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ABORIGINAL CLAIMS TO CULTURAL PROPERTY IN CANADA: A COMPARATIVE LEGAL ANALYSIS OF THE REPATRIATION DEBATE

Catherine Bell*

I. Introduction

Although "aboriginal rights" has yet to be given a comprehensive definition in Canadian law, most native peoples assert that aboriginal rights include the right to govern their own people and their land and its use. For many, the right of self-governance includes the right to determine their own cultural priorities, identify what is and is not essential to their cultural integrity and the survival of their heritage, and exercise ownership rights over tribal cultural property. In Canada, the desire to exercise control over cultural property has manifested itself in several forms. Modern land claims agreements such as the Nunavut Settlement Agreement¹ and the failed Dene/Metis Comprehensive Land Claim Agreement² provide for aboriginal participation in future heritage resource management as well as federal assistance in the repatriation of heritage resources. Museums and aboriginal peoples are also cooperating in the development of repatriation, management, access, and custodial policies. A recent example of the compromise and cooperation approach is the Task Force Report on Museums and First Peoples, which promotes a partnership relationship between First Peoples and Canadian museums "guided by moral, ethical and professional principles and not limited to areas of rights and interests specified by law."³ Unfortunately, because of the complexity of the

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1. Agreement in Principle Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada arts. 36, 37 (Ottawa: Department of Indian Affairs and Northern Development, 1990) [hereinafter Nunavut Agreement-in-Principle].

2. Dene/Metis Comprehensive Land Claim Agreement in Principle § 29 (Ottawa: Department of Indian and Northern Affairs, 1988).

3. TASK FORCE REPORT ON MUSEUMS AND FIRST PEOPLES (Ottawa: Assembly of First Nations and the Canadian Museums Association, 1992). The terms "First Nations" and "First Peoples" are used interchangeably to refer to the original Indian and Inuit Tribes of Canada and their descendants. Section 35(2) of the Constitution Act, 1982, and schedule B of the Canada Act 1982 (U.K.) 1982, ch. 11, defines the aboriginal peoples of Canada as Indian, Inuit, and Metis. Canadian courts have recognized aboriginal rights of Inuit and Indian peoples but have yet to address the issue of Metis rights. This article focuses on Indian and Inuit rights.

ownership issue and the conflicting priorities of aboriginal peoples and the scientific community, claims for control of heritage resources have also been raised before the courts.⁴

In the United States, there has been substantial legislative reform. For example, the United States Congress has enacted legislation to protect American Indian religions and has amended heritage conservation and museum legislation to account for aboriginal concerns relating to the treatment of cultural property.⁵ More recently, Congress passed a repatriation bill calling for the return of human remains, funerary objects, sacred objects, and other cultural property to originating native groups that establish sufficient cultural affiliation to the object claimed.⁶ State conservation legislation has also been subjected to substantial revision.⁷ One of the questions currently asked by the scientific community north of the forty-ninth parallel is whether the claims of Canadian aboriginal peoples will result in similar reforms in Canadian law.

4. Litigation in Canada to date has been very limited, but there has been a substantial amount of litigation concerning sacred sites and sacred objects in the United States. *See, e.g.,* *Mohawk Bands v. Glenbow-Alberta Inst.*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.); *Seneca Nation v. Hammond*, 3 Thompson & Cook (N.Y. Sup. Ct.) 347 (App. Div. 1874); *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281 (1893), *aff'd*, 155 U.S. 196 (1894); *Onondaga Nation v. Thacher*, 61 N.Y.S. 1027 (Sup. Ct. 1899); *Johnson v. Chilkat Village*, 457 F. Supp. 384 (D. Alaska 1978).

5. *See, e.g.,* American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. V 1981); Archaeological Resources Protection Act of 1979, 16 U.S.C.A. §§ 470aa-47011 (West 1992); National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470w-6 (Supp. V 1981).

6. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1988); *see also* Walter R. Echo-Hawk, *Museum Rights v. Indian Rights: Guidelines for Assessing Competing Legal Interest in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 448-53 (1986); Bowden Blair, *Indian Rights: Native Americans Versus American Museums — A Battle For Artifacts*, 7 AM. INDIAN L. REV. 125, 133-54 (1979); C. Dean Higginbotham, *Native Americans Versus Archaeologists: The Legal Issues*, 10 AM. INDIAN L. REV. 91, 104-13 (1982); John E. Peterson II, *Dance of the Dead: A Legal Tango For Control Over Native American Skeletal Remains*, 15 AM. INDIAN L. REV. 115, 135-46 (1989); Ostrich Lurie, *Interim Report, A.A.A. Commission on Native American Remains*, ANTHROPOLOGY NEWSLETTER (Am. Anthropological Ass'n, Washington, D.C.), April, 1990, at 16; Dean B. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1, 17-57 (1982).

7. *See, e.g.,* WASH. REV. CODE §§ 27.44.010-.020 (West 1988); CAL. STAT. § 5097.9 to -5097.99 (West 1988); MASS. GEN. L. ch. 7, § 38A (West 1986); *see also* Margaret B. Bowman, *The Reburial of American Skeletal Remains: Approaches to the Resolution of Conflict*, 13 HARV. ENVTL. L. REV. 147, 196-207 (1989); Walter R. Echo-Hawk, *Tribal Efforts to Protect Against Mistreatment of Indian Dead: The Quest for Equal Protection of the Laws*, NARF LEGAL REV. (Native American Rights Fund, Boulder, Colo.), Winter 1988, at 1; Higginbotham, *supra* note 6, at 111-15; Peterson, *supra* note 6, at 143-46.

A recent Canadian study grouped repatriation claims into three categories: legal, moral, and use.⁸ Use claims relate to professional standards and temporary use or control of objects in the museum's custody. The category of moral claims assumes the ability to differentiate between legal title and moral right. Moral claims focus on contemporary ethical standards and concepts of fairness rather than on acquisition and certainty of legal rights. An important question in resolving moral claims is whether "past practices of acquisition are to be judged by present moral or legal standards."⁹ Legal claims are concerned with certainty and proof of title to museum collections in Canadian law. Each of these categories accepts the legitimacy (but not necessarily the appropriateness) of legal right and the need to accommodate special concerns of culturally affiliated groups in the reduction of claims.

This article examines legal claims and encourages an understanding of their cultural dimensions. The primary objectives of this article are to illustrate the complexity of the ownership issue and to encourage governments and museums to reassess their perceived legal rights to aboriginal cultural property. The author recognizes that the law is not value neutral and that dividing claims to cultural property into "legal" and "extralegal" packages is a fallacy. However, it is hoped that a discussion of the limits and complications of the law will encourage museums and aboriginal peoples to develop a new conceptual framework for the negotiation of claims. Ideally, cross-cultural solutions should be sought through a process which rejects the legal myth of impartiality, critically assesses claims of legal right, and presumes equality and respect for cultural differences.¹⁰

Ownership of aboriginal cultural property no longer in the possession of originating communities is uncertain. At one time, it might have been argued that the combination of Canadian statutes and common law placed title indisputably in the Crown and current custodians. However, recent developments in Canadian aboriginal rights law generate compelling arguments that call into question certainty of title. This article examines title claims in light of these developments. In particular, it examines arguments derived from common law principles of property law, heritage conservation legislation, and the doctrine of

8. See Michael M. Ames et al., *Proposed Museum Policies for Ethnological Collections and the Peoples They Represent*, MUSE, Autumn 1988, at 47, 48.

9. *Id.*

10. For a critique of the rights, discourse, and cultural difference in Canadian law, see generally Mary Ellen Turpel, *Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Difference*, CANADIAN HUMAN RIGHTS YEARBOOK 503 (1989-90).

aboriginal rights. Where provincial laws are at issue, the author focuses on the province of Alberta to illustrate the arguments raised.

