Repatriation of Cultural Property and Aboriginal Rights: A Survey of Contemporary Legal Issues

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ABSTRACT. As a result of increased aboriginal demands, museums and governments are reassessing their roles as guardians of various forms of cultural property. However, an underlying presumption in this process is that a strict legal analysis of ownership will not favour aboriginal ownership of the cultural property at issue. This article argues that recent developments in aboriginal-rights law may call into question a traditional legal analysis of ownership. In particular, it examines an overview of legal issues which may arise in repatriation litigation in light of these developments. The objective is not to encourage litigation but to encourage custodians of aboriginal cultural property to reassess their perceived rights in extra-judicial negotiations with aboriginal peoples.

SOMMAIRE. A la suite d'exigences accrues de la part des Autochtones, les musées et gouvernements réévaluent leur rôle de gardiens de diverses formes de patrimoine culturel. Toutefois, dans ce processus, on présume qu'une analyse strictement juridique de la propriété ne donnera pas automatiquement aux Autochtones la propriété du patrimoine culturel en question. Cet article soutient que de récents développements dans la législation qui régit les droits autochtones peuvent remettre en question l'analyse juridique traditionnelle du droit de propriété. En particulier, à la lumière de ces développements, on présente ici une vue générale des questions légales qui peuvent être soulevées lors d'un litige de rapatriation. Cet article n'a pas pour but d'inciter au litige mais plutôt celui d'encourager les gardiens du patrimoine culturel autochtone à réévaluer ce qu'ils perçoivent être leurs droits lors de négociations extra-judiciaires avec les peuples autochtones.

The Context

On 1 January 1988 the Mohawk bands of Kahnawake, Akwesasne and Kanestake sued the Glenbow-Alberta Institute for the return of a False Face Mask and other objects displayed in the 1988 Spirit Sings exhibition. They asserted that the False Face Mask was a sacred object which has been, and always will be, an inherent part of the spiritual practices of the Mohawk Nation and the Mohawks. Other objects such as moccasins, shoulder bags and a headdress were alleged to be part of the cultural patrimony, traditions, heritage and visible historical record of the Mohawk Nation. In support of their claim to have the objects returned, the Mohawk argued that they have an aboriginal right to their own customs, cultures, traditions, spiritual and other values and beliefs and the practice of the same. They maintained that the Mohawk Nation retained its sovereignty and its own laws. According to Mohawk law, the Mohawk Nation owns all objects of Mohawk origin of spiritual, traditional, cultural or historical significance. The Mohawk maintained that the objects were obtained without the consent of the Mohawk Nation and contrary to their laws. They also argued that interference with Mohawk culture is a violation of "the sacred pact between the Europeans and the Mohawks that both cultures were to co-exist within the territory as distinct entities, politically, spiritually and culturally."[1]

Of particular concern was the exhibit of a False Face Mask or Medicine Mask considered to have spiritual power and an intended purpose solely for members of medicine societies of the Six Nations Iroquois Confederacy, of which the Mohawk Nation forms a part. The Mohawk claimed that exhibiting the mask violated its sacred purpose. The affidavit of chiefs Billy Two-

Rivers, John Bud Morris, Joseph Tehokheron Norton and Eugene Mountour of Kahnawake stipulated the violation as follows:

> The exhibiting by the Defendant [Glenbow-Alberta Institute] of the False Face Mask is a deliberate insult to the Plaintiffs, a distortion and repudiation of their spirituality and beliefs, and interference with their sacred practices, and an affront to the right of the Plaintiffs to profess and practice their own religion and an unwarranted and unlawful intrusion of the sovereignty of the Mohawk Nation. The exhibition of the False Face Mask by the Defendant prevents members of the Mohawk Nation from carrying out a part of their spiritual practices. According to the laws of the Mohawk Nation, the False Face Mask can never under any circumstances be in the possession of non-native persons, museums or other similar institutions. According to the laws of the Mohawk Nation, the False Face Mask cannot be shown to persons who are not members of the Confederacy.[2]

The Alberta Court of Queen's Bench recognized that the Mohawk claim raises serious legal issues. However, it refused an interim application for the return of the objects claimed until the legal issues in the claim were ultimately resolved. In the Court's opinion, the Mohawk were unable to prove that they would suffer irreparable harm if the objects were not returned, a condition which must be met in law to obtain the interim relief sought.[3] The denial of interim relief may have been influenced by a judicial perception of the political motivation in the litigation. At the time of the Mohawk claim, the Spirit Sings exhibition and the 1988 Calgary Olympics were being boycotted at the request of the Lubicon Lake Nation and the Mohawk application was brought in the midst, and in support, of the boycott.[4] The claim which gave rise to the interim application never went to trial and the legal issues raised have yet to be addressed by Canadian courts.

Although aboriginal peoples of Canada have previously sought the return of cultural patrimony and sacred objects through extra-judicial negotiations, the Mohawk action is the first repatriation claim to be brought before Canadian courts. The Mohawk claim reflects the emerging concern of aboriginal peoples to regain control over sacred objects and other objects that have ongoing historical, traditional, religious or cultural importance to their communities. Often these objects are viewed as collective property; that is, property that is not capable of being owned by an individual and which cannot be alienated except in accordance with the laws of the claimant group (hereinafter referred to as tribal cultural property). Aboriginal perspectives on issues such as identification of tribal cultural property and persons with authority to alienate or convey such property may vary in accordance with the laws, traditions and property systems of the claimant group. For example, in some west coast aboriginal cultures there are systems of private and clan or family ownership of cultural property, and tribal ownership may not be an appropriate concept.

Although aboriginal rights have yet to be given a comprehensive definition in Canadian law, most aboriginal peoples assert that these rights include the right of First Nations to govern their own people, their land and its use. For many aboriginal people, this includes the right to determine their own cultural priorities, to identify what is and is not integral to their cultural

survival, and to exercise ownership rights over tribal cultural property. In the United States this position has resulted in repatriation litigation and a substantial amount of legislative reform.[5] In Canada, aboriginal peoples have predominantly been asserting their rights outside of the courtroom. Aboriginal attempts to regain control over tribal cultural property have been manifested in modern land claims agreements, political lobbying for legislative reform and negotiations with museums for the development of culturally sensitive custodial policy.[6]

Specific legislation has not yet been enacted by the federal or provincial governments to regulate ownership and control of tribal cultural property. However, ownership, custody, and transfer of some tribal cultural property, in particular archaeological resources, may be subject to federal and provincial heritage-conservation legislation.[7] All provincial governments have addressed the need to protect archaeological resources located on public provincial lands and private lands. Usually ownership, excavation, custody, and transfer of archaeological property is addressed within a larger legislative framework designed to manage and conserve a broader category of historical property. Such legislation does not specifically address tribal cultural property, but definitions of archaeological and other resources are broad enough to pull some tribal cultural property within the scope of the legislation. Most legislation provides for designation of historical resources, reporting of discoveries, government ownership of archaeological resources, control of excavations on public and private lands through a permit system, archaeological impact assessments, stop orders and penalties for noncompliance. Federal heritage resource-management policy is currently scattered throughout various federal statutes. However, the proposed Archaeological Heritage Protection Act develops a comprehensive policy similar to provincial conservation schemes which will apply to all lands owned by the federal government including Indian lands and lands in the Yukon and Northwest Territories.[8]

