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# **Protection of First Nations Cultural Heritage**



## Law and Society Series

W. Wesley Pue, General Editor

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.

*Protection of First Nations Cultural Heritage* is the second of two volumes. The first volume is *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*, edited by Catherine Bell and Val Napoleon. Both are in the Law and Society series.

*Cover image:* On the cover of this book is a photograph of a Tsimshian portrait mask collected by Robert James Dundas at Metlakatla, British Columbia in 1863. The editors and publisher gratefully acknowledge the permission of Sotheby's and the Carey family to use the photograph of the mask. The photograph has been reproduced in consultation with the Allied Tsimshian Tribes of Lax Kw'alaams and Metlakatla.

*Edited by Catherine Bell and  
Robert K. Paterson*

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**Protection of First Nations  
Cultural Heritage  
Laws, Policy, and Reform**



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# Preface: Towards Reconciliation

*Darlene Johnston*

I remember a time (in the summer of 1990) when, as a freshly trained lawyer heading home to my reserve to work on fishing rights and land claims, I believed that law was the answer. The law that I had in mind was Canadian constitutional law, s. 35 of the *Constitution Act, 1982* to be precise.<sup>1</sup> Section 35 recognizes and affirms the “existing aboriginal and treaty rights” of the aboriginal peoples of Canada. The Supreme Court of Canada had just released its inaugural decision on s. 35 in the case of *R. v. Sparrow*.<sup>2</sup> Employing a generous and liberal interpretive approach, the Court held that aboriginal rights not extinguished by clear and plain legislative intent prior to 1982 were thereafter protected from Crown extinguishment. However, their exercise remained subject to regulatory infringement after 1982, provided a strict justification standard could be satisfied by the Crown. With a zealous confidence, the recollection of which now makes me cringe, I exhorted our chief and council to raise a *Sparrow* challenge to the prosecution that our fishers were facing for exceeding quotas Ontario had imposed in 1984, arguably in violation of our aboriginal and treaty rights. As it turned out, we won our case.<sup>3</sup> You see, this was a time when the *Sparrow* test was one that First Nations were capable of meeting. In 1996, aboriginal rights would be restricted by the *Van der Peet* decision to only those practices that could be proven to have been integral to our distinctive precontact cultures.<sup>4</sup> And in the companion case, *R. v. Gladstone*, reconciliation became a vehicle for infringement in the name of non-aboriginal appeasement.<sup>5</sup> Justifications for interfering with aboriginal constitutional rights were extended from rationales connected to maintaining aboriginal rights, or ensuring they were not “exercised in a dangerous way,” to include public interest rationales previously rejected, such as pursuit of economic and regional fairness.<sup>6</sup> And still I cringe, because I did not anticipate the turn that s. 35 jurisprudence would take. If our win had been appealed, we could not have made it to the Supreme Court before 1996 when *Van der Peet* and *Gladstone* turned the tables.<sup>7</sup>

However, even before my loss of faith in the transformative power of s. 35, my eyes were opened to another source of law. Preparation for our fishing rights trial had led me to the safe in the basement of the Band Office. There I found our community archives, a testament to sovereignty in action. The collection of nineteenth-century land sales books and letter-books, which had been maintained by federally appointed Indian agents, had narrowly escaped destruction. In the late 1960s, when Chief Wilmer Nadjiwon emphatically informed the last Indian agent that his services were no longer required, the latter attempted to burn the books in a large metal garbage barrel outside the Old Council Hall.<sup>8</sup> Although some records were destroyed, most were saved by the intervention of the caretaker, George Keeshig.

While searching through the letter-books, hoping to find some reference to fishing rights, my eyes were drawn to an ancestral name: Kegedonce. It was in a letter dated 3 March 1902, reporting on a meeting of elders convened to discuss the status of a burial ground located on our old reserve near Owen Sound.<sup>9</sup> My grandmother's grandfather, Peter Kegedonce Jones, a signatory to the 1857 treaty that had surrendered that reserve, stated that the burial ground in question contained the remains of parents and grandparents of the elders present at the 1902 meeting. In negotiating the 1857 treaty, our chiefs had explicitly excepted the community burial grounds from the surrender of land, assuming that the burial ground would be protected if reserved from the treaty.<sup>10</sup> As I read this letter, my heart sank like a stone. At that moment, I realized the difference between reading and knowing. I had read the 1857 treaty dozens of times. But it never occurred to me that the fourth condition – “that an acre to be reserved for a burying ground” – actually referred to ancestral burials. Owing partly to the poor translation from Ojibway to English, I had always assumed the land had been set aside for future use as a burial ground. Panic set in as I realized that I didn't know where the burial ground was, and neither did anybody else whom I asked. It took a trip to Ottawa to locate the original Crown survey of the surrendered land, which clearly showed the “graveyard” on Amelia Street in the town plot of Brooke (now Sixth Avenue West, Owen Sound) and then a shorter, but more painful, trip to Owen Sound (an hour by car from our reserve) to discover two relatively new homes standing where the burial ground should have been.

The survey did not reflect the terms of the treaty and the burial grounds had, over time, been treated as surrendered lands. Further archival research revealed that the elders' meeting in 1902 had been organized in response to a municipal request to purchase the burial ground. Without consent from our First Nation, and in clear breach of the treaty and federal statutory regime, the Department of Indian Affairs sold the burial ground in 1903 to the surrounding township of Sarawak, on the condition that the township undertake to remove all the burials to a nearby cemetery. For its part, the township leased our burial ground to a local brick-making company anxious

to take advantage of the clay deposits. A local lawyer, Mr. Tucker, expressed the only outrage to be found in the archival record. He paints a grisly picture, explaining that aboriginal burial practices did not employ coffins, with the result that the ancestral remains “had become part of the soil and this soil is being used for the manufacture of bricks and no effort is being made whatever to protect any portion of the remains where the bodies are in this condition, and only where the bodies are well defined has anything in the nature of confining been attempted. The township never should have been given any right whatever.”<sup>11</sup> Frank Pedley, deputy superintendent of Indian affairs, responded to Mr. Tucker, justifying the sale to the municipality due to “the danger to health arising from the bodies interred in this burial ground.”<sup>12</sup> Obviously, the health of the brick workers, let alone the integrity of the deceased, was not taken as seriously. The sale to the municipality was never cancelled. But neither was a Crown grant issued, presumably because the removal condition was not proven to departmental standards.

The sickening shock and anger I felt when reading these documents made for a sleepless night. As the sun rose on the day I was to meet with chief and council, I made a promise to the disinterred to do all that could be done to make amends. Yet nothing in my legal training had prepared me for the task that lay ahead. Over the weeks and months that followed, I realized my job was simply to create legal space, relying on the reserve status of the lands to shield community members from outside interference as they set about making things right. To make a long story short, a peaceful on-site eight-day vigil resulted in an agreement that provided for removal of the houses from the burial ground and compensation for those who had initially purchased the houses. Out of this experience of desecration and utter disrespect, there emerged a collective, considered, coordinated community response that I soon recognized as aboriginal law in action.

Regrettably, as some chapters in this volume attest, stories of such desecration are not isolated.<sup>13</sup> In my work, I’ve yet to encounter a First Nation that has not experienced violations of its ancestral burial grounds. In the decade that I spent working at home, there was never a time when there was not at least one burial ground matter to be dealt with. What was formerly known as our Land Claims Committee soon became the Land Claims and Burial Grounds Committee. The Law of the Dead as it exists within our, and other, indigenous legal systems is not something that is learned in most Canadian law schools, at least not as they are currently configured. For aboriginal lawyers and scholars, it is the most powerful reminder that our law is sourced elsewhere and continues to operate despite the state’s best efforts at destabilization and assimilation of indigenous laws and peoples.

This book is the second of two companion volumes arising from a long-term collaboration between an interdisciplinary team of scholars and First Nation partners. Although it is not necessary to read the first volume to

follow and appreciate the arguments in the second, it is the first volume that emphasizes the voices of First Nations sharing their experiences, laws, and practices concerning control and protection of their tangible and intangible cultural heritage, including burial grounds – experiences faced by many aboriginal peoples in Canada. Some of these voices are carried into this volume through examples in the text and notes. Both books bring home to the reader the centrality of cultural heritage to the survival of indigenous peoples and how many forms of our cultural heritage (not just our burial grounds) are at risk.

A challenge to the authors in this volume, in drawing on indigenous experiences as one source in their academic analysis, is to give equal consideration to indigenous legal traditions, respond in a respectful manner, and ensure our voices are heard and not lost in consideration of other interests. Prior to reconciliation of our interests with those of the broader Canadian public, we must establish relationships and not continue in separate conversations. As Howell and others demonstrate, in some areas, such as intellectual property law, this may require unique approaches if law is to be at all helpful and emancipatory. This is a theme emphasized in many of the chapters; that is, the need to restructure relationships at all levels, including personal, professional, legal, and political. First Nations have shown great generosity in teaching, speaking to, and negotiating with those institutions that have in the past, and that may well in the future, continue to oppose their just claims. The fundamental principles of reconciliation and reciprocity demand a response.

Many contributors to this volume have demonstrated strong commitment throughout their careers to heritage protection; some are willing to go further out on a limb for indigenous peoples than others. Michael Asch, in the concluding chapter, leads the charge. I recommend reading his chapter first and keeping his comments in mind throughout. He asks the simplest questions, which reveal the absurdity of the status quo: “What could be more reasonable than a desire to ensure that you are the custodian of your own cultural heritage? And what could be more unreasonable than holding another people’s cultural heritage, of ongoing significance to them, in your hands?”<sup>14</sup> Val Napoleon asks an even harder question: “Does adding the ‘cultural’ label to property facilitate its commodification and cause its vulnerability?”<sup>15</sup> Reg Crowshoe has offered one answer: “I would say there is our Nitsitapii properties, whether it’s cultural property or not, the word ‘culture’ is a white man’s problem, not ours.”<sup>16</sup>

But “culture” becomes our problem if we want to rely on s. 35 and the courts to protect our rights. Several chapters in this volume remind us of this and the many problems associated with the *Van der Peet* test of integrality to distinctive precontact cultures. Even though we can manipulate Canadian constitutional law in limited instances to facilitate the protection of

our cultural heritage, I agree with those who argue that a radical shift in legal and political relations is necessary before the concerns of aboriginal peoples in Canada can be meaningfully addressed. All authors point to the need for negotiation rather than litigation, yet some also argue that imbalances of power in negotiation may require some legal and other reforms. Some also demonstrate how, despite these imbalances, cultural heritage professionals and institutions controlling cultural heritage are taking steps to respond to the needs of aboriginal peoples of Canada independent of law reform. However, more needs to be done.

On 13 September 2007, the United Nations General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>17</sup> As Ahmed, Coombe, and others argue in this volume, this is one of many international legal instruments that recognize the relationship between (1) protecting and controlling cultural heritage and (2) indigenous human rights, including rights of self-determination, religious freedoms, self-government, life, practise and revitalization of cultural traditions, and physical and mental integrity. Among other cultural heritage rights, it recognizes the rights of indigenous peoples to protect, maintain, and have access to their cultural sites; use and control ceremonial objects; maintain, protect, and control their intellectual properties; and repatriate their human remains.<sup>18</sup> It calls on states to “enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.”<sup>19</sup> Again I was disappointed, yet not surprised, when countries with colonized indigenous peoples who purport to be leaders in the area of human rights – notably Canada, the United States, Australia, and New Zealand – refused to support the Declaration. However, as authors in this volume demonstrate, we will not stop our struggle. Within Canada there are some mechanisms we can use to move forward, and the tide of international opinion will, we hope, help to persuade governments, if not courts, to increase the pace. Given the interests affected, the existence of relevant indigenous laws and processes, the growing appreciation by non-indigenous institutions and professions of the centrality of cultural heritage and ancestral responsibilities to indigenous human rights and dignity, intercultural and interdisciplinary negotiations today in Canada may hold more promise for reconciliation and protection than recourse to Western law.

#### Notes

- 1 Section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The aboriginal peoples of Canada include the Indian, Inuit, and Métis peoples.
- 2 [1990] 3 C.N.L.R. 160 (S.C.C.).
- 3 *R. v. Jones* (1993), 14 O.R. (3d) 421 (Ontario Court – Provincial Division).
- 4 [1996] 2 S.C.R. 507.

- 5 [1996] 2 S.C.R. 723.
- 6 *Ibid.* at para.75.
- 7 For a critical analysis of the slippage permitted by the Lamer Court, see K. McNeil, "How Can Infringement of Constitutional Rights be Justified?" (1997) 8:2 Constitutional Forum 33 at 35.
- 8 This story was related to me by former chief Wilmer Nadjiwon.
- 9 Resident Indian Agent Letterbook (1901-19) at 106-7 [archived at the Chippewas of Nawash Land Claims Office, Cape Croker, Ontario].
- 10 Treaty No. 82, dated 9 February 1857.
- 11 Letter dated 18 July 1903, to the Deputy Superintendent General of Indian Affairs, Library and Archives Canada (LAC), Department of Indian Affairs, RG 10, vol. 3053, file 244,210.
- 12 Letter dated 20 July 1903, LAC, RG 10, vol. 3053, file 244,210.
- 13 See also, *e.g.*, in the companion volume to this book, Eric McLay, *et al.* "*Allhut tu tet Sul' hweentst* [Respecting the Ancestors]: Understanding Hul'qumi'num Heritage Laws and Concerns for Protection of Archaeological Heritage" in Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver: UBC Press: 2008), 150.
- 14 Michael Asch, "Concluding Thoughts and Fundamental Questions" in this volume at 394.
- 15 Val Napoleon, "Looking beyond the Law: Questions about Indigenous Peoples' Tangible and Intangible Property" in this volume at 371.
- 16 B. Noble, "*Poomaksin*: Skinnipiikani-Nitsiitapii Law, Transfers, and Making Relatives – Practices and Principles for Cultural Protection, Repatriation, Redress, and Heritage Law Making with Canada" in Bell and Napoleon, *supra* note 13 at 291.
- 17 GA Res. 295, UN GAOR, 61st Sess., UN Doc. A/RES/61/295 (2007) online: *UN Draft Declaration on the Rights of Indigenous Peoples* <<http://www.Ohchr.org/English/issues/indigenous/declaration/htm>>.
- 18 *Ibid.* ss. 12 and 31.
- 19 *Ibid.* s. 12.

# Acknowledgments

The initial idea for research leading to publication of this and its companion volume (*First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*) emerged from a smaller research project conducted by Sonja Tanner-Kaplash and Associates and sponsored by the U'mista Cultural Society, First Peoples' Cultural Foundation, and the First Nations Confederacy of Cultural Education Centres. It would not have come about without the dedication of the late Linda Manz of Alert Bay (executive director of the U'mista Cultural Centre, 1992-2001), the late Lawrence Ambers (band manager of the 'Namgis Nation), and Chief Bill Cranmer ('Namgis Nation). The final design and its implementation was developed in collaboration with the U'mista Cultural Society, 'Namgis Nation, Gitanyow Hereditary Chiefs, Ganeda (Frog Clan) House of Luuxhon, Ktunaxa Kinbasket Tribal Council, Oldman River Cultural Centre (Piikani Nation), Mookakin Cultural Society (Kainai Nation), and Hul'qumi'num Treaty Group. We owe a continuing debt of thanks to these partners for their support and active participation in this research. A brief description of each partner is provided at the end of our acknowledgments. We also thank the First Peoples' Cultural Foundation and Hamatla Treaty Society for providing letters in support of funding applications, and we regret that Hamatla and the Nedo'at Hereditary Chiefs were unable to remain partners throughout the entire duration of the project.

As part of the research design, First Nations partners were provided with drafts of chapters of this volume for review and comment as they deemed necessary. Representatives also attended a symposium held at the University of Alberta in June 2005 to discuss research progress and paper drafts. We thank everyone who attended the symposium for their feedback. In particular we are grateful to Violet Birdstone, Barbara Cranmer, Annabel Crop Eared Wolf, Reg Crowshoe, Dorothy First Rider, Katie Ludwig, Laura McCoy, Richard Overstall, Margaret Teneese, Glen Williams, Darlene Russell, Andrea Sanborn, Brian Thom, Lea Joe, and Eric McClay for their hard work coordinating

research activity and their helpful comments throughout the duration of our research program.

Case studies designed in consultation with our partners and reproduced in the first volume provide a rich source of information concerning protection, repatriation, and control of First Nations cultural heritage in Canada. They are one of several sources that the authors of this volume used to select topics and to identify issues and examples. In the first volume, we identified by name and thanked the many community members involved in coordinating case studies, co-authoring reports, reviewing case studies, gathering data, transcribing, and translating. Here we again acknowledge their important contributions. Of particular significance are the oral contributions and oral authorship of many elders, ceremonialists, and other community members who agreed to share information with us. Your knowledge and experience not only enables us to facilitate respect for, and greater understanding of, concerns relating to protection and repatriation but also demonstrates the importance of recognizing and respecting unique features of every First Nation culture and the limits of external law reform.

Research leading to this publication has been conducted over a period of six years and would not have been possible without the help of many dedicated research assistants from various disciplines and universities. For work leading to the second volume, from the University of Alberta faculties of law, anthropology, and Native studies we thank Nduka Ahanonu, Julia Buck, Rosalind Greenwood, Melodie Hope, Nonnie Jackson, Allyson Jeffs, Shannon Kleinschroth, Brian Kiers, Clayton Leonard, Lisa Lehane, David Milward, Robyn Mitchell, Erin McGregor, Ubaka Ogbogu, Omalara Oladipo, Sharon Roberts, Michael Sinclair, Emily Snyder, Brock Roe, Michael Solowan, Erin Viala, and Sean Ward. We also thank the following research assistants: Azdeh Basha, Kristin Hausler and Rita Sidhu (University of British Columbia); Cheyenna Daigneault (University of Saskatchewan); Nola Markey (Simon Fraser University); Stephanie Gabel, Rob Hancock, Marc Pinkoski, and Roch Ripley (University of Victoria); Larion Barsukoff (Willamette University, Oregon); and Mohsen Ahmed and Nicole Aylwin (York University). Special thanks to Clayton Leonard for developing our website and to Kim Cordeiro, Gregg Dearborn, Clayton Leonard, Michael Sinclair, Michael Solowan, and Tim Young for maintaining it.

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### **First Nations Research Partners**

#### **Hul'qumi'num Treaty Group**

The Hul'qumi'num Treaty Group (HTG) represents the treaty interests of six Hul'qumi'num-speaking Coast Salish First Nations located on southeast Vancouver Island and the southern Gulf Islands: the Chemainus, Cowichan, Halalt, Lake Cowichan, Lyackson, and Penelakut First Nations. The HTG is actively involved in research related to the social, economic, and cultural needs of its member nations, including heritage protection and repatriation issues as they relate to treaty.

#### **Ktunaxa Nation**

Ktunaxa Nation consists of five bands with a Kinbasket clan of Shuswap living in the southeastern section of British Columbia. For thousands of years the Ktunaxa existed in the area known as the Kootenay region. The Ktunaxa territory is not confined only to British Columbia but also includes areas as far south as Missoula, Montana, and Spokane, Washington. The Ktunaxa language is unique in that it is not associated with any other language in the known world. Repatriation of human remains and artifacts located in museums is part of the ongoing work of the Ktunaxa Nation.

#### **Luuxhon House/Gitanyow**

The present villages of the Gitxsan are Gitanyow, Gitwangak, Gitsequekla, Kispiox, Glen Vowell, and Gitanmaax. The fundamental political unit in

Gitxsan society is the House group, which is a matrilineal descent group. Each House is part of a larger clan grouping. All Gitanyow Houses can trace their ancestry to early Frog (Ganeda) and Wolf (Lax Gibuu) clan peoples. Their House territories are in the Nass and Skeena watersheds of northern British Columbia. The partners in this study are the Luuxhon House of the Frog Clan in partnership with the Office of the Gitanyow Hereditary Chiefs. The Gitanyow Huwilp Society acts on behalf of Gitanyow houses in a number of different areas, including treaty negotiations, promoting involvement of house groups in conservation management and sustainable development, developing programs and services, and promoting and facilitating Gitanyow culture and laws.

### **Mookakin Cultural Society**

The Mookakin Cultural and Heritage Foundation of the Blood Tribe (Kainai Nation) is named after one of the Blood Tribe's foremost spiritual leaders, thus acknowledging the contribution he made to the preservation of culture and spiritual practices. He was also known as Pat Weasel Head, a Medicine Pipe Bundle keeper, a member of the Horn Society, and, later, a grandfather to the Horn Society. He was also a renowned healer and herbalist. His knowledge and advice governed the Blood in the successful repatriation of several medicine bundles in the 1970s. In keeping with its namesake, the Mookakin Foundation was established in 1998 to promote and preserve the spiritual doctrines and observances of the Blood Tribe, promote and preserve their unique language and history, encourage an appreciation by the general public of Blackfoot culture, encourage and actively pursue repatriations of objects and articles that facilitate spiritual doctrines and observances, and to preserve data, material, and cultural objects of the Blood people. The Blood Reserve is located in southern Alberta. Traditional territories of the Blackfoot people "according to their own traditions," extended into Saskatchewan and the United States, including "southward from the North Saskatchewan River to the Yellowstone River and eastward from the Rocky Mountains to the Cypress Hills and Great Sand Hills of present-day Saskatchewan."<sup>1</sup>

### **Oldman River Cultural Society**

Participation in this research was undertaken by the Oldman River Cultural Centre of the Peigan (Piikani) Nation, under the leadership of Dr. Reg Crowshoe in partnership with Dr. Brian Noble (Sociology and Anthropology, Dalhousie). The Cultural Centre, located on the Peigan Reserve, is mandated to protect and preserve the cultural heritage of the Blackfoot culture and Piikani (Peigan) Nation. The Centre has been actively involved in repatriations of cultural and ceremonial objects. The Piikani Reserve is located in southern Alberta. Traditional territories of the Blackfoot Confederacy, according to their own traditions, extended into Saskatchewan and the United

States, including “southward from the North Saskatchewan River to the Yellowstone River and eastward from the Rocky Mountains to the Cypress Hills and Great Sand Hills of present-day Saskatchewan.”<sup>2</sup>

### **U’mista Cultural Society**

The mandate of the U’mista Cultural Society is to ensure the survival of all aspects of the cultural heritage of the Kwakwaka’wakw. To facilitate this mandate, it has a board of directors composed of members of the Kwakwaka’wakw First Nations and has established a cultural education centre that permanently houses repatriated potlatch items, conducts cultural-based research, archives cultural data, and promotes cultural activities of significance to the community. Communities serviced by the U’mista Cultural Society include: Kwagu’ł (Fort Rupert), Mamalilikala (Village Island), ‘Namgis (Alert Bay), Ławit’sis (Turnour Island), Da’naxda’xw (New Vancouver), Ma’amtagila (Etsikan), Dzawada’uxw (Kingcome Village), Kwik,wasut’inux (Gilford Island), Gwawa’enuxw (Hope Town), Nak’waxda’xw (Blunden Harbour), Gwa’sala (Smith Inlet), G̱usgimukw (Quatsino), T’łat’łasikwala (Hope Island), Weka’yi (Cape Mudge), and Wiwek’am (Campbell River).

### **Notes**

- 1 Gerald Conaty, “Glenbow’s Blackfoot Gallery: Working towards Co-Existence” in Laura Peers and Alison Brown, eds., *Museum and Source Countries: A Routledge Reader* (New York: Routledge, 2003) 227 at 229.
- 2 Ibid.



# Abbreviations

AAPA	American Association of Physical Anthropologists
AFN	Assembly of First Nations
ARPA	<i>Archaeological Resources Protection Act</i> (US)
BLM	Bureau of Land Management (US Department of the Interior)
CAA	Canadian Archaeological Association
CBD	<i>Convention on Biological Diversity</i>
CIHR	Canadian Institutes of Health Research
CMA	Canadian Museums Association
CMC	Canadian Museum of Civilization
CMT	culturally modified trees
COP	Convention of the Parties
CPEI	<i>Cultural Property Export and Import Act</i>
CPIA	<i>Convention on Cultural Property Implementation Act</i> (US)
CRM	cultural resource management
CURA	Community-University Research Alliance (a SSHRC program)
DOI	Department of the Interior (US)
FFM	fact-finding missions
FOIA	<i>Freedom of Information Act</i> (US)
HTG	Hul'qumi'num Treaty Group
ICOM	International Council of Museums
IGC	Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore
ILO	International Labour Organization
IP	intellectual property
IPR	intellectual property rights
ISP	internet service provider
KKTC	Ktunaxa Kinbasket Tribal Council
MOA	Museum of Anthropology, University of British Columbia
MOU	memorandum of understanding

NAGPRA	<i>Native American Graves Protection and Repatriation Act (US)</i>
NEPA	<i>National Environmental Policy Act (US)</i>
NGOs	non-governmental organizations
NHP	National Historic Park (US)
NHPA	<i>National Historic Preservation Act (US)</i>
NMAIA	<i>National Museum of the American Indian Act</i>
NPS	National Park Service (US)
NSERC	Natural Sciences and Engineering Research Council of Canada
NTA	Nicola Tribal Association
OAS	Organization of American States
OCAP	Ownership, Control, Access, and Possession
OW	Office of the Wet'suwet'en (north-central British Columbia)
RBCM	Royal British Columbia Museum
RCAP	Royal Commission on Aboriginal Peoples
SSHRC	Social Sciences and Humanities Research Council of Canada
TCE	traditional cultural expressions
TK	traditional knowledge
TRIPS	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i> (WTO)
UN	United Nations
UNBC	University of Northern British Columbia
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT	<i>UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects</i>
WAI 262	<i>A Treaty of Waitangi</i> claim brought in 1991 by six iwi (tribes) against the New Zealand Crown (often called the “flora and fauna claim” because of some of its subject matter, which mainly surrounds intellectual property)
WCCD	World Commission on Culture and Development
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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# **Protection of First Nations Cultural Heritage**



# Introduction

*Catherine Bell and Robert K. Paterson*

Many indigenous peoples assert that increased protection and control of material and intangible cultural heritage<sup>1</sup> of special significance to them is fundamental to the continuity, revival, and survival of their cultural identity in the face of past and ongoing forces of colonization.<sup>2</sup> But who determines what is significant in light of diverse communities of interest? In Canada, how must aboriginal cultural heritage be connected to the past, present, and future to invoke legal protection? Regardless of legal rights, how do we reconcile interests of First Nations communities (or members within a community) with interests of other First Nations, individuals, and the broader Canadian public?<sup>3</sup> What happens to First Nations culture in the process of its integration into Canadian law and policy? Are there mechanisms external to law reform that can meaningfully address the diversity of needs, priorities, and cultures? These are some of many legal, political, and ethical questions raised in this book and its companion, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*, also published by UBC Press.<sup>4</sup> Although our focus is on First Nations, topics covered are applicable to other indigenous peoples within and outside Canada. Several chapters are written within this broader context, and all are written in a manner accessible to those without formal legal training.