II. Property as a Socio-Economic Concept

Property law is a system of rules that governs legal relations between peoples. The development and content of the system are dependent upon the social context within which the system is formed. In this way, the law of property is not "objective" or value neutral, nor does it exist as a fixed or static system. Rather, the social mores and priorities of a given society affect the formulation and reformulation of property rules and the court's willingness to grant ownership rights to one person (or group) over another.¹¹

In the attempt to reconcile changing technology and social mores with existing rules of property, Canadian courts are influenced by various policy considerations closely linked to the rationalization of a private property system; that is, a system that assumes all property is capable of being owned by an individual. Underlying this system is the philosophy of economic liberalism which encourages exploitation of resources owned by individuals and minimal interference by the state. An inherent assumption of economic liberalism is that the welfare of individual owners as well as the community prospers with a "free market," and the law of supply and demand ensures proper regulation of price, production, and purchase of goods. The policy considerations that courts have emphasized that conform with this particular world view include:

- (1) Certainty of title — the need to know who is entitled to what so that conflict can be avoided and productivity encouraged;
- (2) Fairness — an evaluation necessarily linked to profits from one's labor and investment;
- (3) Economic productivity — the solution that will give rise to measures that can be assessed in terms of profit and the generation of new resources;
- (4) Enforceability — the difficulty of enforcing the rules created and the costs associated with enforcement;
- (5) Labor theory — the notion that laborers and artisans should have fairly extensive rights over the fruits of their labor; and

11. Ownership is the concept used in law to describe a legally enforceable bundle of rights between people with respect to a tangible or intangible object. These rights can be grouped under three broad headings: the right to physical use, the right to enjoyment (e.g. income and services), and the right to management (e.g. sale, lease, devise, and mortgage).

(6) Personality and liberty theory — the notion that legal rules should promote personality traits such as independence, assertiveness and generosity.¹²

Aboriginal property litigation challenges the court to accept the validity of concepts of property that clash with these policies. Although generalizations about native property systems are difficult because of the diversity of customary tribal laws, it can be said that where claims have been made to tribal property, real or personal, a collective concept of property is often invoked. A collective ideology is one where access to and use of resources is determined by the collective interests of society as a whole. Disputes regarding use and control are not resolved by an attempt to isolate an individual owner, but in a way that is conducive to the well-being of the community. Ownership does not lie with a particular individual, but with the community. However, individual members of the collective may acquire superior rights to, or responsibilities for, part of the collective property. In such cases, a trust responsibility may arise, as in the case where sacred moveable property is held and used by the religious leaders of a tribe.

A communal system is similar to a collective system. However, individuals within a communal system cannot acquire special rights to any part of the community property vis-à-vis other members of that community. All resources are available to all individuals in like shares. The characteristics of communal property are explained in the United States decision of *Journeycake v. Cherokee Nation*¹³ as follows:

The distinctive characteristic of [tribal] communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of 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 a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.¹⁴

12. There are numerous discussions on the rationale of private property systems. See, e.g., Felix S. Cohen, *Dialogue on Private Property*, 9 *RUTGERS L. REV.* 357 (1954); Jeremy Waldron, *What is Private Property?*, 5 *OXFORD J.L.S.* 313 (1985). For a discussion of these concepts as applied to emerging concepts of property see *International News Service v. Associated Press*, 248 U.S. 215 (1918); *Moore v. Regents of the Univ. of California*, 793 P.2d 479 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1990); *Victoria Park Racing & Recreation Grounds Co. v. Taylor*, 58 C.L.R. 479 (Austl. 1937); Arnold S. Weinrub, *Information and Property*, 38 *U. TORONTO L.J.* 117 (1988).

13. 28 Ct. Cl. 281 (1893).

14. *Id.* at 302.

The concepts of collective and communal property are not completely foreign to Canadian property law. Dr. Leroy Little Bear¹⁵ suggests that the native concept of property is "somewhat akin to a joint tenancy: the members of a tribe have an undivided interest in land; everybody, as a whole, owns the whole."¹⁶ Although a useful analogy in the attempt to translate one world view to another, the Canadian concept of joint tenancy is not sufficient to capture the holistic native concept of property as the joint tenancy is a unit of individual ownership. The concept of joint tenancy recognizes a fictitious unity of persons that can label property as "mine" and assert property rights against other individual members of a given society. Further, a joint tenant is recognized as having an individual right of alienation with respect to his or her interest in the joint tenancy and individual joint tenants can sever the tenancy.

Another useful analogy may be drawn from the law of contracts. Agreements can be entered into that divide property interests among a collective and restrict rights of use in ways that benefit the collective. Applying this concept to a sacred tribal object, one can envision an implied social contract that the religious laws of the tribe determine individual rights, obligations, and consequences of breach in a manner beneficial to the tribe as a whole. The contract may be extended to include living things other than humans, such as animals and plants, and objects that Western society would view as inanimate. An object with its own living spirit becomes a party to the contract, rather than the subject of ownership.¹⁷

Although analogies can be drawn to help translate aboriginal concepts of property into Canadian legal language, we must question the appropriateness of imposing cultural values embedded in our legal system on the resolution of aboriginal claims. The concept of communal or collective property combined with aboriginal visions of the sacred creates a system of relationships that are very different from those found in the Canadian legal tradition and are difficult for

15. Dr. Leroy Little Bear is a Professor of Native Studies at the University of Lethbridge. Recently he has served as a member of the Cawsey Task Force on the Criminal Justice System and its impact on the Indian and Metis People of Alberta. He is also part of the legal team of the Assembly of First Nations and has assisted in the current constitutional negotiations for an amendment to reorganize and define an inherent right of aboriginal self-government in the Canadian Constitution.

16. Dr. Leroy Little Bear, *A Concept of Native Title*, CASNP BULLETIN, (Can. Ass'n in Support of Native Peoples, Toronto, Can.), Dec. 1976, at 33, *quoted in* BRADFORD W. MORSE, *ABORIGINAL PEOPLES AND THE LAW* 50-51 (1985). The concept of joint tenancy developed in the context of land law. However, Canadian law also recognizes joint ownership of personal property. *See, e.g., Watt v. Watt Estate*, 28 E.T.R. 9 (Man. Ct. App. 1987).

17. Little Bear, *supra* note 16, has used the social contract analogy to explain the native concept of land ownership and the extension of rights to all living things.

decision makers influenced by Christianity and Western legal ideology to understand. Again, noting the danger of attempts to generalize native spirituality, most aboriginal societies adopt a holistic world view which recognizes a special relationship between people and the natural world. The earth is commonly conceived of as a living being which gives life to other living things and upon which the survival of all living things depends.¹⁸ Objects created by people may also be infused with a living spirit.

This view of the sacred results in an evaluation of property and relationships that extends far beyond notions of ownership, profit, and utility. The attempt to frame the relationship of a person to other concepts such as guardian, steward, or caregiver may be more appropriate than to owner or custodian. Further, it becomes inappropriate to treat legal, political, cultural, religious, and other relationships as distinct relationships. In a world view where land is sacred and the people belong to the land, the significance of cultural artifacts cannot be understood if claims to artifacts are compartmentalized. As an illustration of this perspective, Dean Suagee offers the following comment on sacred objects:

Many rituals and ceremonies are concerned with giving thanks for food and other subsistence needs that Mother Earth provides to those who hunt, fish, gather, and/or raise crops. There is an element of stewardship in the performance of such rituals because they are seen as necessary to ensure that the plants, animals, birds, and fish will continue to flourish and make themselves available for human needs. The correct performance of these rituals requires the use of sacred objects made from sacred plants, animals, and mineral materials. The manner of performing a ritual or ceremony, the sacred site at which it is to be performed, and in some cases the time for performance, are strictly prescribed.¹⁹

18. Suagee, *supra* note 6, at 10; Turpel, *supra* note 10, at 517; JACK WOODWARD, *NATIVE LAW* 339-40 (1990).

19. Suagee, *supra* note 6, at 10. Repatriation of the Zuni War Gods from various American museums by Zuni leaders provides an excellent illustration of this point in the context of repatriation claims. The War Gods are wooden carvings, frequently adorned by eagle feathers and used by the Zuni for ceremonial purposes. After the ceremony, the carvings are placed on specific mountain peaks where they continue to serve a religious purpose. It is intended that the War Gods decompose and once again become part of the earth. Preservation results in an imbalance in the spiritual world. There are many accounts of the religious significance of the War Gods and attempts by the Zuni to recover War Gods from museums and other custodians. See, e.g., Blair, *supra* note 6, at 126-28.

Canadian law has recognized collective rights in the context of aboriginal title claims. "Aboriginal title" is the phrase used to describe the collective ownership rights of aboriginal groups to their traditional lands. Claims to aboriginal title can be advanced only by an organized group of aboriginal people.²⁰ Whether the concept of collective ownership will be extended by Canadian courts to moveable cultural property is yet to be determined. Canadian courts have had very recent and limited exposure to claims for aboriginal moveable cultural property. The only case that the author is aware of is the attempt by the Mohawk Bands of Kahnawake, Akwesasne, and Kanesatake to recover tribal property displayed by the Glenbow-Alberta Institute in the 1988 Spirit Sings exhibition.²¹ This repatriation case was carried to the interim injunction stage, but did not go to trial.

