the discovery of a mass grave¹ of 215 children at the site of the Kamloops Indian Residential School, and reports of 751 unmarked burials at the site of the Marieval Residential School, has been discussion of the proper legal and human rights framework for guiding next steps.

There is no established understanding or practice of how to approach the discovery of mass graves in Canadian law. Our federal and provincial legislative regimes have not been developed with the anticipation of the discovery of mass graves. There are many critical questions to be answered including: Who should make decisions about the site and the remains? How should these decisions be made? What is the role of the families? What is the role of the Indigenous Peoples on whose territory the graves are found? What is the role of the federal and provincial governments? What criminal or other investigations may take place, and how must those be conducted?

Answering these questions is not just about the discovery at Tk'emlúps te Secwépemc First Nation or Cowessess First Nation. Other mass graves and unmarked burials have been and will be reported across Canada.

The Truth and Reconciliation Commission (TRC) produced an entire volume on “Missing Children and Unmarked Burials” (Volume 4).² The TRC found that of the 3,200 child deaths they could identify, the schools failed to record a name in almost one-third. The cause of death was not recorded in almost half. There was also an established practice for decades of not sending the bodies of deceased children to their home communities.³ However, the TRC’s work on unmarked burials was incomplete as a result of a refusal of federal funding.⁴ There is much more to learn as more truths are revealed.

According to the findings of the TRC final report on *Missing Children and Unmarked Burials*, the burial practices affiliated with residential schools were wholly unregulated. The report found:

“In the late nineteenth and early twentieth centuries, provincial and municipal governments were either not yet established or in their infancy, and cemetery regulations were non-existent or undeveloped. Given the lack of regulation at the time, it appears that most residential school cemeteries were established informally. It is clear that insufficient consideration was given for the continuing care of graveyards upon closure of the residential schools.”⁵

The National Centre for Truth and Reconciliation (NCTR) initiated a memorial registry of students that died at residential schools in Canada. The registry was created in response to *TRC Call to Action 72*, which states:

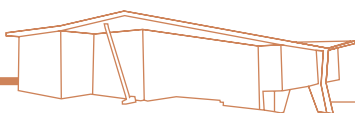
1 For an explanation of terminology see: https://irshdc.ubc.ca/files/2021/06/Terminology_2021.pdf

2 Truth and Reconciliation Commission of Canada (2015). *Canada’s Residential Schools: Missing Children and Unmarked Burials, Final Report of the Truth and Reconciliation Commission of Canada, Volume 4*, Montreal and Kingston: McGill Queen’s University Press, 2015. http://www.trc.ca/assets/pdf/Volume_4_Missing_Children_English_Web.pdf

3 TRC (2015). *Missing Children and Unmarked Burials*, pp. 126.

4 TRC requested \$1.5M to find mass graves at residential schools. The feds denied the money in 2009. *Global News*. June 1, 2021 <https://globalnews.ca/news/7907424/trc-mass-graves-residential-school-federal-funding/>

5 TRC (2015). *Missing Children and Unmarked Burials*, pp. 126.



“We call upon the federal government to allocate sufficient resources to the National Centre for Truth and Reconciliation to allow it to develop and maintain the National Residential School Student Death Register established by the Truth and Reconciliation Commission of Canada.”⁶

The registry was created in consultation with Indigenous communities, Survivors and Elders and provides information to Survivors of residential schools and families of the deceased children. Currently, there are 4,118 children identified on the register.⁷

Further, Indigenous Peoples across the country have knowledge within their communities of where children went, who did not come home, and where bodies are buried. Mass graves are part of the experience of colonialism that Indigenous Peoples have knowledge of. It is essential that an appropriate and timely process, guided by Indigenous Peoples, is established to gather and document this knowledge to ensure it is not lost as we work to establish a clear path forward.

This paper provides preliminary observations and a starting point for a legal and human rights framework regarding unmarked burials and mass graves in Canada. It does so with the view that steps must be taken immediately to ensure proper treatment of the Tk'emlúps te Secwépemc and Cowessess First Nation sites, and other sites that are currently being identified, while laying a proper foundation for addressing future similar discoveries.

