

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

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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.

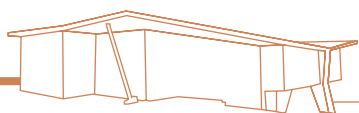
For decades truth-telling and proper investigation of missing children in relation to residential schools has been largely ignored or left to Survivors and communities to advance. This is an enormous burden. Indigenous Peoples must be respected in their territories and Indigenous governments must have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



## 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 grave<sup>1</sup> 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).<sup>2</sup> 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.<sup>3</sup> However, the TRC’s work on unmarked burials was incomplete as a result of a refusal of federal funding.<sup>4</sup> 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.”<sup>5</sup>

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:

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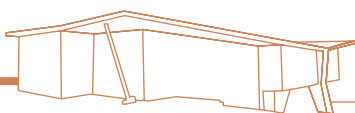
1 For an explanation of terminology see: [https://irshdc.ubc.ca/files/2021/06/Terminology\\_2021.pdf](https://irshdc.ubc.ca/files/2021/06/Terminology_2021.pdf)

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](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.”<sup>6</sup>

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.<sup>7</sup>

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*<sup>8</sup> 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*<sup>9</sup> that affords greater protection.

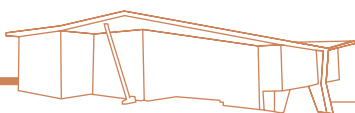
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6 TRC (2015). *Calls to Action*, [http://trc.ca/assets/pdf/Calls\\_to\\_Action\\_English2.pdf](http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf)

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](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](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 4<sup>10</sup>, 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.<sup>11</sup> 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.<sup>12</sup>

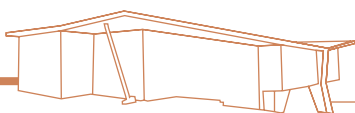
Co-development is also essential for ensuring that the roles of Indigenous laws, protocols, norms, and traditions regarding the treatment of the deceased are reflected within and predominant throughout the framework. Mass graves, such as

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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**

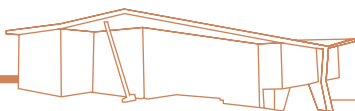
While the TRC was doing its work, it requested \$1.5 million to help search for and document mass graves. This request was denied by the federal government, though some funding has been provided in recent years. Tk'emlúps te Secwépemc started searching for their lost children two decades ago. They needed 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.<sup>13</sup>

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13 Mick Gooda. “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.<sup>14</sup> 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.”<sup>15</sup>

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:

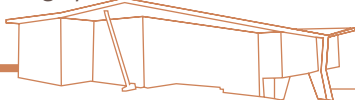
The standard too of “free, prior and informed consent” has resonance for active involvement of communities and their engagement in decisions relating to mass graves. Developed as a principle for protecting the rights of indigenous people, it requires “not merely informing and obtaining consent” from 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.<sup>16</sup>

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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."<sup>17</sup>

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."<sup>18</sup>

##### **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*<sup>19</sup> and federal Bill-C15<sup>20</sup> – 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.

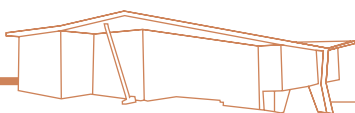
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17 United Nations Commission on Human Rights, "Set of principles for the protection and promotion of human rights through action to combat impunity" (E/CN.4/Sub.2/1997/20/Rev.1), 1997. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/141/42/PDF/G9714142.pdf>,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

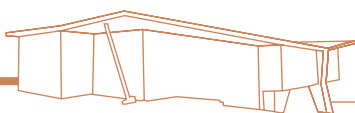
## Elements of a Legal and Human Rights Framework for Mass Graves in Canada

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.

### *2. 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 school.

## ***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.

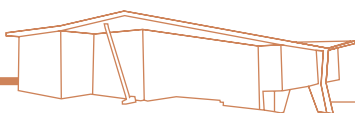
In effect this prohibition is to support truth-telling and ensure that standards are applied to how sites are treated once discovered.

## ***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....<sup>21</sup>

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**

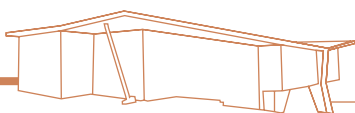
Victims' families, Survivors and Indigenous governments must have clearly recognized roles and authorities within the legal framework. These must meet international legal standards, including free, prior, and informed consent, and the jurisdiction of Indigenous laws and traditions. As well, the framework 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*

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<sup>21</sup> 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.*<sup>22</sup> 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.

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**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>