Recognizing the complexity of the issues raised, Justice Shannon initially granted an "interim interim" injunction in favor of the Mohawk for a period of two weeks, but subsequently concluded that the Mohawk could not meet the requisite legal tests for the issuance of an interim injunction pending trial. In Justice Shannon's opinion, the claim to ownership of tribal cultural property was a serious issue to be tried, but the plaintiffs could not show that irreparable harm would result from the display of the False Face Mask as part of the defendant's exhibition. Emphasizing that the mask had been on display in various museums for many years and that the Mohawk had not objected to these displays in the past, Justice Shannon was not convinced that the continued display of the mask would cause the Mohawk irreparable harm.²²

According to the Mohawk, however, the False Face Mask is a sacred object and an inherent part of the spiritual practices of the Mohawk Nation. It represents the shared power of the original medicine beings and is intended for use by the medicine societies of the Six Nations Confederacy. In their view, exhibiting the Mask violated its intended sacred purpose, constituted desecration of it, and falsely ridiculed and misrepresented the spiritual beliefs and practices of the Iroquois.²³

20. See, e.g., *Calder v. British Columbia*, [1973] S.C.R. 313, 328 (Can.); *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 376 (Can.); *Hamlet of Baker Lake v. Minister of Indian Affairs & Northern Dev.*, 107 D.L.R.3d 513, 542-43 (Fed. Ct. 1979); see also Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. BAR REV. 727, 754-59 (1987).

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

22. *Id.* at 71.

23. The interim decision is not reported. Justice Shannon's reasons for refusing to grant an interim injunction are reported in *Mohawk Bands*, [1988] 3 C.N.L.R. at 71. See also Affidavit of Chiefs Billy Two-Rivers, John Bud Morris, Eugene Montour and Grand Chief Joseph Tehokheron Norton; Statement of Claim of the Mohawk Bands of Kahnawake, Akwesasne, and Kanesatake et al.; Statement of Defence of the Glenbow-Alberta Institute; Statement of Defence and Counterclaim of the Defendant Royal Ontario Museum; and Statement of Defence to Counterclaim of Royal Ontario Museum, all filed in *Mohawk Bands* (No. 8801-00657).

From the Mohawk perspective there was past harm, present harm, and continuing harm, all of which were irreparable.

Although this case illustrates the difficulty of reconciling competing world views in the legal forum, one should not assume that Canadian courts will not reformulate the rules of property to accommodate an aboriginal perspective. Despite its firm roots in the private property rationale, Canadian law is unique in that it often seeks to find a compromise between liberal ideologies that promote the rights of individuals and collective concerns that promote the welfare of communities.²⁴ The balancing of aboriginal collective claims and individual rights claims of non-aboriginals to aboriginal property has historically weighed against aboriginal interests. However, the use of collective legal language by the courts, the growing awareness of the ethnocentric interpretation of rights, the constitutional recognition of aboriginal rights, and the infusion of notions such as honor and duty into aboriginal rights discourse suggests that the scales are slowly beginning to tip in favor of aboriginal peoples.

Although the clash of cultures continues to result in lengthy, expensive, and complicated litigation at the lower levels, decisions are being rendered by the Supreme Court of Canada that further the cause of aboriginal peoples. At this point, one can only speculate whether recent developments will expand to accommodate all property claims of aboriginal peoples. However, given the infusion of private property ideology in Canadian law, there is no doubt that the court will give some weight to factors such as the cost of care incurred by current custodians and the need for certainty of title in the resolution of repatriation claims.

III. Common Law Property Analysis

A. Original Ownership

First possession is the organizing principle of ownership rights under the common law. Historically, this meant possession was accepted as prima facie evidence of title, and loss of possession resulted in loss of title. Possession originally meant physical control, but today, legal possession also includes the intent to exercise dominion over the thing possessed.²⁵ The presumption that possession is proof of title remains,

24. An illustration of this feature in property law is state power of expropriation and limits placed by tort law on the ability to deal with property in a way that causes harm to others.

25. This theory is encapsulated in the common law maxim "possession is the root of title." See generally Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985); E.L.G. TYLER, N.E. PALMER, & JAMES CROSSLEY VAINES, 5 PERSONAL PROPERTY 47-55 (1973) [hereinafter VAINES].

but it can be displaced by documents evidencing title (such as a bill of sale), proof of prior possession, or statutory law.

It will not be difficult for the Canadian court to work with the original ownership theory to trace first possession of an aboriginal artifact to individual acts of creation or title through a chain of subsequent losses and acquisitions. Where the conceptual framework breaks down is in the context of group claims to communal or tribal property. The concept of communal or collective property assumes a theory of ownership which places property rights relating to objects produced by, or originating from, the community in the community, independent of individual acts of creation, possession, loss, and transfer.²⁶ Further, it is unlikely that the claimant aboriginal group will be comprised of the same membership that existed at the time of the creation, transfer, or loss of the cultural property at issue. Consequently, some form of historical tracing to an ancestral group will be necessary to establish prior ownership and the requisite cultural affiliation necessary to assert a claim. Finally, because the common law has yet to develop a comprehensive framework for communal ownership of personal property, judges will need to look outside their existing supply of legal tools to determine how communal cultural property is to be distinguished from individual property, what bundle of rights are associated with communal ownership, and what rights individuals have vis-à-vis communal property.

Communal title to personal property has been incorporated into property systems similar to the Canadian system. For example, the United States courts have adapted principles of common law to conclude that individual members of a tribe cannot transfer title to property held for the common use of the tribe.²⁷ More recently, the United State Congress gave legislative recognition to communal property rights in the Native American Graves Protection and Repatriation Act (NAGPRA).²⁸ The Act sets "standards, conditions and definitions under which Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony might be repatriated from federally funded museums and federal agencies, based on recorded inventories and/or summaries by affected museums of their collections

26. See Affidavit of Chiefs Billy Two-Rivers, John Bud Morris, Eugene Montour and Grand Chief Joseph Tehokheron Norton at para. 9, *Mohawk Bands* (No. 8801-00657) ("exclusive right, title and interest in and to all artifacts produced by or in any way originating from Mohawks and the right to control use of the artifacts" is attributed to the Mohawk Nation).

27. See, e.g., *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (1893); *Onondaga Nation v. Thacher*, 61 N.Y.S. 1027, 1028 (Sup. Ct. 1899); *Echo-Hawk*, *supra* note 6, at 441-45; *Peterson*, *supra* note 6, at 130-32.

28. Pub. L. 101-601, 104 Stat. 3048 (codified as amended 25 U.S.C. §§ 3001-3013 (Supp. II 1990)).

containing such material.”²⁹ Cultural patrimony is defined in the legislation as follows:

an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of an Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from the group³⁰

Given international trends, Canadian recognition of collective rights to aboriginal title, and the movement in aboriginal rights law to define aboriginal rights in their own terms, it is unlikely that the assertion of collective or communal rights will act as a major stumbling block in repatriation claims. The common law concept of ownership is easily expanded to accommodate this concept. If the courts are reluctant to help aboriginals regain control of cultural property that has yet to be discovered or that is currently in the possession of non-aboriginal custodians, easier methods are available to the courts to deny repatriation claims, such as the application of heritage conservation and provincial legislation which require that actions for the recovery of personal property be brought within a certain period of time.³¹

Aboriginal claims to cultural property may be measured against the rights of landowners and occupiers. At common law, articles lying on the surface of the land are presumed to be owned by the occupier of the land if the occupier can prove a manifest intention to exercise control over the land and things upon it.³² Landowners are presumed to own articles attached to or under their land, even if they are not aware of the presence of the object.³³ These presumptions can be displaced by proof of prior possession or ownership and proof that prior rights have not been lost through abandonment, transfer, or some other means.³⁴

29. See generally Geoffrey Platt Jr., *The Repatriation Law Ends One Journey — But Opens a New Road*, MUSEUM NEWS, Jan./Feb. 1991, at 91.

30. 25 U.S.C. § 3001 (Supp. IV 1992).

31. See discussion *infra* text accompanying notes 67-77, 94-104. The federal government is also proposing heritage conservation legislation.

32. See, e.g., *Parker v. British Airways Bd.*, [1982] 2 W.L.R. 503, 511 (Eng. C.A.).

33. *Id.* at 514.