As a result of increased aboriginal demands, museums and governments are reassessing their roles as guardians of various forms of cultural property and, in some instances, are attempting to develop policies which are sensitive to the concerns of aboriginal groups. Of particular interest is a recent initiative by the province of British Columbia. Proposed legislation includes changes to the existing heritage legislation to allow for greater aboriginal control over aboriginal cultural property. The legislation is flexible enough to accommodate aboriginal participation in resource management but it does not guarantee participation. Objects found in or on land that "contains materials, artifacts or features of human origin ... that are evidence or may be evidence of human occupation or use before November 19, 1958" are deemed to be owned by the province.[9] However, the legislation provides that an "inalienable and imprescriptible ownership of native human remains and grave goods vests in and shall be deemed always to have vested in the native people of British Columbia" and in particular the next of kin or where the identity of the deceased or next of kin is not known, the band, tribal council or other Native organization that "represents the

descendants of the deceased person."[10] Any such items in the possession of the Crown, or held by an institution under a permit from the minister, are held in trust. It is anticipated that these items will be turned over to entitled groups or persons on request.[11]

Under the common law, a person who finds an object may acquire rights enforceable against the whole world except a prior owner or possessor. However, there is a presumption of ownership in favour of the landowner where objects are found under or attached to the land. Common-law rights may be superseded by legislation, such as legislation which deems the provincial or federal Crown to be owners of certain properties and limitation of actions legislation which requires actions for the recovery of objects to be brought within a specified time. Without legislated interference, current possessors could always be subject to ownership challenges by prior possessors and landowners.

One of the unique aspects of the legislation proposed by the province of British Columbia is it nullifies claims based only on legislation, possession, finding or ownership of land where an object is found. It subordinates the Crown's ownership to other persons or organizations who are determined "true owners" or original owners by the court.[12] This allows aboriginal peoples to make claims to original ownership of objects which are deemed to be owned by the Crown. The act also allows aboriginal groups to apply for transfer of possession of objects deemed to be owned by the Crown and provision is made to regulate transportation of protected objects out of the province. A critique of the proposed legislation is beyond the scope of this article. The point here is that progress is being made in the political forum and movement is occurring toward recognition of aboriginal participation and control of their cultural heritage.

Progress has also been made in consultations between First Nations and Canadian museums. The Lubicon Lake First Nation's boycott of the Spirit Sings exhibition was the impetus for bringing the Assembly of First Nations and the Canadian Museums Association together in a series of national discussions. Following these discussions the Task Force on Museums and First Peoples was formed with the mission of developing recommendations for strategies "by which Aboriginal peoples and cultural institutions can work together to represent Aboriginal history and culture."[13] Three major issues identified for investigation 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.

The final report of the task force emphasizes the full involvement of First Nations as equal partners and advocates resolving repatriation claims on a case by case collaborative approach which is not limited to strictly legal considerations. The report outlines several options for the resolution of repatriation disputes including: 1) return of and transfer of title to objects that are judged by current legal standards to have been acquired illegally; 2) return and transfer of title to objects which have not been obtained illegally,

but which continue to have sacred, ceremonial, historical, traditional or cultural importance to the aboriginal community; 3) loan of sacred and ceremonial objects for use by aboriginal communities; 4) replication of materials to be returned or retained but available for use by an aboriginal group; and, 5) assistance in repatriation of objects held outside the country.[14]

An underlying presumption in both of these developments is that a strict legal analysis of the ownership issue will not favour aboriginal ownership. Abandoning a strict reliance on legal rights and obligations is beneficial to aboriginal claimants, given the increased willingness of museums and governments to develop culturally sensitive policy. As a result, a distinction is made between existing legal rights and moral obligations, casting repatriation claims in the rhetoric of fairness, contemporary ethics and political obligation. The underlying assumption of negotiations is lack of aboriginal title to the property at issue, rather than uncertainty of ownership and recognition of aboriginal right.

In my opinion, ownership of aboriginal cultural property and, in particular, tribal cultural property is a complex legal issue. Although a traditional legal analysis drawing on principles of property law and legislation supports the conclusion that aboriginal people do not own much of the property at issue, this position is subject to challenge.[15] Recent developments in Canadian aboriginal-rights law call into question the traditional analysis of the ownership issue. Although the impact of aboriginal-rights law on repatriation claims has yet to be considered by Canadian courts, it is possible that an infusion of aboriginal-rights law into the traditional analysis will be a catalyst for a new approach to the resolution of ownership issues. This article argues that at the very least aboriginal rights creates a complex legal issue and, in particular, it provides an overview of legal issues that may arise in repatriation litigation for return of tribal cultural property in light of these developments. Where provincial law is at issue, I focus on the province of Alberta to illustrate the arguments raised.

The purpose of this article is not to encourage movement from extra-judicial negotiations to litigation. There are many reasons why a strict legal debate should be avoided. An emphasis on legal rights forces the parties into an "either/or" adversarial mentality which all sides wish to avoid. Either the claimant aboriginal group has ownership of the object at issue or it does not. The legal concept of ownership may be directly in conflict with how aboriginal peoples view their relationship with the object at issue. Complex legal issues lead to costly, lengthy litigation in which a decision maker is rarely able to render a decision that is satisfactory to all of the parties. The list of reasons goes on. The objective is to encourage government, museums and other custodians of aboriginal cultural property to reassess their perceived legal rights. Aboriginal peoples, museums and governments have potential legal rights at stake in the negotiation of solutions to repatriation disputes. Negotiations should not presume that all legal rights are stacked on the non-aboriginal side of the negotiation table.

Fundamental Issues in Canadian Law

The impact of aboriginal-rights law on claims for ownership and control of tribal cultural property will depend upon the resolution of three central issues yet to be considered by Canadian courts. These are: 1) Do aboriginal peoples have an aboriginal right to collective ownership and control of moveable tribal cultural property? 2) If so, is the right an existing right protected by section 35(1) of the Constitution Act, 1982 or has the right been extinguished by provincial or federal heritage conservation and limitation of actions legislation?[16] 3) What laws should be applied in the resolution of ownership issues: tribal law, the common law of property or both?

Is There an Aboriginal Right to Moveable Cultural Property?

Legal enforcement of an aboriginal right to tribal cultural property is dependant upon the expansion of historical definitions of aboriginal rights beyond land rights. The legal foundation for an expanded definition may be found in the recognition and affirmation of "existing aboriginal rights" in section 35(1) of the Constitution Act, 1982 and the reasoning of the Supreme Court of Canada in *Sparrow v. R.* which emphasizes the traditions of aboriginal peoples in the definition of their rights.[17] Section 35 was included in the Constitution without agreement on the scope and content of aboriginal rights. The Supreme Court addressed this issue for the first time in the *Sparrow* case. Assuming judicial will, *Sparrow* may be a catalyst for a new approach to the definition of rights which draws on two historical streams: Anglo-Canadian law and the traditions of claimant groups. An important issue in the definition process is whether the right claimed is integral to the culture of the claimant group. A corollary issue is whether judges influenced by Judeo-Christian values and western legal ideology will accept and understand aboriginal concepts of property and the sacred in assessing the meaning of a cultural artifact to a claimant group.