Foundations for a Legal Framework for Mass Graves in Canada

There are five foundational understandings for a legal and human rights framework for mass graves in Canada.

1. Existing domestic laws regarding Indigenous cultural heritage, including burial sites, are grossly inadequate

Existing domestic laws that govern Indigenous cultural heritage, including burial sites, are the source of enduring, and escalating conflict and are entirely inappropriate for mass graves.

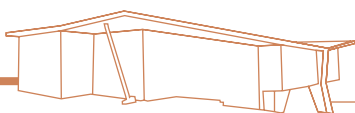
In brief, under the division of powers in the *Constitution of Canada* provincial laws regarding cultural heritage, including historic remains, has been found to be applicable to Indigenous cultural heritage. In British Columbia, for example, this has resulted in the *Heritage Conservation Act*⁸ being found to apply to most instances of the discovery of remains of First Nations Peoples that may date prior to 1846. Such sites, at the same time, are excluded from the *Cremation, Internment and Funeral Services Act*⁹ that affords greater protection.

6 TRC (2015). *Calls to Action*, http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf

7 National Centre for Truth and Reconciliation, Memorial Register, <https://memorial.nctr.ca> accessed 1 June 2021

8 *Heritage Conservation Act*, [RSBC 1996] c 187, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96187_01

9 *Cremation, Internment and Funeral Services Act*, [SBC 2004] c 35, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/04035_01



The effect of this - to state it bluntly - is that historic First Nations burial sites in British Columbia are not treated as burial sites or cemeteries. They are regulated as historic artifacts, under the authority of the provincial government rather than families and communities, and not treated like other human resting places. They are allowed to be disturbed, and in some instances even destroyed. Indigenous protocols and laws are marginalized. While the *Act* includes a provision, section 4¹⁰, that allow for agreements with First Nations about how their cultural heritage will be addressed, the provincial government continues to refuse to utilize this section.

However, this does not mean the federal government does not have a role. Quite the opposite. The federal government has jurisdiction regarding burials on Indian Reserves and the *Indian Act* does speak to reserve land being used for Indian burials.¹¹ The mass grave at Tk'emlúps te Secwépemc is located on reserve, as will be others. Under the *Constitution* the federal government also has powers to legislate matters distinctly regarding "Indians."

Nothing in provincial or federal law, however, speaks to mass graves, or the specific circumstances of mass graves of Indigenous Peoples that were used in the 20th century as the result of atrocities at residential schools. These are not pre-1846 historic sites, nor are they sites of recent burials. They are unmarked potential crime scenes that require rigorous processes of investigation and identification. They are sites of unfinished business and human rights violations where cultural and social burial practices and ceremony to honour the deceased were prevented from taking place.

Discovery of truth, healing, and justice need to move forward in parallel and complimentary ways. There is no existing legal regime to address this.

2. A framework must be co-developed with Indigenous Peoples, and ensure respect for Indigenous traditions, protocols, and cultural norms regarding those who are deceased

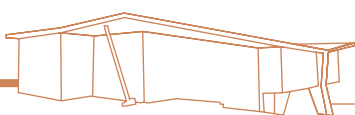
Any legal framework that is developed to address mass graves must be co-developed with Indigenous Peoples, who are the primary peoples to whom the framework will apply. Such co-development will need to meet the standards in the *United Nations Declaration on the Rights of Indigenous Peoples*, which require free, prior and informed consent of Indigenous Peoples on legislative matters that may affect them.¹²

Co-development is also essential for ensuring that the roles of Indigenous laws, protocols, norms, and traditions regarding the treatment of the deceased are reflected within and predominant throughout the framework. Mass graves, such as

10 Section 4(1) states "The Province may enter into a formal agreement with a first nation with respect to the conservation and protection of heritage sites and heritage objects that represent the cultural heritage of the aboriginal people who are represented by that first nation."

11 For example, section 18(2) of the *Indian Act* states "The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct."

12 Article 19.



at Tk'emlúps te Secwépemc, prevented any “last rites” to occur. Children went missing and disappeared. The emotional, spiritual, and social effects of this are profound, interfering with essential practices and rituals that support grieving, healing, and resilience.