34. In the United States, native peoples receive some assistance in meeting this onus of proof through the following provision in the United States Code:

In all trials about the right of property in which an Indian may be a party

Skeletal remains have been treated differently from other objects buried in the land because full ownership rights cannot be exercised over dead bodies and human skeletal remains. Dead bodies have been treated as a form of quasi property. An "individual can possess certain rights in a dead body, such as control and disposition after death, but does not have the whole 'bundle of rights' granted to an owner of other property."³⁵ This special treatment of dead bodies has resulted in the development of laws preventing interference with grave sites. In Canada, control and protection of grave sites is regulated by provincial cemeteries legislation. However, ancient burial grounds of aboriginal peoples no longer used by aboriginal groups have not been drawn into the protection of cemeteries legislation. Rather, ancient burial grounds have been treated as an archaeological resource, capable of transfer and ownership.³⁶

In the absence of evidence of abandonment, the United States recognizes property rights of descendant aboriginal groups to ancestral burial grounds.³⁷ Further, consultation with descendant groups concerning the proper excavation and treatment of skeletal remains is legislated.³⁸ Rights to human remains in the custody of federal museums has also been addressed. For example, NAGPRA establishes conditions for the return of human remains to aboriginal groups that can establish a lineal or cultural affiliation.³⁹ A few states have enacted similar legislation, but it is exceptional for such legislation to extend to private museums.⁴⁰

In Canada, government officials and members of the scientific community are beginning to work cooperatively with aboriginal groups to develop policies and legislation for the proper treatment, care, and

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.

25 U.S.C.A. § 194 (West 1992).

35. See Bowman, *supra* note 7, at 167. The law relating to property in the human body is in a state of flux. See generally Diana Brahm, *Bailment and Donation of Parts of the Human Body*, 139 NEW L.J. 80 (1989); Randy W. Marusyk & Margaret S. Swain, *A Question of Property Rights in the Human Body*, 21 OTTAWA L. REV. 351 (1989); Stephen Ashley Mortinger, *Spleen for Sale: Moore v. Regents of the University of California and the Right to Sell Parts of Your Body*, 51 OHIO ST. L.J. 499 (1990).

36. See discussion *infra* text accompanying notes 113-20.

37. See *Charrier v. Bell*, 496 So. 2d 601 (La. Ct. App. 1986), *cert. denied*, 498 So. 2d 753 (La. 1986).

38. See *supra* notes 6-7.

39. 25 U.S.C. § 3005 (Supp. IV 1992).

40. See *supra* note 7.

return of human remains. For example, the University of Alberta recently agreed to return skeletal remains excavated from the Sharp-head burial site near Ponoka, Alberta, but the claimants failed to recover the remains, so they are still maintained as part of the University's collection.⁴¹ Other examples of cooperation are the burial site provisions negotiated in the northern land claims agreements, consultation with native peoples on proposed legislation to be enacted in the province of British Columbia which provides that inalienable and inprescriptible ownership of native human remains and grave goods will be vested in the native people of British Columbia and federal consultation with aboriginal groups in the development of proposed legislation that requires consultations with the representatives of the deceased prior to excavation of burial sites.⁴²

B. Transfer and Acquisition of Ownership Interests

Most owners of personal property are not original owners. Rather, title is acquired through various methods. Rights in personal property are most commonly terminated and transferred through gifts and contracts of exchange or sale. However, rights can also be lost through abandonment, intermixture, accession, confusion, and the application of limitation of actions legislation.

1. Donation, Sale, and Exchange

A fundamental principle of donation, sales, and exchanges is the doctrine of *nemo dat quod non habet*.⁴³ According to this doctrine, a person cannot transfer greater rights in the property than she or he has.⁴⁴ Tribal property donated or sold by individual members of a

41. Interview with John Priegert, Curator, Archaeological Survey of Alberta (Jan. 16, 1991).

42. See *supra* note 2. See also Yukon Comprehensive Land Claim Umbrella Final Agreement ch. 13 (Ottawa: Department of Indian Affairs & N. Dev., 1990); Draft Heritage Conservation Act § 28(5), in *HERITAGE LEGISLATION: A WHITE PAPER FOR PUBLIC REVIEW* (B.C. Ministry of Mun. Affairs, Recreation & Culture 1991); *GLOBE & MAIL* (Toronto), Feb. 9, 1991, at C-2; and Communications Canada, Marcel Masse Tables Draft Archaeological Bill, Seeks Comment from Interested Groups (Dec. 19, 1990) (news release F1-90-3818F).

43. He who hath not cannot give.

44. VAINES, *supra* note 25, at 159-61. There are some legislated exceptions to the rule that may arise in a particular fact pattern, such as sales in an open market. A detailed analysis of these exceptions is beyond the scope of this article. However, one of the most important limitations is contained in legislation which requires that actions for recovery of personal property are brought within a defined time period. This legislation is discussed *infra* text accompanying notes 67-77 of this article.

group or stolen from an aboriginal group is frequently the subject of repatriation claims.⁴⁵ The central issue in these claims is the capacity of the individual to transfer title. The common law concerning title to stolen property is clear. A thief, or anyone claiming rights through a thief, cannot assert property rights against a prior owner or possessor.⁴⁶ The doctrine of *nemo dat* protects the rights of the prior possessor. The refusal to return stolen property, absent legislative intervention, is a conversion of the property which gives rise to civil and criminal liability.⁴⁷ Purchasing or receiving the object in good faith without knowledge that the object is stolen is no defense, but it may give the purchaser a remedy against the seller. Further, equity may recognize some entitlement to compensation for the cost of caring for and storing the object.

The same analysis can be applied to an individual member of a tribe who sells or donates tribal property without the consent of the tribe. The definition of proper consent may be an issue. For example, an individual may have the consent of the local band council, but not of the religious leaders, to sell a sacred item. The court will have to determine whether the consent is valid and whether it prevents the tribe from reclaiming the property. Once lack of consent is established, *nemo dat* operates to prohibit the transfer of ownership rights by individuals, regardless of the purchaser's innocence. The effect of *nemo dat* in this context is described by the New York Supreme Court in *Seneca Nation of Indians v. Hammond*⁴⁸ as follows:

The bark in question . . . was the property of the plaintiffs. Those who purchased it from 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 their vendors had no title: or that their acts, of which the plaintiffs complain, were done in good faith.⁴⁹

45. See Statement of Defence and Counterclaim of the Defendant Royal Ontario Museum, *Mohawk Bands v. Glenbow-Alberta Inst.*, [1988] 3 C.N.L.R. 70 (No. 8801-00657). The defense raised by the Royal Ontario Museum in the Spirit Sings litigation is that the False Face Mask was donated to the Museum in accordance with the terms of the owner's will. See also *Mohawk Bands v. Glenbow-Alberta Inst.*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.). See discussion *supra* note 6 of American case law by Echo-Hawk and Blair.

46. This conclusion is derived from the general rule that a person cannot transfer title greater than he or she has, in absence of legislated interference. See *supra* note 44.

47. For a general discussion of conversion, see RALPH L. SIMMONDS & GEORGE R. STEWART, STUDY PAPER ON WRONGFUL INTERFERENCE WITH GOODS 20-28 (1989) and VAINES, *supra* note 25, at 19-21, 159.

48. 3 Thompson & Cook (N.Y. Sup. Ct.) 347 (App. Div. 1874).

49. *Id.* at 349; see also Echo-Hawk, *supra* note 6, at 441-44.

If cultural property is transferred with the authority of the group, principles of contract law may still vitiate the contract if the plaintiff can establish undue influence, mistake, or fraud.⁵⁰ The availability of these arguments will depend upon the facts of a particular acquisition such as speculation in native artifacts, pressure sales, misinformation, inadequate compensation, economic deprivation, and threatened disintegration of native communities. Given these factors, a court may conclude that the parties lacked equality of bargaining power and find a way to avoid the contract.

The problem faced by aboriginal claimants is proving historical facts when witnesses to the actual circumstances of the sale are deceased. The court is left to speculate what "might have been" based on oral histories and expert testimony. Consequently, in absence of clear evidence of fraud or undue influence, it is unlikely that such claims would be successful.

2. *Abandonment*

An owner or possessor of chattels can divest himself or herself of ownership or possessory rights through abandonment. Abandonment must be voluntary and accompanied by the intent to divest of ownership rights. Leaving goods, misplacing goods, or forgetting to recover goods is not enough to constitute abandonment. Abandoned goods are subject to the first in time rule; that is, the first person to possess the goods after they are abandoned has best title to them. An example of the application of abandonment to repatriation claims is the case of the Zuni War Gods. Once Zuni War Gods are used for ceremonial purposes, they are left at the mercy of the environment in a place designated by the tribe. Although the War Gods may appear to have been abandoned to the discoverer, they have not been abandoned because the Zuni did not intend to divest themselves of all rights in the War Gods and allow the first person who discovers them to acquire ownership rights. Rather, the exposure of the War Gods to the environment is an intentional religious practice.⁵¹ Because the War Gods are not abandoned, the Zuni should have superior rights to a finder and persons claiming through a finder, based on principles of first possession.