Defining Aboriginal Rights

To date, aboriginal rights have been defined on a case by case basis arising from aboriginal claims to land or land-use rights.[18] This has given rise to the view that aboriginal rights are a bundle of property rights associated with title claims of aboriginal peoples to specific parcels of land. The interpretation of aboriginal rights as a bundle of property rights can be contrasted to the emerging theory that aboriginal rights are those rights which are integral to the culture of a claimant group. Support for the latter definition is drawn from the *Sparrow* decision and a shift in judicial opinion to an inherent theory of rights. The inherent-rights theory presumes that aboriginal rights are unique legal rights that arise from pre-contact Indian social order. They exist independent of acts of creation or recognition by the Crown.[19]

Sparrow is the first statement by the Supreme Court on the interpretation of section 35(1) of the Constitution Act, 1982. Rather than develop a comprehensive definition of aboriginal rights, the court failed to place limits

on the types of rights that can be categorized as aboriginal rights suggesting that the content of aboriginal rights will continue to be determined on a case by case basis. When the purpose of affirmation of aboriginal rights was considered, the Court concluded that a generous, liberal interpretation of section 35(1)is demanded. Further, the Court held that aboriginal rights must be interpreted flexibly so as to allow their exercise in a contemporary manner.

Sparrow suggests that a central consideration in characterizing a right as aboriginal is whether the right was an integral part of the culture of the claimant group.[20] Although "integral" is not defined, it is important that the significance of the right is measured in the context of the society as a whole. For example, in *Sparrow* the right to fish is considered an aboriginal right not only because the salmon fishery is a valuable food source, but also because of its role in the system of beliefs, social practices and ceremonies of the Musqueum people.[21] The court also suggests that integral means that the right continues to be integral to the existing claimant group.[22] In assessing the nature, scope and content of the right the Court considered anthropological evidence, but also emphasized that the interpretation of the right at stake must be "sensitive to the aboriginal perspective itself on the meaning of the right at stake."[23] Scope and content is not to be determined by common-law concepts of property, executive action or legislative policy alone.[24] This approach, coupled with the Court's recognition that aboriginal rights are independent and "pre-existing" legal rights suggests that the section 35 is a unique constitutional provision which draws on traditions of aboriginal peoples and Canadian law in the definition of rights.

Reconciliation of World Views

Sparrow provides Canadian courts with the necessary precedential foundation to recognize rights to collective ownership and control of tribal cultural property where such property is integral to the culture of the claimant group. If this right is recognized, the main issue facing aboriginal peoples is whether judges can understand the essential meaning of a cultural artifact from an aboriginal perspective and reconcile this perspective with a private-property rationale. It is unlikely judges will completely discount policy arguments linked to the rationalization of the Canadian private-property system. The main justifications for the system are certainty of title (the need to know who owns what to avoid conflict and encourage productivity), fairness (an evaluation linked to profit from one's labour), economic productivity, enforceability of rules, labour theory (rights over the fruits of one's own labour) and personality and liberty theory (the idea that laws should promote personality traits such as independence, assertiveness and generosity). Regardless of the aboriginal perception of their rights, these considerations will likely result in some attention being paid to issues such as cost of care, length of possession by the present custodian, and cost of acquisition.

Aboriginal property litigation also challenges courts to accept the validity of property and value systems different from those embedded in Canadian

law. Although generalizations about aboriginal-property systems are difficult because of the diversity of custom, many claims have been made to tribal cultural property and in such claims a *collective* or *communal* concept of property is often invoked. In a *collective* system access to, and use of, resources is determined by the collective interests of society as a whole. In translating this concept of property into Canadian legal language, it can be described as a system where ownership lies with the community, but individuals or groups, such as religious societies or families, may acquire superior rights to, or responsibilities for, part of the collective property. In such cases a trust responsibility may arise such as where sacred property is held by religious leaders of a tribe. Further, the concept of community may be extended to include living things other than humans, such as animals and plants, and objects that western society views as inanimate.[25]

A communal system is similar except individuals cannot acquire special rights *vis-à-vis* other members of the community. The characteristics of communal property as they relate to interests in land are explained in the United States decision of *Journeycake v. Cherokee Nation* as follows:

> The distinctive characteristic of [tribal] communal property is that every member of the community is owner as such. He does not take as heir, or purchaser, or grantee; if he dies his right to the property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has the right of property in the lands as perfect as that of any other persons; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.[26]

Canadian courts have recognized concepts of collective property in the context of claims to aboriginal title. It is unlikely they will have difficulty extending or modifying this concept to apply to moveable tribal cultural property or other forms of group property. The identity of the owner will be determined by looking at the aboriginal community in which the object originated. However, conflicts may occur between aboriginal customary law and presumptions in Canadian law regarding the transferability of the object at issue. In that instance the issue is what laws should apply? I shall come back to my thoughts on this issue later in the article.

Although the expansion of western legal concepts, like ownership, is useful in understanding and giving legal recognition to aboriginal rights, it should be noted that the holistic world view of some aboriginal peoples may result in the creation of a unique system of relationships. The differences in western and aboriginal ideology must be appreciated in assessing the importance of a cultural object to the community. Most aboriginal societies adopt a world view which recognizes a special relationship between people and the natural world. The earth is commonly viewed as a living being which gives life to other living things and upon which the survival of all living things depends. Objects created by people may also be infused with a spirit.[27] This view of the sacred results in an evaluation of property and relationships that extends far beyond notions of ownership, profit and utility. In the attempt to describe the relationship of an aboriginal people to tribal cultural property,

concepts such as guardian, steward or caregiver may be more appropriate than owner.

Is the Right to Collective Ownership and Control an Existing Aboriginal Right?

Even if the Canadian courts recognize an aboriginal right to tribal cultural property, the right may not be enforceable by aboriginal peoples. Provincial and federal legislation may extinguish or limit the exercise of the right. For this reason, the determination of whether an aboriginal right to cultural property is an existing, enforceable legal right requires an examination of provincial and federal legislation concerning ownership and control of tribal cultural resources. Whether general legislation will operate to limit the rights of aboriginal peoples to ownership and control of tribal cultural property will depend upon the answers to several questions including: 1) Does the property at issue fall within the scope of provincial heritage-conservation legislation?[28] 2) Does the property fall within the scope of federal legislation affecting the use and control of moveable cultural property? 3) Can aboriginal rights be unilaterally extinguished by provincial and federal action without the consent of aboriginal peoples? 4) Does provincial or federal legislation purport to abrogate aboriginal rights in "clear and plain" or express language? 5) If the right is an existing aboriginal right, what is the legal effect of the proposed federal Archaeological Heritage Protection Act?[29] 6) Are claims for repatriation of aboriginal cultural property limited by provincial limitation of actions legislation, that is, legislation which bars an application to the courts for recovery of property after the expiration of a specified period of time?

Historical Resources Act

In Alberta, ownership and management of historical resources is regulated by the Historical Resources Act.[30] If property falls within the scope of this legislation, the common law respecting ownership and acquisition of property is substantially altered. In 1978, the act was amended to vest ownership of all archaeological resources found on private lands and provincial public lands in the provincial Crown. Consequently, claims for ownership of archaeological property acquired after 1978 arising from prior possession or ownership may only be available to the provincial Crown. The legislation also grants the minister power to provide for the care, management, excavation and disposition of archaeological resources. Control over excavations and disposition is exercised through a permit system, archaeological impact assessments, stop orders and penalties for non-compliance. The combined effect of these provisions is that security of title to archaeological property acquired after 1978 is dependant upon derivation from the Crown, compliance with conditions placed by the Crown and compliance with the legislation.