Ownership, protection, and control of First Nations cultural heritage in Canadian law is primarily governed by a complex web of First Nations laws, the common law of property, aboriginal constitutional rights, and federal and provincial property and other legislation.<sup>5</sup> Increased attention has been given to these issues in Canadian land claim agreements, modern treaties, private negotiations, professional ethical guidelines, government and other institutional policies, contracts, cooperative care and management agreements, litigation, and limited statutory reform. However, in some instances legislation and policy is dated or fails to adequately respond to the unique legal or moral rights and interests of the aboriginal peoples of Canada. In

this book we explore the current legal environment and consider potential avenues for reform, including consideration of ethical codes, international law, and indigenous laws and processes. Our intent is not to offer definitive answers to the questions raised or to cover all perspectives. Simple answers do not exist and opinions are numerous. Rather, we strive to give the reader a deeper understanding of the opportunities and limits of the law. We hope this book will be a helpful contribution to a much wider dialogue with affected communities of interest and energize further discussion surrounding the protection and renewal of indigenous culture.

### **Relationship to the Broad Research Program**

The objectives of this book and the perspectives it contains are more clearly understood within the context of a broader research program in which it is one of several outcomes. Although able to stand alone, it is one of two companion volumes arising from research commenced in June 2000 in response to concerns raised by some First Nations in Canada and the first Protection and Repatriation Project.<sup>6</sup> The objectives of the latter project were to draft a position paper on the need for protective legislation for items of spiritual, cultural, and historical importance to First Nations and to recommend strategies for action towards this objective as well as other strategies for preservation, maintenance, and protection. As the primary concern of the U'mista Cultural Society at the time was to address problems First Nations may encounter in preventing exports of significant cultural items out of Canada, emphasis shifted to examine in greater detail how the *Cultural Property Export and Import Act* and its administration might better serve the needs of First Nations.<sup>7</sup> Some of the results of that work are discussed in Chapter 2 of this book, "International Movement of First Nations Cultural Heritage in Canadian Law." Given the complexity of the legal and policy environment, Catherine Bell undertook to seek more funding for a broader collaborative research program involving a wider range of expertise.

Research leading to this book was conducted in collaboration with First Nations partners in British Columbia and southern Alberta and scholars in law, anthropology, and archaeology. Our First Nations partners are the Ktunaxa Kinbasket Tribal Council (KKTC); the Mookakin Cultural Society (Mookakin) of the Kainai Nation (also known as the Blood Tribe); the Oldman River Cultural Centre (in discussion with the Knut-sum-atak, or Brave Dog Society) of the Piikani (Peigan Nation, Piikani); the Frog Clan (Gitxsan) 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).<sup>8</sup> The broad objectives of our research were to: (1) provide First Nations 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 Nations cultures, perspectives, and experiences; (3) create reflective case study reports with the potential for diverse uses and means of dissemination; (4) assist First Nations partners to 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 broad international, social, political, and legal context.

This volume of our research speaks primarily to the second, fifth, and sixth objectives. Given the amount of law covered, the complexity of the issues raised, and the need to meet concerns related to the length of the manuscript, some chapters are written in a more concise style of legal writing and are less narrative in their discussion of law than others. However, we have included extensive citations and an appendix of selected case law and legislation for those readers who wish to gain access to further details (see appendix at end of volume).

Some topics and examples are drawn from case studies developed with First Nations partners and from a review chapter on repatriation and protection experiences across Canada reproduced in our companion volume: *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*.<sup>9</sup> However, the opinions expressed in this volume draw on a wider range of sources and represent the opinions of the authors, not a particular First Nations partner.<sup>10</sup> The case studies are organized thematically around data derived primarily from discussion circles and interviews with First Nations 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 *Adawx* Study," which draws on the formal oral histories of the Gitksan and Tsimshian peoples. These studies represent a range of experiences with cultural heritage legislation, repatriation and protection, and indigenous laws and processes concerning belonging, responsibility, and control. They are not intended to reflect a generalized First Nations perspective. All partners in this research acknowledge the need for more extensive consultation with First Nations in Canada on matters of law reform.

It is beyond the scope of this book to delve into the content of the case studies in detail. They identify a range of issues and suggest a multifaceted approach to protection and control that encompasses a wide range of strategies within and external to Canadian legal frameworks. Common themes raised include improved relations between First Nations and cultural heritage professionals; lack of adequate financial and other resources to support successful partnerships, programs, and initiatives in the areas of cultural

protection and repatriation; and the importance of supporting internal strategies within First Nations communities. The studies also provide examples of addressing past injustices through repatriation and greater control over cultural heritage; the impact of colonization on continuity of cultural knowledge and practices; the importance of language and repatriation and protection of certain objects, practices, ceremonies, and knowledge to survival, revival, and continuity of contemporary First Nations cultures, identities, and well-being; biases or power imbalances in Canadian laws, enforcement of heritage protection legislation, and negotiation; the complexity of diverse First Nations conceptions of cultural property, belonging, and responsibility; the inextricable connection of cultural knowledge and identity to the land; the need to take more seriously the interests of First Nations in their territories, including burial sites, in the face of economic development; misrepresentation of First Nations cultures and appropriation of their intangible heritage; the limited ability of cultural property, intellectual property, and provincial heritage conservation legislation to address protection issues without legal or policy reform; and the importance of acknowledging and respecting First Nations laws and processes.

Some of the contradictions and tensions we identified in our more detailed discussion of methodology in *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* carry over into this book.<sup>11</sup> For example, there continues to be a tension between the need and desire for statutory reform. First Nations experiences of legislation directed at them have been largely negative, and laws that do exist to protect heritage are considered inadequate. Many desire to enforce, restore, or enact their own laws concerning cultural heritage protection. At the same time, First Nations rights and interests may not be genuinely engaged without some external law reform.

Authors also struggle with the use of appropriate language and intellectual categories for research consistent with First Nations understandings of cultural heritage. For example, ownership is not a universal construct; rather, ownership sets out a particular relationship in our culturally constructed world. This is similar to ideas of the sacred and law. Law and the sacred are only such in the society that created them. For instance, law created by Gitksan peoples is not law for Cree peoples. From a First Nations perspective, it is also often difficult 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. Although we seek to communicate information in a manner that respects these differences, we also seek to present our research in a way that is accessible to indigenous and non-indigenous readers and that has meaning in Canadian legal and policy contexts. The difficulties remain evident not only in our choice of terminology but also in how we have organized the material.

There is also a more fundamental question of whether Canadian law can help further First Nations goals without continuing the colonization of indigenous ways of knowing and being. Given this, it is important to consider both the benefits and detriments of using law as a tool to address what, in essence, may be considered a question of “respectful treatment of native cultures and indigenous forms of self-expression within mass societies.”<sup>12</sup> We also struggle to reconcile the belief that First Nations should be able to exercise jurisdiction over aspects of their own cultural heritage through statutory intervention by external governments to protect First Nations rights and interests as well as the constitutional requirement to consider interests of the broader Canadian public. Regardless of the position taken on inherent First Nations jurisdiction, the 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) refusal by governments to recognize First Nations jurisdiction over heritage resources located off reserve lands and intellectual property, and (3) the cost, time, and complexity of negotiating jurisdiction over the range of areas raised in this research, serve to bring several authors back to thinking about Canadian legislation and policy reform.

To remind us of these contradictions, tensions, and limitations in our work, Val Napoleon introduces the intellectual instrument of the Trickster. 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.”<sup>13</sup> We believe that the Trickster will enable us to see the contradictions and perhaps even to intellectually straddle cognitive dissonance in order to move our thinking along.

In indigenous societies, the Trickster is not simply a literary device (as it often is in Western society, where literature is, at least conceptually, separate from politics, law, and economics) but an intellectual device that provides a way of seeing and thinking that does not view politics, law, and economics as separate institutions but, rather, as embedded within the fabric of the whole. Given this, the Trickster can more properly be considered both a teacher and challenger of legal, political, and/or social norms. The critical work of the Trickster lies in the discomfort s/he creates, and it is in our discomfort that we do our best learning. It is in our discomfort that we see things that we are not used to seeing and think what we are not used to thinking. Consequently, we urge the reader to stay with any discomfort that these chapters may create.

### Overview of Chapters

Part 1 of *Protection of First Nations Cultural Heritage* begins with three chapters on the controversial and complex issues of repatriation and trade in First Nations material culture. As Catherine Bell (Chapter 1) elaborates, rationales and priorities for repatriation vary, as do repatriation experiences with museums and other collectors of First Nations material. After surveying normative rationales for repatriation, the Canadian legal environment, and issues of policy and process, she considers how repatriation legislation might operate to facilitate repatriation negotiations. Bell concludes that repatriation legislation, if enacted, should act “as a safety net for First Nations, address potential liabilities faced by custodial institutions and governments, and apply only when invoked by First Nations to ensure that other repatriation processes satisfactory to particular institutions and First Nations can be maintained.”<sup>14</sup>

Catherine Bell and Robert Paterson (Chapter 2) advocate the importance of strengthening protections for First Nations under federal export control law. In their opinion, the Canadian *Cultural Property Export and Import Act*<sup>15</sup> and its administration fail to adequately address First Nations concerns or to respond to “ethical and legal considerations applicable to contemporary federal dealings with aboriginal peoples in Canada and [the Act] is in need of amendment.”<sup>16</sup> Once removed from Canada, attempts to recover material culture present challenging legal problems, including the unwillingness of other countries to enforce Canadian export control laws. For these reasons, Bell and Paterson argue that, while legal instruments such as treaties may be a means to achieve some agreement in the international realm, and provision of financial and other support for the return of historically removed material is important, changes to domestic and foreign laws and processes are also required.

James Nafziger (Chapter 3) concludes Part 1 by discussing US legislation concerning the protection and repatriation of Native American cultural heritage, with a focus on the *Native American Graves Protection and Repatriation Act (NAGPRA)* of 1990.<sup>17</sup> This legislation is considered because of its impact on attitudes in Canada relating to repatriation law and the lessons that can be learned from it. Nafziger stresses that *NAGPRA* is not a property law but, rather, human rights legislation that continues to leave some issues, such as the reburial of what are categorized in US law as unaffiliated human remains, unresolved. Some of these issues have benefited from collaborative solutions developed by an independent dispute resolution process: the *NAGPRA* Review Committee.

Part 2 is concerned with heritage sites and ancestral remains. Protocols for repatriation and care for ancestors vary among First Nations. However, many believe that storage and mistreatment of remains runs contrary to concepts of human dignity and respect. Although many institutions in possession of

First Nations ancestral remains in Canada are prepared to return these remains for interment, issues of costs, proof of ancestral connection, and proper handling arise. Advocating minimal statutory intervention and referring to recent changes in English law, Paterson argues in Chapter 4 for a revision of the common law concerning human remains in general. In the meantime, practical steps, such as funding for inventories of public collections, would support the resolution of outstanding claims on the part of descendants. The issue of what scope there should be for scientific research on remains probably defies judicial resolution, and Paterson suggests alternatives.

A strong and intimate connection to the land makes it difficult for First Nations to identify priority landscapes in need of protection, although many speak of the importance of protecting burial sites and other significant cultural places. George Nicholas (Chapter 6) and Bruce Ziff and Melodie Hope (Chapter 5) consider this from two very different perspectives – professional ethics and the inadequacy of statutory protection. Nicholas discusses how First Nations involvement in cultural resource management has helped address deficiencies in existing archaeological and other heritage legislation. He goes on to explore examples of how innovative approaches can also resolve difficult intellectual property issues in archaeology – such as imposing restrictions on information about sites and technologies to protect aboriginal interests. In their chapter, Bruce Ziff and Melodie Hope explore the concept of “place” and the extent to which law can protect aboriginal sacred sites and other places of cultural significance. They review an array of legislative measures that affect aboriginal cultural sites and note that there are many incongruities involving the relationship of the law and aboriginal culture and values, which they suggest might be resolved through uniform federal legislation that incorporates greater deference towards how aboriginal peoples define their own cultures. However, resources must also be devoted to enforcement.

In Part 3, intangible heritage is the focus of Robert Howell and Roch Ripley (Chapter 7), Rosemary Coombe (Chapter 8), and Kelly Bannister (Chapter 9). Robert Howell and Roch Ripley introduce readers to fundamental features of Western intellectual property law. They explore the relationship between the intellectual property legal regime, Canadian intellectual property laws, and the rights of traditional knowledge holders. The limits of existing laws are discussed and possible alternatives suggested, including amending existing laws – the focus being a *sui generis* (*i.e.*, unique) formulation that separates the objectives of protection and research, development, and market usage. In their chapters Rosemary Coombe and Kelly Bannister elaborate on the complexity and challenges of protecting traditional knowledge and cultural expressions within Western intellectual property regimes, with Bannister focusing on options external to conventional legal regulation. Coombe addresses “the international institutions and processes that have brought

these issues to global attention in the last two decades, the emergence of agreed upon principles and objectives, and the prospects these pose for protecting First Nations heritage.”<sup>18</sup> While the situation is one of flux, she demonstrates that there has now emerged a higher level of credibility for the recognition and protection of traditional knowledge. In dealing with the protection of intangible cultural heritage through research codes and community protocols, Kelly Bannister discusses how such approaches significantly complement traditional legal approaches. For instance, voluntary guidelines adopted by academic granting agencies in Canada afford protection for aboriginal concerns, though they have not been without controversy.

Questions of belonging, protection, and control are not just “property rights” issues but are more concerned with human rights and respect for human dignity. Thus it is appropriate that, in Part 4, we conclude this volume with considerations of international human rights, First Nations laws, and the recognition of First Nations legal institutions within the Canadian state. Mohsen Ahmed, Nicole Aylwin, and Rosemary Coombe (Chapter 10) discuss the emergence of indigenous cultural heritage rights in international human rights law and policy. This has arisen out of recognition of past as well as present injustices towards indigenous peoples and against the background of recognition of the violation of the rights of others (such as those of Jews in Europe and Japanese in North America). The authors explore the development of rights theory to encompass what is cultural in the broader sense. Sometimes courts do not support a dynamic view of culture but, rather, require its re-expression in some sort of limited way that reinforces the need for international efforts – such as those undertaken by UNESCO and other bodies.

Norman Zlotkin (Chapter 11) argues that both the common law (judicial decisions) and the Constitution in Canada provide a basis for recognition of First Nations customary laws implicating cultural heritage. By “customary law” he means a system of laws, rules, protocols, and social relations that are held by an aboriginal community. Zlotkin considers that the statutory codification of aboriginal customary law, including matters of cultural heritage, is unnecessary and potentially misleading. More desirable is the recognition of a pre-existing system of laws, particularly in relation to resolving questions of legitimacy of title and disputes among First Nations community members or with the community government. However, he notes that application to institutions located outside aboriginal communities may be more problematic in the absence of an enabling legislated framework. Val Napoleon (Chapter 12) considers the example of Gitksan pedagogy to illustrate how the protection of cultural heritage requires “re-embedding it in the larger aboriginal political project.” She also notes that “[t]o be effective, strategies towards this end, both non-legal and legal, must be both culturally

and geographically specific.”<sup>19</sup> She explores legal pluralism as an option for bringing First Nations legal and political orders together with the state.

We conclude with Michael Asch (Conclusion), who elaborates on key fundamental themes that the authors of this volume have raised both directly and indirectly: colonial relations and cultural heritage, cultural difference and cultural heritage, and issues of jurisdiction. One way forward, Asch proposes, is to challenge the validity of any legal and political construction of the relationship between Canada and First Nations that ignores respect for cultural difference, the equality of all cultures, and recognition of the ongoing rights of these communities to jurisdiction over their own heritage. He challenges us to consider, as we read the chapters in this volume, whether it is possible, without such fundamental change, to achieve an outcome in which First Nations truly control their cultural heritage.

### Notes

- 1 In 1995, United Nations Special Rapporteur Dr. Erica Irene Daes proposed a definition of cultural 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). Dr. Daes defines the heritage of indigenous peoples as being “comprised of all objects, sites, and knowledge the nature of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory” and “objects, knowledge and literary or artistic works which may be created in the future based on its heritage.” Marie Battiste and Sákéj Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich Publishing, 2000) at 65 also explain that indigenous understandings of cultural heritage are not restricted to historical manifestations of knowledge or material heritage and that cultural heritage is best understood as that which “belongs to the distinct identity of a people.” These definitions are consistent with the range of issues and understandings of “cultural property” considered by First Nations participants in the research that led to the publication of this volume and its companion, Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008). The struggle to find terminology that respects First Nations understandings and has meaning within a Canadian legal context is addressed in further detail below and in several chapters in both volumes.
- 2 There are many examples of the impact of colonization on the cultural heritage of indigenous peoples in Canada and abroad and the importance of increased protection and control to cultural identity and continuity. See e.g., *ibid*; Jennifer Kramer, *Switchbacks: Art, Ownership, and Nuxalk National Identity* (Vancouver: UBC Press, 2006); Battiste and Henderson, *supra* note 1; Terri Janke, *Our Culture Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (Sydney: Australian Institute for Aboriginal and Torres Strait Islanders and the Torres Strait Commission, 1998); Bruce Ziff and Pratima Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, NJ: Rutgers University Press, 1997); Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vols. 1 and 3 (Ottawa: Supply and Services Canada, 1996) at 263-319 and 599-601, respectively; Robert Paterson and Darcy Edgar, eds., *Material Culture in Flux* (1995) Special Issue U.B.C. Law Rev; and the Task Force on Museums and First Peoples, *Turning the Page: Forging New Partnerships Between Museums and First Peoples* (Ottawa: Canadian Museums Association, 1992).
- 3 Section 35(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 defines the aboriginal peoples of Canada as the “Indian, Inuit and Métis peoples.”

“First Nation” is a term of self-identification adopted by most Indian bands and Treaty nations in Canada.

- 4 Bell and Napoleon, *supra* note 1.
- 5 In writing about law, we recognize that many believe that certain relationships to the material and intangible realm are governed by a higher set of spiritual laws. We thank the elders who advised us on how to approach our work, given this concern, and limit most of our considerations to other laws that implicate First Nations cultural heritage.
- 6 The first research program was sponsored by the U'mista Cultural Society (U'mista), the First Nations Confederacy of Cultural Education Centres, and the First Peoples' Cultural Foundation. 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 the companion to this volume, Dr. Eldon Yellow Horn, and Brenda Beck.
- 7 R.S.C. 1985, c. 51.
- 8 The Hamatla Treaty Society and Nedo'at Hereditary Chiefs were also original partners in the research program leading to this volume, but they had to withdraw as a result of unexpected priorities that arose in their communities. For further information about the communities represented and their territories, see the acknowledgments to this volume.
- 9 Also included in Bell and Napoleon, *supra* note 1, are three chapters that more deeply reflect on the role played by residential schools and discriminatory government policy in loss of cultural knowledge; the centrality of language to cultural preservation; and the challenges of reconciling Western and First Nations legal orders and different understandings of property, owning, and belonging. Most studies, a review of Canadian legislation, a detailed bibliography, and other resources, including workshop proceedings and original case study proposals have also been made available through our project website at <<http://www.law.ualberta.ca/research/aboriginalculturalheritage/>>.
- 10 Some chapters draw links to case studies in Bell and Napoleon, *supra* note 1 in text and notes, while others do this primarily in endnotes accompanying the chapter. Our partners were provided with the opportunity to comment on these chapters and representatives attended a symposium with authors to review draft papers and proposals for change. Details of the methodology followed in this research and challenges in meeting our objectives are provided in Bell and Napoleon, *ibid*, at 9-18.
- 11 These include contradictions in design, terminology, and organization elaborated in “Introduction” in Bell and Napoleon, *ibid*.
- 12 Michael F. Brown, *Who Owns Native Culture?* (Cambridge, MA: Harvard University Press, 2003) at 10. Focusing on controversies concerning sacred sites and intangible expressions of indigenous heritage, Brown emphasizes that 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.”
- 13 Richard Lee and Richard Daly, eds., *The Cambridge Encyclopedia of Hunters and Gatherers* (Cambridge: Cambridge University Press, 1999) at 4-5.
- 14 Catherine Bell, “Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform” in this volume at 65.
- 15 R.S.C. 1985, c. C-51.
- 16 Catherine Bell and Robert K. Paterson, “International Movement of First Nations Cultural Heritage in Canadian Law” in this volume at 78.
- 17 24 U.S.C. ss. 3001-3013 (West Supp. 1001).
- 18 Rosemary Coombe, “First Nations Intangible Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law” in this volume at 247.
- 19 Val Napoleon, “Looking beyond the Law: Questions about Indigenous Peoples' Tangible and Intangible Property” in this volume at 371.

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Part 1:  
Repatriation and Trade

Tricksters stand where the door swings open. Tricksters are in that place where things are both joined together and come apart.<sup>1</sup>

Old Man, Napi,<sup>2</sup> has a headache. He's been reading. Very important stuff, yes. He imagines dust wafting up from conversations on complicated questions, some settling on his eyelids. He fights to keep them open. Napi gives in and leans his head back against the tree and closes his eyes. The sun is hot and he can smell the green leaves of summer.

Little questions start to niggle at Napi's consciousness. Is sovereignty over-rated and mainly rhetorical? How exactly might Western and indigenous laws relate across the respective cultures? As law to law? Practically? Is this type of relationship possible? Desirable even? It seems that even when Western law is used as a tool to empower indigenous peoples, it captures their law. Its language and concepts suck indigenous peoples into Western legal constructs.

Yet, he wonders, is it possible to avoid Western legal paradigms if you want the relationships created by them changed? And is it simply a matter of creating new relationships between indigenous peoples and the Canadian state? What does this do to the rights accorded in the old relationship as set out by treaties? Can a new equal relationship and treaty rights fit in the same thought? So many contradictions and complications. Napi decides to find something else to do somewhere where there is less dust in the air.

#### Notes

- 1 Margaret Atwood, book review of *Trickster Makes This World: Mischief, Myth and Art* by Lewis Hyde (n.d.), online: OW Toad <<http://www.owtoad.com>> at 3.
- 2 Blackfoot trickster.

# 1

## Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform

*Catherine Bell*

Repatriation efforts by aboriginal peoples in Canada are influenced by a wide range of concerns, including respect for human rights, religious practices, and laws of source communities; reparation of past injustices; transmission and retention of cultural knowledge; and preservation, continuity and revival of languages, values, and practices that form part of a people's collective identity.<sup>1</sup> Many Canadian institutions (including museums, universities, and government agencies) holding First Nations and other aboriginal material are sensitive to these concerns and have been working collaboratively to improve access to collections and to increase involvement of source communities or other significantly connected groups and individuals (such as families, clans, and spiritual societies) in management, care, display, and interpretation. They are also engaged in a wide range of other initiatives that support living and dynamic aboriginal traditions, including through collaborative research and more formalized repatriation procedures and policies.<sup>2</sup> Repatriation policies and procedures demonstrate a commitment to negotiations with First Nations on moral and ethical grounds on a case-by-case basis.<sup>3</sup> In areas where modern land claims, treaties, and self-government agreements are being negotiated, repatriation may also occur through negotiations involving federal and provincial government agencies and publicly funded museums. However, these processes are not available to all First Nations nor are they necessarily always their preferred means to negotiate.

Given these developments, some question the necessity and desirability of engaging in discussions of legal rights and law reform. The challenge of communicating across cultures, varying concepts of property, proving circumstances around acquisition of historically removed items, privacy concerns, and diverse cultural protection priorities are some of the reasons offered for resolving repatriation through institutional policy and case-by-case negotiations alone. Another benefit of policy frameworks is that they offer the flexibility to accommodate the diversity of rationales for, interest

in, and negotiated responses to repatriation requests. Strict interpretation of legal provisions, different cultural understandings and misunderstandings of words, and unconscious and conscious bias in application of evidentiary standards are some of the potential problems feared when the possibility of mandatory repatriation legislation is raised.<sup>4</sup> Repatriation procedures that approach questions of entitlement through adoption and definition of categories of cultural items (*e.g.*, sacred, communal, and cultural patrimony) may also require First Nations to manipulate understandings of their connection to the material world. Of course, these and other concerns may also present themselves in regulation through formal adoption and codification of aboriginal specific institutional repatriation policies, perhaps explaining why some Canadian institutions with and without aboriginal repatriation policies continue to respond to repatriation claims through other legal mechanisms for deaccessioning and transfer of title.

The above concerns take on greater significance if one contemplates mandatory national repatriation legislation that dictates uniform solutions and procedures. In an attempt to develop universal standards and to achieve certainty of title in Western law, regulation intended to empower First Nations can have the unanticipated effect of creating a legal environment that undermines indigenous understandings of their relationship to cultural heritage and existing relations with museums. However, this need not be the case, and different approaches may be more appropriate given the legal and policy environment in Canada. For example, amendments to existing legislation, rather than enactment of repatriation legislation *per se*, may be used to address specific regional concerns. An example is an amendment to the British Columbia *Museum Act* to address museum obligations and the interplay of repatriation with treaty negotiation in that province.<sup>5</sup> In Alberta, repatriation legislation responds to negotiated solutions and legal issues that have arisen in that region by enabling large-scale and unconditional returns of “sacred ceremonial objects” from the Royal Alberta Museum and the Glenbow Alberta Institute to First Nations in that province.<sup>6</sup> This law does not prevent the negotiation of other arrangements for loan or care of sacred ceremonial items or repatriation of items outside the scope of the legislation through other legal means.