The Louisiana Court of Appeals recently considered the doctrine of abandonment as applied to aboriginal burial sites and funerary objects in the decision of *Charrier v. Bell*.⁵² This case involved materials recovered from approximately 150 burial sites at the Trudeau Planta-

50. See generally Echo-Hawk, *supra* note 6.

51. See *supra* note 19.

52. 496 So. 2d 601 (La. Ct. App. 1986); see also Peterson, *supra* note 6, at 133-35; Blair, *supra* note 6, at 133-35; Bowman, *supra* note 7, at 170-74.

tion in Louisiana. The remains were unearthed between 1968 and 1971 by an amateur archaeologist (Charrier) who attempted to sell them to Harvard's Peabody Museum. The museum leased some skeletal remains and artifacts but did not purchase them, as museum officials doubted Charrier's ability to convey legal title. As a result, Charrier sued for a declaration that he had title arising from finding the abandoned goods. The claims of landowners were not at issue as the State had intervened in 1978 and purchased both the relevant land and artifacts from the landowners. In 1981, the United States Bureau of Indian Affairs recognized the Tunica and Boloxi Indians as tribes which resulted in the state subordinating its claim to the artifacts to the Indians. As a result, the contest for ownership rights was between Charrier as finder and the Tunica and Boloxi Indians as descendants of the deceased and prior possessors of the burial sites.

The trial court held that the Indians were the owners of the skeletal remains and the funerary objects.⁵³ The Court of Appeals upheld this decision, finding that the common law of abandonment does not apply to burial materials.⁵⁴ As the doctrine of abandonment is the same in both the United States and Canada, this decision may be significant in Canada. The court reasoned that the Tunica and Boloxi did not intend to abandon the body of a tribal member and the objects buried with it upon burial.⁵⁵ After hearing extensive expert testimony on the history of the area, the question of duress causing abandonment of the area, and the burial practices of the Indians, the court explained the lack of divesting intent necessary for abandonment as follows:

However, the fact that the descendants or fellow tribesmen of the deceased Tunica Indians resolved, for some customary, religious or spiritual belief, to bury certain items along with the bodies of the deceased, does not result in a conclusion that the goods were abandoned. While the relinquishment of immediate possession may have been proved, an objective viewing of the circumstances and intent of relinquishment does not result in a finding of abandonment. Objects may be buried with a descendant for any number of reasons. The relinquishment of possession normally serves some spiritual, moral, or religious purpose of the descendant/owner, but is not intended as a means of relinquishing ownership to a stranger. Plaintiff's argument carried to its logical conclusion would render a grave subject to despoliation either immediately after interment or definitely after

53. *Charrier*, 496 So. 2d at 602.

54. *Id.* at 605.

55. *Id.* at 604.

removal of the descendants of the deceased from the neighbourhood of the cemetery.⁵⁶

Charrier may not be extended to support the general principle that natives showing sufficient biological and cultural links to burial sites own all archaeological material buried in those sites. The *Charrier* decision is based on a chain-of-title analysis. Therefore, a slight variation of the facts could sever a link in the chain.

3. *Intermixture, Accession, and Alteration*

Owners may also lose ownership rights through intermixtures, accessions, and alterations of goods. Intermixture occurs when there is a confusion of goods owned by different persons such that the property of each can no longer be distinguished. Entitlement to commingled goods will vary depending on a number of factors such as the kind, quality, and quantity of the goods; the proportions contributed; the circumstances through which the intermixture came about (e.g., negligence or deliberate action by one of the owners); and principles of fairness and practicality. The court generally attempts to avoid granting rights to a wrongdoer and to protect rights of innocent third parties.⁵⁷

The related doctrines of accession and alteration are also influenced by the concept of fairness. The doctrine of accession applies when an object of lesser value is attached to one of greater value than the principal chattel owned by someone else. The general rule is that the accession follows the title of the principle thing to which it is attached. The central issue here is whether there has been an accession. The most commonly applied tests for accession are the injurious removal and destruction of utility tests. The former asks whether the lesser chattel can be removed without seriously injuring the whole. If the answer is yes, there is no accession. The utility test asks whether removal will destroy the utility of the principle chattel. If the answer is yes, there is an accession. The test adopted by the court tends to vary, depending on the identification of the parties and the involvement of innocent parties.⁵⁸

Alteration occurs when property is converted into a different species. The operator or person who converts the substance becomes the owner of the newly created property and is liable to the former proprietor for the value of the substance converted. An example of alteration is the conversion of grapes to wine.⁵⁹ Provincial legislators have inter-

56. *Id.* at 604-05.

57. VAINES, *supra* note 25, at 434-35; *Jones v. De Marchant*, [1916] 10 W.W.R. 841 (Man. C.A.).

58. VAINES, *supra* note 25, at 430-34; *Firestone Tire v. Indus. Acceptance Corp.*, [1971] 1 S.C.R. 357 (Can.).

59. VAINES, *supra* note 25, at 430-34.

vened in this area to protect material suppliers and repair people through the right to a lien.⁶⁰

Issues of intermixture, accession, and alteration may arise if a museum has restored cultural property in poor physical condition or if property has been attached to, or commingled with, other cultural patrimony for the purposes of display or storage. For example, a museum may acquire a ceremonial headdress in poor physical condition. Rather than dispose of it, the museum may recreate the original using new materials and imitating the aboriginal technique of construction. Does the accession of new materials and labor introduced by the museum render the headdress museum property? Many factors will have to be considered including the cultural value of the headdress, the monetary value of the headdress prior to restoration, the necessity of restoration, adequacy of compensation, and the method of original acquisition. (Rights originally acquired through a wrongdoer will not be superior to those of a previous owner or possessor.) Finally, it should be noted that the lines between the doctrines of alteration, accession, and intermixture are not clearly drawn which means the court may adopt whichever doctrine is best suited to render the outcome the court considers most just.⁶¹

4. *Finding*

The loss of property does not necessarily result in the loss of ownership rights. A finder of lost or misplaced goods acquires rights enforceable against the whole world except a prior owner or possessor. The onus of proof lies with the person challenging the title of the finder or person in possession. Mere discovery of an object imposes no rights or duties on a finder. However, once the finder assumes control of the object, he or she is obliged to keep the object safe and to take reasonable steps to return it to the prior possessor.⁶²

The rights of persons acquiring title through finding are measured against the rights of prior possessors and landowners. If finding occurs on privately-owned land and the object is unattached, the finder has superior rights to the occupier of the land unless the occupier has a manifest intention to exercise control over the land and the things upon it. The requisite intention can be express or implied from the circumstances. For example, a finding on land where the occupier has allowed unrestricted access and a finding on land surrounded by "no

60. See, e.g., Possessory Lien Act, R.S.A. ch. P-13, § 2 (1980).

61. See *Jones v. De Merchant*, [1916] 10 W.W.R. 841 (Man. C.A.).

62. *Parker v. British Airways Bd.*, [1982] 2 W.L.R. 503, 514 (1982) (Eng. C.A.); see generally T.J. Follows, *Parker v. British Airways Board and the Law of Finding of Chattels*, 12 KINGSTON L. REV. 1 (1982).

trespass'' signs may lead to different results. The former practice suggests a lack of intent to control and the latter, posting of signs, the opposite.

However, these circumstances will be considered along with other factors and might not be determinative of the issue. As discussed above, title to objects in or under the land are presumed to be owned by the landowner or occupier. A landowner or occupier who does not object has greater rights than a prior possessor to objects found on or under her land unless the object is abandoned. Consequently, title obtained from landowners and finders, or persons claiming through them, is uncertain. Landowners and occupiers have the same obligations to the original owner as a finder.