The definition of archaeological property is broad enough to include tribal cultural property buried or partially buried in the ground.[31] In the context of

repatriation claims, this means protection is offered to museums and other custodians of certain aboriginal archaeological resources acquired after 1978 unless the legislation is rendered inapplicable to an aboriginal-rights claim. As the definition of archaeological property refers to a "work of man" it is possible that skeletal remains are not owned by the province.[32] However, despite this uncertainty, current archaeological practice in Alberta is to obtain a permit under the act and notify the RCMP.[33] Custody and disposition is dealt with on a case by case basis and respect may be shown to the wishes of local bands in the determination of these matters.

Tribal cultural property that is not buried or partially buried in the land may fall within the definition of an historic object or resource under the act.[34] The minister may purchase or dispose of historic objects on any terms considered appropriate. In doing so, the minister is bound by the common law and can not receive or dispose of rights greater than those of the original transferor. A fundamental principal in Canadian property law is the doctrine of *nemo dat quod non habet*. Although there are some legislated exceptions to this principal, the general rule is a person can not transfer greater rights in an object than she or he has. Consequently, the Crown is not immune from ownership claims arising from invalidity of the transferor's title or prior possessory rights. The act also allows for such properties to be protected from destruction, alteration and removal through the process of designation. Although it is possible for moveable tribal cultural property to be designated, the author is unaware of any such designations.

Finally, it should be noted that the Provincial Parks Act and the Foreign Cultural Property Immunity Act may also affect ownership of tribal cultural property.[35] Ownership of provincial parks and historic sites created under the former act is vested in the province. Artifacts recovered from the surface of these lands may be disposed of by the minister if, upon reasonable inquiry, the owner cannot be found. The Foreign Cultural Property Immunity Act limits proceedings to recover custody and control of cultural property which is ordinarily kept in a foreign country, but is brought into Alberta for temporary exhibition or research, if the property at issue is ordered to be of "significance" by the lieutenant governor in council. Even if the legal rights of the foreign custodian are dubious, proceedings in Alberta's courts are barred.

Federal Legislation

The federal government has not asserted a comprehensive legislated claim to ownership of cultural property located on federal lands. Consequently, the common law of property is the basis for determining most ownership questions unless, as suggested below, aboriginal-rights law creates a unique framework of analysis for claims to tribal cultural property. Under the common law, rights to property buried or partially buried in federal lands will be measured against a presumption in favour of the federal government as landowner.[36] The current policy of the federal government is to assert ownership to all archaeological resources on Crown lands. Rights

to objects lying on the surface of federal lands will be measured against rights of finders and prior possessors. Unless the Crown evidences an intent to control the land and all of the objects upon it, its rights may be inferior to that of a finder.[37] The Crown's title will always be subject to claims of prior owners and possessors unless prior rights have been extinguished through transfer, abandonment, neglect to assert a claim in a timely manner or some other legally recognized method.[38] The uncertainty of Crown title has caused particular concern in the North because "in many arctic regions sites are exposed and artifacts lie on the surface of the land."[39] Consequently, northern aboriginal peoples are insisting that heritage resources be addressed in modern land-claims agreements.[40]

Ownership of property on reserve lands is governed by the Indian Act.[41] Although the Crown does not claim ownership of moveable property on reserve lands, restrictions have been placed on the care and disposition of certain objects. Section 91 provides that written consent of the minister is required for the transfer of title to Indian grave houses, totem poles, carved house poles, pictographs and petroglyphs located on reserves. The section also prohibits destruction or vandalism. Under the act, legal title to reserve lands is vested in the Crown and beneficial title in the band. Consequently, one can argue there is a presumption of ownership of archaeological resources in favour of the Crown, but this presumption can be displaced by proof of prior possession. One might also argue that the Crown has an obligation to institute protective measures if the band council has failed to take initiatives under its general bylaw-making powers.[42]

Protection mechanisms affecting archaeological resources on federal lands are scattered throughout various federal enactments.[43] Of particular interest is the Cultural Property Import and Export Act which restricts the export of articles enumerated on the cultural property export control list.[44] Items included are broad enough to encompass aboriginal cultural property valued at more than $2,000. Exports in violation of the act will not be effective to transfer title. However, the success of repatriation claims utilizing this legislation will depend upon the treaties with, and legislation of, the countries which receive the imported goods and their willingness to respect Canadian law on this point.

The proposed Archaeological Heritage Protection Act will contain a comprehensive federal scheme for ownership and control of archaeological resources.[45] The resource management envisaged by the legislation is similar to the provincial scheme and applies to all federal lands, including Indian lands. However, the legislation requires consultation with descendants upon the discovery of burial sites.[46] Section 5 of the act vests ownership of archaeological artifacts described in a list of protected artifacts and located on federal lands, other than Indian lands, in the federal Crown. Indian lands include reserve lands and lands subject to a land-claims agreement. An artifact is defined as an "object, or any part of an object, that was made or used by human beings and that has been discarded, lost or abandoned for 50 years or more."[47] Whether an article is discarded, lost or

abandoned will be a question of fact and law. The effect of the ownership provision is to bar claims by prior possessors to artifacts discovered or disposed of after the legislation is enacted. In the context of repatriation litigation, this may mean that aboriginal peoples can not claim common law ownership rights to artifacts found on federal lands, other than Indian lands, unless they establish that the object is not an artifact or the artifact is not contained on the list of protected objects.

Unilateral Extinguishment

Although subject to great criticism, Canadian law has consistently maintained that prior to 1982, aboriginal and treaty rights could be extinguished or limited by unilateral federal and provincial action without the consent of aboriginal peoples.[48] It is beyond the scope of this article to outline arguments supporting a principle of consent. However, it should be noted that this issue will likely continue to be the subject of litigation until the principle of consent is accepted by federal and provincial governments. Further there is movement in the Supreme Court toward limiting the powers of the Crown. Canadian courts have historically upheld the ability of the Crown to exercise this power over aboriginal people to their detriment. However, *Guerin* began a movement away from this tradition by creating a new dichotomy in judicial premises: the absolute power of the Crown to unilaterally extinguish aboriginal and treaty rights and the duty of the Crown to act responsibly for the benefit of Canada's first peoples.[49] Further limits were placed on the powers of the federal and provincial governments following the recognition and affirmation of aboriginal rights in the Canadian constitution. This coupled with the trend in recent decisions of the Supreme Court to emphasize concepts of duty and honour in determining the intent of the Crown in exercising its powers suggests the provincial and federal governments have a greater legal burden to prove extinguishment than has been imposed in the past.[50]

In the spring of 1990, the Supreme Court of Canada placed significant limitations on Crown power. First, in the *Sioui* decision, the Supreme Court concluded that the consent of the Huron was required to extinguish their treaty rights.[51] The requirement of consent evolved from an emphasis on the need to uphold the honour of the Crown. In this decision the court also placed limits on the occupancy theory of extinguishment. Prior to *Sioui*, the courts maintained that aboriginal rights could be extinguished where the Crown exercised complete dominion over the land in a manner that is adverse to aboriginal rights of occupancy.[52] It was not clear whether the occupation required was physical or whether a comprehensive enactment of adverse legislation was enough. In *Sioui*, Mr. Justice Lamer clarified that physical occupation gives rise to extinguishment by occupation and that for rights to be extinguished, they must be contrary to the purpose of Crown occupation and prevent realization of that purpose.[53] Although the rights at issue in the case are treaty rights, the analysis is easily extended to the broader category of aboriginal rights.