An assumption when considering legislated approaches may be that solutions can be negotiated without consideration of legal rights. However, to some extent, legal considerations will influence all repatriation negotiations. For example, they may influence the assessment of best and worst alternatives to a negotiated agreement, obligations and potential liabilities, and parameters for negotiation, whether this is expressed, desired, or understood by participants at the actual negotiation table. Some institutions expressly acknowledge this fact in their repatriation policy. An example is the Repatriation Guidelines of the University of British Columbia Museum of Anthropol-

ogy, which acknowledge that “First Nations are governed by their own legal traditions and policies” but also states that “MOA’s negotiation position is guided by Canadian law and international agreements signed by Canada, and by the governing body of UBC.”<sup>7</sup>

It is also problematic to assume that legal analysis of ownership rights will always favour institutions with aboriginal collections or that the law gives them authority to dispose of all items in their collections at will. Ownership and control of aboriginal material culture in Canadian law is informed by various streams, including property and contract law; aboriginal constitutional rights and treaties; aboriginal legal orders; laws concerning museum, government, and corporate obligations; and federal and provincial legislation. It is a complex and sometimes uncertain environment that calls into question conventional property-based approaches to assessing ownership and, at the same time, creates potential barriers for return and transfer of unconditional title. Aboriginal constitutional rights may be directly or indirectly implicated in repatriation negotiation in a number of areas, including statutory title (*e.g.*, title arising from legislation that places ownership of archaeological material in a provincial government), scope of material eligible for return, and validity of transfer. Standards of proof, public notification, competing claims, use, preservation, conditions for return, and the proposal of solutions that fall short of return may also be influenced by concerns about liability and interpretations of public trust and institutional mandates, particularly where claims do not form part of modern treaty, self-government, or land claims negotiations. Further, some Canadian legislation affecting ownership and control is largely dated, fails through express language to address existing and potential aboriginal rights and other interests, and may not reflect changes in policy and practices of institutions charged with implementing it (such as consultation with potentially affected aboriginal peoples upon discovery of burial items or in the face of requests for repatriation).

Even if little attention is given to legal considerations in negotiations, the absence of an interculturally legitimate dispute resolution mechanism to address potential power imbalances and to help bring indigenous concepts of owning or belonging into an equal relation with Western property law is problematic. Although sincere attempts are often made to give equal and respectful consideration to different cultural understandings and legal processes, final decision-making authority remains with custodial institutions or government officials. In most instances, the current recourse, if negotiations break down, is expensive and unprecedented litigation before Canadian courts, and this is impossible for many First Nations to sustain. Further, the cultural, historical, scientific, emotional, public, political, and ethical dimensions of repatriation claims require intercultural, professional, and community expertise and call for innovative approaches, making it difficult to find

satisfactory solutions based only in judicial interpretations of Canadian property or constitutional law.

For these and other reasons elaborated below, and at the request of First Nations partners,<sup>8</sup> the purpose of this chapter is to outline the legal and policy environment for repatriation negotiation in Canada and to indicate how repatriation legislation might operate for the benefit of First Nations claimants. Regardless of the approach taken, mandatory and uniform legislation is not likely to be welcome, and more extensive consultation with First Nations and other affected communities of interest is required. For many First Nations, matters of cultural heritage are considered an area of inherent First Nations jurisdiction. Given this and the diversity of cultures, priorities, and relationships with institutions, repatriation legislation will likely only be acceptable if it is designed to facilitate negotiated solutions and respects the freedom of First Nations to choose to use it (or not) as a safety net if collaborative mechanisms fail – particularly in circumstances where First Nations do not have access to, or choose not to participate in, self-government, land claim, and treaty processes.<sup>9</sup>

Although some examples are given, it is beyond the scope of this chapter to explore in detail rationales for and against repatriation or the many collaborations that have helped redefine relationships between Canadian institutions and aboriginal peoples represented in their collections.<sup>10</sup> Many cultural heritage professionals and museum personnel in Canada agree with justifications for increased aboriginal control through repatriation and other means. More debatable is the desirability and necessity of addressing through legislation existing and potential problems in the legal and policy environment that might affect negotiation. However, some discussion of rationales for repatriation is still required as this provides historical and moral contexts for understanding Canadian policy and legal issues raised in this chapter. Thus, I begin with an overview of normative rationale and ethical considerations influencing the development of repatriation policy in Canada, demonstrate some of the complexities in the legal and policy environment in which repatriation negotiations occur, and, I hope, generate some debate and critical reflection through my discussion of Canadian law reform.<sup>11</sup>

Although access to oral and visual material is also important for cultural renewal and continuity, the focus here is on material culture that, under Western conceptualizations of cultural heritage, are considered “objects,” or “artifacts,” and are of “ongoing historical, traditional or cultural import” central to a First Nation community or culture.<sup>12</sup> Given the purpose of this chapter, my focus is intentionally narrow and is influenced by categories of cultural material adopted in the *Task Force Report on Museums and First Peoples* (which, in turn, is influencing museum and governmental policy making) and tests for identifying aboriginal constitutional rights in s. 35(1) of the Canadian Constitution.<sup>13</sup> In particular, I am concerned with material culture

“owned” or controlled by the Crown (under property-based approaches in Canadian law) and in the possession of government-funded museums, agencies, and other public institutions.

Questions of reform are largely considered within the framework of Western law. However, ideas are offered with the knowledge that many aboriginal peoples engaged in repatriation look to their own legal and spiritual orders as the foundation for relationships between peoples, and between peoples and the material world. Although treaty relationships are raised, more thoughtful and elaborate consideration of government, jurisdiction, legal orders, and the cultural sovereignty of First Nations is given in the final section and conclusion to this volume. Readers are encouraged to read Michael Asch’s concluding chapter before and after reading this chapter to ensure that these perspectives are more fully engaged when reflecting upon the collaborative approaches and legislated options considered here. Finally, while the focus is on First Nations material, the legal and policy analysis offered in this chapter is also often applicable to Inuit and Métis peoples.

### **Rationales for Repatriation**

Rationales for repatriation are rarely offered in isolation, vary among First Nations, and differ depending on the history or nature of the item sought. In Canada, as elsewhere, repatriation efforts by indigenous peoples are part of a broader movement of decolonization and reparation of past injustices.<sup>14</sup> They bring into focus issues of ethics, law, politics, knowledge, power, and economics. Within this context certain material may become so integrally related to the group identity and well-being of a present population that it takes on communal characteristics or other value, even if not considered this way at the time of separation from the community. This and the dynamic nature of all cultures means that the nature of an item may change, as may the emphasis by claimants on historical factors and circumstances of acquisition. Refusal to repatriate may be viewed as a continuation of cultural oppression, and the process of repatriation may become a political act of self-determination. As Jennifer Kramer astutely observes in her account of the Nuxalk’s repatriation of the Echo Mask:

I believe that the desire that motivates repatriation is the desire to obtain the right to self-define as an individual and as a First Nation. Therefore, I would like to suggest that repatriation is the act of claiming metaphorical territory via control of an object. This is accomplished when First Nations determine the terminology one uses to discuss their cultural objects, thus compelling the use of an Aboriginal conceptual system. Although ostensibly repatriation is about the return of an object to a specific place, it is also about being linked to an object and making a statement about who is in control.<sup>15</sup>

Understanding this dimension of repatriation and the moral obligations acknowledged by many Canadian institutions with aboriginal collections requires some familiarity with the role that law and Canadian governments have played in undermining First Nations culture in Canada. Of particular significance are removal of children from their communities into environments that oppressed indigenous languages and traditions, and enactment of laws prohibiting First Nations religious and cultural practices.<sup>16</sup> Residential schools; government support for Christian education, control, and intimidation; voluntary and involuntary enfranchisement (loss of rights associated with Indian status under federal legislation, including living on reserve land); forced dismantling of traditional governments; and laws prohibiting the potlatch and other ceremonies, including the Blackfoot Sundance and Cree and Saulteaux Thirst Dance, were some of the most fundamental components of the civilizing policy. Only certain features of the dances were outlawed, such as giving away property and wounding, not the dances themselves. However, Indian agents still attempted to suppress the actual dances through intimidation, threats (such as the reduction of rations or cancellation of contracts), and arrests and imprisonment.<sup>17</sup> “Most of these provisions and practices arose during the period between 1880 and the 1930s, when the assimilative thrust of Indian policy was at its peak.”<sup>18</sup> Provisions outlawing specific cultural practices were part of federal Indian legislation until the early 1950s.

Some items were also acquired in a manner that, under Canadian laws at the time, would be considered illegal. One of the best-known and earliest examples of repatriation is the return of potlatch items to the U'mista Cultural Centre in Alert Bay, British Columbia. Following a large potlatch held at Village Island in 1921, forty-five people were charged with offences, including making speeches, dancing, arranging articles to be given away, and carrying gifts to recipients.<sup>19</sup> Regalia was seized from those charged and others were coerced to surrender regalia under threat of criminal prosecution. As Stan Ashcroft, legal counsel to the 'N̄amgis Nation, explains:

Halliday had amendments made to the Indian Act which provided that the conviction could be by way of summary conviction. What that meant is it didn't have to go to a judge. It could go to a magistrate, which happened to be Halliday. So what happened then, of course, is the people go before Halliday, he convicts them, sentences them to prison. But he and Angerman concocted a scheme whereby the individuals and the various Bands and chiefs are offered, essentially, an ultimatum. If you turn over your potlatch artifacts and regalia, not only of those persons who have been charged and/or convicted, but all ... the other potlatch regalia and artifacts, we won't put these people in jail and we will be lenient in terms of any other prosecutions. In the future, in fact, we won't prosecute if you agree to this. So,

effectively, it was coercion. It was duress. It resulted in the giving up of a huge amount of regalia and artifacts, portions of which have only recently been returned.<sup>20</sup>

In the late nineteenth and early twentieth centuries, fear that Indian cultures in Canada would vanish also provided an impetus for anthropologists, archeologists, and other collectors carrying out institutional mandates to gather and preserve as much as they could for the benefit of future generations – an action carried out largely in good faith. Items were also gifted, exchanged, and intentionally made for sale. Some items considered inalienable outside the originating community, or of significant intrinsic value to it, were also sold by converts. “Not all religious conversions were voluntary: often First Nations were given the option of Christianity or starvation.”<sup>21</sup> Sometimes new and traditional beliefs prevailed and “traditionalists” also sold or gave items to museums for safekeeping.<sup>22</sup> Other items were sold by mistake or due to economic and social duress.<sup>23</sup> These and other influences, such as restrictions placed on the economic use of reserve lands and involuntary enfranchisement provisions, also contributed to family breakdown as well as economic and other forms of social hardship.<sup>24</sup> During this time, materials were also created for the purpose of sale or donation or were given to museums and others for safekeeping.

As a result, cultural material in the collections of museums, government agencies, and other institutions may include not only some items acquired under illegal, potentially illegal, or questionable ethical circumstances but also a wide array of tangible and intangible material acquired legitimately under the laws of Canada and affected First Nations communities. It is therefore not surprising that international and domestic museums recognize a moral obligation to return to “originating culture(s) or individuals objects ... judged by current legal standards to have been acquired illegally.”<sup>25</sup> Major museums in Canada holding public and private collections and government departments, such as Parks Canada, have returned material to First Nations claimants on this basis and will also consider returning sacred (and sometimes other culturally sensitive material) acquired “unethically.”<sup>26</sup> More complicated is the return of so-called secular items obtained legally under Canadian law (but not under First Nations laws at the time of removal) or under questionable circumstances (such as economic duress), particularly where requests concern unconditional transfer of title to a large number of items, negotiations do not form part of an intergovernmental treaty or land claim process, or disagreement arises regarding what is sacred, ceremonial, or vital.

Seeking recognition of First Nations laws in this and other contexts is not only an aspect of the broader goal of self-determination but it may also implicate other human rights, including religious freedoms. For example, the Blackfoot have specific performance-based laws concerning control, use,

treatment, and transfer of material culture, including medicine bundles and the knowledge associated with them.<sup>27</sup> From a Western perspective, title can be acquired through donation or sale from another person with valid legal title. For the Blackfoot, title documents do not determine whether an individual in possession of a bundle is rightfully “transferred” under Blackfoot law. More fundamental are compliance with the ceremonial transfer process and preparedness of recipients to assume the responsibility and knowledge of the bundle, given its importance in representing and maintaining relational networks with the rest of Creation.<sup>28</sup> Bundles “have a life in and of themselves” and are given to the Blackfoot people “by the Creator to provide health, harmony, and well-being for both the individual and for the group.”<sup>29</sup> Although as part of the ceremonial transfer process “the recipient of a bundle will provide material goods to the previous keeper as a show of the sincerity of his/her desire to take on the care of a particular bundle,” this practice does not have an equivalent Western concept and “clearly does not mean purchase and sale.”<sup>30</sup> Regardless of how bundles have come into the possession of museums, and regardless of the vitality of Blackfoot laws or ceremonies at the time, many bundles are of significant importance to Blackfoot ceremonial life today. The fact that bundles are in a museum collection may not change the responsibility of Blackfoot religious societies and members to attend to their spiritual needs.<sup>31</sup>

Of concern to many First Nations is loss of traditional cultural knowledge and the strengthening and renewal of that knowledge within the community.<sup>32</sup> This loss is sometimes facilitated by separation from material culture and lack of attending knowledge within the community regarding its accessibility and use. For this reason, as explained by Violet Birdstone, a member of the Ktunaxa/Kinbasket repatriation committee, everyday items like clothing, baskets, utensils, and other similar items may be equally important to repatriate, particularly where such items are plentiful in collections and skills for making them are no longer known within the community.<sup>33</sup> In the words of Maori historian Hirini Moko Mead, repatriation “is part of the process of reassembling the dislocated portions of a culture. For some indigenous peoples who have lost most of their culture, the process is like trying to rebuild Humpty Dumpty.”<sup>34</sup> As the knowledge associated with such material rests with the elders in the community, it is important that elders have access to it before they die. It is equally important that young people have access to these items so that they can gain strength from them by learning about and reconnecting with their ancestors.

Arguments for returning so-called secular material on this basis alone may present less moral persuasion in repatriation negotiations when other interests are taken into consideration, such as those of the broader public and scientific community. At the same time, First Nations seeking repatriation for this reason alone may be more open to receiving loans, replicas, virtual

representations, and local exhibits or negotiating other means for gaining access to and controlling information (sometimes referred to in museum discourse as “information repatriation”). An example is the Reciprocal Research Network – a physical and virtual research infrastructure being co-developed by the Museum of Anthropology, the U’mista Cultural Society, the Musqueam Indian Band, and the Stó:lō Nation/Tribal Council. It brings together representations and information about collections from geographically dispersed First Nations communities and twelve partner museums (in Canada, the United States, and the United Kingdom). It seeks to respect the laws and research protocols of source communities in providing access to information, and it provides an environment within which to engender and facilitate collaborative research.<sup>35</sup>

Language is a fundamental aspect of cultural knowledge and group identity. It is the main instrument through which culture is transmitted and understood.<sup>36</sup> Within one language are words and cultural understandings that cannot be fully understood in a different language. Many First Nations languages are endangered, requiring the employment of numerous strategies to ensure their preservation. Repatriation of objects and oral material is one of several important strategies in language preservation and revitalization. Access to objects fosters language renewal as elders and other knowledge keepers recall and share information about associated knowledge by using words and concepts that have fallen out of regular use. Oral material, such as recordings, written forms of language, and research on language, is important with regard to learning and pronouncing the language as well as with regard to connecting listeners to the past. The importance of access to this material is underscored by the limited amount of contemporary writing in aboriginal languages, tools for language instruction, and aboriginal language communication through newspapers, radio, television, performing arts, and other forms. In this situation, quality copies of oral material, rather than originals or other means of gaining access to language information, may be more acceptable to some First Nations, given the complexities of intellectual property law and the justifications offered for return.<sup>37</sup>

Connection to material culture is also integral to self-identity and psychological well-being. People develop a sense of “self” not only through personal experience but also through relationship to community – their own and others. Cultural context and differentiation is also inextricably linked to one’s sense of dignity, emotional strength, personal development, and well-being.<sup>38</sup> Material cultural heritage is an important expression not only of individual creative processes but also of individual and group spiritual, cultural, and political life. It is for this reason that controlling, removing, and destroying “cultural heritage is such an effective tool of domination.”<sup>39</sup>

Whatever its form, material culture is also an expression of relationships between individuals, community, the natural, and the spiritual realm.

Western conceptions of property that draw dichotomies such as animate and inanimate, sacred and secular, may be difficult to reconcile with First Nations understandings. However, some material may be viewed as having a more significant historical and contemporary role in maintaining these relationships and the health of the community and communicating with the spiritual realm. For these or other strategic reasons, emphasis may be given by a particular First Nation to argue for the repatriation of material considered necessary for ongoing ceremonies. Control over items integral to transmission of knowledge through ceremonial life, to the extent that such distinctions are accepted and established, may be viewed as a duty and central not just to cultural but also to physical survival.<sup>40</sup> The human and religious rights overtones of such claims give them moral suasion on a universally understood level. As a consequence, it is not surprising that many Canadian museums and government institutions will repatriate or loan items that continue to be significant in the practice of ceremonial and religious life, and, in Alberta, legislation has been enacted to enable transfers of “sacred ceremonial items that are vital to the practice of their sacred ceremonial traditions.”<sup>41</sup> Most also have a means of consulting and working collaboratively with appropriate groups or individuals from source communities on the proper care and treatment of such items.

Repatriation can also be used as a means of improving economic well-being. For example, some First Nations in Canada seek to develop their own museums and cultural and interpretive centres. Not only does this help them ensure local involvement in interpretation, priorities, and protocols for preservation, use, and access by community members but it also generates employment and training opportunities and attracts tourists. A recent example is the collaboration between the Siksika Nation and the federal and Alberta provincial governments to create Blackfoot Crossing Historical Park, “which combines archaeological sites, artifacts, education, theatre and eco-tourism on 809 acres” east of Calgary.<sup>42</sup> One hundred and twenty artifacts have been repatriated and housed there. Another is the role that the repatriated potlatch collection housed at the U'mista Cultural Centre has in attracting tourism to Alert Bay, British Columbia. However, few First Nations in Canada have facilities that meet contemporary museum conservation standards. In instances in which all parties share a concern for physical preservation, proper training, and the need for suitable facilities, limited funding is available. The absence of sufficient funds to support the process of repatriation from inception to conclusion is the most significant barrier to final resolution of some repatriation claims.

First Nations are also concerned about how their histories and cultures are depicted. Many of these concerns, as they relate to exhibits at major Canadian museums, are being successfully addressed through avenues other than repatriation, such as the establishment of advisory committees; cooperative

management agreements; recruitment of First Nations board members, volunteers, and personnel; First Nations involvement in interpretation and display of First Nation collections; and other initiatives. Some First Nations are also attempting to control future misrepresentation through research protocols and the enforcement of research agreements through the law of contract. In some instances, control over cultural items may not be as important as the images depicted on them. It is beyond the scope of this chapter to explore the rationales for controlling the use of intangible heritage (see Part 3). The point here is that repatriation may not be so much about the recovery of an item as it is about respectful use of images considered rightfully controlled by individuals or groups within a First Nation.<sup>43</sup> However, Western copyright law may very well operate to put rights of use and control elsewhere.

Many other factors weigh into the assessment of justifications for repatriation, development of policy initiatives, and negotiated solutions. For example, items may have acquired new meanings and significance to the broader cultural heritage of a province, nation, or humankind. Issues of ownership under Canadian property law may arise if an item has been restored at significant cost or items from different communities have become commingled with each other.<sup>44</sup> Within and between First Nations, various connections and webs of entitlement and responsibility may complicate efforts to return and generate, rather than resolve, issues of control.<sup>45</sup> The Canadian public relies on preservation and protection of aboriginal material to understand its national and regional history and the role of aboriginal people in the formation of current economic, political, social, and other institutions. Return of items not intended for ceremonial use could operate to the detriment of originating communities as important associated knowledge might be lost if insufficient funds and facilities are available to support repatriation initiatives. Given the migration of many First Nations to urban communities, access to cultural information could be reduced rather than increased if existing collections are significantly depleted through transfer to local museums or cultural centres. The need and preparedness for return varies, with many items continuing to remain, by agreement, in collections for diverse reasons. As elaborated below, these concerns will also be considered in the assessment of legal rights and law reform initiatives.

## **Domestic Legal Environment**

### **Constitutional Rights**

#### *Recognition*

Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the “existing aboriginal and treaty rights of the Aboriginal peoples of Canada.” Although there is no case law directly on point, trends in Canadian aboriginal rights

law support arguments for the existence of aboriginal constitutional rights to ownership of certain forms of aboriginal material culture. Aboriginal rights that have not been validly extinguished by treaty or legislation prior to their constitutional protection in 1982 continue as enforceable constitutional rights. As elaborated below, the significance of elevating aboriginal rights to constitutional status lies in the limits placed on the ability of federal and provincial governments to terminate or regulate their exercise. Although aboriginal rights are collective rights of a group, depending on the nature of the right, they may be exercised by individual members of the group.

When we examine various streams of aboriginal and treaty rights jurisprudence, a number of arguments emerge.<sup>46</sup> One argument is that rights to material culture may form part of a broader claim for aboriginal title. According to the Supreme Court of Canada (Supreme Court), aboriginal title is derived from occupation of land at the time the Crown asserted sovereignty over that land. Proof of title and reconciliation of prior occupation with Crown sovereignty requires taking into account the common law (a system of law that is based on judicial decisions) and aboriginal perspectives, including their laws and land tenure systems.<sup>47</sup> Take, for example, crest (totem) poles, which may not only serve as a physical manifestation of the history and identity of a particular Gitxsan chief and house (family lineage group) but also communicate intangible and tangible property rights.<sup>48</sup> As the Supreme Court calls upon us to consider both Canadian and indigenous law in rights recognition and reconciliation, Canadian fixtures law might be applied to determine, for example, whether a crest pole attached to land (or a building) and removed without permission is properly considered part of aboriginal land. Central in this analysis may be whether the totem pole was affixed “to enhance the land (which leads to a conclusion that a fixture exists) or better use of the chattel [crest pole] as a chattel” – a nebulous and difficult distinction to apply in many contexts.<sup>49</sup> If it is a fixture, it is part of the land.

Gitxsan law may then be used to support the conclusion that crest poles that are not carved for the purpose of donation or sale are intricately connected to aboriginal land, history, and territorial jurisdiction. Like deeds or title documents, crest poles evidence territory of a particular house. They form part of the land itself. As Xamlaxyelxw, Solomon Marsden, a chief of the Ganeda (Frog/Raven) Clan of the Gitanyow (Kitwancool) Tribe of the Gitxsan explained in his testimony in *Delgamuikw*:

When a chief is planning to raise the pole, it is very important because he thinks back on his territory where he would put all ... the power and authority that he has and he will put all the crests in his adawx [verbal record of lineage's history] on this pole ... the Indians know how important it is to

our people, because it shows where our power and authority and jurisdiction is ...

The pole represents ... the power and ownership of the territory. The ... totem poles that you see standing have these – and they're not just standing there for nothing.<sup>50</sup>

Looked upon over a period of years, judicial decisions concerning definition, interpretation, and termination of a wide range of aboriginal constitutional rights also suggest there are certain generic rights enjoyed by all aboriginal peoples of Canada, including “the right to an ancestral territory (Aboriginal title),” “the right of cultural integrity,” and “the right to customary law.”<sup>51</sup> The right of cultural integrity is defined by Brian Slattery, a leading expert in Canadian aboriginal rights law, as “*the right of Aboriginal peoples to maintain and develop the central and significant elements of their ancestral culture.*”<sup>52</sup> This fundamental right fosters a range of “intermediate generic rights” “relating to such subjects as religion, language, and livelihood,” which, in turn, “give birth to specific rights” shaped by practices, customs, and traditions that may differ among particular aboriginal groups.<sup>53</sup> The basic framework for ascertaining specific rights recognized in s. 35 is given in *R. v. Van der Peet*.<sup>54</sup>

In *R. v. Van der Peet*, the Supreme Court held that aboriginal rights are sourced in practices, customs, and traditions that were integral to the distinctive culture of an aboriginal group prior to European contact and that continue to be integral to the distinctive culture of that community today.<sup>55</sup> Therefore, it is necessary to show “how the claimed right relates to the pre-contact culture or way of life of an Aboriginal society.”<sup>56</sup> Although there must be some degree of continuity, this requirement does not mean claimants must prove an unbroken chain of practice or significance, and it will not be applied strictly in circumstances that are considered unjust. For example, because of the oral nature of aboriginal societies, it would be extremely difficult for them to produce conclusive evidence from precontact times. Consequently, postcontact evidence can be used to prove the integral nature of precontact practices if “it is directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact.”<sup>57</sup> Laws of evidence have also been adapted to give persuasive value to oral histories and not just written documents.<sup>58</sup>

Focus on the centrality of precontact activities and distinctive elements of aboriginal culture in *Van der Peet* has generated substantial criticism. For example, this focus implies that aboriginal culture can be accurately described by a shopping list of static characteristics, a presumption abandoned by contemporary anthropological theory. Imagine, John Borrows muses, what it would be like if the rights of other Canadians depended on “whether they

were important to them two or three hundred years ago.”<sup>59</sup> Such emphasis also fails to give meaningful content to aboriginal perspectives of their own cultures and the fact that “the concept of culture itself is inherently cultural.”<sup>60</sup> Further, “[a]lthough the nature of the *practice* which founds the Aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular Aboriginal community, the nature of the *right* must be determined in light of present day circumstance.”<sup>61</sup>

More recent decisions of the Supreme Court advocate flexibility when engaging the *Van der Peet* analysis, and they do so in a manner consistent with the purposes of s. 35 of the Constitution. These purposes include reconciliation of prior occupation, distinctive aboriginal societies, and indigenous legal orders with the assertion of Crown sovereignty,<sup>62</sup> and addressing injustices suffered “at the hands of colonizers who failed to respect the distinctive cultures of pre-existing Aboriginal societies.”<sup>63</sup> Thus, in the context of Métis aboriginal rights to hunt, the *Van der Peet* approach was modified to accommodate the postcontact emergence of the Métis as a people and to prevent injustices that might arise from unreasonable burdens of proof given their unique history, including the denial of their existence as a people by Canadian governments.<sup>64</sup> In *Sappier*, the Supreme Court also held flexibility to be important “because the object [of the *Van der Peet* analysis] is to provide cultural security and continuity for the particular Aboriginal society.”<sup>65</sup> The main issue in *Sappier* was whether the Maliseet and Mikmaq use of wood prior to contact for such things as shelter, transportation, fuel, and tools was integral to their distinctive cultures. In answering this question, the Supreme Court acknowledged that its direction in *Van der Peet* that “pre-contact practice must be a ‘defining feature’ of the Aboriginal society, such that culture would be ‘fundamentally altered’ without it has ... served in some cases to create artificial barriers to the recognition and affirmation of Aboriginal rights.”<sup>66</sup> So too has the concept of “distinctive culture.” “Distinctive” does not mean “distinct” or unique.<sup>67</sup> The purpose of the integral and distinctive requirements in *Van der Peet* is simply “to understand the way of life of the particular Aboriginal society, pre-contact, and to determine how the claimed right relates to it.”<sup>68</sup> It should not be used to exclude rights claims based on practices undertaken for survival, or other traditions and customs that may also be practised by, or of significance to, other aboriginal or non-aboriginal peoples.