In the chain of possessory title, a finder who acquires property by committing a wrongful act, such as trespass, may still acquire rights enforceable against subsequent possessors if the property is not claimed by a prior possessor. For example, if a museum purchases an artifact from X, who stole it from Y, who acquired the artifact by trespassing on the lands of Z, Y can assert better title to the artifact than the museum. However, if the owner of the land or another prior possessor of the artifact asserts a claim, those rights would be superior to the rights of the trespasser.⁶³

5. *Objects Confiscated by Law*

Brief mention should be made of title to objects confiscated pursuant to laws which today would be considered racist, unethical, or unconstitutional. An example, of such a law is the anti-potlatch provision contained in the Indian Act⁶⁴ from 1866 until 1951.⁶⁵ The potlatch was a ceremonial feast performed by certain tribes of the West Coast. It involved the use and exchange of ceremonial property. Pursuant to the anti-potlatch law, participants were arrested and their ceremonial property confiscated. Some of the confiscated items were placed in museums and have been the subject of repatriation negotiations.⁶⁶ If the anti-potlatch law was invalid at the time of enactment, arguably *nemo dat* would apply and the confiscating government could not

63. See, e.g., *Bird v. Fort Frances*, [1949] 2 D.L.R. 791, 799 (Ont. H.C.).

64. Indian Act, R.S.C. ch. 43, § 114.

65. See WOODWARD, *supra* note 18, at 341.

66. One of the most famous extralegal repatriation claims involves the Museum of Civilization and the Kwakiutl Potlatch collection. In this case, ceremonial objects were seized in 1922 and given in part to the National Museum. After years of negotiations, the objects were returned to the Northwest Coast to be housed in federally funded and Kwakiutl-operated museums. See Brian Shein, *Playing Pretending, Being Real*, CANADIAN ART, Spring, 1987, at 76; Carole Henderson Carpenter, *Secret, Precious Things: Repatriation of Potlatch Art*, ART MAGAZINE, May/June 1981, at 64.

transfer title to third parties. However, if the law was valid, a court may reduce the question of entitlement to confiscated property to an ethical or political question.

C. *Limitation of Actions*

The above discussion illustrates that the common law rules of acquisition and loss of ownership rights give rise to uncertainty of title. Without legislated interference, current possessors would always risk title challenges by prior possessors. In order to provide for greater certainty of title, encourage prompt settlement of disputes, and protect reasonable expectations of innocent purchasers, most provinces have introduced limitation of actions legislation. This legislation requires prior possessors to bring property actions before the courts within a specified time.⁶⁷ Limitation periods may be the greatest stumbling block for aboriginal peoples bringing repatriation claims. Consequently, it is important to consider the potential impact of limitation periods and their application to aboriginal peoples. The latter issue will be addressed in the examination of aboriginal rights below.

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 arises.⁶⁸ The cause of action arises on the date of the interference with the chattel. While some provincial statutes provide that the title of the original owner is extinguished once the designated period expires, the Alberta legislation is silent on that point.⁶⁹ Consequently, it is unclear whether the failure to bring an action within two years operates to extinguish the rights of the prior possessor or if it merely deprives the owner/possessor of a right of action in court. This issue is significant because the common law remedy of recaption may not be affected by the Act if title is not extinguished.⁷⁰

Recaption is the right to recover property without the aid of judicial process.⁷¹ It assumes the recaptor has superior title to the recaptee. It is usually asserted as a defense to an action rather than as a remedy. For example, if goods are wrongfully taken (e.g., fraud or theft) or wrongfully detained (e.g., possessor claims through a person who does not have the capacity to transfer title), recaption may be a defense to trespass if entry and repossession is peaceable. The recaptor will not be civilly or criminally liable if she or he establishes better title as a

67. See DEREK MENDES ET AL., 2 PROPERTY LAW 3:36-3:43 (1990); J.E. Cote, *Prescription of Title to Chattels*, 7 ALTA. L. REV. 93 (1968-69).

68. Limitation of Actions Act, R.S.A. ch. L-15, § 51 (1980).

69. See generally Cote, *supra* note 67.

70. *Id.* at 93-94.

71. SIMMONDS & STEWART, *supra* note 47, at 93.

defense.⁷² Therefore, despite the operation of limitation periods, it is not inconceivable for an aboriginal person to enter a museum and peacefully remove what is his/hers, nor are such encounters unheard of. In the late 1970s, a medicine bundle was removed from the Provincial Museum of Alberta and returned to the Blood tribe. In the spirit of maintaining good public relations, the museum did not press charges. If the museum had pressed charges, undoubtedly the Blackfoot would have defended with the right of recaption, and the apparent loophole in the Alberta legislation would have been put to the test.⁷³

In the United States, there is a policy against the application of statutes of limitations to Indian claims in the absence of a clear federal statement to the contrary.⁷⁴ In Canada, the issue has yet to be resolved. In cases of concealed information, continuing trespass limitation periods will not run until the concealment is discovered or with reasonable diligence it ought to have been discovered.⁷⁵ However, beyond these two situations, the state of law in Canada is unclear as lower courts have applied limitation periods to prevent property claims by aboriginal peoples.⁷⁶ Perhaps the fiduciary obligation of the Crown to aboriginal peoples, principles of constitutional law, and the law of extinguishment render existing limitation periods inapplicable to native aboriginal people.⁷⁷

D. Laches

A different but related issue is whether the equitable doctrine of laches can be applied to effectively bar aboriginal claims to property. Laches assumes that the law aids the vigilant and not those who sleep on their rights. Failure to assert a claim which results in prejudice to another party may give rise to a defense of laches and operate as an equitable bar to the plaintiff. The doctrine will not apply where the

72. Assume for example that *A* takes property from *B*. *B* sues *A* in conversion. *A* defends with a right of recaption. See *id.* at 93-105; *Devoe v. Long & Long*, [1951] 1 D.L.R. 203 (N.B. S.C.A.D.). It is possible that the Seizures Act, R.S.A., ch. 5-11 (1980) may affect the availability of this defense. See *Re Canadian Acceptance Corp.*, 2 Alta. L.R.2d 377 (Alta. Dist. Ct. 1977).

73. Interview with Ruth McConnell, Assistant Curator of Ethnology, Provincial Museum of Alberta (Jan. 19, 1991).

74. See, e.g., *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 240-44 (1985).

75. *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 390 (Can.); *Johnson v. British Columbia Hydro & Power Auth.*, [1981] 3 C.N.L.R. 63 (B.C.S.C.).

76. See, e.g., *Appassasin v. Canada*, [1988] 1 C.N.L.R. 73, 144-46 (Fed. Ct.); *Ontario v. Bear Island Found.*, 15 D.L.R.4th 321, 444 (1985), *aff'd* [1989] 2 C.N.L.R. 73 (Ont. C.A.) (on appeal to Supreme Court of Canada); see also William B. Henderson, *Litigating Native Claims*, LAW SOC'Y GAZETTE 174, 191-92 (1985).

77. See discussion *infra* text accompanying notes 225-71.

defendant in an action has been guilty of equitable fraud, but it has been applied to the detriment of aboriginal peoples in the absence of fraud.⁷⁸ It is submitted that because laches is an equitable and discretionary doctrine, it will not be applied without considering the circumstances of transfer and the ability of the natives to learn of and act on their rights in law.⁷⁹

Given the recent emphasis by the Supreme Court of Canada on the Crown's history of honoring its obligations to aboriginal peoples "in the breach" and the Crown's fiduciary duty toward Canada's First Nations, it is submitted that the Supreme Court will be hesitant to apply doctrines of equity in favor of the Crown.⁸⁰ However, the issue will not be as easily resolved where innocent parties, such as museums, are affected.⁸¹

E. Effect of Invalidity of Transfer and Finding

Acquiring possession through a faulty chain of title may render the possessor a bailee. The bailment may be characterized as unconscious or involuntary because the possessor did not intentionally assume the responsibilities of a bailee. However, intention may be imputed by the Court. Classification as either unconscious or involuntary has the effect of reducing the standard of care necessary to meet the bailee's obligation to care for the goods bailed. It has been said that there is no duty of care assumed by an unconscious bailee until the bailee knows he is dealing with someone else's property.⁸² However, recent English authority suggests there is a duty on unconscious bailees to use a sufficient standard of care to ascertain whether or not goods within their control are their own.⁸³ Despite some uncertainty on this point, it is clear that once a person is aware she or he is dealing with someone else's property and assumes responsibility, that person is subject to the rights and obligations of an involuntary bailee.⁸⁴ An involuntary

78. See Henderson, *supra* note 76, at 192.

79. This reasoning has been rejected by the Ontario trial court and the Court of Appeals in *Ontario v. Bear Island Found.*, 15 D.L.R.4th 321 (Ont. H.C. 1984), *aff'd* [1989] 2 C.N.L.R. 73 (Ont. C.A.) (on appeal to Supreme Court of Canada), but it is yet to be addressed directly by the Supreme Court of Canada. This argument has been accepted and applied to aboriginal peoples in the international area. See *Cayuga Indian Claims (Gr. Brit. v. U.S.)*, 6 R.I.A.A. 173, 189 (1926).