Finally, prior to the *Sparrow* case, the courts maintained that aboriginal and treaty rights could be extinguished by legislation, but it was uncertain whether the intent to extinguish must be clear and plain or if was sufficient that the legislation coupled with other government action was inconsistent with the continued exercise of an aboriginal or treaty right. *Sparrow* resolves the debate by stating unequivocally that the language of the legislation must be clear and plain.[54] Unfortunately, the court does not elaborate on what is meant by clear and plain. In this case Mr. Sparrow was charged under the Fisheries Act for fishing with a drift net longer than that permitted by his band's fishing license.[55] The issue before the court was whether Mr. Sparrow's aboriginal right to fish had been extinguished by the elaborate regulatory restrictions under the Fisheries Act or whether it was an existing aboriginal right protected by section 35(1), of the Constitution. Assuming the right was not extinguished before the protection of aboriginal rights in section 35(1), a further issue is whether section 35(1) limits provincial and federal power to terminate or limit the exercise of aboriginal rights. Despite the prohibition in the federal fishing regulations that *no person* shall fish without a license, the court held that the regulatory scheme did not evidence a clear and plain manifestation of Parliament's intent to extinguish the aboriginal right to fish. As there are few statutes or regulations that so clearly conflict with the exercise of an aboriginal right as a prohibition, some have suggested that clear and plain means that actual consideration must have been given to the impact of the legislation on the aboriginal or treaty right at issue.[56] The failure of the Supreme Court to indicate more specifically the language and intent required to meet the clear and plain test has resulted in lower courts demonstrating a reluctance to apply the test.[57]

In *Sparrow* the court concluded that the fishing regulations *limited* the exercise of Mr. Sparrow's aboriginal right to fish but the right was not *extinguished*. As a result, Mr. Sparrow's aboriginal right to fish was protected by the Constitution. According to the court, the recognition of "existing Aboriginal rights" in section 35(1) refers to rights which were not extinguished prior to the inclusion of section 35 of the Constitution (that is, prior to 17 April 1982). Rights extinguished before the enactment of section 35 no longer exist as enforceable legal rights, but rights which have merely been regulated or limited in their exercise are protected by the constitution in their original unregulated form.[58] Thus government action will partially define the content of aboriginal rights included in section 35(1) if the government has clearly operated to extinguish an aboriginal right prior to 17 April 1982. After this date, aboriginal rights can arguably not be extinguished without constitutional amendment or consent of the aboriginal peoples affected. Further, rights can only be regulated or limited in their exercise after 1982 if the regulation can be justified. If the aboriginal claimant proves the existence of a right and that legislation has the effect of interfering with that right, the onus shifts to the Crown to justify interference.[59]

The test of justification involves two steps. First, the Crown must establish a valid legislative objective such as conservation and management of resources. Second, it must show the objective is attained in such a way as

to uphold the honour of the Crown. The responsibility of the government to act in a fiduciary capacity (that is, a "trust-like" manner for the benefit of aboriginal peoples) must be the first consideration in determining whether the legislation or action can be justified. Other questions to be asked in the justification process include whether there is as little interference as possible with aboriginal rights, whether fair compensation is paid in the event of expropriation and whether the aboriginal group affected has been consulted.[60]

It should be noted that strong arguments can be raised to challenge the constitutional competency of provincial governments to extinguish or regulate aboriginal rights. Under section 91(24) of the Constitution Act, 1867, the federal government is given jurisdiction over Indians and lands reserved for Indians.[61] However, section 88 of the Indian Act by reference incorporates provincial law that affects "Indianess" as federal law and renders it applicable to Indian peoples in some circumstances.[62] One could argue that this section is a breach of the federal government's fiduciary obligation and an invalid delegation of its constitutional powers. Despite these and other arguments, the courts have held in many cases that general provincial legislation enacted prior to 1982 can limit the exercise of aboriginal rights.[63]

Impact of Provincial and Federal Heritage-Resource Legislation

Given the need for "clear and plain" intent to extinguish aboriginal rights, one can argue that heritage-conservation legislation does not extinguish aboriginal rights. As neither federal or provincial legislation expressly places ownership of tribal cultural property in the government, it is difficult to argue that there has been a statutory expropriation of the right unless it can be shown that the government actually considered the termination of an aboriginal right. A clear intention to terminate aboriginal rights is not evidenced nor is termination necessarily implied by operation of the legislation. Coupled with the rule of interpretation that ambiguous terminology is to be interpreted in favour of aboriginal peoples, these arguments suggest that aboriginal rights of collective ownership of tribal cultural property continue to exist. Although rights may have been indirectly regulated by legislation, they are entrenched in the Constitution in unregulated form and continued regulation of the right will need to be justified in accordance with the *Sparrow* test.

In light of the above, one must question the validity of the proposed federal Archaeological Heritage Protection Act.[64] As the bill will be enacted after 1982, it may have to meet the justification tests. Given consultation with aboriginal groups in the drafting of the legislation, current federal policy to help aboriginal groups to develop suitable repositories for aboriginal artifacts, and the federal objective to protect and conserve archaeological resources, it may be difficult to argue that the objectives of the federal government are invalid or that the government has proceeded in a manner inconsistent with upholding the honour of the Crown. In fact, one might argue that the government has an obligation to develop or assist in the

development of a conservation scheme.[65] However, provisions vesting ownership of aboriginal archaeological property may not withstand aboriginal opposition as such provisions offend the principle of minimal interference. The same can be said of the imposition of a permit protection scheme on Indian lands where the band council has, or wishes to develop, its own bylaws. Further, provision has not been made in the legislation to compensate for the expropriation of ownership rights.

Federal and provincial control of heritage resources may have extinguished aboriginal ownership rights where control arises from physical occupation of an area prior to 1982 and aboriginal ownership of moveable cultural property is completely inconsistent with the reason for occupation. For example, if land is set aside as a historic site, recognition of full ownership rights may be inconsistent with the purposes of establishing the site. Arguably, only those rights which seriously compromise the objectives of the Crown will be extinguished, such as the right of disposition. Other rights, such as use and access, may still remain.[66]

Limitation of Actions

Section 51 of the Alberta Limitation of Actions Act provides that actions for trespass, conversion, taking away or detention of chattels must be brought within two years after the cause of action arose.[67] The purpose of the legislation is to provide for greater certainty of title, encourage prompt settlement of disputes and protect reasonable expectations of innocent purchasers. Where some provincial legislation provides that title of the original owner is extinguished once the limitation period expires, Alberta's legislation is silent on this point.[68]

In cases of continuing trespass and concealed information, the courts have held that limitation periods will not bar aboriginal claims.[69] However, beyond these two situations it is unclear as lower courts have applied limitation periods against aboriginal peoples.[70] The issue is yet to be addressed by the Supreme Court. Applying the clear and plain test to this legislation the Court may conclude that the intent of the legislature to bar claims based on aboriginal rights is not clear and plain. Further, one could argue that its application to aboriginal groups contravenes the guarantee of equality in section 15 of the Charter of Rights and Freedoms because the effect of application is more severe on aboriginal rights claims than other property claims.[71] The severity arises from the fact that aboriginal-rights claims are historical claims and aboriginal rights is an emerging concept. These arguments combined with the recent emphasis on the Crown's fiduciary obligations to aboriginal peoples suggest that limitation of actions legislation should not be effective to bar aboriginal-rights claims.