Given the above developments and the purposes of s. 35, it is possible to extend the *Van der Peet* analysis to repatriation claims. For example, aboriginal rights to ownership and control of items of significant ongoing historical, traditional, or cultural import to a First Nation may arise if items claimed were integral to an activity, custom, practice, or tradition that was historically, and is presently, integral to their distinctive cultural identity and (1) the

item has precontact community origins or (2) the item is not precontact in origin but originates from the claimant community and continues to be central to an activity, custom, tradition, or practice that is precontact in origin. The fact that potential economic and political ramifications of repatriation claims on non-aboriginal Canadians are substantially different from those associated with claims to resource rights (typically the subject of aboriginal rights litigation) bolsters the argument for rights recognition. Although this argument has yet to be litigated in Canada, there are a few instances in which the courts have recognized the potential for recognition of aboriginal rights to protection and control of cultural objects and sites.<sup>69</sup>

Repatriation claims may also be grounded in a general aboriginal right to practise one's religion because "spirituality and the performance of religious rites have always been central to indigenous societies, a matter acknowledged in relations between the Crown and Aboriginal peoples, notably in the ceremonies attending diplomacy and treaty making."<sup>70</sup> Such a claim assumes that a connection can be established between the items claimed and the specific spiritual practices of an aboriginal group utilizing the *Van der Peet* analysis. An argument might also be made that legislation vesting title in the Crown to material culture integral to the ongoing spiritual practices of First Nations and the continued holding of such material by government institutions violates the right to freedom of religion protected by the *Canadian Charter of Rights and Freedoms*.<sup>71</sup> However, this may be a more difficult argument to maintain. It is not necessary that the purpose of government action be to deny the exercise of religious practices as long as this is its effect.<sup>72</sup> Although the *Charter* can be used to strike down or force amendments to legislation, it cannot be used to force government action, and First Nations would have to establish that the absence of the sacred material at issue substantially interferes with a religious belief or practice.<sup>73</sup> It may also be necessary to show that the material at issue plays a vital role and cannot be replaced.

Rather than focusing on the aboriginal nature of an item or its use, a claim may be founded on precontact First Nations laws (often referred to as traditional or customary laws) and customs concerning the individual and communal nature of an item or its use and transfer – provided that such laws continue to be integral to the distinctive culture of the First Nation asserting the claim. In *Van der Peet* Chief Justice Lamer (as he then was) recognized that indigenous legal orders survived the assertion of Crown sovereignty.<sup>74</sup> In *Delgamuukw*, he also stated that "traditional laws" are "elements of the practices, customs and traditions of Aboriginal peoples" that attract rights recognition.<sup>75</sup> These and other judicial opinions suggest that "the right to maintain and develop their systems of customary law" is another example

of a generic right applicable to all aboriginal peoples in Canada, although “the particular legal systems protected by the right obviously differ in content.”<sup>76</sup>

As First Nations law is addressed in greater detail later in this volume, I do not elaborate upon it here; however, a few important points are worthy of mention. First Nations law, certainly at the time of contact, was largely oral (and/or depicted through images), performance-based, and demonstrated through social practice that might include means of enforcement different from Western legal systems (such as through the will of the Creator). Like Canadian common law, First Nations laws evolve and have been affected by the existence of other legal systems. As some flexibility is adopted in assessing continuity, periods of cessation and revival will not necessarily prevent rights recognition. However, it is still likely necessary to demonstrate some continuity over time in the content of the law and its observance. It may also be necessary for First Nations to articulate laws in a manner “cognizable to the non-aboriginal legal system.”<sup>77</sup> The potential impact of these requirements on maintaining the integrity of First Nations legal orders is one reason that some reject, and others approach with caution, legislative intervention directed at recognizing and accommodating customary law, particularly if rights recognition requires the codification of customary laws.

Another issue is that “customary law may not directly address relations with outside communities and institutions.”<sup>78</sup> However, one might argue that such relations are reasonably implied in laws concerning capacity and processes for acquiring and conveying entitlements and responsibilities to property. Further, customary laws meeting requisite judicial criteria exist alongside Canadian laws and need to be reconciled.<sup>79</sup> Reconciliation requires placing equal weight on the common law and aboriginal perspectives, including their legal perspectives.<sup>80</sup> Reg Crowshoe, bundle holder and elder of the Piikani Nation, offers application and adjudication of military law as an example.<sup>81</sup>

Another approach might be to blend First Nations and Canadian property law in the resolution of a claim. The example of blending fixtures and First Nations law has already been given in the discussion of crest poles. Another helpful example can be found in two early US decisions that look to tribal law to ascertain the individual or communal nature of property and the validity of its disposition at the time of separation from the community.<sup>82</sup> If tribal law has been violated, the common law rule that one cannot confer a greater interest in property than he or she holds (known as the *nemo dat* rule) has been applied. This approach is adopted in US repatriation law through *NAGPRA*. The law of the originating Native American group at the time of separation determines whether an item claimed as cultural patrimony is communal and therefore inalienable by individuals.<sup>83</sup> Rather than being viewed as an extension of customary law, the use of the *nemo dat* rule can

also be viewed as extending “property rights to Aboriginals that are already protected for everyone else.”<sup>84</sup>

Respect and enforcement of laws concerning the communal nature and alienation of material culture may also be founded on general rights of cultural preservation and integrity, customary law, and self-government recognized and affirmed in original treaty relationships between First Nations and the Crown. Treaties are also the foundation of jurisdictional relations between First Nations and the Crown.<sup>85</sup> As such, one can argue that areas of legislative jurisdiction not delegated by treaty to non-indigenous governments, or at least those areas of jurisdiction not terminated by clear and plain legislation or other acts of state considered valid by Canadian courts (but not necessarily by First Nations signatories), continue with First Nations governments. Rights to control over material culture may also be implied in the purpose of treaties and the treaty-making process itself. For example, when interpreting treaties, Canadian courts must seek to identify the common intention of the parties; consider written text and oral promises; resolve ambiguities in favour of First Nations signatories; presume the honour and integrity of the Crown; and interpret treaties in a way that allows the modern exercise of treaty rights.<sup>86</sup> An integral part of the treaty-making process among Cree and Blackfoot Nations (and others) involved the pipe ceremony and other symbolic representation of the sacred and enduring nature of treaties. Participation in, and respect for, First Nations spiritual beliefs and ceremonies by treaty negotiators can be taken as evidence of the common intention not to interfere with ceremonies and to respect the proper use of items integral to them.<sup>87</sup>

### *Infringement, Justification, and Extinguishment*

Only the federal government can extinguish s. 35 aboriginal and treaty rights through legislation.<sup>88</sup> Further, legislation purporting to extinguish aboriginal and treaty rights must be clear and plain in its intent.<sup>89</sup> This arguably requires the federal government to consider potential conflict with aboriginal or treaty rights and to choose to resolve that conflict through abrogation. As elaborated in the next section, not only is there an absence of federal legislation asserting ownership over moveable aboriginal material culture, but aboriginal rights are not considered in federal legislation that affects trade in this material, such as s. 91 of the *Indian Act*<sup>90</sup> and the *Cultural Property Export and Import Act*.<sup>91</sup> Similarly, there is no evidence of clear and plain intent in federal legislation to terminate customary laws implicating rights of ownership and control of all aboriginal cultural objects.

Aboriginal rights protected by s. 35 are not absolute and may be infringed through provincial and federal legislation if the infringement meets what has come to be known as the “justification test.” First, the government must demonstrate a “compelling and substantial” valid legislative objective that has been exercised in a manner consistent with the honour of the Crown

and its fiduciary obligations towards aboriginal peoples.<sup>92</sup> The broader public interest must be considered in assessing valid objectives, such as historical reliance on a resource by the non-aboriginal community and the economic impact of giving aboriginal interests priority. Justifications that may be relevant in repatriation claims are elaborated in the discussion of provincial legislation below. Consideration of these factors may call for a solution that accommodates a range of interests.

The second part of the justification test requires federal and provincial governments to consult with affected aboriginal peoples, which, in the repatriation context, may apply to the enactment of new laws or the continuing application of laws implicating ownership, disposition, and protection of products of archaeological research and the excavation or destruction of sites. The nature and extent of the consultation necessary varies with the circumstances, including the nature of the right and the extent of infringement. However, consultation must always “be in good faith, and with the intention of substantially addressing the concerns of Aboriginal people” affected.<sup>93</sup> Recent decisions of the Supreme Court state that maintaining the honour of the Crown also requires some degree of consultation in relation to potential rights not yet recognized by Canadian courts or through agreement.<sup>94</sup>

### ***Reconciliation and Negotiation***

The need to reconcile aboriginal interests with those of the larger Canadian society is a theme that runs through aboriginal rights jurisprudence interpreting s. 35. Although the Supreme Court gives us a framework within which to argue for the recognition of aboriginal constitutional rights, it also calls upon us to negotiate how to interpret the content of those rights in a way that gives them contemporary meaning, serves the interests of modern aboriginal peoples, and takes into consideration non-aboriginal interests. Some principles to guide negotiation include placing equal weight on aboriginal and Canadian legal perspectives, negotiating in good faith and with the “intention of substantially addressing” the concerns of aboriginal claimants,<sup>95</sup> considering the purposes of s. 35 in assessing proof of historical circumstances and practices and giving content to rights in a modern form, and taking into consideration the impact of government action on existing and potential aboriginal rights and interests.

### **Common Law and Legislation**

Principles of contract and property law may also support repatriation claims. The examples of fixtures law and *nemo dat* have already been given. Another example is acquisition of property in dubious circumstances that suggest significant inequality of bargaining power, undue influence, mistake, or fraud. This can void what would otherwise be considered a legitimate transfer

of title as the concept of “voluntariness” is central in ascertaining the intent necessary to donate or sell.<sup>96</sup>

However, a potential significant barrier to common law and aboriginal rights claims is the application of statutory limitation periods that require that actions be brought before provincial and federal courts within a specified time period. For this reason, it is important to consider the impact such legislation could have and the types of reform that may be necessary to empower First Nation claimants.

### ***Limitations Legislation***

In addressing limitations legislation, a significant hurdle for First Nations is a juridical concept of fairness in which protection of innocent good faith purchasers is a fundamental component. The primary purposes of limitation periods as applied to property claims are to encourage prompt settlement of disputes, create the certainty of title necessary for the operation of markets in a private property system, and protect reasonable expectations of good faith purchases. They are also intended to address evidentiary problems that can occur as time passes, such as the death of witnesses and the interpretation of historical documents and unfairness that can arise from measuring past conduct against new standards of conduct liability. However, they are not intended to operate as instruments of injustice, and such injustices do not necessarily lose their “sting with the passage of years.”<sup>97</sup>

Limitation periods generally commence when the claimant knows, or reasonably ought to know, the material facts upon which the claim is based (discovery principle). Although ignorance of the law will not normally extend a limitation period, vulnerability and the awareness or ability to bring a possible legal action have at times been relevant considerations in assessments of discoverability in the context of aboriginal claims.<sup>98</sup> The application of limitation periods is complicated further by the lack of consistency in provincial law and questions that arise about the material time frame to ascertain discoverability. For example, where some provinces expressly exclude application of limitation periods to s. 35 claims or equitable claims by aboriginal peoples against the Crown, others are silent. Because the underlying cause of action in a repatriation claim is often historical, there are a number of potential material dates to ascertain discoverability and the relevant legislation that applies, including the following: the time when an item was separated from the community; the time it came into the possession of the defendant; the date at which material facts came to be known through research or other means; the date of first inquiry about an item; the date of refusal to return; and, where fiduciary obligation or the honour of the Crown is at issue, perhaps the date that fresh obligations arose through control over the item after the date of the original breach.<sup>99</sup>

Tamara Kagan argues that there are three ways to mitigate the effect of such statutory limitations on repatriation claims: “judicial interpretation, legislative amendment, and constitutional challenge” – the latter argument arising from the inability of provinces to terminate aboriginal rights.<sup>100</sup> She notes that recent judicial interpretations take into consideration the larger social context of a claim and whether the policy behind limitations legislation is served through its strict application, including whether application will perpetuate a continuing injustice. Those with specialized knowledge, like collectors, may also be held to higher standards.<sup>101</sup> However, courts will also take into consideration the interests of innocent private good faith purchasers, particularly where there is no reason for them to “doubt the validity” of their title.<sup>102</sup>

Application of limitation periods in actions to recover items of ongoing historical, traditional, or cultural import central to a First Nations community or culture that, through legislation or other means, are considered the property of governments and Crown corporations may be harder to sustain based on usual policy justifications. This is not to suggest that specific institutions or their employees frequently or consistently acted in bad faith historically, although actions of individuals and institutions are relevant considerations. For example, where “good faith” is a requirement for immunity from claims, assessment of good faith may require consideration of the role government played in creating legal, societal, and other pressures that operated to the detriment of First Nations at the relevant historical date and whether it is honourable and just for the Crown or its institutions and agencies to rely on limitation periods as a consequence. Such arguments may also be relevant in instances where limitations legislation is suspended while claimants are under a disability. These broader considerations may lead to a conclusion that reliance on statutory bars to claims of significant cultural items by First Nations continues to perpetuate a historical injustice.

Limitation periods may also be harder to justify where the effect of application is to prevent a claim for, or exercise of, aboriginal constitutional rights to property. Policy arguments against application become stronger when the purposes of constitutional protection are taken into consideration, including those articulated above. Aboriginal rights may also give rise to unique fiduciary (trust-like) equitable obligations on provincial and federal governments, which include acting in the utmost good faith and in the best interests of aboriginal beneficiaries of the relationship. Although the Crown must balance these obligations with its obligations to the public at large, “because the beneficiary is under no duty to inquire into the actions of the fiduciary” and may rely on the “good faith exercise of those duties” it is more difficult to sustain arguments based on discoverability in instances in which a fiduciary obligation exists.<sup>103</sup> However, ultimate limitations may still apply.<sup>104</sup>

Different approaches have been taken by the courts to limitation periods and aboriginal rights claims, making it difficult to predict how they will be applied to specific repatriation claims. In some instances, courts have interpreted limitation statutes strictly, with the result that a claim is statute-barred. Others have chosen not to apply them in aboriginal rights claims, invoking policy and other legal concepts such as continuing trespass (ongoing unauthorized interference with property), fraud (intentional deception), equitable fraud (concealment, which, considering the relationship of the parties, is considered unconscionable),<sup>105</sup> and broad interpretations of the discovery principle. Arguments for non-application have also been upheld on the basis that provinces cannot pass legislation that goes to the core of federal jurisdiction over “Indians and lands reserved for the Indians.”<sup>106</sup>

The above complexities in the law support avoiding reliance on such technical legal arguments and negotiating repatriation claims on moral and ethnical grounds, which is the approach of several major museums and government agencies in Canada. However, there are compelling policy considerations for making limitation period inapplicable to the repatriation of certain forms of government-owned or -controlled property (*e.g.*, ceremonial property or property obtained under duress or illegally under Canadian or First Nations law at the time of separation from the community). This would create certainty in Canadian law and operate to the benefit of First Nations as limitations, and other forms of statutory title, may be expressly or impliedly relied upon by parties and affect the balance of negotiating power. Another approach might be to delay the application of limitation periods until after a repatriation claim has been made and refused, a rule that has been applied by some states in the United States in relation to claims for stolen art. Regardless of how limitation periods are addressed, the doctrine of laches may still apply, unless expressly addressed by legislation, to protect current possessors where there has been inexcusable delay resulting in reasonable reliance on the status quo or there is acquiescence by the delaying party. Acquiescence occurs when “a person with full knowledge of his own rights and the acts that infringe them, has, by his conduct, led the persons responsible for the infringement to believe that he has waived or abandoned his rights.”<sup>107</sup> However, as this argument is based in equity, it will not be applied if, considering the circumstances of all affected, it would be unjust in the circumstances.

### ***Federal Legislation***

There is no federal legislation that makes a comprehensive claim to ownership of cultural resources on or under federal lands or waters, and measures to protect First Nations cultural heritage on federal land, to the extent they exist, are scattered throughout federal and territorial legislation and policy.<sup>108</sup>

As a result, rights to some archaeological material are governed by the law of finding, which gives superior rights to land owners over finders of buried items but not over original owners (assuming claims of true owners are not barred by limitation periods and items have not been abandoned).<sup>109</sup> Although there have been consultations on enacting federal archaeological protection legislation in the past, and Parks Canada is currently “working on proposed archaeological legislation,” there is no federal legislation that clearly and plainly addresses aboriginal rights to ownership and control of their archaeological heritage.<sup>110</sup> Legislation to protect archaeological heritage was proposed in 1990 but was never enacted for a number of reasons, including objections by some First Nations to provisions vesting ownership of archaeological resources in the federal Crown, even though the proposed legislation also provided for consultation with cultural and religious groups in case of newly discovered objects and allowed for negotiated agreements with aboriginal peoples for ownership and control of archaeological resources.<sup>111</sup>

The federal government does not claim ownership of moveable cultural property on reserve lands, but certain restrictions have been placed on care and disposition of grave houses, totem poles, carved house poles, pictographs, and petroglyphs. Certain items may also fall within the purview of export controls articulated in the *Cultural Property Export and Import Act (CPEI)*, and, in some instances, First Nations may qualify for repatriation funding to buy items intended for export. However, as it was enacted in 1978 before Canadian jurisprudence on aboriginal rights evolved, it is not surprising that the *CPEI* itself does not anticipate or incorporate the unique legal rights and interests of First Nations. In short, this means that there is no federal legislation that extinguishes potential aboriginal rights to cultural objects, and enactment of future archaeological or other federal legislation that affects or potentially affects aboriginal rights in this area requires consultation and justification to the extent that rights are actually or potentially limited or abrogated.

Canada also does not have federal repatriation legislation. Some government agencies, such as Parks Canada, have, or are in the process of developing, policies to respond to repatriation claims. Federal agencies and institutions are also responding to repatriation requests in the context of negotiations with First Nations for the creation of parks and historic sites and modern land claim and treaty negotiations. Examples are the Blackfoot Historical Crossings Park discussed earlier and the Tlicho Agreement signed on 25 August 2003. The latter agreement provides for return of heritage resources through cooperative efforts of the Government of Canada, the Northwest Territories, and the Tlicho, provided that “appropriate facilities and expertise exist ... which are capable of maintaining such Tlicho heritage

for future generations” and that “relocation is compatible with the maintenance of the integrity of public archives and national and territorial heritage resource collections.”<sup>112</sup> The Nisga’a treaty also contains repatriation provisions affecting collections of the Royal British Columbia Museum and the Canadian Museum of Civilization.<sup>113</sup>

### ***Provincial Legislation***

First Nations material culture is also affected by provincial heritage conservation legislation.<sup>114</sup> Most of these laws provide for the designation and protection of historic resources, the reporting of discoveries, and the control of excavations through some form of permit system. In many provinces, the provincial Crown asserts ownership of archaeological objects found on or under public, and sometimes private, land. Provincial museums and universities are the main repositories for items acquired through statutory vesting. Statutory vesting under provincial law will not extinguish aboriginal constitutional rights to archaeological or other material if such rights can be established. However, continued application of provincial laws may be justified if a province proves a valid legislative objective. It may be argued that recognizing aboriginal ownership could result in Canadians as a whole losing the opportunity to learn from and about practices, traditions, and peoples integral to Canada’s multicultural society. However, this argument is less persuasive if one considers that American experiences under *NAGPRA* have not led to significant depletion of museum collections, the scope of material Canadian First Nations generally seek to have returned, and the fact that many First Nations continue to respect the role museums have in preserving their cultural heritage and educating the general public. It may also be argued that government interference in vesting ownership of archaeological heritage operates to the benefit of aboriginal peoples by ensuring the proper care and protection of aboriginal material culture that might otherwise be destroyed or that Crown ownership is necessary to facilitate the exploitation of natural resources for the economic well-being of all citizens of the province, including aboriginal peoples. Regardless of the persuasiveness of these arguments, they may not be sufficient to justify provincial ownership of the broad range of aboriginal material currently affected by limitations and cultural heritage legislation. Nor would they be sufficient to support analogous federal legislation. However, in some circumstances, they may support limiting the scope of repatriation rights and imposing conditions for return (such as those contained in the Tlicho agreement).

Even if a court finds these justifications sufficiently compelling and substantial to support Crown ownership or control, if an aboriginal right is established, the province must prove that it is accomplishing its objectives in

a manner consistent with its fiduciary obligation. For example, the province may be required to consult with an aboriginal group regarding ownership, disposition, and protection of products of archaeological research and excavation or destruction of sites. This is often done as a matter of federal and provincial policy, but it is not always expressly articulated in relevant legislation and thus is more vulnerable to change.<sup>115</sup>

### ***Laws Regulating Museums***

Museum and archives law considered together with the common law of negligence and fiduciary obligation may also place legal restraints on the ability to repatriate. Legal obligations of museums are found in legislation, common law, incorporating documents, and internal policies. Consequently, rules applicable to particular institutions may vary. However, publicly funded museums in Canada share similar public mandates. Take, for example, the federal *Museums Act*, which establishes and regulates federal museum corporations, including the Canadian Museum of Civilization (CMC).<sup>116</sup> The *Act* declares that “the heritage of Canada and all its peoples is an important part of the world heritage and must be preserved for present and future generations.”<sup>117</sup> It charges museums under the *Act* with “preserving and promoting the heritage of Canada and all its peoples throughout Canada and abroad and in contributing to the collective memory and sense of identity of all Canadians.”<sup>118</sup> The emphasis on preservation, education, and public interest in such mandates raises issues about liability if these goals come into conflict with issues of title, use, and preservation raised in repatriation claims. Although many Canadian museums interpret public mandates to include repatriation of significant cultural items to aboriginal peoples, such mandates may also affect the scope and/or quantity of items considered for repatriation, particularly outside the treaty and land claim process.

Much of Canadian legislation governing publicly funded museums establishes a corporate body under the governance of a board of directors or trustees, often a Crown corporation. Generally, museum corporations are vested with the power to acquire, preserve, and dispose of assets, with powers of disposal being articulated more broadly in some legislation than others. For example, the CMC may “sell, exchange, give away, destroy or otherwise dispose of objects of historical or cultural interest and other museum material in its collection and use any revenue obtained there from to further its collection.”<sup>119</sup> However, these powers are restricted in that the CMC “may not deal with property otherwise than in accordance with the terms, if any, on which it was acquired or held.”<sup>120</sup> Deaccessioning under these and similar provisions also requires consideration of their purpose for inclusion in the legislation and the public interest in retaining items. While the former point is a rule of statutory interpretation and the latter can be reasonably implied

by the mandates of publicly funded museums, in some instances they are also expressly articulated in legislation and museum policy.<sup>121</sup>

Statutory obligations must also be interpreted in the context of continuing common law obligations. For example, the law of negligence may impose a duty to take reasonable steps to ensure that property is returned to the appropriate individual, group, or First Nation. In the United States, some courts have applied the law of negligence and concluded that museum trustees must take the same care in handling collections that a reasonably prudent person would take in dealing with his or her own property.<sup>122</sup> Museum trustees must also “manage the affairs of the museum so that its property will not be diverted from the public purposes for which it was entrusted.”<sup>123</sup> In situations where museums are established as trusts, this includes remaining “loyal to the terms of the trust and ... carry[ing] out the purposes for which the charitable organization was created.”<sup>124</sup>

As Robert K. Paterson argues, directors of museum corporations in Canada may be held to different standards as museums here “are not usually established as trusts.”<sup>125</sup> However, laws of negligence will likely still apply, and provisions in mandates similar to those contained in the *Glenbow-Alberta Institute Act* (discussed below) could be interpreted to impose trustee-like (fiduciary) obligations on the Crown and its agents.<sup>126</sup> Balancing the interests of a diverse public also becomes more of a legal slippery slope depending on the economic and national cultural value or number of items returned. For example, it is unclear how the courts will act in situations: (1) where museums do not seek compensation for deaccessioned items of significant economic value that are not needed for ceremonies or were not acquired under questionable circumstances; or (2) the number of items transferred raises questions about the substantial depletion of a collection and its value. It is possible, given their public mandates, that such actions will be treated the same as charitable acts by private corporations; that is, they may be upheld if they are consistent with the long-term profitability and goals of the museum corporation.<sup>127</sup> Such rights of disposal may also be grounded in the unique moral and potential legal claims of First Nations, including fiduciary obligations owed by the Crown and its agents to First Nations. Prohibitions placed on alienation in documents of sale or donation may also result in the inability to repatriate without permission of the vendor or donor, or a court order, even if there is a reasonable basis to challenge the source of title and ability to transfer.