80. *Regina v. Sparrow*, 70 D.L.R.4th 385, 404 (Can. 1990); see also Catherine Bell, *Reconciling Powers and Duties: A Comment on Horseman, Sioui and Sparrow*, CONST. FOR., Autumn 1990, at 1.

81. Interestingly, laches was raised as a defense by the Glenbow-Alberta Institute in relation to the Mohawk repatriation claim, but the matter was never resolved at trial. See *Affidavit of Chiefs Billy Two-Rivers, John Bud Morris, Eugene Montour, and Grand Chief Joseph Tehokheron Norton, Mohawk Bands v. Glenbow-Alberta Inst.*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.) (No. 8801-00657).

82. See, e.g., *Cosentino v. Dominion Express Co.*, 16 Man. L.R. 563 (Man. C.A. 1906).

83. *AVX Ltd. v. EGM Solders Ltd.*, *The Times* (Eng. Com. Crt., 1982).

84. N.E. PALMER, *BAILMENT* 379-91 (1979).

bailee has a duty not to be grossly negligent with the bailed goods, a standard less stringent than the ordinary standard of reasonable care.

If an aboriginal community successfully establishes title to cultural property in the custody of a museum, the museum could be viewed in law as an involuntary bailee. In a repatriation claim, the standard of care offered by museums is not likely to be an issue unless the goods are damaged or used in a way offensive to native religion. However, classification as a bailee may affect the enforceability of deaccession policy and policies concerning access to and return of aboriginal property. For example, a bailee cannot place conditions on the return of bailed goods to a bailor in absence of agreement or legislation to the contrary. The current policy of some Canadian museums is to return cultural property to originating communities if certain conditions are met such as paying compensation for cost of care, availability of proper caring facilities, and replacement of originals with replicas. Such conditions assume the museum has title. If a bailee, these conditions can be imposed only by the courts or through legislation.⁸⁵

An illustration of legislated interference is the resolution of the claim by the Onondaga Tribe of the Iroquois Nation for the return of wampum belts in the custody of the New York State Museum in Albany. The Onondaga considered the belts to be an integral part of their culture, as symbols woven into the belts constituted their only recorded history. Demands for return were refused by the state museum until 1971. Bending to public pressure, the legislature passed an act requiring the return of the wampum belts.⁸⁶ As a condition of return, the Onondaga had to replace the belts with replicas and build an appropriate fireproof facility on the reservation to house them. The adequacy of housing would be determined by the museum. The fireproof housing requirement was impossible to meet because of the costs to develop the facilities. Consequently, the Onondaga were unable to regain custody of their belts.⁸⁷

A bailee also has limited rights of transfer. A bailee can transfer possession to a sub-bailee but only with the consent of the bailor. If consent is express or implied by the courts, the owner can enforce bailment rights against the bailee and sub-bailee. A chain of liability is created through the sub-bailment. If the original bailee transfers possession without consent, the bailee is strictly liable to the bailor

85. If the right to control aboriginal cultural property is recognized as an aboriginal right, limitations on the exercise of property rights imposed after 1982 will have to meet the justification test in *Regina v. Sparrow*, 70 D.L.R.4th 385, 412-17 (1990) (Can.). See discussion *infra* text accompanying notes 239-41.

86. N.Y. Indian Act para. 27 (McKinney), cited in Blair, *supra* note 6.

87. Blair, *supra* note 6, at 126.

for breach of bailment and may be liable in conversion.⁸⁸ Applying this analysis to repatriation claims, if a museum holds property as bailee, and as part of its deaccession policy decides to sell the bailed property by public auction or private sale or to lend it to other museums, these actions could amount to conversion. Both the museum and the subsequent bailee of the museum could be liable to aboriginal owners.⁸⁹

Liability may also be incurred if a museum intentionally discards or destroys aboriginal cultural property in its possession. Intentional destruction could be an act of conversion and a breach of bailment. Destruction or failure to return the property could give rise to strict liability. Only in the case of loss or unintentional damage would the museum be protected from liability and only if it can prove the cause of the loss of damage was not negligent or unreasonable in nature. If the damage or loss occurs while the bailed items are in the care of the museum, the onus is on the museum to disprove negligence.

It is important to note that the museum may be insulated from liability by the application of limitation of actions legislation. However, until the issues of title are resolved, it is wise for museums to exercise caution in the disposal of aboriginal cultural property. For such property, destruction is not an option and sale should be a last resort. Rather, to comply with a potential bailee's obligations, a museum might make reasonable efforts to locate and negotiate the return of property to originating communities or their ancestral groups. It should be noted that there is some danger in this approach as the return of artifacts to the wrong group could result in an action in conversion. However, a court is unlikely to award significant damages against a museum if the museum acted reasonably and the property can be recovered. In order to ensure this outcome, United States legislation, NAGPRA, provides that in the event of disputing claims, the museum can hold the property claimed until the dispute is resolved or a method of disposition is agreed upon.⁹⁰ Any museum that repatriates an item in good faith pursuant to the legislation is not liable for claims by an aggrieved party or for claims of breach of trust or violations of state law inconsistent with the act.⁹¹

If a museum is unable to ascertain the originating community, the best solution may be to place the artifacts with another museum that can provide proper care for the artifacts until the issue of ownership is resolved. Further, clear records of disposition of the artifact and

88. See PALMER, *supra* note 84, at 786-87; see also *Chapman v. Robinson & Ferguson*, [1970] 71 W.W.R. 515 (Atla. Dist. Ct.).

89. A.P. BELL, *MODERN LAW OF PERSONAL PROPERTY IN ENGLAND AND IRELAND* 130 (1989).

90. 25 U.S.C. § 3005(e) (Supp. IV 1992).

91. *Id.* § 3005(f).

proceeds from sales should be kept. Any decisions relating to disposal should take into account the religious and cultural value of artifacts in addition to their economic value. Finally, all decisions must take into account the Cultural Property Export and Import Act⁹² which restricts the import and export of cultural property.

F. Summation of Common Law Arguments

Although the cultural hurdles associated with repatriation claims will likely be overcome by aboriginals making these claims, the limitation periods may still operate to block these claims. If limitation periods can be avoided, stolen property and property sold without the authority of the collective are the most vulnerable to repatriation claims by operation of the principle of *nemo dat*. Rights of landowners to skeletal remains and objects buried in or lying on land may be subordinated to claims of an ancestral aboriginal group showing sufficient historical connection and cultural affiliation to the property at issue, unless the property is abandoned. However, it will be difficult to prove prior possession because title is presumed in the landowner or person in possession, most aboriginal peoples did not keep written records, and most creators or relevant witnesses are dead. Further, the passage of time may make tracing the property at issue to a particular group difficult. Although the court will accept the oral tradition of aboriginal witnesses in testimony, scientific corroboration will be required.⁹³ The result is lengthy and costly litigation.

IV. Federal and Provincial Heritage Resource Legislation

The Constitution Acts of 1867 and 1982 divide legislative jurisdiction over the control of personal property and archaeological resources between the federal and provincial governments.⁹⁴ The provinces possess jurisdiction over provincial Crown lands, property, and civil rights within their provincial boundaries. Pursuant to these powers, most provinces have enacted provincial parks and heritage conservation legislation. The federal government has legislative jurisdiction over federal property, Indians and lands reserved for Indians, shipping, navigation, and the regulation of trade and commerce. Pursuant to

92. R.S.C. ch. C-51 (1985). For a general discussion on museum deaccession and repatriation policies in Canada and the United States, see, for example, David W. Barr, *Legacies and Heresies: Some Alternatives in Disposing of Museum Collections*, MUSE, Summer 1990, at 14; Ames, *supra* note 8, at 47; Michael Tymchuk, *Repatriation — The Saskatchewan and Canadian Experience*, LIAISON, Summer 1984, at 7.

93. See, e.g., Ontario v. Bear Island Found., 15 D.L.R.4th 321, 336-40 (Ont. H.C. 1984), *aff'd* [1989] 2 C.N.L.R. 73 (Ont. C.A.) (on appeal to Supreme Court of Canada); Delgamuukw v. British Columbia, 79 D.L.R. 4th 185 (1991).

94. CAN. CONST. (Constitution Act, 1867) pt. VI, §§ 91-92.

these powers, the federal government has enacted legislation that directly and indirectly affects the ownership, control, and export and import of archaeological and cultural property of national importance.