What Laws are to be Applied in the Resolution of Disputes?

If aboriginal rights to tribal cultural property are existing, enforceable legal rights, what laws should govern the resolution of disputes? Options include common-law principles of property law, tribal customary law or an

application of both to create a unique body of law in recognition of the unique legal status of aboriginal peoples. The resolution of this issue may be affected by answers to the following questions: 1) What are the ramifications of applying either the common law of property and/or tribal law? 2) Will aboriginal rights be expanded to include rights to self-government? 3) Does section 35(1) provide the court with a mechanism to apply common law and tribal law without getting tangled in the issue of competing sovereignties?

Application of Tribal and Common Law

In the United States, First Nations have the jurisdiction to enact and enforce tribal property laws within the territorial boundaries of their lands. Some tribal laws will also extend to members who reside elsewhere.[72] Tribal laws vary from nation to nation in accordance with customary laws and tribal codes. Where property is removed outside of Indian territories and is in the possession of a nontribal member, a blended law approach has been adopted. In some cases the validity of a transfer to a nonmember has been analyzed in accordance with tribal law and the effect of invalidity in accordance with American law. For example, tribal property donated or sold by individual members of a group, or stolen from an aboriginal group, is often the subject of repatriation claims. The central issue in these claims is the capacity of the transferor to convey title. United States courts have looked to tribal law to determine this capacity. If the consent of the tribe is required but has not been obtained, the common law rule of *nemo dat quod non habet* has been applied. According to this rule, a person cannot transfer greater rights in the property than she or he has. *Nemo dat* operates to prohibit the transfer of ownership rights by the unauthorized transferor regardless of the innocence of the purchaser. The effect of *nemo dat* has been described by the New York Supreme Court in *Seneca Nation of Indians v. Hammond* as follows:

> The bark in question ... was the property of the plaintiffs. Those who purchased it from the individual Indians got no title, and they could confer none to the defendants. Everybody who meddled with the bark became a trespasser. It is no defense that the defendants acted for others in buying the bark, or that they purchased it without notice that the vendors had no title: or that their acts, of which the plaintiffs complain, were done in good faith.[73]

As a result of these developments, potential purchasers of property in the United States must look to tribal law and custom as well as the common law to determine whether a transferor can convey title by gift, sale, devise or any other manner. The innocent purchaser's remedy is against the wrongful seller, not the rightful owner. Assuming that Canadian courts accept the concept of collective ownership of tribal cultural property, the issue is whether the same approach to the resolution of disputes could occur in Canada. It is clear that the courts are looking to aboriginal traditions to determine the content of aboriginal rights asserted, but will the concept of aboriginal rights be extended to include the right to enact and enforce tribal property laws?

Aboriginal Rights To Government

The enforcement of tribal laws in the United States is directly linked to the doctrine of residual sovereignty. The acceptance of inherent rights in the United States has led to the recognition of Indian nations as "domestic dependant nations."[74] This means that upon entering treaties, Indian nations do not cease to be sovereign and self-governing nations; rather, powers of government both internal and external to Indian territory are retained unless surrendered by treaty, overruled by congressional enactments, or limited by reasonable state regulation.[75] Although the powers of aboriginal government have been reduced over time, they retain authority to enact and enforce civil laws subject to territorial and membership limitations.

Historically, Canadian law has denied sovereign rights of aboriginal peoples unless powers of government have been granted to aboriginal peoples by the federal government and given force by legislation. However, in May 1990 the Supreme Court stated that the status of First Nations at the time of colonial expansion in Canada was that of independent nations capable of entering solemn agreements with the Crown.[76] The relationship between First Nations and the Crown was categorized as unique, falling somewhere between "the kind of relations conducted with sovereign states and relations such states had with their own citizens."[77] At first glance these statements suggest that Canada is moving toward recognition of sovereign rights, but they cannot be read independent of the *Sparrow* decision.

Although *Sparrow* suggests that an inherent-rights approach is to be adopted in the recognition and definition of aboriginal rights, comments on the issue of Crown sovereignty suggest that the court may be reluctant to extend aboriginal rights to include rights of government.[78] Relying on section 91(24) of the Constitution Act, 1867, the court concluded that there was never any doubt that sovereignty and legislative power vested in the Crown.[79] The impact of this conclusion on claims to sovereign rights and the application of tribal law in the resolution of disputes is uncertain. Perhaps the court is retaining a contingent-rights approach on the question of sovereignty suggesting that only those powers delegated by the federal and provincial crowns will be recognized and enforced.[80] On the other hand, the comments may be limited in their application to external rights of sovereignty leaving room to recognize the continued existence of unextinguished internal rights to self-governance and lawmaking.

The interpretation of section 91(24) in *Sparrow* can be criticized on several grounds. First, it is not clear that section 91(24) was intended to extinguish sovereign rights of aboriginal peoples. An alternative interpretation is that the section was included in the Constitution to centralize administration of Indian policy in the federal government. Second, the contingent-rights theory is based on an ethnocentric colonial theory that assumes the superiority of European nations. The theory assumes that for the purpose of acquiring sovereignty, aboriginal lands were vacant.[81] This theory is rejected in contemporary international law and has been incorporated into Canadian law as a result of the misinterpretation of early United

States decisions which interpret colonial law.[82] Finally, the conclusion that all sovereign rights are extinguished is contrary to the spirit of the *Sparrow* decision which emphasizes the uniqueness of section 35(1) and the need to look to aboriginal traditions in the definition of aboriginal rights.

Avoiding Competing Sovereignties

Regardless of the court's position on the question of sovereignty, the blending of two traditions in the resolution of disputes remains a viable alternative. Although *Sparrow* seems to exclude aboriginal sovereignty in favour of Crown sovereignty, the definitional guidelines in *Sparrow* provide a mechanism to treat section 35 of the Constitution as a unique provision which draws on both common law and aboriginal traditions. Emphasizing the unique nature of aboriginal rights, the court defines rights as those "in keeping with the culture and existence" of the aboriginal group asserting the claim.[83] The court also recommends avoiding the application of traditional common-law concepts in the interpretation of the right.[84] Rather than adopting an "either/or" approach to the application of common law and tribal law, the interpretation guidelines in *Sparrow* may act as a catalyst for a fresh and culturally sensitive approach to the resolution of disputes. The real issue is not maintaining the security of Canadian sovereignty, but the willingness of the court to recognize injustice and respect cultural difference.