For these reasons, regardless of how custodial institutions interpret their public mandates through repatriation policies, case-by-case negotiations, or other means, they are potentially limited in what they can do, absent recourse to a more formal legal mechanism that can address public obligations and liabilities, such as the modern treaty or land claim process. Also for these

reasons, museums tend to have deaccession and repatriation policies that require the approval of a board of directors and, in some cases, ministerial approval. It is beyond the scope of this chapter to review all law governing federal and provincial public institutions and potential sources of liability. The point is, it is unclear how statutory and common law responsibilities are to be understood in the context of repatriation by publicly funded museums and government agencies, given the diverse public they are intended to serve. In an attempt to address these and other concerns, some museums, such as the CMC, have developed detailed repatriation policies. However, museums can only go so far with policy initiatives as they cannot, through policy, change the legislation or common law that governs them.

Rights of disposition by librarians and archivists may also be limited by similar common law and statutory obligations.<sup>128</sup> Canadian intellectual property and access to information laws create further obstacles to repatriation. For example, photographs, journal entries, and sound recordings of First Nations songs, traditional knowledge, language, or other forms of intangible heritage under Canadian law are generally considered the property of the anthropologists, missionaries, and explorers who made them rather than of the affected First Nations. Once copyright to this material expires, those records are considered to be in the public domain. Although archivists are authorized to restrict access to confidential archival material, usually pursuant to agreements under which such archives are acquired, access to information legislation and the public mandate of archives may limit the ability to deny access to other culturally sensitive material. Some provinces expressly allow the withholding of information that could reasonably be expected to result in harm to historic sites or that could harm relations with First Nations governments.<sup>129</sup> However, there is no express protection or discretion to deny access on the basis of records being considered sacred or confidential in nature where such conditions are not clearly placed through contractual arrangements with the donor.

In British Columbia some statutory reform has evolved that addresses the interplay of repatriation with treaty negotiation and statutory and common law obligations. The *BC Museum Act* gives the board of directors authority to dispose of items in the Royal British Columbia Museum collection at its discretion: "(i) after considering the cultural significance of the objects and public interest in retaining the objects in the collection, and (ii) in accordance with the ethical and other standards" adopted.<sup>130</sup> Section 7 requires the museum to transfer title and possession of an item in its collection to a First Nation upon government request. Situations in which a request might be made include a treaty or other agreement made between the government and a First Nation. Such a transfer may also be subject to government-imposed terms and conditions. Concerns about potential liability and the need for a

more transparent process are also addressed through more extensive statutory reform in Alberta.

### ***Alberta's Repatriation Legislation and Takings Law***

Alberta's *First Nations Sacred Ceremonial Objects Repatriation Act* (*Repatriation Act*) was originally intended to aid specific repatriation negotiations between the Blackfoot people of Alberta and the Glenbow-Alberta Institute for return of medicine bundles and other ceremonial items. However, it also applies to the Provincial Museum of Alberta (now the Royal Alberta Museum) and all First Nations in Alberta. It is intended "to harmonize the role museums play in the preservation of human heritage with the aspirations of First Nations to support traditional values" and "ensure that First Nations communities have ownership and responsibility [for] spiritual artifacts."<sup>131</sup> Section 1(e) defines sacred ceremonial objects as objects, the title to which is vested in the Crown, that are "vital to the practice of the First Nation's sacred ceremonial traditions." Although not the product of rights-based negotiation, this definition is consistent with judicial definitions of aboriginal rights at the time of enactment, potential religious rights arguments, and contemporary museum policy. However, the requirement that an item be "vital" to practice is a stricter approach than that taken in more recent interpretations of the integral to distinctive culture test discussed earlier in this chapter.

Prior to the enactment of Alberta's legislation, returning sacred ceremonial items could expose the Glenbow and the Government of Alberta to liability as objects in the Glenbow collection are held by the provincial Crown and Glenbow on behalf of the citizens of Alberta. Although contrary arguments exist, this section could be interpreted as imposing trustee-like obligations discussed under laws regulating museums above. Further, Glenbow had the authority to manage its collections, including loans to First Nations, but ministerial approval was required to deaccession. Ministerial approval was difficult to obtain for a number of reasons, including uncertain legal status of band councils and potential conflicts that could be generated by returns to individuals.<sup>132</sup> As the Glenbow and the Royal Alberta Museum were making increasingly extensive loans of ceremonial items that technically "belonged" to the province or were held in trust for the people of the province, the provincial government felt that a consistent and transparent process to guide such decisions was required.<sup>133</sup> The *Repatriation Act* and consequential amendments to other relevant legislation, such as the *Glenbow-Alberta Institute Act*, facilitate return by relieving the Glenbow and the province of legal liability arising from a repatriation conducted in good faith pursuant to it.<sup>134</sup> As a result, title to 251 cultural items previously on loan to the Blackfoot has been transferred to them.

First Nations initiate the repatriation process by negotiating regulations. The minister must grant approval for repatriations in accordance with the regulations, unless, in the minister's opinion, repatriation would be considered inappropriate.<sup>135</sup> Repatriation involves transfer to a First Nation of the Crown's title and acceptance by the First Nation on behalf of all of the people of that First Nation. Rules around repatriation of sacred ceremonial items not covered by the Blackfoot agreement are to be governed by regulations yet to be enacted.

The *Blackfoot First Nations Sacred Ceremonial Objects Repatriation Regulation* came into force in May 2004 following consultations with the Blackfoot.<sup>136</sup> Under this regulation an application for repatriation must be made by a society incorporated under Alberta law and acknowledged by the elected chiefs and council. Applications may only be made by an incorporated society on behalf of individuals who agree to put the sacred ceremonial object back into use.<sup>137</sup> The society accepts title on behalf of the First Nation and agrees to ensure the object is used in a manner consistent with its sacred ceremonial nature.<sup>138</sup> Although not suitable for all First Nations communities, these requirements are consistent with Blackfoot systems of authority and traditions concerning the responsibility of bundle holders to use bundles as intended by the Creator. Also, the mechanism of a legal society enables repatriation to appropriate community authorities rather than the band council.

Reliance on negotiated regulations enables the creation of unique community-specific processes, but it also increases costs and delay.<sup>139</sup> Alberta's legislation was drafted under time pressures and in response to a particular request and, as such, leaves more to regulation than might otherwise have been the case. The *Act* can also be criticized on various other levels, including the assumption of the validity of Crown ownership, its failure to include private institutions that receive provincial funding, the emphasis on sacred ceremonial material to the exclusion of other forms, and its failure to facilitate claims by First Nations located in other provinces. Further, repatriation of sacred ceremonial material not included in the Blackfoot agreement can be denied if, in the minister's opinion, it is inappropriate. Although enacted with good intentions, the discretion placed in the minister and retention of power by non-aboriginal governments over the fate of aboriginal cultural material continues to run contrary to the aspirations for self-determination and cultural sovereignty of some First Nations. As will become clearer below, this legislation may also be vulnerable to constitutional challenge for being beyond provincial legislative jurisdiction as it relates only to First Nations material culture. It can only be fully understood in the context of political will, trust, and a compromise containing the minimal amount of statutory interference considered necessary to bring home a large number of sacred ceremonial items vital to the continuity of Blackfoot ceremonies. It is only one step in a broader repatriation effort by the Blackfoot.

In the same year that Alberta passed repatriation legislation, the *Alberta Personal Property Bill of Rights* was enacted.<sup>140</sup> This legislation prevents the Crown from acquiring statutory title to personal property that, through the operation of common law or legislation, is owned by a person other than the Crown unless a process is in place to determine and pay fair compensation.<sup>141</sup> Personal property is defined as “tangible personal property that is capable of being physically touched, seen or moved.”<sup>142</sup> Consequently, the *Alberta Bill of Rights* places conditions on Alberta’s ability to extend the scope of its repatriation legislation to First Nations material culture that is privately owned, including material that a museum or public institution acquires through private donation or sale that does not, through the operation of legislation, become the property of the provincial or federal governments.

Similar legislation does not exist in other provinces or territories.<sup>143</sup> However, a recent decision of the British Columbia Court of Appeal suggests that there may be a common law obligation to pay compensation when any form of private property is taken through the operation of legislation.<sup>144</sup> The definition of “taking” in this decision coincides with US jurisprudence, which defines a taking as denial of “all economically beneficial or productive use.”<sup>145</sup> Consequently, it is likely that federal and provincial governments would be reluctant to enact repatriation legislation that extends to items considered privately owned material culture under Canadian property laws, given the significant financial repercussions and concerns about protecting good faith purchases for value. However, they might be convinced to provide funding for acquisitions from private collections or establish a mechanism for statutory acquisition of specific forms of material culture, such as sacred and ceremonial material, considered vital to a First Nation.

### Issues of Jurisdiction

Another complication in Canada is that the division of jurisdiction to enact laws is divided between the federal and provincial governments. Although it can be argued that matters of aboriginal cultural heritage are areas of core federal jurisdiction over aboriginal rights, culture *per se* does not fall within federal jurisdiction.<sup>146</sup> Further, subject to a few exceptions, such as collections governed by federal legislation and regulation of interprovincial or international trade, provincial governments have jurisdiction over most property within their boundaries. Pursuant to this jurisdiction, provinces are able, for example, to enact legislation of general application that affects aboriginal archaeological heritage discovered on or under provincial or private land. It is more questionable whether a province can enact “property legislation” applicable to First Nations only, such as Alberta’s *Repatriation Act*. A problem is that strict application of constitutional law doctrines could render such legislation invalid by characterizing it as implicating the “core of Indianness” and, thus, a matter of federal jurisdiction, particularly if an aboriginal right

to the property at issue can be established.<sup>147</sup> However, in practice there is nothing preventing such provincial laws from operating unless they are challenged in the courts. Further, the current practice of the Supreme Court to interpret constitutional powers in a manner cognizant of the political realities of Confederation may result in a decision that First Nations cultural heritage is a matter of overlapping jurisdiction, in which case provincial law is only rendered inapplicable in the face of conflicting federal legislation.

The history of provincial control over personal property may mean that federal repatriation legislation, other than in relation to its own property and collector institutions under federal law, is not politically feasible without a judicial pronouncement first on aboriginal or treaty rights. However, it is possible to argue that aspects of First Nation cultural heritage are central to the collective identity of an aboriginal people and, thus, more properly considered a matter of federal jurisdiction. Rather than enact separate repatriation legislation, the federal government could consider legislation covering a wider range of First Nations cultural protection issues. A number of factors suggest that this approach is unlikely, including the tendency of the federal government to restrict the exercise of its jurisdiction within the boundaries of federal lands, absence of Canadian jurisprudence on aboriginal rights to cultural heritage *per se*, a history of provincial heritage conservation legislation, costs associated with protecting heritage, political pressures not to take on significant financial commitments, and the growth of bureaucracy and difficulties associated with administering such broad legislation.

Given the above, it is difficult to determine where judicial opinion might fall on the issue of constitutional validity of provincial repatriation laws. A recent decision by the Supreme Court suggests that lack of federal opposition may be a factor in decision making, particularly where jurisdiction can be reasonably sourced in the province and the province has assumed that jurisdiction.<sup>148</sup> Because of the importance and necessity of accommodating diverse First Nations, continual dialogue, and the array of provincial legislation that must be considered in identifying statutory content and amendments, the federal government may maintain, for legal and practical purposes, that provincial governments are in the best position to address the repatriation of First Nations cultural items, except in relation to federal property. Any jurisdictional issues that arise can be addressed by the federal government's adoption of parallel legislation approving provincial initiatives.<sup>149</sup> However, some First Nations will oppose provincial involvement, no matter what the justifications, as they perceive their relationship under treaty to be directly with the federal government.

This raises another fundamental issue: How do we reconcile federal or provincial jurisdiction with First Nations jurisdictions? For many First Nations, cultural heritage is considered a matter of inherent First Nations

jurisdiction. Even where jurisdiction is not asserted, some prefer to pursue repatriation claims through negotiation processes viewed as more consistent with their own dispute resolution processes and legal orders. Unlike the United States, Canada does not have clear jurisprudence on rights to self-government. However, reasoning in various decisions and academic opinion supports the conclusion that First Nations jurisdictions co-exist with those of other governments where not clearly extinguished by federal legislation or treaty.<sup>150</sup> Currently, territory and membership based governmental powers, including matters of heritage protection and ownership of material culture, are the subject of modern treaty, self-government, and land claim negotiations. First Nations also have differing views on the appropriate role of federal and provincial governments in matters of material culture. Given this environment, legislated responses to repatriation will likely only be acceptable to most First Nations if they recognize and seek to respect and equitably reconcile First Nations laws and social practices concerning use, disposition, and belonging; are initiated, supported, and shaped by those First Nations affected; and are flexible enough to enable First Nations who choose not to be regulated by external federal or provincial laws to pursue other means or to choose application of legislation until the contemporary scope of First Nations jurisdictions are determined through self-government, treaty, or other processes. Such optional frameworks are not unheard of in Canada in matters that potentially affect powers of self-government.

## **Issues of Policy and Process**

### **Contemporary Museum Policy**

Canadian institutions with aboriginal-specific repatriation and collection management policies have been influenced by the recommendations of the Canadian Museums Association (CMA) and the Assembly of First Nations (AFN) Task Force on Museums and First Peoples (Task Force).<sup>151</sup> Prior to the release of the Task Force recommendations in 1992, some were already responding to concerns about the retention, display, and treatment of human remains, burial items, and other material through a range of initiatives, including, in some instances, through repatriation. For example, after many years of negotiations, in 1975 potlatch items from the Village Island potlatch confiscated under discriminatory Canadian laws were repatriated from the Museum of Man (now CMC) to the Kwakwaka'wakw on condition that an appropriate facility be built to house them. In 1988, after the intervention of the minister of Indian affairs, potlatch items from the Royal Ontario Museum (ROM) were also returned.<sup>152</sup> There are also examples of the repatriation of sacred ceremonial material, such as CMC's 1989 return of the Starlight bundle to the Sarcee. In explaining this decision, the CMC "stressed the

importance of the bundle to the band in conducting tribal ceremonies, its intended use in educating young Sarcees about their heritage, and the band's assurances that the bundle would be well preserved."<sup>153</sup>

Increased attention to repatriation was brought about by the Task Force and the controversial events leading to its creation. In 1988, as part of the Winter Olympic Games in Calgary, the Olympic Arts Festival hosted a special exhibit entitled *The Spirit Sings* at the Glenbow Museum. The exhibit included a number of masks lent from other museums. The Lubicon Nation objected to the display of the masks and organized a boycott of the exhibit.<sup>154</sup> Of particular controversy was the display of a False Face Mask on loan from ROM and allegedly sold and displayed in violation of Mohawk law. False Face Masks are the communal property of the Medicine Society of the Mohawk Nation and Iroquois Confederacy, are used in healing and other ceremonies and, it was alleged, are forbidden from public view.<sup>155</sup> Upon learning of the exhibit, the Mohawk Nations of Kahnawake, Akwesasne, and Kanasatake sued the Glenbow-Alberta Institute for the return of the mask and other Mohawk cultural items on display. They also applied for an injunction (a court order that prohibits a party from committing a particular act) to prevent the continued display of the mask until issues of ownership and the enforcement of Mohawk law could be resolved at trial. Justice Shannon of the Alberta Court of Queen's Bench granted an initial application to have the mask removed from display. However, two weeks later, upon hearing evidence from ROM that the mask had been on display at various museums for many years without objection, he decided that the Mohawk failed to show that irreparable harm would be suffered from the continued display of the mask until trial – a legal condition that must be met for the relief sought. Although the court acknowledged that the question of ownership was a serious issue to be tried, the matter never went to trial.

In the wake of the *Spirit Sings* controversy, the Glenbow Museum worked to improve its relationship with First Nations and, in 1990, established the First Nations Advisory Council. "Sacred objects were [also] returned on loan to First Nation communities for use in traditional ceremonies that are vital for the survival of their cultures."<sup>156</sup> A Treaty 7 liaison position was also created, and First Nations people were hired to help with program delivery. However, later efforts to repatriate and transfer the title of sacred ceremonial objects to the Blackfoot were hampered by the barriers discussed earlier, eventually leading to the enactment of Alberta's *Repatriation Act* and an amendment to the *Glenbow-Alberta Institute Act*. The Glenbow continues to be a leader in the development of responsive programs, policies, and partnerships with First Nations that are represented in its collections. The CMC and ROM also continue to develop more responsive programs and policies, including policies to guide repatriation negotiations within and external to the treaty, self-government, and land claim processes.<sup>157</sup>

Also arising from the Spirit Sings controversy was a conference sponsored by the AFN and CMA on the relationship between Canadian museums and First peoples, which ultimately led to the establishment of the Task Force. Although the Task Force Report brought to light collaborative projects between museums and aboriginal peoples, “[t]hree major issues identified were: 1) increased involvement of Aboriginal peoples in the interpretation of their culture and history by cultural institutions; 2) improved access to museum collections by Aboriginal peoples; and 3) the repatriation of artifacts and human remains.”<sup>158</sup> The report also outlined a range of optional treatments for the “disposition of Aboriginal cultural patrimony including human remains, burial objects, sacred and ceremonial objects and other cultural objects that have ongoing historical, traditional, or cultural import to an Aboriginal community of culture.”<sup>159</sup> These include the need to: (1) return or transfer title to items that are judged by current legal standards to have been acquired illegally; (2) consider requests for transfer of title to objects that have not been obtained illegally but that continue to have sacred, ceremonial, historical, traditional, or cultural importance to an aboriginal community; (3) loan sacred and ceremonial items to aboriginal communities for use in ceremonies and festivities; (4) consider replicating material returned or retained; and (5) assist with the repatriation of objects held outside the country.<sup>160</sup>

Policy reform has also been influenced by, and in some instances provides guidelines for participation in, modern treaty, land claim, and self-government processes. *NAGPRA* was also studied by the Task Force, and its influence can be seen in a number of areas, including the language used in some policies to describe proof of claims and material that will be considered for repatriation.<sup>161</sup> However, recognizing that “concepts of ownership vary” and concerned that legislation could encourage a “strictly legalistic approach” to resolving repatriation claims, the Task Force, “[w]hile not ruling out the possibility of creating legislation in the future,” recommended that museums and aboriginal peoples resolve repatriation and other issues through collaborative negotiations.<sup>162</sup> The Task Force also called on museums and aboriginal peoples to establish partnerships guided by certain key principles, several of which are relevant to the negotiation of repatriation claims, including: working “together to correct inequities that have characterized their relationships in the past”; appreciating “the conceptual knowledge and approaches” of both aboriginal peoples and “academically-trained workers”; acknowledging mutually legitimate interests in cultural materials; and recognizing the “commonality of interest in the research, documentation, presentation, promotion and education of various publics.”<sup>163</sup>

Repatriation policies developed to guide the collaborative process in accordance with these principles vary. Policies reviewed share in common a consideration of the range of optional treatments set out by the Task Force, with some policies expressly indicating the influence that the Task Force has

had on content. I consider briefly key provisions from three examples here: the Royal British Columbia Museum (RBCM), the CMC, and the Manitoba Museum.<sup>164</sup> These policies operate in addition to general deaccessioning policies, which may expand the legal mechanisms for transferring title to specific items in collections through donation, sale, and public auction, often with preference given to other cultural institutions (including First Nations cultural institutions).

The RBCM Aboriginal Material Operating Policy and the CMC Repatriation Policy share in common a willingness to negotiate the repatriation of a wide range of material (and associated records), including items used in ceremonies and religious practices. The RBCM applies to “sacred or ceremonial” items “*essential* to the continuation of ceremonial and ritual life.” The “claimant must demonstrate that materials are *needed* by a traditional Aboriginal leader or leaders for traditional Aboriginal practices.”<sup>165</sup> Similarly, the CMC will consider requests for “objects which have demonstrably originated with the Aboriginal society and were employed by traditional curers and/or definitively related to traditional and ongoing religious practice.”<sup>166</sup> The RBCM policy also expressly provides for negotiation “with Aboriginal communities on the return of material culture of spiritual significance *or essential to cultural survival* ... bearing in mind the provincial interest, and in the context of ongoing treaty negotiations.”<sup>167</sup> A similar provision found in the deaccession and transfer provisions of the RBCM Collections Policy suggests that negotiations for the latter material may not be limited to the treaty negotiation process.<sup>168</sup>

The RBCM will also consider requests to return “directly associated burial objects” to “an Aboriginal community with a demonstrable claim of historical relationship to those objects in question,”<sup>169</sup> and the CMC will consider requests to return “objects directly associated with burials demonstrably linked to the Aboriginal government or individuals making the request.”<sup>170</sup> Although the CMC Repatriation Policy states that repatriation requests from aboriginal individuals and organizations will be considered, it also states that objects will only be repatriated to aboriginal governments if the request falls into the latter category or “the Aboriginal Government has designated in writing a duly constituted organization, such as a cultural centre, to assume responsibility for the material in question.”<sup>171</sup>

The RBCM policy contains a general commitment to return objects “acquired under circumstances that render the Museum’s claim invalid.”<sup>172</sup> The CMC will return to claimants that demonstrate an “undisputed historical relationship” to objects alleged to have been “acquired under conditions which were *illegal* at the time.”<sup>173</sup> “Requests for material which may be the subject of competing claims will not be considered until the [CMC] has received written confirmation from the Aboriginal governments concerned that the overlapping claims have been resolved.”<sup>174</sup> Whether or not it is ex-

PLICIT in repatriation policy, the nature of the historical relationship of a claimant and the possibility of competing claims will likely be considerations in all repatriation negotiations with all museums in light of their legal obligations. These factors, “the conditions under which the materials were acquired by the museum,” and whether the “character of the objects” is within the scope of the policy are considered in all requests for repatriation by the CMC.<sup>175</sup>

The range of items covered by the Nisga’a treaty (2001) suggests that both the RBCM and the CMC may have more flexibility when engaged in the land claim and modern treaty processes.<sup>176</sup> A wide range of items have also been returned under repatriation and deaccessioning policies. For example, at the time of writing, the CMC reported that it was actively engaged in discussions with thirty-four First Nations concerning the repatriation of cultural items and ancestral remains.<sup>177</sup> Repatriation can also be pursued at the CMC through the Sacred Materials Program. This program, which has been running since the 1990s, involves the CMC’s inviting and paying for representatives of First Nations to visit the CMC every year to view the items and records in its collection, to make recommendations on care and handling, to provide ceremonial care if desired, and to discuss repatriation requests.

Neither the CMC nor the RBCM policies expressly address whether ethical considerations and indigenous legal orders will be given equal consideration in assessing the invalidity or illegality of circumstances of acquisition. However, such factors are by necessity given some consideration by those seeking collaborative solutions through negotiations, if they are raised by First Nations claimants. At the time of writing, repatriation procedures at the Manitoba Museum were under review. They adopt the same language as the CMC with respect to illegally acquired material, but they also expressly raise the question of whether acquisition under circumstances of “cultural duress” should also be considered. Under the proposed policy, the museum may also repatriate “objects which have demonstrably originated with a particular ceremonial aboriginal or non-aboriginal society or organization and were employed by traditional ceremonialists and/or definitively related to traditional or ongoing religious practice,” “directly associated burial objects,” and material of “spiritual significance or essential to cultural survival.” The repatriation of human remains is directed by provincial legislation and policy. Remains and directly associated burial objects are only repatriated to an aboriginal government or an organization designated in writing for that purpose.<sup>178</sup> The new procedures also address repatriation in the context of land claims, self-government, and treaty processes.

### **Challenges of Policy-Based Repatriation**

Some who oppose repatriation legislation point to the development of re-

sponsive institutional policies, such as those discussed, and assert that legislation is not required. They emphasize that museum personnel in Canada are ethical professionals committed to the process of resolving repatriation claims on a case-by-case basis. I do not dispute this. However, it is also important to consider existing and potential problems for First Nations claimants, including lack of certainty and consistency; significant time and costs associated with ascertaining, researching, and complying with diverse policies and standards of proof; varying levels of commitment to repatriate; imbalance of power in negotiations; and legal impediments to return. Problems and potential entitlements arising from the legal environment in Canada have already been addressed and are only raised briefly here.

Lack of certainty may arise from a number of influences, including the fact that some institutions do not have clearly defined and transparent aboriginal repatriation policies, the diversity of approaches to repatriation, and reliance on personal relationships with individual museum and government staff willing to learn and advocate on behalf of a First Nation. Repatriation negotiations also have a significant educational component that may involve many meetings of employees and administrators with elders, researchers, and other knowledge keepers over a period of time. Although the personal nature of the process is consistent with many First Nations approaches to reconciliation of interests, of concern to some are that changes in staff may mean that the educational and orientation process has to start all over again. Further uncertainty and costs are generated by the lack of a centralized system to gain access to information about repatriation policies and practices, to obtain precedents to aid in preparing a repatriation claim, and to administer and monitor the implementation of the Task Force recommendations.

Given the public mandates of many institutions with aboriginal collections, a challenge in repatriation negotiations may also be that preservation, study, and public enjoyment of rare, fragile, or "secular" items will be considered as important as the current interest of a First Nation claimant, particularly where items have significant economic value or are considered to have significant national importance. In such circumstances, lack of funding poses a significant barrier when adequate facilities, training, and ongoing operational funding are considered essential by some or all of the parties.<sup>179</sup> Problems may also arise from museological concepts of use and preservation. For example, subject to the common exceptions of illegally acquired or ceremonial items, some institutions may interpret their mandates as requiring preservation that takes the form of protecting objects from their original uses.<sup>180</sup> They may also be more reluctant to engage in the unconditional repatriation of items not needed for ongoing ceremonies for many other reasons, including concern about changes in First Nations laws for disposition, funding priorities, and attitudes between generations; the potentially significant depletion of the size or value of a collection; access problems arising from

the remoteness of proposed facilities (including access by First Nations community members that have moved to urban centres); and the continued availability of government programs and other funding sources to support operations of First Nations facilities.