The UN Declaration provides guidance on the importance of ensuring the diversity and distinct practices, beliefs and protocols of First Nations are respected.

The preamble and Article 9 of the UN Declaration speak to the diversity of practices and the right to belong to Nations in accordance with traditions including repatriation and cultural practices:

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

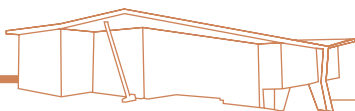
3. A framework must ensure the ability to discover other mass graves, investigate what crimes occurred, and preserve evidence

While the TRC was doing its work, it requested \$1.5 million to help search for and document mass graves. This request was denied by the federal government, though some funding has been provided in recent years. Tk'emlúps te Secwépemc started searching for their lost children two decades ago. They needed to secure funds themselves to do this, and to find the appropriate experts and technology.

We are now confronted with a range of matters for which there are not clear standards, resources, or infrastructure. Local, and even provincial, coroners' offices are not staffed and trained to deal with the complexities of mass graves. Similarly, police forces do not have the resourcing and expertise to undertake the extent of investigations that are now required. This is notwithstanding the tensions that often exist between the police and Indigenous communities, and the historic role of police in enforcing aspects of the residential school system, and other human rights abuses of Indigenous Peoples.

There are also complex questions about how the remains and evidence should be handled and preserved, and how that work will be addressed in a way that respects the need to identify and name the children. There is a need for co-developed standards that will guide the use of these technologies and the data that results from this use to ensure that no further harm is done. Issues of privacy, access, data ownership, and preservation must be informed by the principles outlined in the UN Declaration and Indigenous Peoples must be positioned as leading this process.¹³

13 Gooda, Mick, “The practical power of human rights: how international human rights standards can inform archival and recordkeeping practices.” *Archival Science* (2012) 12: 141-150.



A framework must provide standards and support for all of these matters. Absent this, the risk of further harms, through disturbance or mistreatment of the remains, and the continued denial of the truth, remain.

4. International law norms and standards, and emerging practices regarding mass graves, should be reflected in a domestic legal framework

A framework must be grounded in the international human rights law framework. The right to life of these children was violated. So were “last rights” such as those related to “last rites,” and the religious, spiritual, and cultural rights that are core elements of human identity and experience. Further investigation may reveal at least some causes of death, that may be evidence of violence and criminal harms.

In 2020, the Secretary-General of the United Nations released a report on mass graves, speaking to the emerging international law framework that should govern them.¹⁴ The report highlights that the existence of mass graves evidence acts that violate the “prohibition against enforced disappearances, the obligation to investigate extrajudicial killings, and the right to truth. They may also be an element of the crimes of genocide, ethnic cleansing and related crimes.” The report identifies that where a mass grave is discovered the interests of “individuation and identification” of those who are buried, crime scene investigation and collection of evidence, memorialization, and (re)burial must all be accounted for. The report also states that “consideration of formulation of minimum standards is needed; standards sensitive to local realities, for engaging families, Survivors and affected communities in profoundly important decisions about the treatment and management of mass graves.”¹⁵

Reflecting these realities the report presents that a proper human rights framework for addressing mass graves must clearly include an “obligation to investigate,” an “obligation to search and identify,” obligations regarding respect for human remains, “obligations regarding victims’ families,” and the “obligation of non-repetition and prevention.”

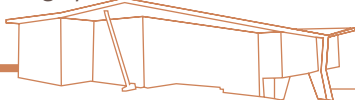
The report also emphasizes the role that **free, prior, and informed** consent must play:

The standard too of “free, prior and informed consent” has resonance for active involvement of communities and their engagement in decisions relating to mass graves. Developed as a principle for protecting the rights of indigenous people, it requires “not merely informing and obtaining consent” from the affected communities, but their “effective and meaningful participation” in decision-making. There is “no one formula that can be copied and pasted into each community” dealing with the wrenching reality of mass graves. Instead, one must understand each community’s individual “political, economic, social, environmental, and ... spiritual factors.” The appropriate treatment for one mass grave is unlikely to be appropriate for all sites, and the treatment of even one site might change over time.¹⁶