Conclusion

The ability of aboriginal peoples to regain control over tribal cultural property no longer in their possession is uncertain. Many of the issues likely to arise in a repatriation claim are yet to be considered by Canadian courts. A survey of some of the issues in this paper has illustrated that recent developments in the law of aboriginal rights cast doubt on title to tribal cultural property, particularly where property has been stolen or sold by an individual without consent of the tribe. Given the complexity and cultural sensitivity of these issues, it is essential that governments and museums rethink their positions as custodians of cultural property and work cooperatively with aboriginal peoples to resolve issues of management, access, care and custody. The issue is one of aboriginal right and respect for cultural difference, not merely sensitivity to the claims of culturally affiliated groups. If this is understood, expensive and lengthy litigation may be avoided to the benefit of all parties involved.

NOTES

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1. See Statement of Claim filed by Mohawk plaintiffs in Action No. 8801 00657, Court of Queen's Bench, Judicial District of Calgary, par. 14.

2. See, Affidavit of chiefs Bill Two-Rivers, John Bud Morris, Eugene Montour and Grand Chief Joseph Tehokheron Norton, par. 14. See also Statement of Claim filed by the Mohawk plaintiffs in Action No. 8801 00657, Court of Queen's Bench, Judicial District of Calgary.

3. See, *Mohawk Bands v. Glenbow-Alberta Institute* [1988] 3 C.N.L.R. 70 (Alta. Q.B.).

4. *Supra* note 1, par. 38.

5. The United States Congress has enacted legislation to protect American Indian religions and has amended heritage-conservation legislation to account for aboriginal concerns relating to treatment of cultural property. More recently, Congress passed a repatriation bill calling for the return of human remains, funerary objects, sacred objects and other cultural property to originating aboriginal groups that establish sufficient cultural affiliation to the objects claimed. State legislation has also been subjected to substantial revision. For example, American Indian Religious Freedom Act 42 U.S.C. par. 1996 (1981); Archaeological Resource Protection Act of 1979, 16 U.S.C.A. pars. 470-470w-6 (Supp. v 1981) and the Native American Grave Protection and Repatriation Act, Oct. 27, 1990, Pub. L. 101-601. For a general discussion see W. Echo-Hawk, "Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interest in Native Cultural Resources," *New York University Review of Law and Social Change* 14 (1986): 448-53; C. Higgenbotham, "Native Americans Versus Archaeologists: The Legal Issues," *American Indian Law Review* 10 (1982): 104-13; D. Saugee, "American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers," *American Indian Law Review* 10 (1982): 17-57; B. Blair, "Indian Rights: Native Americans Versus American Museums — A Battle For Artifacts," *American Indian Law Review* 7 (1979): 133-54; J.E. Peterson II, "Dance of the Dead: A Legal Tango For Control Over Native American Skeletal Remains," *American Indian Law Review* 15, no. 1 (1989): 135-46; and N. Ostriech Lurie, "Interim Report, A.A.A. Commission on Native American Remains," *Anthropology Newsletter* 15 (April 1990).

6. Recent land-claims agreements provide for aboriginal participation in heritage-resource management. In the Yukon, ownership of ethnographic resources found on settlement land is placed in the Yukon First Nations. In the Nunavut agreement the issue of ownership is left for further negotiation. The failed Dene/Métis agreement also provided for federal assistance in the repatriation process. See, *Agreement in Principle Between the Inuit of Nunavut Settlement Area and Her Majesty In the Right of Canada* (Ottawa: Department of Indian Affairs and Northern Development, 1990) articles 36 and 37; *Comprehensive Land Claim Umbrella Final Agreement Between The Government of Canada, the Council of Yukon Indians and The Government of the Yukon* (Ottawa: Department of Indian Affairs and Northern Development, 1990), ch. 13; and the *Dene/Metis Comprehensive Land Claim Agreement in Principle* (Ottawa: Department of Indian Affairs and Northern Development, 1988), section 29.

7. The definition of heritage and historic resources varies from province to province as does the treatment of archaeological and nonarchaeological resources. This paper discusses relevant legislation in Alberta.

8. "Proposed Act respecting the protection of the archaeological heritage of Canada," released by the minister of Communications, 19 December 1990.

9. Draft Heritage Conservation Act, British Columbia, Minister of Municipal Affairs, Recreation and Culture, s.18(1)(a) and s. 28(2).

10. Ibid., s. 28(5).

11. Ibid., s. 2(6). See also Province of British Columbia, "Heritage Legislation: Improving Stewardship for Heritage Resources of Native Origin" (Victoria: Ministry of Municipal Affairs, Recreation and Culture, March 1991).

12. Ibid., s. 28(3),(10) and 32.

13. *Task Force Report on Museums and First Peoples* (Ottawa: Assembly of First Nations and Canadian Museums Association, 1992), 2.

14. For further discussion of the Task Force recommendations see C. Bell, "Reflections on the New Relationship: Comments on the Task Force Guidelines For Repatriation," in Canadian Museums Association, *Legal Affairs and Management Symposium* (Ottawa: Canadian Museums Association, 1992), 55.

15. A detailed analysis of the traditional arguments is forthcoming in C. Bell, "Aboriginal Claims to Cultural Property in Canada: A Comparative Examination of the Repatriation Debate," *American Indian Law Review* 17, no. 2 (forthcoming).

16. Schedule B of the Canada Act, 1982 (U.K.) 1982, c.11. Section 35(1) provides that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

17. (1990) 70 D.L.R. (4th) 385. For an alternative discussion of *Sparrow* see W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" *Queen's Law Journal* 15, no. 2 (1990): 217.

18. A notable exception are a limited number of cases which have upheld the validity of customary adoption. These cases are relied upon to support a broader theory of rights. For example, *Re Tagornack Adoption Petition* [1984] 1 C.N.L.R. 185 (N.W.T.S.C.); *Re Katie's Adoption Petition* (1961) 38 W.W.R. 155 (N.W.T. Terr. Ct.); N. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada" [1984] 4 C.N.L.R. 1.

19. Two landmark decisions in the development of the inherent rights theory are *Guerin v. R.* (1984) 2 S.C.R. 335 and *Sparrow, supra* note 17.

20. *Supra* note 17, at 402.

21. Ibid.

22. The idea of continued cultural importance may be descriptive rather than limiting as Canadian law supports the notion that once a right is established it continues in spite of cultural changes. In the context of aboriginal-rights law the issue becomes whether or not the right has been terminated by legitimate government action.

23. *Supra* note 17, at 411.

24. Ibid.

25. L. Little Bear, "A Concept of Native Title" *CASNAP Bulletin* 258 (December 1976): 262.

26. 28 Ct. Cl. 281 (1893) at 302. For further discussion see, ibid.

27. For discussion see, *supra* note 25; Jack Woodward, *Native Law* (Toronto: Carswell, 1990), 339; D. Saugee, "American Indian Religious Freedom and Cultural Resource Management: Protecting Mother Earth's Caretakers," *American Indian Law Review* 10 (1982): 10; and M.E. Turpell, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Difference," *Canadian Human Rights Yearbook* 3 (1989-90): 517.

28. Where provincial laws are at issue, this paper focusses on laws in the province of Alberta to illustrate the arguments raised.

29. *Supra* note 8.

30. R.S.A. 1980, H-8.

31. Archaeological resources are defined in s.1(a) as a work of man that: (i) is primarily of value for its prehistoric, historic, cultural, or scientific significance, and (ii) is or was buried or partially buried in land in Alberta or submerged beneath the surface of any watercourse or permanent body of water in Alberta.

32. Ibid.

33. The RCMP are notified of the discovery of human remains in accordance with the Fatality Inquiries Act, R.S.A. 1985, c. F-6.