Funding has been an ongoing issue in implementing Task Force recommendations. Following the work of the Task Force, the CMA sought federal funding for a council of museums and First Peoples to assist with, promote, document the progress, and monitor the implementation of its recommendations. Funding was also sought for a resource centre to support the work of the council. Applications were unsuccessful, and implementation was left up to the goodwill of museums.<sup>181</sup> More recent attempts by the CMA to get federal funding to document progress has also been denied, and federal and provincial funding for museums and government agencies dealing with matters of heritage has been significantly reduced. Although there are many cultural centres in urban and First Nations communities, few have museums. Even where First Nations seek to establish their own museums, other priorities may make resources scarce. Funding is also necessary for ceremonial preparations, costs of transport, recording, staff resources, and many other expenses associated with the repatriation process. Regardless of whether a legislated or policy-based approach is taken to repatriation, increased public funding is required.

A concern raised in the introduction to this chapter is that regulation of repatriation through legislation rather than institutional policy may create adversarial relationships and inflexible legal standards of proof that operate to the detriment of First Nations. However, the experience of *NAGPRA* is that US courts have rarely needed to intervene. The legislation has largely been interpreted by those implementing it with its purpose in mind, and effective advisory and dispute resolution processes are available in the event of disagreement.<sup>182</sup> Further, the issue of proof is equally problematic in the policy context, and perhaps more so because of the diversity in criteria for claims and standards of proof applied. Criteria adopted may be more stringent than the most relevant legal standards. For example, aboriginal rights claims may extend to items “integral to the distinctive culture” of a First Nation claimant<sup>183</sup> – a standard less stringent than, for example, “essential to cultural survival.”<sup>184</sup>

I suggest that the standard to prove all elements of a claim should not be stricter than proof on a balance of probabilities. This is the standard adopted in civil (non-criminal) litigation claims by Canadian courts, and it is also the most likely standard to be applied in determining the reasonableness of decisions and the liability of institutions responding to repatriation requests. It requires that elements of a claim be established based on a preponderance of evidence, not indisputably or beyond a reasonable doubt. The latter standard is more relevant if the law of trusts is applied to interpreting fiduciary

obligations arising from public mandates. Arguments against the application of trust law have already been made. However, as there is no Canadian law directly on point, the exercise of caution and application of stricter standards in some policy contexts (*e.g.*, competing claims) is easily understood.

Regardless of criteria for claims and standards adopted to prove them, many other factors will influence the persuasive value of evidence and generate potential disputes. Repatriation procedures, whether legislated or not, may pit oral history against written documents. In this process, oral histories and the authority of those relating them can consciously and unconsciously be scrutinized under Western norms. Concerns about the frailty of human memory, reliance on what appear to be unsubstantiated assertions or strongly articulated positions, maintaining professional standards, public mandates, and a host of others may result in the need for First Nations to conduct research beyond discussions with elders and other knowledge keepers, corroborate oral testimony with expert opinion and other forms of familiar evidence, and accept solutions that fall short of return. This is not to suggest that all elders are always experts or that oral assertions should always be accepted as truth but, rather, that perceptions and circumstances of inequality may arise even when sincere attempts to give equal consideration to conceptual knowledge and approaches are being made. It also points to another potential problem – the amount of research that may be required to meet legislated standards. However, both of these problems may also present themselves in policy-based approaches as institutions must ensure that sufficient research is conducted to substantiate claims and to comply with legal obligations. Although some institutions may choose to accept different approaches and lower standards, depending on the circumstances, this could potentially expose them to liability.

The fact that written records, studies, circumstances of transfer, and other historical details are often in the possession of custodial institutions means that First Nations researchers may have to make on-site visits to go through museum records and reconcile them with community knowledge. While institutions currently share this information (subject to limits imposed by law), the socio-economic circumstances of First Nations claimants can have a significant impact on their ability to conduct and persuasively present this type of research. As discussed in the following section, the requirement that claims fit within certain categories of property, such as “secular,” “sacred,” “communal,” and “burial,” places an additional burden on First Nations to prove that the material they seek fits within a category that may be inconsistent with their understanding. As elaborated below, a strategy more sensitive to these problems and other issues of proof raised may be to avoid entitlements based on categories of property and to create evidentiary presumptions.

In circumstances where institutions are prepared to consider different systems of law and concepts of belonging, another potential area for dispute involves different conceptual understandings of what we mean by “law.”<sup>185</sup> When non-aboriginal people consider the existence of aboriginal legal orders, we are inevitably influenced by our understanding of what law is, regardless of our efforts to mitigate against this bias. The tendency may be to look for clearly articulated rules capable of judicial enforcement instead of operating within the social paradigm of the particular group asserting the claim. Given the expertise of people engaged in repatriation negotiations, they will be less likely to fall into this trap. The need to reconcile First Nations legal orders with Canadian law may nevertheless result in the adoption of inappropriate standards for measuring the existence and continuity of law within a community.

The above concerns raise more fundamental questions about the power and equality of participation by First Nations claimants in the negotiation process. Many First Nations and Canadian institutions seek through collaborative negotiation to develop relationships of equality and respect based on commonality of interest. However, the current policy environment hampers the development of relationships of true equality and, arguably, lags behind developments in Canadian law by failing to clearly place equal emphasis on, or found the resolution of disputes in, Western laws and First Nations legal orders. The need for access to effective and interculturally legitimate dispute resolution is elaborated in the final section of this chapter, “Possibilities for Change.” However, before discussing these possibilities, more attention should be given to concerns about legislated responses arising from fears associated with *NAGPRA*.

### **Lessons from *NAGPRA***

*NAGPRA*, and most repatriation policy in Canada, looks to specific categories of property to determine responses to repatriation requests. Such approaches to matters of cultural heritage “inherently suffer from underinclusiveness.”<sup>186</sup> Take, for example, the concept of communal property. First Nations property systems are much more complex than what can be found in simplistic understandings of communal and individual property division. Within a First Nation, cultural items may have individual, familial, and group dimensions. They may also be governed by specific laws of descent or exclusivity that enable alienation by individuals but that restrict the class of recipients. Given the difficulty of finding definitions acceptable to all First Nations, it is not surprising that some policies in Canada avoid the use of strictly defined categories and reference to “communal” property. However, although fitting within legislated definitions caused some difficulty in negotiations with some institutions in the United States, the experience of *NAGPRA* generally

is that legislated provisions are being interpreted with the purpose of *NAGPRA* in mind and that “Native American interpretation” of ambiguous terms has prevailed.<sup>187</sup>

*NAGPRA* has also taught us that legislation can have a significant economic and social impact on First Nations communities. Because of limited human and financial resources, tribal museums and governments have had a difficult time responding to notifications, collection summaries and inventories, requests for consultation, and other processes generated by *NAGPRA*.<sup>188</sup> *NAGPRA* has also shown us that the imposition of legislation and the mandatory reporting of material in collections can cause dissent in communities already faced with multiple priorities over where to allocate resources.<sup>189</sup> Rather than resource allocation priorities emerging as a result of internal social and political processes, outside forces can force a change in the agenda. *NAGPRA* has also caused some dissent in communities because it requires federally recognized tribal government bodies to determine who will act on behalf of the government and the community in negotiations. This can create problems of inconsistency with tribal law or structures of decision-making authority within a tribal confederation of formerly autonomous tribes.<sup>190</sup> Increase in funding to support repatriation helped to address some, but not all, of these concerns.

Similar issues arise in Canada. For example, the band council is not always the appropriate authority, according to the laws of the originating First Nation, to initiate proceedings or take possession. Further, band councils and other groups within the community may not be viewed as entities capable of assuming legal obligations in Canadian law. Although institutions are often sensitive to this problem, in some situations they may also be concerned with repatriating to entities recognized in Canadian law; so, for example, obligations contained in repatriation agreements can be enforced. Maintaining positive intergovernmental relations may also require, from the point of view of institutions and federal and provincial governments, band council participation. Alberta’s legislation tries to address this problem by enabling negotiation by societies incorporated under Alberta law and acknowledged as representatives of the band council.<sup>191</sup> Although this worked well for the Blackfoot, if used as a model outside this context, it also has the potentially destructive effect of creating even more entities with non-aboriginal origins to replace those that already exist. Another approach is to look to First Nations laws to determine the appropriate claimant. Even then, for the reasons given, some form of official delegation by the band council may be required.

*NAGPRA* has also demonstrated that repatriation legislation may have a significant impact on museum operations, particularly those that do not currently have aboriginal-specific policies and institutional arrangements in place for repatriation. As James Nason explains, *NAGPRA* required federally

funded American museums and other institutions to create new operational policies, to find the means to implement them, to create more effective ways for generating and maintaining data about collections, and to develop systems for advising affected communities on newly acquired material.<sup>192</sup> It also resulted in the need for more financial resources to develop inventories and summaries of collections, to research and participate in negotiations, and to implement cooperative management initiatives, again underscoring the importance of adequate financial commitments to support legal or policy reform.

Another issue is individual and community preparedness to receive material culture. This may be an issue not only of physical capacity and museological training but also of spiritual readiness to put items back into use and attend to their spiritual needs. Repatriation may mean rebuilding ceremonial structures and having people in the community eligible under First Nations law, spiritually prepared, and willing to take on responsibilities. In some communities, it may be necessary to create new laws and protocols that address contemporary concerns or unanticipated events. For example, ceremonies around the retrieval and reinterment of skeletal remains and burial items do not have a historical basis as the removal of this material and violation of burial laws was never anticipated. In these circumstances, museums and other institutions continue to act as places of safekeeping until material can make its way back to the community.

### **Possibilities for Change**

A strong message that emerges from both the legal and policy environment in Canada is the need for the negotiation and reconciliation of complex and sometimes diverse interests and legal orders. For example, both aboriginal rights doctrine and responses to repatriation claims by museums in Canada consider the nature of an item and/or historically based circumstances and then, through the process of negotiation, consider legal and normative principles in determining how to serve the modern interests of aboriginal peoples and the public. As this determination will vary from case to case depending on a wide range of factors, enacting legislation that details the content of the conversation and attempts to dictate an exclusive range of solutions is unhelpful and could be counter-productive (for example, by reducing options currently available). So how then might repatriation legislation operate to the benefit of First Nations? It will operate to the benefit of First Nations if it is designed to facilitate collaborative negotiations by dealing with some of the existing and potential problems inherent in the current legal and policy regime. It is most useful for negotiations outside the modern treaty, land claim, and self-government negotiation processes. However, although issues of scope of material eligible for return and liability can be addressed, issues of power and participation also arise in the latter context.

What might repatriation legislation designed to facilitate negotiation look like? I suggest that at least five core elements are required: (1) rules for application that respond to the importance of supporting existing successful partnerships and the economic, social, and political reality of affected institutions and First Nations; (2) creation of an interculturally legitimate dispute resolution process (perhaps in addition to other mechanisms, such as evidentiary presumptions) to ensure equal consideration of First Nations legal orders and ways of knowing; (3) clarification of legal standards applicable to museums and governments in discharging their public mandates and other responsibilities in relation to aboriginal items in their collections; (4) removal of, or more equitable guidelines for, application of limitation periods to repatriation claims; and (5) an adequate commitment to funding. As the latter two elements have already been discussed in detail, they are not elaborated upon below.

Some of these changes are possible through policy reform and some possibilities discussed are already contained in the policies of some institutions. For example, institutional policies could include access to more appropriate dispute resolution processes in the event of negotiations breaking down. Such reforms are encouraged because an advantage of addressing problems without resorting to legislation is that change can occur quickly. However, absence of uniform policy, the ease with which it can be repealed, the vulnerability of those relying upon the discretion of policy makers, the inability to amend law through policy, and various other factors I have raised in this chapter are some of the problems of relying on policy reform alone. Although the focus here is on repatriation legislation, consequential amendments to other legislation need to be considered in light of aboriginal legal rights and the restrictions placed on custodial institutions. Examples include changes to museum, heritage conservation, and limitations legislation discussed earlier in this chapter.

### **Issues of Application**

An important issue is whether repatriation legislation should be mandatory in application to all repatriations of First Nations material. This does not appear to be necessary to respond to the rationales for repatriation in Canada or the objective of addressing potential imbalances in negotiating power. Further, for political reasons elaborated earlier, and to maintain desired flexibility, legislation should not preclude repatriation under other processes. An alternative approach is for repatriation legislation to operate more like a safety net for First Nations in the event of collaborative processes breaking down. Specific obligations could be triggered when a First Nation (or other eligible claimant) seeks information about collections or repatriation. For example, provision of summaries of relevant material and information about

the range of repatriation processes available could be triggered by requests.<sup>193</sup> The arguments against this approach is that First Nations may not know where material is or where to begin their search and that complete inventories of collections are not always available online to assist them. However, the experience of *NAGPRA* suggests that this needs to be balanced against the significant financial and potential social costs of requiring public institutions to gather and send this information to all First Nations regardless of their interest in pursuing claims. Once a claim is received, obligations can also be placed on institutions to notify First Nations governments and individuals, groups, or families that an institution knows, or reasonably ought to be able to discover, have a potential claim. As museums and public institutions are in the best position to know the law that governs them, information provided should include the existence of repatriation policies and/or legislation. This approach of responding to specific requests is consistent with existing approaches to repatriation, ensures that First Nations get what is needed to commence a claim, and does not place unreasonable burdens on institutions.

Where claims are pursued, consideration must be given to processes for obtaining more detailed information, the range of people entitled to access, costs of reproduction or site visits, and other related matters. This assessment should take into consideration the need to balance staff resources against the expensive and time-consuming process of research on site. As it is often crucial to provide a first-hand examination of material in order to determine an accurate picture of its significance, access must be available to inspect material when requested. These considerations are currently at play in approaches to repatriation by Canadian institutions and, therefore, may not need to be specified in legislated approaches if access to efficient and effective dispute resolution processes are in place.

To be consistent with aboriginal rights law, public institutions and government agencies should entertain repatriation requests to a wide range of items of “ongoing historical, traditional or cultural import” of central significance or “integral” to a First Nations community, culture, or its relationship with the land, as is the case with some institutional policies. Words such as “central,” “significant,” and “integral” create room for negotiation by adopting the language of aboriginal and Canadian cultural property law, but they are not so vague as to be unenforceable in Canadian law.

As I have argued, different legal and ethical considerations apply to material owned or controlled by a government agency or Crown corporation and material owned by private individuals. The former do not invoke the same policy considerations as those afforded to individual purchasers and are less likely to invoke a requirement of compensation. However, given the political will, funding of private museums with aboriginal collections could

be tied to the application of legislation to future acquisitions with, perhaps, the consequence of freeing more funding for First Nations-controlled institutions.

A controversial issue is whether repatriation provisions should apply to property that has been privately donated to public institutions. A factor to consider is whether future donors will be reluctant to donate if material donated is subject to potential repatriation claims. Some museum policies expressly require donors be advised of this possibility, and most expressly prevent repatriation in breach of conditions placed on donation or sale to museums where circumstances do not raise issues of validity of title. For First Nations, this could have the negative effect of keeping more important cultural material in the hands of private collectors or encouraging attempts to sell or donate collections outside of Canada. It is therefore important that First Nations be given greater control over material originating from their communities that is intended for export and that relevant legislation be amended to ensure proper notification and support. Complications also arise where conditions are placed on donations and sales to public institutions. Although legislation can remove restrictions on alienation imposed by such conditions (as these types of obligations are context-specific and hard to anticipate in advance), it may be preferable to decide this issue on a case-by-case basis outside the statutory framework through other legal means.

Another issue of scope is whether oral and archival material should be included or whether statutory intervention should be limited to "objects." As access to oral and archival material can have a pivotal role in cultural continuity and revival and the preservation of language, there are strong ethical arguments for their inclusion. However, arguments for transfer of control or title are harder to maintain, given Canadian intellectual property laws and other property laws affecting recordings, pictures, writings, and other creative works.<sup>194</sup> Given this and the rationale for the repatriation of such material, the provision of good-quality copies may in some circumstances be a reasonable compromise. The issue then becomes who should bear the costs, particularly when significant amounts of material are at issue. This points to the need for some loan or funding mechanism to assist in these and other efforts, given the economic realities of most museums and First Nations. As is already the practice with some institutions, associated records outlining the provenance and illustrating the history of the material culture being repatriated should be provided to successful claimants, particularly where the objective is to establish a museum-like facility within the community (*e.g.*, collectors' notes, research notes, and catalogue records).

### **Issues of Power and Process**

There are several ways that issues of power and equality of participation can be addressed. Two responses are considered here: evidentiary presumptions

and appropriate dispute resolution. The former deals with matters of proof and the latter is broad enough to include matters of proof and other potential areas vital to negotiations where parties cannot reach agreement. Dealing first with presumptions, an equitable legal response to problems of proof, informed by a desire to address past injustices, might be a presumption in favour of First Nations title to material of central significance to their ongoing culture that was separated from their communities when the assimilative effect of government law and policy was at its peak. The Royal Commission on Aboriginal Peoples (RCAP) identifies this period as from 1880 to 1930.<sup>195</sup> How might this presumption work in practice? If museum records or First Nations accounts provide reasonable grounds to believe that material was removed during the time period set, then the onus would be on the cultural institution to investigate provenance and conclusively establish legitimate acquisition in the face of a repatriation claim. This approach places the burden on the party most likely to have a documented record of circumstances of acquisition and puts First Nations in the position of responding to research, thereby potentially reducing costs borne by them. Tamara Kagan argues that another viable approach based in legal and normative rationale is as follows: once a First Nation has proved on a balance of probabilities “the significance and centrality of an object,” this “justifies presumptive vesting of title to that group.”<sup>196</sup> However, First Nations will argue that some material, such as ceremonial material and burial items, may require that significance and centrality always be presumed, necessarily resulting in some differentiation in burdens of proof based on the nature of an item.

Presumptions such as these designed to mitigate against unfair circumstances and difficult burdens of proof are found in other Canadian property law contexts.<sup>197</sup> Similar approaches can also be found in policies and international agreements that call upon museums and other institutions to review their collections “for any indication of unlawful appropriation” during the Nazi era, with a view to negotiating restitutions.<sup>198</sup> However, even in this context, opinions differ on how to treat “transfers of title that were necessitated by the prevailing conditions” and sales made under unreasonable pressures but legal under the laws at the time.<sup>199</sup>

Some may fear that the adoption of evidentiary presumptions such as these pose a significant threat to the integrity and value of First Nations collections. Differing repatriation priorities among First Nations, increased First Nations participation in modern collections management, and the appreciation many First Nations have for the role museums have played, and continue to play, in protecting their cultural heritage and educating the broader public suggest that this is an unlikely outcome. The experience of US museums under *NAGPRA* also attests to this fact.<sup>200</sup> However, given this and the further concern that equal weight may not be given to the forms of evidence necessary to trigger or rebut evidentiary presumptions, a less

controversial approach may be to address issues of proof, and other breakdowns in negotiation, through a dispute resolution mechanism designed by and agreed upon by the affected parties. In such processes, joint fact finding and research could be encouraged through applications for grants and loans. The most beneficial approach for First Nations is to have both evidentiary presumptions and access to an effective dispute resolution process.

In designing an effective dispute resolution process, it is important to be aware that familiar forms such as mediation, arbitration, and expert tribunals have taken on specific roles within Western legal culture and are influenced by it. Thus, Michelle LeBaron notes that, in designing dispute resolution systems between diverse First Nations and dominant cultural groups, important questions that need to be asked include: "Whose values are reflected when there is opposition within or between groups? How do we design processes that accommodate preferences for directness and indirectness, for unrestricted speaking time and tight limits on participation?"<sup>201</sup> These issues increase in complexity when we consider "how the process frames the way that cultural understandings and meanings get listened to during a process – or not."<sup>202</sup> It is beyond the scope of this chapter to get into specific challenges of design; the point is that creating an effective mechanism means more than just adopting familiar forms.

A principle for conflict resolution that is currently respected by many Canadian institutions holds that competing claims within a community or between First Nations communities are best resolved within and between those communities. This both respects matters of internal governance and avoids potential liability from returning items, albeit in good faith, to the wrong entity. More difficult questions are whether litigation should be the only recourse if efforts to resolve conflict between claimants fail, given the potential for this situation to indefinitely block a repatriation claim; how to create an effective and interculturally legitimate process for resolving impasses in negotiations; and whether resort to such processes should be mandatory before repatriation claims can be taken to Canadian courts. Given the importance of respecting autonomous First Nations decision making in the current legal and political environment, requiring the consent of First Nations claimants initiating a claim to alternative processes is likely to get the most support from First Nations. As facilitated mediation and negotiation are dependent upon good faith participation, the consent of all affected parties may be preferable.

Numerous generic arguments exist for seeking to resolve conflict outside of the adversarial judicial system. Some of these that are applicable to repatriation claims are lack of First Nations involvement in final decision making when agreements can not be reached; lack of judicial expertise relating to the needs of scientific, museum, and First Nations communities;

formality; strict evidentiary rules; and costs of litigation. Legislation could help to address these concerns by establishing a single representative expert decision-making body (such as the *NAGPRA* repatriation committee) or on a case-by-case basis with members appointed by affected parties. As effective dispute resolution needs to be anchored in the values of those whom it is intended to serve, and given the diversity of First Nations cultures in Canada, issues of cultural legitimacy may best be addressed by representation of First Nations and institutions directly affected in dispute resolution processes. These may be uniquely designed on a case-by-case basis or may take on a familiar form, such as a body composed of representatives selected by parties to the dispute bodies as well as an agreed upon neutral (a common model adopted in Canadian labour disputes). Access to lists of experts and range of dispute resolution options through national or provincial repatriation institutions or foundations would assist in this process. Currently, no such institutions to facilitate claims in this or other ways exist in Canada. At the very least, ultimate decision-making authority should not simply be shifted from custodial institutions to government personnel or ministers as this simply perpetuates relationships of power and dependency.

Attention should also be given to flexibility of procedure, incorporation of cultural elements into procedure and decision making, and costs, particularly given the poor economic conditions of most First Nations communities. An example in Canada is the Métis Settlements Appeal Tribunal (MSAT), a bicultural tribunal consisting mainly of elected Métis settlement members. Its role is to interpret and enforce Métis settlement legislation and Métis laws enacted pursuant to that legislation. It has jurisdiction not only over settlement members but also over oil and gas companies with interests in Métis settlement lands. The concept of justice that informs MSAT operations, decisions, and procedures is influenced by principles of administrative law, Métis custom, traditional Métis dispute resolution values, and Western alternative dispute resolution rationales. MSAT promotes fair, efficient, and accessible justice in a number of ways, including: holding public hearings on affected settlement land or locations most accessible to parties affected; eliminating costs for filing and adopting a policy of not awarding costs; employment of research development officers who conduct investigations and provide relevant findings to all affected parties; and through its ability to fashion and require participation in alternative processes, such as mediation, is designed to reflect the cultural values of those affected.<sup>203</sup>

### **Issues of Liability**

As raised earlier, an issue of public interest concerns whether some or all forms of material culture falling within the broad scope of repatriation legislation should be returned free of conditions relating to preservation,

treatment, and use. This and other questions that implicate public mandates require negotiations to take into account a range of affected interests. However, the current regime leaves the ultimate power to decide how these interests will be balanced with government or custodial institutions. To be equitable, decisions should be subject to review as part of the dispute resolution process discussed above. The process of balancing interests should take into consideration laws, uses, and economic conditions of a claimant nation with respect to all forms of material culture, not just human remains, burial goods, and “sacred” material. Legal and normative considerations also require that factors such as the frailty of the item; the specific rationale for the claim (including the importance of putting items back into religious or ceremonial use); relevant First Nation laws or protocols concerning matters such as belonging, disposition, preservation, creation of replicas, and appropriate care and use; safety of community members who will come into contact with the item (*e.g.*, pesticide and arsenic problems); and the importance and appropriateness of access on the part of community members living outside the community as well as non-community members for educational or other purposes all be among those issues considered. This is consistent with some institutional policies that require repatriation negotiations to explore all options available to meet the spirit and intent of the request, including, but not limited to, special access to holdings, loans, exhibits, replication, respectful storage and use, shared authority to co-manage, interim custodial arrangements, and repatriation. Mandating that these factors and optional treatments be explored in all negotiations before unconditional return is one possible mechanism to help ensure that the interests of the wider public will be considered by all parties. A further requirement that the parties negotiate in good faith with the intent of substantially addressing each other’s concerns – the minimum standard applied in consultations on aboriginal rights – might also be included to ensure that these and other factors are given meaningful consideration.

Notification obligations raised earlier may result in custodial institutions being faced by competing claims from First Nations communities, individuals, and groups. In that event, it is important that all parties be notified of the competing claim and be given sufficient time to resolve the matter between themselves. As it is difficult to proceed until such conflicts are resolved, a reasonable time limit that takes into consideration the realities of First Nations resources might be placed on this process and an optional dispute resolution mechanism, other than a ruling by the custodial institution, be provided. Some First Nations argue that competing claims are not a significant threat because those entitled to claim are ethically, morally, and legally bound not to make claims for material that is not theirs. Nevertheless, passage of time, material falling into disuse, documentary evidence to the contrary, and other factors generate problems.

Public mandates and lack of clear jurisprudence on aboriginal constitutional rights to material culture may also result in governments and custodial institutions having a legal obligation to notify a broader public of repatriation claims, including First Nations not connected to the claim. Notification of the Crown's legislative and regulatory intent is usually published in government publications such as the *Gazette*. However, this is an ineffective means of communicating to the public in general and First Nations in particular. Notification of repatriation requests and time limits to contact affected institutions might be more effective if placed in a national electronically accessible register, such as the Federal Register under *NAGPRA*, and local media such as First Nations newspapers.

Despite taking the various precautions raised in this section, governments and institutions might still be exposed to unanticipated liability. Therefore, it is important to include a provision that no legal action lie against the Crown, museum, or public institution that has taken reasonable steps to ascertain rights to repatriation pursuant to the procedures outlined in the legislation and that has repatriated in good faith. Regulatory power in the minister responsible for the legislation may also be important to address matters that are not anticipated. Respect for First Nations jurisdiction suggests that such power should only be exercised at the request of, and in consultation with, affected First Nations. An example of a situation in which such power may need to be exercised occurs when material originating from two different First Nations has become attached and cannot be separated without causing damage. Although the unilateral exercise of ministerial discretion is the norm, there is precedent for this approach in self-government legislation.<sup>204</sup> A general regulatory power that enables the enactment of regulations at the request of public institutions or First Nations claimants affected by the legislation would ensure maximum flexibility and the ability to tailor specific matters to the distinctive traditions of claimant First Nations.