14 UN General Assembly, 3rd Committee, Note by the Secretary-General “Extrajudicial, summary or arbitrary executions”

15 Klinkner, M. and Smith, E., *The Bournemouth Protocol on Mass Grave Protection and Investigation*, Bournemouth University (2020), Funded in part by the International Commission on Missing Persons, with Dr. Agnes Callamard. See also: *Universal Standards for Investigation of Mass Graves* <https://www.ejiltalk.org/universal-standards-for-investigation-of-mass-graves/>; Report of the of the Human Rights Council on extrajudicial, summary or arbitrary executions (2020). Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world, <https://www.ohchr.org/en/issues/executions/pages/srexecutionsindex.aspx>

16 Paragraph 75



International legal mechanisms addressing mass graves, atrocity and genocide are complemented by the *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*. Included in the 38 Principles are human rights approaches to truth, the duty to preserve memory, the victims' right to know and guarantees to give effect to the right to know.

A re-examination and application of the Joinet-Orentlicher Principles is important in light of the calls for investigations into the site at the Kamloops Indian Residential School, Marieval Residential School and other schools in Canada. Notably, the rights for Indigenous communities to obtain more information on "past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes." Moreover, how this right to truth "provides a vital safeguard against the recurrence of violations."¹⁷

Amidst calls for immediate action and the establishment of a legal process and a human rights-based approach, the Joinet-Orentlicher Principles emphasize the "effective operation of the judiciary, to give effect to the right to know."¹⁸

5. The human rights of Indigenous Peoples, including those in the United Nations Declaration on the Rights of Indigenous Peoples must be implemented through a domestic legal framework

The legal principles relevant to mass graves in international law and the specific human rights standards of Indigenous Peoples must be applied. British Columbia's *Declaration on the Rights of Indigenous Peoples*¹⁹ and federal Bill-C15²⁰ – both of which affirm and implement the UN Declaration – re-iterate why these standards must form the foundation of a framework for mass graves.

In addition to free, prior and informed consent as noted above, there are other standards in the UN Declaration that are relevant to mass graves. These include article 7:

Article 7

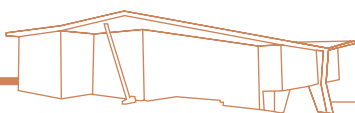
1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

17 United Nations Commission on Human Rights, "Set of principles for the protection and promotion of human rights through action to combat impunity" (E/CN.4/Sub.2/1997/20/Rev.1), 1997. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/141/42/PDF/G9714142.pdf>, pp 7.

18 UN Commission on Human Rights, (E/CN.4/Sub.2/1997/20/Rev.1), 1997. pp. 7-19.

19 Bill 41 - 2019: *Declaration on the Rights of Indigenous Peoples Act*. <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1>

20 Bill C-15 - 2021: *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*. <https://parl.ca/DocumentViewer/en/43-2/bill/C-15/third-reading>



Article 12 and 34 address spiritual rights, including those related to human remains, and the roles of Indigenous laws and institutions:

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.

Article 34

1. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

The UN Declaration speaks to the effective resolution of conflicts with the state about the violation of any rights. A legal framework is an avenue for providing a path to resolution in relation to mass graves:

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous Peoples concerned and international human rights.

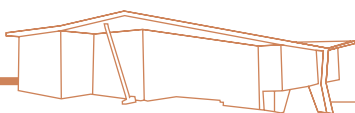
Elements of a Legal and Human Rights Framework for Mass Graves in Canada

There are six preliminary elements proposed as the core of a legal and human rights framework for mass graves in Canada. All of the foundations discussed above would be reflected in each of these elements.

1. Appointment of a Special Rapporteur as an interim step

There is an urgency to ensure a proper, structured, process and dialogue is taking place now with regards to the mass grave at Tk'emlúps te Secwépemc First Nation and recent discovery at Cowessess First Nation. This cannot await the establishment of a legislated framework.

It is proposed that a Special Rapporteur be appointed now, chosen jointly by the federal government and Indigenous Peoples. The Special Rapporteur must have expertise in the rights of Indigenous Peoples, international and domestic law, human rights law, and experience in investigations.