34. Section 1(e) defines historic object as "any historic resource of a moveable nature including any specimen, artifact, document or work of art." Section 1(f) defines a historic resource as "any work of nature or man that is primarily of value for its palaeotological, archaeological, historic, cultural, natural, scientific or aesthetic interest."

35. R.S.A. 1985, c. P-22; R.S.A. 1985, c. F-12.5.

36. For a general discussion of Crown ownership see *Federal Archaeological Heritage Protection and Management: A Discussion Paper* (Ottawa: Dept. of Communications, 1988), 57-59.

37. For a general discussion of the law of finding see *Parker v. British Airways Board* (1982) 2 W.L.R. 503 (Engl. C.A.).

38. In the United States, Native peoples receive some assistance in meeting this onus of proof through the following provision of the United States Code 25 U.S.C.A. par. 194 (West 1983):

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

39. *Supra* note 36, at 57.

40. *Supra* note 6.

41. R.S.C. 1985, c.1-6.

42. The concept of fiduciary obligation originates in *Guerin, supra* note 19 and has been extended in *Sparrow, supra* note 17. According to this doctrine the Crown has an obligation to act in the best interests of aboriginal peoples. The extent of this obligation is uncertain. See generally, Woodward, *supra* note 27, at 110-14.

43. Indian Act R.S.C. 1985 c.1-6; Canada Shipping Act, R.S.C. 1985, c.S-9; Historic Sites and Monuments Act, R.S.C. 1985, c.14-4; National Parks Act, R.S.C. 1985, c.N-14; Museums Act, 1990 38 Eli. II. c.3; Cultural Property Import and Export Act, R.S.C. 1985, s.c.51; Northwest Territories Act, R.S.C. 1985, c.N-27 and Yukon Act, R.S.C. 1985, c.Y-Z. For general discussion of this legislation see Woodward, *supra* note 27, at 342-45 and *supra* note 36, at 48-70.

44. R.S.C. 1985, c. C-51.

45. *Supra* note 8.

46. Ibid., s.8.

47. Ibid., s. 2(1).

48. For example, M. Jackson, "The Articulation of Native Rights in Canadian Law," *University of British Columbia Law Review* 18, no. 2 (1984): 255; Woodward, *supra* note 27, at 200-05; B. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987), c. 6, and "Address of the Gitskan and Wet 'suwet' en Hereditary Chiefs" [1988] 1 C.N.L.R. 17.

49. *Supra* note 19.

50. For example, *Sparrow, supra* note 17, at 408; but see *R. v. Horseman* (1990) 1 S.C.R 901. See also, C. Bell, "Reconciling Powers and Duties: A Comment on *Horseman, Sioui* and *Sparrow*," *Constitutional Forum* 2 (1990): 1.

51. *A.G. Que. v. Sioui* [1990] 1 S.C.R. 1025 at 1063.

52. *Calder v. A.G.B.C.* (1973) S.C.R. 313. This theory is also subject to great criticism. See Woodward, *supra* note 27, at 203-10.

53. *Supra* note 51, at 1072.

54. *Supra* note 17, at 401.

55. R.S.C. 1985, c.F-14.

56. See, Binnie, *supra* note 17.

57. See for example, *Delgamuukw et al. v. A.G.B.C.* (8 March 1991) Smithers No. 0843 (B.C.S.C.) at 237. In this decision Mr. Justice McEachern concludes that the clear and plain test does not require express statutory language indicating an intent to extinguish

rights. In effect he pays lip service to the clear and plain test and applies the inconsistent legislation test.

58. *Supra* note 17, at 395-97.

59. Ibid., 411-12.

60. Ibid., 412-13, 416.

61. (U.K.), 30 and 31 Vict., c.3.

62. *Supra* note 44; *Dick v. R.* (1985), 23 D.L.R. (4th) 175 at 185-186. "Indianess" has yet to be given clear definition. Recent court decisions suggest it refers to Indian status and traditional practices (for example, hunting).

63. For example, L. Little Bear "Section 88 of the Indian Act and the Application of Provincial Laws to Indians," in Anthony Long and Menno Boldt, eds., *Governments in Conflict* (Toronto: University of Toronto Press, 1988), 175. For a recent decision of the Supreme Court upholding extinguishment by provincial legislation see *R. v. Horseman*, *supra* note 50.

64. *Supra* note 8. Similar arguments could apply to the proposed B.C. legislation. That is, if an aboriginal right to tribal cultural property exists, limits placed on these rights after 1982 must be justified.

65. *Supra* note 42.

66. *Sioui*, *supra* note 51, at 1073.

67. R.S.A. 1985, c. L-15.

68. This issue may be of some significance. If the section only extinguishes the right of action in court, common law remedies for the recovery of property that do not require the aid of judicial process may still be available. See, J.E. Cote. "Prescription of Title to Chattels," *Alberta Law Review* 7 (1968-69): 93.

69. *Guerin*, *supra* note 19 and *Johnson v. B.C. Hydro* [1981] 3 C.N.L.R. 63 (B.C.S.C.) at 67-71.

70. For example, *Appassasin et al. v. Can.* [1988] 1 C.N.L.R. 73 at 144-146; *A.G. Ontario v. Bear Island Foundation* 15 D.L.R. (4th) 321 at 444; aff'd [1989] 2 C.N.L.R. 73 (C.A.) See also W. Henderson, "Litigating Native Claims," *Law and Society Gazette* (1985): 191-92.

71. Canada Act, 1982 (U.K.), 1982 c. 11.

72. For example, *Johnson v. Chilkat Indian Village* 457 F. Supp 383 (D. Alaska 1978). In this case a Tlingit Indian woman claimed an interest in a number of artifacts of cultural significance to the Tlingit people but had been prevented from removing them from the reserve. The Court held she was bound by tribal law even though she no longer resided in the tribal territory.

73. 3 Thompson and Cook 347 (N.Y.1874) at 349.

74. *Worcester v. Georgia*, 6 Peters 515 (1832) at 559.

75. H. Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States," *Buffalo Law Review* 27 (1978): 637; S. Hurley, "Aboriginal Rights, the Constitution and the Marshall Court," *La Revue Jurdique Tehmis* 17 (1982-83): 403.

76. *Supra* note 51, at 1053-56.

77. Ibid., 1038.

78. The contingent-rights theory assumes aboriginal rights arise from Crown grant or recognition. The inherent-rights theory recognizes aboriginal rights as independent legal rights arising from use and occupation of lands prior to European settlement.

79. *Supra* note 17, at 404.

80. For a discussion of this argument see M. Asch and P. Macklam, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*," *Alberta Law Review* 29, no. 2 (1991): 507.

81. Ibid., 508-12.

82. See *Western Sahara* (1975) I.C.J. Reports 6 at 39; D. Sanders, "The Re-emergence of Indigenous Questions in International Law" *Canadian Human Rights Yearbook* 4 (1983): 29. Canadian courts rely on the decision of *Johnston v. McIntosh* which upholds the doctrine of discovery as the foundation of Crown title and sovereignty. This position was reconsidered in *Worcester v. Georgia*, *supra* note 74. See also Jackson, *supra* note 48 and Berman, *supra* note 75.

83. *Supra* note 17, at 411.

84. Ibid.