### **Repatriation Institute**

A significant step in facilitating repatriation negotiations that need not be founded in legislation is to create an institute or foundation to act as a repository for easily accessible information and to provide assistance in the repatriation process.<sup>205</sup> Such an institute could serve many functions, including providing research or manuals to assist in the application process; maintaining an easily accessible electronic database of First Nations material culture held at public institutions; facilitating development, consultation, and negotiation of repatriation regulations and other statutory instruments; administering government grants and loans; raising funds and public awareness to assist in domestic and international repatriations; providing an advisory function before and during negotiations; providing a range of dispute resolution services or maintaining lists of dispute resolution practitioners with

experience in cross-cultural communication and heritage matters (including experts in traditional dispute resolution processes and protocols from First Nations communities); assisting in interpretation of legislation and preparation of applications and supporting material for claims; and serving as a repository for notices about claims to be commenced and resolved. Institutions repatriating items should also maintain a record, including, where appropriate, in accordance with the laws of an originating First Nation, a visual record, of items repatriated and documents pertaining to repatriated items. Such information not only helps identify an item's location, but, if placed in a centralized registry, can assist in future claims.

### **Conclusion**

Given public interest in preservation and access to First Nations material culture, the current legal and policy environment, and the rationale for repatriation, what fundamental principles should guide law reform initiatives should they occur? RCAP offers four fundamental principles for forging new relationships between First Nations and the Crown: mutual recognition, mutual respect, sharing, and mutual responsibility. As RCAP's principles aim to assist the process of decolonization, and repatriation is largely concerned with this process, these principles are helpful in shaping regulatory frameworks for repatriation and are consistent with those adopted by many Canadian institutions. They call for recognition and protection of the integrity and survival of aboriginal laws, customs, and practices concerning belonging, responsibility, use and disposition of material culture; a review of public institutions, laws, and policies that perpetuate relationships of dependency; laws and policies that do not repeat past injustices but instead take into account the historical circumstances under which material came into the possession of institutions and the difficult burdens of proof born by aboriginal peoples; understanding the interrelatedness of intangible and material culture, language, land, well-being, and the natural and spiritual realms; and protection and preservation of indigenous lands and languages.

It is important that these principles be applied in a manner that can be given practical effect in a world in which different legal and knowledge systems must co-exist. Thus, First Nations participating in the work of the Task Force and the research discussed in the introduction to this volume speak of partnerships, parallel systems, dialogues, respect, and cooperation. RCAP's approach also recognizes the rights and interests of non-aboriginal peoples and aboriginal peoples living off reserve. In particular, the principles of sharing and mutual recognition call for reciprocity, recognition of interdependency, respect for different cultures and institutions, and action that benefits both partners in the relationship. Applied to repatriation, this also calls on First Nations to acknowledge the role museums and other institu-

tions have played in public education and preservation of First Nations material culture and the need to harmonize that role with aspirations to strengthen and renew cultural identity and to ensure the survival of healthy First Nations communities.

I have argued that statutory intervention can help create a coherent, transparent, and equitable framework for negotiation that benefits First Nations participants. However, there are also dangers to this approach. Although enacted with good intentions, retention and exercise of power by Canadian governments over the fate of First Nations material culture may be perceived as contrary to First Nations aspirations for self-determination. Diversity of First Nations laws and cultures can be undermined in an attempt to develop generic “one-size-fits-all” legal frameworks. For this reason, we must learn from the strengths and weaknesses of repatriation legislation in other jurisdictions. Legislation should act as a safety net for First Nations, address potential legal liabilities faced by custodial institutions and governments, and ensure that other repatriation processes satisfactory to particular institutions and First Nations can be maintained. Many museums and government agencies have been proactive and have come a long way in meeting the needs of First Nations. Positive relationships established through these processes should be supported and encouraged to develop.

The extent of law reform necessary across Canada and within Canadian courts, and the question of where a line needs to be drawn before outside law begins to shape the inside laws and processes of a First Nation, are matters that will vary from community to community. This makes national and provincial law reform activity that much more challenging. However, I suggest that governments and their institutions should assume the challenge to further decolonize existing relationships, address imbalances of power, and respect emerging and existing aboriginal constitutional rights. Although agreement may not be reached on the issue of repatriation legislation *per se*, existing laws that create barriers to return should be amended or rendered inapplicable; potential liabilities for institutions returning in good faith should be addressed; funding should be substantially increased; fair, efficient, and interculturally legitimate mechanisms for resolving disputes should be developed; and an institute or foundation to facilitate claims preparation and resolution and to monitor progress should be established.

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**Notes**

- 1 The aboriginal peoples of Canada include Indians (many self-identify as First Nations), Inuit, and Métis peoples. The word “repatriation” is used by aboriginal peoples in Canada and custodians of their material culture to describe claims for return of material cultural to originating or other significantly connected communities, such as descendant families and religious societies. Although “ownership” and the appropriateness of its application is understood differently among peoples and in relation to different items, repatriation includes transfer of title recognized under Canadian law.
- 2 Information about repatriation policies was obtained online or by request from twelve federal and provincial museums in Canada or museums structured as Crown corporations that receive public funds. We also contacted the Glenbow Museum, Museum of Anthropology (University of British Columbia), and Parks Canada because of their reputations for developing responsive policies in this area. There is no central collection of museum, university, or government agency policy, and few public or private museums, or government agencies have their policies online. At the time of writing (2006), Parks Canada and six of the museums we contacted had specific aboriginal repatriation policies and guidelines relating to objects in their collections in place, being developed, or under revision (Canadian Museum of Civilization, Manitoba Museum, Royal Saskatchewan Museum, UBC Museum of Anthropology, Royal British Columbia Museum, Royal Ontario Museum). Developed after the release of the Task Force recommendations, all are consistent with the recommendations and most expressly acknowledge developing their policy with reference to, or in the spirit of, the recommendations. Provincial law outlines procedures for the Glenbow and Royal Alberta Museum for sacred ceremonial items. They do not have specific policies for aboriginal items that fall outside the scope of this legislation. We contacted some universities and governments but did not do a comprehensive review of university and government agency policy, nor did we contact private museums. In 2007, Janine Andrews (executive director, University of Alberta Museums and Collections Services) and Corinne Marceau conducted a survey of museums, government agencies, and universities concerning repatriation policies that covered funerary objects and ancestral remains as well as other cultural materials. They sent twenty-one surveys and received eight responses. They found that, in addition to the above, some universities (including the University of Alberta) also have aboriginal-specific policies influenced by the recommendations of the *Task Force Report*, *infra* note 3. Of those who responded, most continue and prefer a case-by-case approach governed by general deaccession laws and procedures, largely noting the ability of such an approach to adapt to unique circumstances. However, some saw a lack of consistency as a weakness in the current policy regime. Most of the eight respondents did not favour federal repatriation legislation; however, a few felt provincial legislation may be appropriate. For further discussion of museum policy and repatriation initiatives, see Catherine Bell, *et al.*, “First Nation Cultural Heritage: A Selected Survey of Issues and Initiatives” in Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) 367 at 367-86.
- 3 This is the approach advocated by the joint Assembly of First Nations (AFN) and Canadian Museums Association (CMA) Task Force on Museum and First Peoples. See *Task Force Report on Museums and First Peoples: Turning the Page: Forging New Partnerships between Museums and First Peoples*, 3d ed. (Ottawa: AFN and CMA, 1994) at 5 and 9 (hereafter *Task Force Report*).
- 4 These concerns are sometimes raised with reference to the *Native American Graves Protection and Repatriation Act*, 25 U.S.C. §. 3001-3013 (West Supp. 2001) [NAGPRA]. See *e.g.*, Catherine Bell, *et al.*, “Repatriation and Protection: Reflections on the Kainai Experience” in Bell and Napoleon, *supra* note 2, 203 at 220-32; And Catherine Bell and Heather McCuaig, “Protection and Repatriation of Ktunaxa/Kinbasket Cultural Resources: Perspectives of Community Members” in Bell and Napoleon, *ibid.*, 312 at 356.
- 5 S.B.C. 2003, c. 12, s. 5(2)b. See also *infra* note 130 and accompanying text and discussion of proposed amendments to the *Cultural Property Export and Import Act*, R.S.C. 1985, c. C-51 discussed in Catherine Bell and Robert K. Paterson, “International Movement of First Nations Cultural Heritage in Canada” in this volume.
- 6 *First Nations Sacred Ceremonial Objects Repatriation Act*, R.S.A. 2000, c. F-14.

- 7 Museum of Anthropology (MOA), 2007, Repatriation Guidelines, para. 3 online: <<http://www.moa.ubc.ca>>.
- 8 Our partners are identified in the acknowledgments and introduction to this volume. Although First Nations partners wanted to explore this issue, many of the individual participants in the case studies reproduced in Bell and Napoleon, *supra* note 2, are skeptical about the utility of Canadian law in general, largely because of experiences with federal Indian legislation, a desire to have First Nations laws recognized and respected, and what they see as a lack of enforcement of laws intended to protect heritage sites and objects. At the same time, there is an underlying message that some law reform may be necessary to change aspects of the legal environment in order to achieve repatriation goals. For example, the Mookakin Cultural Society and Blackfoot elders participated in developing Alberta's repatriation legislation despite a clear preference by some not to engage external law reform. Other participants in the Ktunaxa, Hul'qumi'num, and Kwakwaka'wakw studies speak more generally of the need to strengthen existing cultural heritage laws, re-examine Canadian laws concerning title to First Nation objects, and work collaboratively to enact laws that protect their cultural identity, objects, and cultural ways.
- 9 Such optional frameworks are not unheard of in Canada in matters that potentially affect powers of self-government. An example is the *First Nations Land Management Act*, S.C. 1999, c. 24, which gives signatory First Nations to a framework agreement on land management the ability to opt out of land management provisions under the *Indian Act*, R.S.C. 1985, c. I-5 and to establish their own land management regimes that increase decision making at a local level.
- 10 For an elaboration of arguments for and against repatriation see *e.g.*, Jennifer Kramer, *Switchbacks: Art, Ownership, and Nuxalk National Identity* (Vancouver: UBC Press, 2006); Sarah Harding, "Value, Obligation, and Cultural Heritage" (1999) 31 *Ariz. St. L.J.* 291; *gii-dal-guud-sliiaay* (Terry-Lynn Williams), "Cultural Perpetuation: Repatriation of First Nations Cultural Heritage" (1995 Special Issue) *U.B.C. L. Rev.* 183; Christian Feest, "Repatriation: A European View on the Question of Restitution of Native American Artifacts" (1995) 9:2 *European Review of Native American Studies* 33-42 and the response of Gerald Conaty and Robert Janes in "Issues of Repatriation: A Canadian View" (1997) 11:2 *European Review of Native American Studies* 31-37; Michael Ames, *Museums, the Public, and Anthropology* (Vancouver: UBC Press, 1986); and, more generally, concerning control over a wider range of cultural heritage matters, including repatriation, see Michael Brown, *Who Owns Native Culture?* (Cambridge, MS: Harvard University Press, 2003), in particular at 212-34 and 244-49. In addition to some of the references in these notes to museum literature, see also the bibliography online: <<http://www.law.ualberta.ca/research/aboriginalculturalheritage>>.
- 11 In addition to sources cited, I draw on information shared and papers presented at numerous conferences, including: "The Repatriation of Material and Immaterial Patrimonies: A Comparative Approach Canada and Melanesia (Quebec City, September 2007); International Conference on Repatriation (Nuuk Greenland, February 2007); "Cultural Heritage Issues: Legacy of Conquest, Colonization and Commerce" (Willamette University College of Law, Salem Oregon, October 2006); "Cultural Policies, Trade, Liberalization, and Identity Politics: Testing the Limits of the State" (Windsor, May 2006); World Archaeological Congress Second Indigenous Inter-Congress (Auckland, NZ, November 2005); First Nations International Symposium on Repatriation (Maniwaki Quebec, August 2005); Aboriginal Repatriation Conference (Queen Charlotte Islands/Haida Gwaii, May 2004); World Intellectual Property Organization Regional Session (Ottawa, September 2003); World Indigenous Peoples Conference (Simon Fraser University, Kelowna, October 2002); Symposium: Intellectual Property and Traditional Knowledge (University of Saskatchewan, Saskatoon, November 2002); International Conference on Protecting Traditional Knowledge and Traditional Resource Rights in the New Millennium (University of British Columbia, February 2000); Canadian Museums Assoc. Annual Conference (Ottawa, March 1996); Material Culture in Flux: Repatriation of Cultural Property (University of British Columbia, Vancouver, May 1994); Canadian Museums and Canadian Bar Association Legal Affairs and Management Symposium (Ottawa, May 1992); and the National Conference on the Task Force on Canadian Museums and First Peoples, (Ottawa, February 1992).

- 12 *Task Force Report*, *supra* note 3 at 8.
- 13 *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. The definition adopted is also consistent with definitions of cultural patrimony under s. 2(3)D of NAGPRA, *supra* note 4, which defines cultural patrimony as “an object of ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual,” as well as with perspectives of First Nations partners in this study, but it may be more liberal than some Canadian museum repatriation policies.
- 14 See e.g., the report of United Nations Special Rapporteur, Dr. Erica Irene Daes, 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) and chapters on international law in this volume.
- 15 Kramer, *supra* note 10 at 90. See also *gii-dal-guud-sliiaay*, *supra* note 10 at 193.
- 16 There are many writings on the impact of residential schools, federal Indian legislation, and other aspects of Canada’s civilizing policy on First Nations. See e.g., Jim R. Miller, “Troubled Legacy: A History of Native Residential Schools” (2003) 66 Sask. L. Rev. 357; J.R. Miller, *Shingwauk’s Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996); John S. Milloy, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999); Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 245-386; Suzanne Fournier and Ernie Crey, *Stolen from Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver: Douglas and McIntyre, 1997); Katherine Pettipas, *Severing the Ties that Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994); and Annabel Crop Eared Wolf, “Protecting Religious Rights and Freedoms: Blood Tribe/Kainai Efforts through Cultural and Intellectual Properties Policy and Repatriation” (Fall 1997) *Alberta Museums Review* 38. See also case studies and Dale Cunningham, *et al.* “Canada’s Policy of Cultural Colonization: Indian Residential Schools and the *Indian Act*” in Bell and Napoleon, *supra* note 2.
- 17 See Crop Eared Wolf, *ibid.* at 39; and RCAP, *ibid.* at 292.
- 18 RCAP, *ibid.* at 281.
- 19 Gloria Cranmer Webster, “The Potlatch Repatriation Collection” (1995 Special Edition) U.B.C. Law Rev. 137 at 138.
- 20 Interview of Stan Ashcroft by Barb Cranmer (21 November 2002) West Vancouver, British Columbia, quoted in Bell *et al.*, “Recovering from Colonization: Perspectives of Community Members on Protection and Repatriation of Kwakwaka’wakw Cultural Heritage” in Bell and Napoleon, *supra* note 2, 33 at 54.
- 21 Conaty and Janes, *supra* note 10 at 35.
- 22 *Ibid.*
- 23 For example, on Canada’s West Coast, experienced collectors “took measure both of the seasonal employment and of the years when the salmon fishery failed” and had knowledge of those communities under the influence of missionaries who were most likely to sell. See Douglas Cole, *Captured Heritage: The Scramble for Northwest Coast Artifacts* (Vancouver: UBC Press, 1995) at 297. Other First Nations sold under similar pressures. See e.g., Bell *et al.*, “Kainai,” *supra* note 4 at 231. See also discussion of the removal and return of the G’psgolox pole (also known as the Haisla Spirit Pole) in Catherine Bell *et al.*, “Survey,” *supra* note 2 at 380-82.
- 24 Loss of material culture through the latter circumstances are alluded to in the 1868 version of the *Indian Act* concerning “pawns for intoxicants” and recovery of things pawned. See discussion in Eldon Yellowhorn, “Heritage Protection on Indian Reserve Lands in Canada” (1999) 44:170 *Plains Anthropologist*, 107 at 110.
- 25 *Task Force Report*, *supra* note 3 at 9. See also International Council of Museums, *Code of Ethics for Museums*, 2004 edition, online: International Council of Museums <<http://icom.museum/ethics.html>>. This is consistent with international norms around theft and looting of works of art, but there is little agreement on an international level, in either context,

- that the innocence of custodial institutions in possession or the merits of their legal entitlements be ignored or that the item necessarily be returned.
- 26 The Canadian Museum Association, *Ethical Guidelines* (1999) online: CMA <<http://www.museums.ca/cma1/About/CMA/ethics/introduction.htm>>. E.4.4 provides museums should be “committed to the return ... of culturally sensitive objects when requested by communities or groups with a demonstrable claim of historical relationship” and “be prepared to facilitate the return of material which may have been acquired under circumstances that invalidate the museums claim to title.” This approach is consistent with the *Task Force Report*.
  - 27 See e.g., Brian Noble, “*Poomaksin*: Skinnipiikani-Nitsitapii Law, Transfers, and Making Relationships: Practices and Principles for Cultural Protection, Repatriation, Redress, and Heritage Law Making with Canada” in Bell and Napoleon, *supra* note 2, 258 at 260-79; Bell *et al*, “Kainai,” *supra* note 4 at 223-33 and 248-49. Medicine bundles contain numerous ceremonial items and associated songs, dances, and other cultural knowledge necessary for the performance of ceremonies and transmission of knowledge within Blackfoot societies.
  - 28 As Conaty and Janes explain, *supra* note 10 at 34, adopting the Blackfoot worldview, “one cannot isolate songs from ceremonies from bundles: one cannot think of the relational network without including bundles, Other Beings, ceremonies, etc. To speak of any one part in isolation is to risk making the whole incomprehensible. To remove any part (such as the holy objects) is to risk making the entire worldview dysfunctional and to risk unbalancing the relational network.”
  - 29 Crop Eared Wolf, *supra* note 16 at 38.
  - 30 Blood Tribe, “Submission to the Denver Art Museum for the Repatriation of Blood Tribe Holy Bundles” (1999) [on file with the Mookakin Foundation, Standoff, Alberta], cited in Bell *et al.*, “Kainai,” *supra* note 4 at 226.
  - 31 Bell *et al.*, “Kainai,” *ibid.* note 4 at 206.
  - 32 Traditional cultural knowledge is an amalgam of historical and contemporary influences and is used here to describe values, beliefs, customs, practices, and traditions that form part of a First Nations identity and are connected to experiences of their ancestors.
  - 33 See interview of Violet Birdstone by Laura McCoy (2 October 2002) Cranbrook, British Columbia, quoted in Bell *et al.*, “Ktunaxa” *supra* note 4 at 316-17.
  - 34 “The Mataatua Declaration and the Case of the Carved Meeting House Mataatua” (1995 Special Issue) U.B.C. L. Rev. 69 at 71.
  - 35 See online: <[http://www.moa.ubc.ca/RRN/bout\\_overview.html](http://www.moa.ubc.ca/RRN/bout_overview.html)>. Although the site also includes some ceremonial and other sensitive items, this is only with the permission of originating First Nations.
  - 36 All of the studies in Bell and Napoleon, *supra* note 2, speak to the importance of language preservation. See also Marianne Ignace and Ron Ignace, “Canadian Aboriginal Languages and the Protection of Cultural Heritage” in Bell and Napoleon *ibid.* at 417; and RCAP, *Gathering Strength*, vol. 3 (Ottawa: Supply and Services Canada, 1996) at 602-44.
  - 37 Both the U’mista study, *supra* note 20, and the Ktunaxa study, *supra* note 4, address the importance of repatriating oral material, with some participants noting the problem of not having proper facilities for storage and suggesting that the return of originals may not be necessary to achieve goals associated with the repatriation of oral material.
  - 38 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995); and Will Kymlicka, *Liberalism, Community and Culture* (New York: Oxford University Press, 1989) cited in Sarah Harding, *supra* note 10 at 334-35.
  - 39 Harding, *ibid.* at 335, with reference to Kymlicka’s analysis in *Liberalism, ibid.* at 175-76 of why “destruction and degradation of cultural heritage [is] so central to oppressive regimes around the world.”
  - 40 Gerald T. Conaty, “Glenbow’s Blackfoot Gallery: Working towards Co-Existence” in Laura Peers and Alison K. Brown, *Museums and Source Communities: A Routledge Reader* (New York: Routledge, 2003) 227 at 230.
  - 41 Preamble to the *Repatriation Act*, *supra* note 6.
  - 42 Dawn Walton, “New Park Helps Brighten the Blackfoot’s Future” *Edmonton Journal* (19 July 2007) A3.

- 43 See *e.g.*, Richard Overstall, “The Law Is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow” in Bell and Napoleon, *supra* note 2, 126, and, in particular, the authors’ conclusions at 92, 101, and 110-11.
- 44 Property rights may be lost as a result of commingling, attachment, and alteration of objects. Entitlement varies depending on a number of factors, including portions attributed, kind and quality of goods, circumstances through which property came into one’s possession, protection of innocent parties, uniqueness of the items at issue, and ability to compensate. This issue could arise, for example, when a museum restores a ceremonial headdress in poor physical condition. For a discussion of this area of property law, see Bruce Ziff, *Principles of Property Law*, 4th ed. (Toronto: Thompson Canada Ltd., 2006) at 108-15.
- 45 For an example, see Jennifer Kramer’s interpretation of the Nuxalk mask repatriation, *supra* note 10 at 87-103.
- 46 Some of these arguments draw on or are elaborated in previous writings by the author. See Catherine Bell, “Aboriginal Claims to Cultural Property in Canada: A Comparative Analysis of the Repatriation Debate” (1992) 17:2 *Am. Indian L. Rev.* 457; Catherine Bell, “Limitations, Legislation and Domestic Repatriation” (1995 Special Issue) *U.B.C. L. Rev.* 149; Catherine Bell and Robert K. Paterson, “Aboriginal Rights to Repatriation of Cultural Property” in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton, BC: Theytus Books, 2003) at 103. See also Patrick Walker and Clarine Ostrove, “The Aboriginal Right to Cultural Property” (1995) Special Issue *U.B.C. L. Rev.* 13.
- 47 See *e.g.*, *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. (S.C.C.) 14 at para. 148.
- 48 See *e.g.*, discussion of poles and pole-raising feasts in Susan Marsden, “Northwest Coast *Adawx* Study” in Bell and Napoleon, *supra* note 2, 114 at 116-25. This analysis will not necessarily apply to all poles. As with other forms of material culture, poles may be carved today for donation, sale, or other purposes.
- 49 Bruce Ziff, *supra* note 44 at 106. Whether or not an object is a fixture is determined by an objective test. If an item is attached even slightly, we presume it is a fixture unless the purpose of annexation suggests otherwise.
- 50 Direct Examination in *Delgamuukw v. British Columbia*, [1989] 6 W.W.R. 308 (B.C.S.C.) (May 9, 1988) vol. 94 at 5963 and (May 11, 1988) vol. 96 at 6066, respectively, as quoted in Marsden, “*Adawx*,” *supra* note 48 at 118-19.
- 51 Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 *Sup. Ct. L. Rev.* (2d) 595 at 600. The generic rights he discusses in the article and that are applicable to all aboriginal peoples in Canada are the right to an ancestral territory, the right of cultural integrity, the right to conclude treaties, the right to customary law, the right to honourable treatment by the Crown, and the right of self-government.
- 52 *Ibid.* [emphasis in original].
- 53 *Ibid.* at 606. He explains, for example at 607-8, that the “intermediate generic right to religion ... shelters a range of specific religious rights vested in particular Aboriginal groups,” depending on their particular activities, rites, institutions, and outlooks.
- 54 [1996] 4 C.N.L.R. (S.C.C.) 177.
- 55 *Ibid.* at para. 46.
- 56 *R. v. Sappier; R. v. Gray*, [2007] 1 C.N.L.R. (S.C.C.) 368 at para. 22.
- 57 *Mitchell v. Canada* (Minister of National Revenue), [2001] 3 C.N.L.R. 122 at para. 29.
- 58 *Delgamuukw*, *supra* note 47 at paras. 83-88.
- 59 John Borrows, “The Trickster: Integral to Distinctive Culture” (1997) 8:2 *Const’l. For.* 27 at 30.
- 60 Russel Barsh and James Youngblood Henderson, “The Supreme Court’s Van der Peet Trilogy: Native Imperialism and the Ropes of Sand” (1997) *McGill L. J.* 993 at 1002. For other critiques see *e.g.*, dissenting opinions of Justice McLachlin (as she then was) and Justice L’Heureux-Dubé in *Van der Peet*, *supra* note 54; Catherine Bell, “New Directions in the Law of Aboriginal Rights” (1998) 77 *Can. Bar. Rev.* 36 at 47-50; James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining a Just Society* (Saskatchewan: Native Law Centre, 2006) at 178-228; Slattery, *supra* note 51 at 597; and Michael Asch, “Concluding Thoughts and Fundamental Questions” in this volume.