The responsibilities of the Special Rapporteur would include the following:

1. Engage in dialogue directly with Tk'emlúps te Secwépemc and Cowessess First Nations, as well as other sites as identified, and based on that dialogue, make recommendations on actions the federal government, as well as provincial and federal governments, should take regarding mass graves and unmarked burials.
2. Assist in facilitating co-operation between all jurisdictions on near term next steps to be taken at the Tk'emlúps te Secwépemc and Cowessess First Nations' sites.
3. Develop, through dialogue with Indigenous Peoples, governments, and experts, a recommended federal legal framework for mass graves.
4. Support the development of actions and approaches that advance redress, restorative justice, and healing.

Additionally, an immediate end must come to all concealing of records and archival material about the Kamloops Indian Residential School and all residential schools. The Special Rapporteur, in full partnership with Indigenous Peoples, should have the ability to identify, access, and control all records related to the schools.

2. A prohibition on hiding, damaging, interfering with or destroying mass graves, with criminal sanctions

The legal framework must include clear elements that ensure that whatever mass graves exist in Canada are identified, made public, and protected. This must extend to imposing criminal sanctions on any efforts to hide information (including documentary information) regarding the existence of such sites, as well any interference or destruction of such sites.

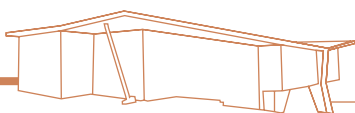
In effect this prohibition is to support truth-telling and ensure that standards are applied to how sites are treated once discovered.

3. Establishment of a public guardian responsible for the identification of all unmarked burial sites, and protection of mass graves from damage, interference or destruction

A legal framework requires a positive obligation to identify and protect such sites. A public office, such as a public guardian, should be charged with carrying out that obligation. In effect this body would be doing what the TRC was blocked from doing due to lack of federal government funding.

The public guardian's powers would include identifying all unmarked burial sites connected to residential schools and protect these from erosion, destruction, manipulation or disturbance.

The public guardian would also be responsible for working in partnership with Indigenous Peoples through the required establishment of protocols and agreements regarding standards to be applied, as well as the identification and protection of specific sites. This may include putting in place confidential processes so information supporting investigations, identification of remains, and identification of sites can be brought forward.



4. Regulation of standards for the use of digital technologies to discover and document mass burial sites

The framework must facilitate and regulate the use of digital technologies to discover mass burial sites. There is a need to protect the personal information that might be revealed and ensure that the information gathered is documented and protected to the standard required should it be required for future legal proceedings. As well, the roles of families and communities in owning information about their deceased loved ones must be confirmed. This documentation must be used to ensure there is complete accountability for the death and/or inhumane disposal of the remains.

There are no clear standards currently in place in Canada. There are some standards that have been developed such as the Bournemouth University *Mass Grave Protection and Investigation Guidelines*. Drawing on these guidelines will be important. As they are described:

Mass graves contain evidence that is essential to the effective realisation of truth, justice and perpetrator accountability. Effective rules and procedures for the protection, maintenance and investigation of mass graves are therefore vital. At present, however, while there are a number of best practice approaches in operation amongst various actors in the field, no universal, shared or common standards exist. Through a participative and consultative process, this Protocol fills that gap. It neither duplicates nor replaces existing documents on principles and good practice. Instead it offers a unifying inter- and intra-disciplinary approach to mass grave protection and investigation. It follows the chronology of these processes in their entirety with a multitude of stakeholders, disciplines and mechanisms coming together for the dual, and mutually reinforcing, purpose of advancing truth and justice....²¹

The public guardian would play a role in ensuring standards are clear and applied, and updated as needed as technology continues to emerge.

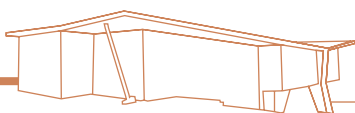
5. Mandated roles and authorities for Indigenous families and governments

Victims' families, Survivors and Indigenous governments must have clearly recognized roles and authorities within the legal framework. These must meet international legal standards, including free, prior, and informed consent, and the jurisdiction of Indigenous laws and traditions. As well, the framework must include a proper focus on redress, restorative justice, healing, and protecting the memory of the lives of the children, families and communities affected.