- 61 *Sappier*, *supra* note 56 at para. 48 [emphasis in original].
- 62 *Van der Peet*, *supra* note 54 at paras. 42 and 49-50 and *Delgamuukw*, *supra* note 47 at para. 148.
- 63 *R. v. Cote*, [1996] 4 C.N.L.R. 26 at 48-49 (S.C.C.).
- 64 Métis communities emerged after contact through inter-marriage and development of a distinctive Métis identity. See *e.g.*, discussions of continuity in the context of Métis claims in *R. v. Powley*, [2003] 4 C.N.L.R. (S.C.C.) 207.
- 65 *Sappier*, *supra* note 56 at para. 33.
- 66 *Ibid.* at para. 41.
- 67 *Ibid.* at para. 40.
- 68 *Ibid.*
- 69 There has been limited litigation in Canada directly on this point. An exception is the suit brought by the Mohawk bands of Kahnawake, Akwesasne, and Kanésatake, which sued the Glenbow-Alberta Museum for return of a False Face Mask and other objects displayed in the 1988 Spirit Sings exhibition. See *Mohawk Bands*, *infra* note 155 and accompanying text. The judge recognized that the Mohawk claim to aboriginal rights to enforcement of traditional laws concerning use and display of a False Face Mask raised a serious legal issue. However, the matter never went to trial. Comments made by the Supreme Court of Canada in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 C.N.L.R. 143 (S.C.C.) at 168 also suggest that cultural heritage may in some cases “be a key part of the collective identity of people” and that “some component of cultural heritage” might go to the core of identity in such a way as to affect the application of provincial law. Some of these arguments were also developed by the Nuxalk in an action against art dealer Howard Roloff, who was seeking to prevent the sale of an Echo Mask, a declaration upholding Nuxalk law, and an order restoring possession. The matter never made it to trial as it was eventually settled out of court.
- 70 Slattery, *supra* note 51 at 607.
- 71 Part I of the *Constitution Act, 1982*, *supra* note 13.
- 72 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 331.
- 73 On the latter point, see *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 759 and *Big M Drug Mart*, *ibid.* at 336.
- 74 *Van der Peet*, *supra* note 54 at paras. 38-42. See also, *Mitchell*, *supra* note 57 at paras. 9-10, 61-64, and 141-54.
- 75 *Delgamuukw*, *supra* note 47 at para. 148.
- 76 Slattery, *supra* note 51 at 601.
- 77 *Van der Peet*, *supra* note 54 at para. 49.
- 78 Norman Zlotkin, “From Time-Immemorial: The Recognition of Aboriginal Law in Canada” in this volume at 363 and 366.
- 79 *Mitchell*, *supra* note 57.
- 80 *Van der Peet*, *supra* note 54 at paras. 49-50.
- 81 Noble, *supra* note 27 at 300.
- 82 See *e.g.*, *Journeycake v. Cherokee Indian Nation*, 24 Ct. Cl. 281 (1893), *aff’d* 155 U.S. 196 (1894) (W.L.) at 302, explaining the concept of aboriginal communal property; and *Seneca Nation of Indians v. Hammond* 3 *Thompson and Cook* (N.Y. Sup. Ct.) 347 (App. Div. 1874) at 349, where the court concludes those who purchased bark contrary to the laws of the Seneca Nation did not acquire title and could not confer title to the defendants.
- 83 *NAGPRA*, *supra* note 4, s. 2(3)(D).
- 84 Sherry Hutt and C. Timothy McKeown, “Control of Cultural Property as Human Rights Law” (1999) 31 *Ariz. St. L.J.* 363 at 366, cited in Tamara Kagan, “Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach” (2005) 63 *U.T. Fac. L. Rev.* 1 at 33.
- 85 The policy of the British government was to “maintain relations with [First Nations] very close to those maintained between sovereign nations” and to “allow them autonomy in their internal affairs, intervening in this area as little as possible.” *R. v. Sioui*, [1990] 1 S.C.R. 1025.

- 86 *R. v. Marshall*, [2005] 2 S.C.R. 220. It should be noted that different rules of interpretation apply to modern treaties and land claims where there is a presumption that these matters have been addressed and where there are surrender and release clauses.
- 87 As one elder explains: “[I]n our way we made those commitments through and in the name of and in the force of the pipe stem. And it was the pipe stem that the chiefs had Alexander Morris hold who came as the representative. That is our solemn way of doing promises” in Office of the Treaty Commissioner for Saskatchewan, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: Office of the Treaty Commissioner for Saskatchewan, 1998) at 65.
- 88 *Delgamuukw*, *supra* note 47 at para. 168.
- 89 *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 at 177 (S.C.C.).
- 90 R.S.C. 1985, c. I-5.
- 91 R.S.C. 1985, c. C-51.
- 92 The justification test is first stated in *Sparrow*, *supra* note 89 and is elaborated in *R. v. Gladstone*, [1994] 4 C.N.L.R. 65 (S.C.C.) at 95.
- 93 *Delgamuukw*, *supra* note 47 at para. 168.
- 94 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.
- 95 *Delgamuukw*, *supra* note 47 at para. 168. For further discussion of the call for reconciliation and principles to guide that process see Slattery, *supra* note 51.
- 96 E. Richard Atleo, “Policy Development for Museums: A First Nations Perspective” 48:1 (1991) B.C. Studies 48 at 55-57. For examples of other common law arguments, see Bell, “Aboriginal Claims,” *supra* note 46 at 478-81; and Kagan, *supra* note 84.
- 97 *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at para. 123. For further discussion of the application of limitations legislation, see also Kagan, *supra* note 84 and Bell, “Limitations,” *supra* note 46.
- 98 *Wewaykum*, *ibid.* at 123 and 124; *Papaschase Indian Band No. 136 (Descendants of) v. Canada (Attorney General)*, [2007] 2 C.N.L.R. 283 (Alta. C.A.) at paras. 142-43; and *Manitoba Metis Federation Inc. v. Canada (A.G.)*, [2008] 2 C.N.L.R. (Man. Q.B.) 52 at paras. 430, 438, 445-46. Some legislation also requires an awareness, actual or constructive, that the facts warrant bringing a claim.
- 99 On the later point, see *Semiahmoo Indian Band v. Canada*, [1998] 1 C.N.L.R. (F.C.A.) 230 at 270-73.
- 100 Kagan, *supra* note 84 at 26.
- 101 See e.g., Marc-Andre Renold, “Stolen Art: The Ubiquitous Question of Good Faith” in *Resolution of Cultural Property Disputes* (The Hague, Netherlands: Kluwer Law International, 2004) 251 at 258.
- 102 Kagan, *supra* note 84 at 29, and see e.g., *Chippewas of Sarnia Band v. Canada (A.G.)* (2000), 195 D.L.R. (4th) 135; leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 63.
- 103 Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 190.
- 104 *Wewaykum*, *supra* note 9 at para. 135. For a general discussion of fiduciary relations and limitation periods, see Rotman, *ibid.* 190-95.
- 105 See e.g., *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.) at 345; *Semiahmoo*, *supra* note 99 at 552.
- 106 *Constitution Act, 1867* (U.K.), 30 and 31 Vict., c. 3, s. 91(24), reprinted in R.S.C. 1985, App. II, No. 5 gives the federal government jurisdiction over “Indians and lands reserved for the Indians,” which has been interpreted to include aboriginal rights and may include significant aboriginal cultural heritage. See *infra* note 148-49 and accompanying text. This line of reasoning may be more difficult to maintain in the instance of moveable property, given provincial jurisdiction to pass laws in this area and the narrow interpretation given by the federal government to its jurisdiction over aboriginal cultural heritage. It may also have limited application in the Federal Court because s. 39 of the *Federal Courts Act* R.S.A. 1985 c. F-7 referentially incorporates provincial limitations statutes. However, in *Roberts v. Canada*, [2000] 3 C.N.L.R. 303 the Federal Court of Appeal opened the door for consideration of whether this section might be constitutionally invalid if it is found to limit the aboriginal or treaty rights guaranteed in s. 35.

- 107 John Yogis, *Canadian Law Dictionary* (Hauppauge, New York: Barron's Educational Series, Inc., 1998) at 149 and 7, respectively. See also *Wewaykum*, *supra* note 97 at paras. 109-12.
- 108 Parks Canada is currently working on archaeological legislation, and some regulations have been passed by territorial governments and applied to northern regions. For a discussion of legislation, see Bruce Ziff and Melodie Hope, "Unsitely: The Eclectic Regimes that Protect Aboriginal Cultural Places in Canada" in this volume, and Bell, "Aboriginal Claims," *supra* note 46 at 481-501. See also Catherine Bell and Michael Solowan, "A Selected Review of Canadian Legislation Affecting First Nation Cultural Heritage" online: Project for the Protection and Repatriation of First Nation Cultural Heritage in Canada <<http://www.law.ualberta.ca/research/aboriginalculturalheritage/researchpapers.htm>>.
- 109 More complicated rules apply to objects on but not attached to land. In such instances, in order to have superior rights to finders, occupiers of land must demonstrate a manifest intent to control the land and items on it. See Ziff, *supra* note 44 at 133-39. To ascertain abandonment one must consider whether the act was voluntary and whether there was an intent to divest all rights. In the *Charrier v. Bell* 496 So.2d 601 (La.Ct. App. 1986), the Louisiana Court of Appeal applied the same law of abandonment that we have in Canada to conclude that buried items in archaeological sites are not abandoned. With respect to other items left on the land, see also Bell, "Aboriginal Claims," *supra* note 46 at 471-72.
- 110 Virginia Miles, "Parks Canada Agency's Policies That Guide Repatriation of Human Remains and Objects" (Paper presented at the World Archeological Congress, The Meanings and Values of Repatriation: A Multidisciplinary Conference, 8-10 July 2005) [unpublished] at 3.
- 111 *Proposed Act Respecting the Protection of Archaeological Heritage of Canada* (Ottawa, 1990). For further discussion, see Bell, "Aboriginal Claims," *supra* note 46 at 495-99; and M. Haunton, "Canada's Proposed Archaeological Heritage Protection Act" (1992) 1 Int'l. J. Cultural Property 395. This approach can be contrasted to NAGPRA, *supra* note 4 s. 3(a), which places "ownership or control of Native American cultural items which are excavated or discovered on federal or tribal land" after NAGPRA's enactment in lineal descendants, or, if lineal descendants cannot be ascertained (in order of priority) in the Indian tribe on whose tribal land items were discovered or with the closest cultural affiliation. Special rules apply if cultural affiliation cannot be reasonably ascertained.
- 112 "Tlicho Agreement," s. 17.3.1, online: Indian and Northern Affairs Canada <[http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr2\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr2_e.html)>. Heritage Resources are defined as artifacts, objects, or records of historical or cultural significance, s. 1.1.1. The agreement is enacted federally as *Tlicho Land Claims and Self-Government Act*, S.C. 2005, c. 1 and by the Government of the Northwest Territories as *Tlicho Land Claims and Self-Government Agreement Act*, S.N.W.T. 2003, c. 28. See also discussion of museum policy and these agreements in Bell *et al.*, "Survey," *supra* note 2.
- 113 "Nisga'a Final Agreement," chap. 17, online: Indian and Northern Affairs Canada <[http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html)>. Enacted by the British Columbia legislature as the *Nisga'a Final Agreement Act*, S.B.C. 1999 c. 2 and federally as the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7. See also Bell *et al.*, "Survey," *ibid.*
- 114 For further discussion, see *supra* note 108.
- 115 One exception is the BC *Heritage Conservation Act*, R.S.B.C. 1996, c. 187, which enables the minister to enter formal agreements with First Nations concerning conservation and protection of heritage sites and objects. Although, to my knowledge, no such agreements have been entered independent of the BC treaty process.
- 116 S.C. 1990, c. 3.
- 117 *Ibid.*, s. 3.
- 118 *Ibid.*, s. 3(a). The public mandate of Canadian museums that are members of the CMA is elaborated in the CMA *Ethical Guidelines*, *supra* note 26, c. 1 as follows:

Museums have two fundamental public trust responsibilities: stewardship and public service. The trust of stewardship requires museums to acquire, document and preserve collections in accordance with institutions policies, to be accountable for them, and to pass them on to future generations of the public in good condition.

The trust of public service requires museums to create and advance not only knowledge, but more importantly understanding, by making the collections and accurate information about them, physically and intellectually available to all communities served by the museum. To this end, museums seek to be public focal points for learning, discussion and development, and to ensure equality of opportunity for access.

This mandate is not viewed as contrary to returning “culturally sensitive” material to First Nations. However, repatriation requests are assessed within this broader mandate.

- 119 *Supra* note 116, s. 9(c). See also ss. 6(1)(c), 12(1)(c), 15(1)(c).  
 120 *Ibid.*, ss. 6(2), 9(2), 12(2), 15(2).  
 121 See, e.g., *Museum Act*, *supra* note 5, s. 5(2)(b).  
 122 Marilyn Phalen, *Museums and the Law* (Nashville: American Association for State and Local History, 1982) at 155. See also Patty Gerstenblith, *Art, Cultural Heritage, and the Law: Cases and Materials* (Durham, N.C.: Carolina Academic Press, 2004) at 293.  
 123 Phalen, *ibid.* at 154.  
 124 Gerstenblith, *supra* note 122 at 274.  
 125 Robert K. Paterson, “Totems and Teapots: The Royal British Columbia Museum Corporation” (2007) 40(1) U.B.C. L. Rev. 421 at 428.  
 126 R.S.A. 2000, c. G-6.  
 127 *Supra* note 125 at 426-27.  
 128 See e.g., *Library and Archives Act of Canada*, S.C. 2004, c. 11.  
 129 Legislation in Alberta, British Columbia, and Nova Scotia specifically includes reference to aboriginal governments, and Manitoba legislation includes a reference to information given in confidence by local governments.  
 130 *Supra* note 5, s. 5(2).  
 131 *Repatriation Act*, *supra* note 110, Preamble. On the latter point, see Alberta, Legislative Assembly, *Hansard*, 01 (17 February 2000) at 4 (Speech from the Throne). Discussed in greater detail in Bell, “Survey,” *supra* note 2 at 369-70; and Bell *et al.*, “Kainai,” *supra* note 4 at 238-40.  
 132 Personal communication with Gerald Conaty, Senior Curator of Ethnology, Glenbow Museum (30 April 2003).  
 133 Personal communication with Jack Ives, former manager, Archaeology and History (Provincial Archaeologist), Heritage Resources Management (25 June 2004).  
 134 *Repatriation Act*, *supra* note 6, s. 4. Sections 20(2) and (3) of the *Glenbow Act*, *supra* note 126 now provide that
- (2) All collection assets are vested in the Crown to be held by it, subject to this *Act*, on behalf of the people of Alberta.
  - (3) The Crown may repatriate collection assets in accordance with the First Nations Sacred Ceremonial Objects Repatriation Act, and in that event subsection (2) does not apply to those collection assets.
- 135 *Repatriation Act*, *supra* note 6, ss. 2(1)-(2). Dr. Ives explains that this would include circumstances such as competing claims or the request of a replica.  
 136 Alta Reg. 96/2004.  
 137 *Ibid.*, ss. 3-4.  
 138 *Ibid.* Schedule, Transfer and Acceptance of a Sacred Ceremonial Object.  
 139 For example, a period of four years elapsed between the passage of the legislation and the Blackfoot regulation.  
 140 R.S.A. 2000, c. A-31.  
 141 *Ibid.*, s. 2.  
 142 *Ibid.*, s. 1, subject to limited exceptions set out in s. 3.  
 143 Property rights are not protected in the Canadian Constitution. The *Canadian Bill of Rights*, S.C. 1960, c. 44, Pt. 1, s. 1(a) includes a right to “enjoyment of property” and not to be deprived of it “except by due process of law,” but this protection has been interpreted as procedural in nature and does not provide substantive protection against government takings.

- Authorson v. Canada (A.G.)*, [2003] 2 S.C.R. 40. For further discussion see Richard W. Bauman, "Property Rights in the Canadian Constitutional Context" (1992) 8 S.A.J.H.R. 344.
- 144 *Rock Resources Inc. v. British Columbia* (2003), 229 D.L.R. (4th) 115 (B.C.C.A.).
- 145 *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) at 2889. The case concerned legislation providing for development of beachfront land.
- 146 In *Delgamuukw*, *supra* note 47 at paras. 177-88 the Supreme Court suggests that aboriginal rights are an essential aspect of "Indianness" and therefore fall within core federal jurisdiction. For a discussion of the application of these constitutional doctrines as they apply to heritage conservation legislation, see Catherine Bell, "Protecting Indigenous Heritage Resources in Canada: A Comment on *Kitkatla v. British Columbia*" (2001) 10:2 Int'l J. Cult. Prop. 246 at 250; and *Kitkatla*, *supra* note 69 at 168.
- 147 Federal jurisdiction over "Indians, and Lands reserved for the Indians" operates to prevent provincial laws from applying to matters considered to be at the core of federal jurisdiction and enables the federal government to enact legislation that invades what would otherwise be considered a provincial matter. Although a province can pass laws of general application within spheres of provincial jurisdiction that affect aboriginal rights, it cannot pass legislation that is primarily concerned with Indian identity or aboriginal rights.
- 148 *Kitkatla*, *supra* note 69.
- 149 See *e.g.*, "Nisga'a Final Agreement," *supra* note 113.
- 150 See *e.g.*, *Delgamuukw*, *supra* note 47; Royal Commission on Aboriginal Peoples, *Partners In Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Canada: Minister of Supply and Services Canada, 1993); and Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001).
- 151 See *supra* note 3 and *supra* note 110 at 5.
- 152 Raising issues of concern to many museums at the time, including ownership, compensation, and preservation; ROM was only prepared to negotiate alternatives to repatriation (*e.g.*, cooperative travelling exhibit). See Gloria Cranmer Webster, "The 'R' Word" (1998) 6:3 Muse 43 at 43-44. See also *supra* note 19.
- 153 Rebecca Clements, "Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law" (2001) 49 U. of T. Law Rev. 1 at 9.
- 154 For different perspectives on this event, see J.D. Harrison "Museums and Politics: *The Spirit Sings* and the Lubicon Boycott" (1998) 6:3 Muse 12.
- 155 *Mohawk Bands of Kahnawake, Akwesasne and Kanesatake v. Glenbow-Alberta Institute*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.). For further discussion, see Catherine Bell, "Repatriation of Cultural Property and Aboriginal Rights: A Survey of Contemporary Legal Issues" (1992) 17:2 *Prairie Forum* (Special Issue: Native Studies) 313 at 313-14; and Bell, *et al.*, "Survey," *supra* note 2 at 369-70. The Mohawk asserted that the False Face Mask had spiritual powers and was an inherent part of the ongoing spiritual practices of the medicine societies. Other items, such as moccasins, shoulder bags, and headdresses, were alleged to be part of the cultural patrimony, traditions, heritage, and visible record of the Mohawk Nation. They argued an aboriginal right to their own customs, cultures, traditions, spiritual and other values, and the right to practise the same. They also maintained that the items at issue were obtained without the consent and contrary to the laws of the Mohawk Nation. Although ROM could trace title to a member of the Six Nation Band of Indians, it was argued that False Face Masks are not capable of individual ownership and transfer.
- 156 *Supra* note 40.
- 157 See *e.g.*, ROM, "Object Repatriation Policy," online: <<http://www.rom.om.ca/about/policy/docs/caorepatriationrev.pdf>> and CMC, "Repatriation Policy" online: <<http://www.civilization.ca/cmc/repatriation/repatriation.html>>.
- 158 *Task Force Report*, *supra* note 3 at 1.
- 159 *Ibid.* at 8.
- 160 *Ibid.* at 8-9.
- 161 For example, the ROM policy *supra* note 157, which draws directly on the language of NAGPRA, *supra* note 4 to define "cultural affiliation," "sacred objects," "burial objects," and "cultural patrimony." However, while ROM defines "cultural patrimony" other than burial

items as “the property of an aboriginal people,” it does not contain the further description found in NAGPRA s. 2(3)(D), that cultural patrimony be considered inalienable by an individual (although one might argue that this is implied). Other policies are less directly influenced but may still contain common features.

162 *Task Force Report*, *supra* note 3 at 5.

163 *Ibid.* at 7.

164 RBCM, “Aboriginal Material Operating Policy” online: <[http://www.royalbcmuseum.bc.ca/Content\\_Files/Files/AboriginalMaterialOperatingPolicy.pdf](http://www.royalbcmuseum.bc.ca/Content_Files/Files/AboriginalMaterialOperatingPolicy.pdf)>; CMC “Repatriation Policy,” *supra* note 157; and Manitoba Museum, *Draft Repatriation Policy* [March 2005] at 3 [unpublished] available from the Manitoba Museum.

165 “Aboriginal Policy,” *ibid.* at 3-4.

166 “Repatriation Policy,” *supra* note 157, s. 6.1.

167 “Aboriginal Policy,” *supra* note 164 at 3.

168 Collection Policy, online: <[http://www.royalbcmuseum.bc.ca/Content\\_Files/Files/CollectionPolicyApril2006.pdf](http://www.royalbcmuseum.bc.ca/Content_Files/Files/CollectionPolicyApril2006.pdf)> at 9. The RBCM will deaccession and transfer such material, and factors influencing transfer will include “the museum’s purpose under the Museum Act and in the context of ongoing treaty negotiations.”

169 “Aboriginal Policy,” *supra* note 164 at 3.

170 “Repatriation Policy,” *supra* note 157, s. 6.1.

171 *Ibid.*, s. 6.3.

172 “Aboriginal Policy,” *supra* note 164 at 3.

173 “Repatriation Policy,” *supra* note 157, s. 6.3 [emphasis added].

174 *Ibid.*, s. 5.4.

175 *Ibid.*

176 See Chapter 17 of the *Nisga’a Final Agreement*, *supra* note 113.

177 CMC, “Summary of Corporate Plan (2006-2007 to 2010-2011)” online: <<http://www.civilization.ca/societe/corpsm06e.pdf>>.

178 *Supra* note 164.

179 For example, the International Council of Museums and the *Task Force Report on Museums and First Peoples*, *supra* note 3, encourage return of items necessary for restoration and continuity of cultural practices but anticipate the need to create training programs, gain access to funding, and build facilities in order to make this possible. Another example is the *Professional Guidelines* for the University of British Columbia’s Museum of Anthropology, which anticipate the possibility of items being transferred to an institution closer to the community if items require special environments in order to be preserved. UBC Museum of Anthropology, *Professional Guidelines, Ethnology Collectors Policy 1998*, online: UBC Museum of Anthropology <<http://www.moa.ubc.ca/pdf/Acquisitions-policy.pdf>> s. B7.1 and 7.5. Although not a public institution, it serves a similar public mandate. However, this is not to suggest that conditions on subsequent care will necessarily always be imposed or be opposed by First Nations also concerned with physical preservation.

180 Miriam Clavir, *Preserving What Is Valued: Museums, Conservation, and First Nations* (Vancouver: UBC Press, 2002) at 149 and 134. See, also generally, 115-216 for First Nations perspectives on preservation and conservation; and RCAP, vol. 3, *supra* note 36 at 592.

181 Trudy Nicks, “The Task Force on Museums and First Peoples” (1995 Special Edition) *Material Culture in Flux* U.B.C. L. Rev. 143 at 144.

182 For a general discussion, see James Nafziger, “The Protection and Repatriation of Indigenous Cultural Heritage in the United States” in this volume.

183 See *infra* note 55-73 and accompanying text.

184 *Supra* note 167.

185 For a general discussion of this problem, see Val Napoleon, “Looking beyond the Law: Questions about Indigenous Peoples’ Tangible and Intangible Property” in this volume.

186 Kathryn Last, “The Resolution of Cultural Property Disputes: Some Issues of Definition” in *Resolution of Cultural Property Disputes*, *supra* note 99, 53 at 62-63.

187 Nafziger, *supra* note 182 at 140.

- 188 James D. Nason, "Beyond Repatriation: Cultural Policy and Practice for the Twenty-First Century" in Bruce Ziff and Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, NJ: Rutgers University Press, 1997) 155 at 291.
- 189 *Ibid.*
- 190 *Ibid.* at 304.
- 191 *Blackfoot Regulation*, *supra* note 136, ss. 3, 4.
- 192 *Supra* note 188 at 301-4.
- 193 It is common for written requests to be required under museum repatriation policies. It is difficult to avoid the necessity of writing, given the evidentiary issues that arise with oral communication, the need for certainty about the application of the legislation, and the importance of record keeping. However, attempts should be made to accommodate oral and written traditions as much as possible throughout the repatriation process.
- 194 See e.g., Robert Howell and Roch Ripley, "The Interconnection of Intellectual Property and Cultural Property (Traditional Knowledge)" in this volume.
- 195 E.g., RCAP, *supra* note 16 at 281 suggests 1880-1930. See also E. Richard Atleo, *supra* note 96 at 57. Atleo argues that 1875-1970 is more appropriate as this is when economic conditions "were very favourable to the dominant society," and he explains why this should not result in "wholesale chaos for museums."
- 196 *Supra* note 84 at 39.
- 197 An example is the reverse onus applied in the law of bailment (e.g., the bailor lent my car to you, the bailee) requiring a bailee to disprove negligence for damage to bailed goods during the course of bailment, the assumption being that the bailee is in the best position to know what happened while goods were in his or her possession. A bailment is a temporary transfer of possession from one person to another. Under Canadian law, a loan of an item considered "owned" by a museum to a First Nation would be a bailment, with certain obligations attaching to the bailor (museum) and bailee (person or group signing loan agreement). Conversely, if a museum or other institution acquired possession under a faulty chain of title, it could be considered the bailee. See Bell, "Aboriginal Claims," *supra* note 46 at 478-81.
- 198 Nancy Yeide, "Provenance and Museums" in *Resolution of Cultural Property Disputes*, *supra* note 101 at 101. See also Lucien J. Simmons, "Provenance and Auction Houses," 85 at 86-87; and Lyndel V. Prott, "Responding to World War II Art Looting" also in *supra* note 101 at 113. Some museums are prohibited by legislation from deaccessioning on such moral grounds. See e.g., *Attorney-General v. Trustees of the British Museum* [2005] 3 W.L.R. 396 (Ch).
- 199 *Supra* note 186 at 69.
- 200 See Nafziger, *supra* note 182.
- 201 Michelle LeBaron, "Learning New Dances: Finding Effective Ways to Address Intercultural Disputes" in Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 1 at 20.
- 202 *Ibid.*
- 203 For a discussion of the Tribunal and a collection of decisions, see Catherine Bell and MSAT, *Contemporary Métis Justice: The Settlement Way* (Saskatoon: University of Saskatchewan Native Law Centre, 1999). MSAT can still be criticized at several levels, including that it is too influenced by Western legal influences. But this was a decision that was considered necessary in order to create its own dispute resolution system, particularly given its jurisdiction over non-settlement members. MSAT has employed Métis custom and practice as well as principles of common law in its decisions. Of 167 decisions, only seven have been appealed, and, of those, only one was successful. On MSAT and other examples, see Catherine Bell, "Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada" in Bell and Kahane, *supra* note 202 and other essays in that volume.
- 204 See e.g., *Alberta's Métis Settlements Act*, R.S.A. 2000, c. M-14.
- 205 An example would be the American Indian Ritual Object Repatriation Foundation.