6. Reflecting leading standards regarding memorialization

As noted earlier, there is growing understanding of the importance of memorialization processes in the context of serious violations of human rights and the principles and international legal framework that governs them. This includes standards on writing and teaching of history, broader public and social discourses, imagery and representation, and archiving. As the United Nations has observed "*positive work in the area of memory not only helps to build democratic cultures in which human*

21 Klinkner, M. and Smith, E., *The Bournemouth Protocol on Mass Grave Protection and Investigation*, Bournemouth University (2020): p. 3.

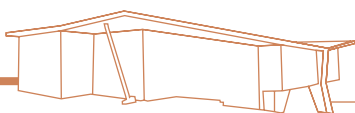


*rights are respected but also fulfils the legal obligation of States to guarantee human rights.*²² There is an obligation at international law for states to have memorialization processes and that “without memory, the rights to truth, justice and full reparation cannot be fully realized and there can be no guarantees of non-recurrence.” These must be incorporated and reflected in a domestic legal framework governing mass graves in Canada.

Conclusion

The Foundations and Elements identified in this paper are intended to advance the discourse that is urgently needed on a legal and human rights framework for mass graves in Canada. In the international arena, critical work has been done on such a framework, but domestically there is effectively nothing. It is imperative that governments, working in co-operation with Survivors, families, and communities, as well as experts, start immediately putting the pieces of a domestic framework in place. This work cannot wait. As more sites are learned about, it is necessary to have a clear path of what must be done to ensure that truth-telling, justice and accountability, and redress and healing can all occur as they must.

22 United Nations Human Rights Council, “Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice - Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence” A/HRC/45/45. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/175/70/PDF/G2017570.pdf>




APPENDIX:

International human rights and legal considerations in relation to terminology and the discovery of undocumented burials at the Kamloops Indian Residential School

June 9, 2021

DISCUSSION ON TERMINOLOGY

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INTERNATIONAL HUMAN RIGHTS AND LEGAL CONSIDERATIONS IN RELATION TO TERMINOLOGY AND THE DISCOVERY OF UNDOCUMENTED BURIALS AT THE KAMLOOPS INDIAN RESIDENTIAL SCHOOL

DISCUSSION ON TERMINOLOGY

June 9, 2021

Mass Grave or Unmarked Burial?

Many former residential school sites in Canada include a cemetery and it has been suggested that a majority may include an unmarked burial site. At this time there is not sufficient information to confirm how many marked or unmarked burial sites exist, however, investigations are ongoing. The Truth and Reconciliation Commission of Canada (TRC) Final Report, Volume 4 was dedicated to the [Unmarked Burials and Missing Children](#) of the residential school system. The term “unmarked burial” emerged during the TRC process to describe the physical sites of former residential schools and where Survivors or communities indicated burial sites. It was noted that often there was no formal designation of those sites as cemeteries.

Following the May 27, 2021 news release from Tk'emlúps te Secwépmeč on the discovery of unmarked and undocumented burials at the site of the Kamloops Indian Residential School (KIRS), the preliminary reports indicated use of the term “unmarked burial.” After the Tk'emlúps te Secwépmeč May 31, 2021 [press release](#), news agencies have updated their usage of the term “mass graves” and instead have used “unmarked burials” consistently.

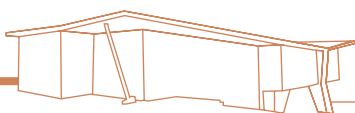
The discovery of unmarked or undocumented burials (as records are incomplete or unavailable in the KIRS situation) proximate to an Indian residential school calls for reflection on what the appropriate legal and policy framework should be for assessing the site, and referring to it in public discussion.

Of note are a number of international humanitarian and human rights considerations relevant to the context of Indigenous Peoples. The residential school policies were part of state-sanctioned colonialism. Law and policy governing residential schools mandated the forced removal of children under the objective of “education.” Generations of Survivors have testified that this system of forced removal to attend the denominational schools resulted in massive human rights violations. Canada’s policies authorized the forced removal of children without the consent of individuals, families and Indigenous communities. Guardianship over the lives of the children were passed to the various religious entities running the schools on behalf of Canada.

At the international level, experts and organizations have been working for many years on some standardized language and protocols to address missing persons, and in particular the context of an undocumented burial site or “mass grave.” This work is relevant to the situation in Canada with the discovery of a burial site proximate to a residential school in Kamloops.

The [International Commission on Missing Persons](#) has assisted this work and supported the publication of a Protocol on the matter, entitled the *Bournemouth Protocol on Mass Grave Protection*.¹ The Protocol was published in 2020

1 Klinkner, M. and Smith, E., (2020) *The Bournemouth Protocol on Mass Grave Protection and Investigation*, Bournemouth University. <https://www.bournemouth.ac.uk/research/projects/mass-grave-protection-truth-justice>; see also: International Commission on Missing Persons: Legal Frameworks and Rights. <https://www.icmp.int/the-missing/legal-frameworks-and-rights/>



and is the product of extensive dialogue with global experts, those who have processed mass graves in a variety of contexts, and international bodies responsible to address state accountability for human rights violations. The foundation for the work on the mass grave protocol is recognition that it is the obligation of the State to investigate and account for instances of mass graves, especially where the location suggests a connection with human rights violations. The obligation under these protocols is with the State in which the grave is found, guided by protocols, and a number of working definitions and standards, which are offered to promote accountability, investigation and reporting on these matters.

In the Protocol, the definition of **mass grave** is defined as:

“A site or defined area containing a multitude (more than one) of buried, submerged or surface scattered human remains (including skeletonised, commingled and fragmented remains), where the circumstances surrounding the death and/or the body-disposal method warranting an investigation as to their lawfulness.”

Missing person is defined as

“Persons missing as a result of conflict, human rights abuses and/or organised violence.”

Victim is defined as

“Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in the state or as a result of acts which constitute gross violations of international human rights law or serious violations of international humanitarian law.”

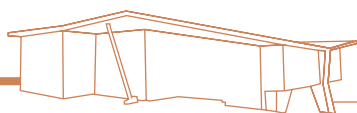
While the preference of certain First Nations might be to refer to unmarked burials of their cherished relations, as the lens shifts to the framework for analysis and consideration of next steps, the international standards and protocols should inform terminology and dialogue. In this respect, the emerging international human rights and legal norm is to classify such sites as “mass graves”

Cultural Genocide, Genocide, or Ethnocide?

In addition to various terminology to refer to the site of the mass grave, there are a variety of terms in use in relation to the concept of the crime of genocide, and recently the Prime Minister of Canada has used the phrase genocide in relation to the impact of colonial policies on Indigenous Peoples.²

The term “cultural genocide” was used in the reports of the Truth and Reconciliation Commission, to frame the

² Here’s the 1st steps Canada plans to take in light of the MMIWG inquiry.” (June 3, 2021). Global News. <https://globalnews.ca/news/7918083/mmiwg-federal-commitment-action-plan/>



nature of the destruction caused by residential schools as a cultural loss and not the extermination or intentional eradication of Indigenous Peoples.

According to the Truth and Reconciliation Commission of Canada (2015):

“**Cultural genocide** is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.”³

The term “genocide” was used in the papers and reporting by the National Inquiry into Missing and Murdered Indigenous Women and Girls. The position advanced was that the totality of colonial policies and practices of the Crown amounted to the effect of a genocide.

The Supplementary Report on a *Legal Analysis of Genocide* for the Inquiry on Missing and Murdered Indigenous Women and Girls states:

“...**genocide** has been empowered by colonial structures, evidenced notably by the *Indian Act*, the Sixties Scoop, residential schools and breaches of human and Indigenous rights, leading directly to the current increased rates of violence, death, and suicide in Indigenous populations.”⁴

There is no international category of “cultural genocide” as it was considered during the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide⁵, but not included in the final definition. Article 3 states:

Article III

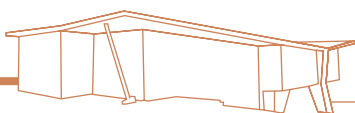
The following acts shall be punishable:

- a. Genocide;
- b. Conspiracy to commit genocide;
- c. Direct and public incitement to commit genocide;

3 Truth and Reconciliation Commission of Canada, (2015) *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, Montreal & Kingston: McGill Queens Press, pp. 1.

4 National Inquiry into Missing and Murdered Indigenous Women and Girls, *Supplementary Report: A Legal Analysis of Genocide*, pp. 4 https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf .

5 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948. https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.



- d. Attempt to commit genocide;
- e. Complicity in genocide.

There have been considerations for the use of the term genocide as it applies to the UN Genocide Convention and its inclusion of Article 2 and “forcibly transferring children of the group to another group.” Article 2, parts a) to e) state:

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

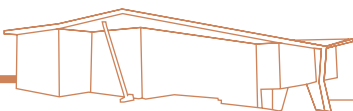
- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.

The interplay between “genocide” and the term “ethnocide” is relevant to discussion of article 8 of the *United Nations Declaration on the Rights of Indigenous Peoples*,⁶ and in particular in relation to policies that seek to intentionally disrupt the transmission of identity and culture through residential schools. Article 8 states:

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

The context of the Declaration’s restatement of human rights protections and standards for Indigenous Peoples,

6 Pruiim, S. (2014). “Ethnocide and Indigenous Peoples: Article 8 of the Declaration on the Rights of Indigenous Peoples.” 35(2) *Adelaide Law Review* 269. <https://law.adelaide.edu.au/system/files/media/documents/2019-02/ch4-alr-35-2-pruim.pdf>.



is valuable as Canada and British Columbia have committed to implement the Declaration as the framework for reconciliation. This was recommended by the TRC as the framework for reconciliation at all levels.

“Genocide,” “cultural genocide” and “ethnocide” each have specific legal meanings, require distinct processes or state responses, and involve a variety of international standards and mechanisms to be considered. Furthermore, these concepts are related to matters of reparation, redress and restoration for the harm caused.⁷

More dialogue and discussion is required, but care should be taken to assess these terms and consider how to frame and construct an appropriate approach to the residential schools missing children and mass grave work that must be undertaken.

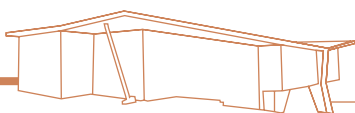
Dialogue and Discussion Required

The framework for the assessment of missing children and mass graves such as was recently confirmed in British Columbia, is a new area of assessment and consideration from a normative viewpoint. These key concepts will be discussed and considered by the First Nations impacted, and Tk'emlups te Secwépmeč has requested time to reflect and develop its approach to this situation, and how it will advance accountability and protection, while honouring the lives of those at the site.

These are fundamental questions and are not to be answered in haste at this point as people come together to support each other with the impact of this revelation, and consider next steps. While we are contending today with laws, policies and practices of the past, the impacts are with us afresh, and the extent to which these impacts were known for some time informs the context.

Dr. Peter Henderson Bryce, a former Chief Medical Officer for the federal government and advocate for the health of Indigenous children living in residential schools, spoke out as early as 1907 about the unacceptable conditions and risk of [deaths of children](#) in the schools. Dr Bryce stated that the churches and the federal government had the means to save many lives but failed to take adequate action in the face of known concerns. Further evidence from Dr. Bryce's inspections suggests that the numbers of student deaths over time were much higher when taking into account that many children died shortly after leaving the schools.

7 Logan, Tricia. (2018) “Questions of Privacy and Confidentiality after Atrocity: Collecting and Retaining Records of the Residential School System in Canada” 12(1) *Genocide Studies International*, pp. 100.



Final Thought

As we lack the full disclosure of church and state records regarding Indian residential schools, it is important to hold space for dialogue and reflection surrounding the terminology and framing of the situation. There is an urgent need to ensure that all records related to the Indian Residential School System and its operations by the church are made available, without exception, to appropriate entities to support the identification of missing children and to ensure that protocols can be followed for the investigation of a mass grave. The religious congregations that operated the Kamloops Indian Residential School must immediately make all records available and accessible to Tk'emlúps te Secwépmeč First Nation.

The Indian Residential School History and Dialogue Centre stands in support of Tk'emlúps te Secwépmeč First Nation, all Indigenous Peoples in BC and Survivors of residential schools and will assist in the areas of our expertise on records, archives and living testimony of Survivors to support a full and accessible record of the disturbing discovery.