Prior to May of 1990, federal resource management policy was scattered throughout the Indian Act, shipping legislation, parks and historic sites legislation, museums legislation, and the Cultural Property Import and Export Act.⁹⁵ In May of 1990, Communications Minister Marcel Masse announced the federal government's intention to develop a comprehensive policy and legislative framework for the ownership, protection, and management of archaeological property found on federal lands including reserve lands and lands in the Yukon and Northwest Territories.⁹⁶ In February of 1991, draft legislation was tabled.

The bill is the product of a consultation process with various interested groups including members of the scientific, museum, and aboriginal communities and is currently being distributed to permit detailed comment prior to its introduction to parliament.⁹⁷ The proposed Archaeological Heritage Protection Act is intended to operate in addition to existing measures under parks and environmental legislation but introduces some consequential amendments to the Cultural Import and Export Act, Yukon Act, and the Northwest Territories Act.⁹⁸ Of particular concern to aboriginal people are provisions placing ownership and control of resources in the federal government and special provisions controlling the excavation of burial sites.

A. Provincial Legislation

All provinces 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 resources.⁹⁹ Most

95. See, e.g., Canada Shipping Act, R.S.C., ch. S-9 (1985); Cultural Property Import and Export Act, R.S.C., ch. c-51 (1985); Historic Sites and Monuments Act, R.S.C., ch. H-4 (1985); Indian Act, R.S.C., ch. I-5 (1985); Museums Act, 38 Eli. II. ch. 3 (1990); National Parks Act, R.S.C., ch. N-14 (1985); Northwest Territories Act, R.S.C., ch. N-27 (1985); Yukon Act, R.S.C., ch. Y-2 (1985).

96. Hon. Marcel Masse, *Archaeology: Protection of Our Heritage* (Whitehorse, Yukon, May 10, 1990) (doc. SP-90-8080E-12).

97. *GLOBE & MAIL* (Toronto), *supra* note 42.

98. Proposed Act Respecting the Protection of Archeological Heritage of Canada (Communications Canada, Dec. 19, 1990) R.S.C., ch. C-51 (1985); [hereinafter *Archaeological Heritage Protection Act*]. R.S.C., ch. 4-2 (1985); R.S.C., ch. N-27 (1985).

99. Some provinces have special legislation protecting sacred lands, objects, and burial sites. This is the exception, not the rule. See, e.g., *Heritage Property Act*, S.S. ch. H-2.2, § 65 (1979-80); *Heritage Conservation Act*, R.S.B.C. ch. 165, § 6 (1979). Also, the government of British Columbia is proposing amendments to its existing heritage legislation to allow for greater aboriginal control and ownership over aboriginal cultural property and to negotiate return. See also *Draft Heritage Conservation Act*, *supra* note 42, § 28(5).

legislation provides for designation of historical resources, reporting of finds, 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 non-compliance.

1. Historical Resources Act

In Alberta, ownership and management of historical resources is regulated by the Historical Resources Act.¹⁰⁰ The common law respecting ownership and acquisition of property within the scope of the Act is substantially altered. The extent of the alteration depends upon the classification of the property as an archaeological resource. The Act defines "archaeological resource" as a work of man that is primarily of value for its prehistoric, historic, cultural, or scientific significance, and 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, and includes the works of man or classes of works of man designated by regulations as archaeological resources.¹⁰¹

(a) Archaeological Resources

In 1978, the Historical Resources Act was amended to vest ownership of archaeological resources found on public and private lands in the Crown.¹⁰² The legislation also grants the Minister power to provide for the care, management, excavation, and disposition of archaeological resources. As a result of these provisions, the provincial Crown becomes the first link in the chain of title to archaeological resources excavated and acquired after 1978. Claims for resources after 1978 arising from prior ownership or possessory rights can be brought only by the Provincial Crown. Security of title is dependent on derivation from the Crown, compliance with conditions placed by the Crown,

100. R.S.A. ch. H-8 (1980).

101. R.S.A., ch. H-8 § 1 provides:

(e) "historic object" means any historic resource of a moveable nature including any specimen, artifact, document or work of art;

(f) "historic resource" means any work of nature or man that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest including, but not limited to, a palaeontological, archaeological, prehistoric, historic or natural structure or object;

(g) "historic site" means any site which includes or is comprised of an historical resource of an immovable nature or which cannot be disassociated from its context without destroying some or all of its value as an historical resource and includes a prehistoric, historic or natural site or structure.

102. Alberta Historical Resources Amendment Act, S.A. ch.4, § 20.2 (1978). Ownership is vested pursuant to § 28 in the 1980 version.

and compliance with the legislation. Ownership of archaeological property acquired prior to 1978 continues to be determined by principles of common law.¹⁰³

The definition of archaeological resources is broad enough to include aboriginal cultural artifacts that are or have been buried or partially buried. In the context of repatriation claims, this means protection is offered to museums and other custodians of aboriginal archaeological resources which were acquired after 1978. If custodial or ownership rights are derived from the Crown in accordance with the legislation, the recipient receives legal title and is insulated from repatriation claims. However, if archaeological resources are obtained from a transferor other than the Crown or a person who has transferred rights in violation of the legislation, the Crown has the legal means under common law principles of *nemo dat* to challenge the validity of title. Given the unique nature of the goods at issue, a successful challenge by the Crown would likely result in a mandatory injunction for the return of the property.

(b) Non-Archaeological Resources

Aboriginal cultural property that is not or has not been buried or partially buried may fall within the definition of a historic object or resource under the Act. Historic resource is defined to include works of nature or man of "prehistoric, historic, cultural, natural, scientific or aesthetic interest,"¹⁰⁴ but the latter terms are left undefined, leaving the application of the Act to a particular object at the discretion of the Minister.¹⁰⁵ The common law rules respecting ownership and transfer of these resources is not affected by the legislation in absence of positive action on the part of the Minister.

The Minister may acquire by "purchase, gift, bequest, devise, loan, lease or otherwise any historic object, building or historic site" and may sell, lease, exchange, or otherwise dispose of property so acquired on any terms he or she considers appropriate.¹⁰⁶ In doing so, the Minister is bound by *nemo dat*; that is, the Crown cannot receive or dispose of rights greater than those of the transferor. Consequently, the Crown is not immune from ownership claims arising from invalidity of the transferor's title or prior possessory rights. The Act also provides that property received by gift, devise, bequest, or loan is subject to any terms or conditions stipulated by the donor. Under common law principles, violation of terms and conditions can result in revocation.¹⁰⁷

103. See discussion *supra* text accompanying notes 25-93.

104. Historical Resources Act, R.S.A. ch. H-8, § 1 (1980).

105. *Id.* § 1(f).

106. *Id.* § 5.

107. See discussion *supra* text accompanying notes 43-49.

The rights of owners of historical resources can be limited if preservation of such property is considered, by the Minister or council of a municipality, to be in the public interest resulting in its designation as a registered historic resource, a provincial historic resource, or a municipal historic resource. Designation may occur at the request of the owner, other interested persons, or at the Minister's own initiative. The main purpose of designation is to protect the property from destruction, alteration, and removal without consent of the Minister or municipal council. In the case of provincial historic resources, the Minister must be notified of proposed dispositions and receipt of such property by inheritance. The Minister may also make orders regarding maintenance and repair. The designated property may include a historic object together with any land in or on which it is located, and adjacent land. Where the order relates to land, a copy of the order is registered at the appropriate land title office as notice to potential purchasers.¹⁰⁸

(c) Protection of Historic Resources

Limitations are placed on the recovery, treatment, and disposition of archaeological and other historic resources through various protective mechanisms in the Act. However, given the remote locations of most archaeological sites, activity is often difficult to police. In addition to the designation provisions discussed above, several protective measures are adopted including a permit system for excavations; obligations on finders to report discoveries of historic resources; penalties for exporting archeological, historical or paleontological resources outside of the province without written permission of the Minister; penalties for contravening the Act; and the issuance of stop orders by the Minister when an activity may endanger a historic site.¹⁰⁹

108. Historical Resources Act, R.S.A. ch. H-8, § 15(2)(c) (1980). Although it is possible for moveable aboriginal cultural property to be designated under the provisions of the Act, the author is unaware of any such designations.

109. *Id.* The Historical Resources Act provides: (1) Excavations on any land in Alberta for the purpose of seeking or collecting historic resources, is prohibited without a permit issued by the Minister. *Id.* § 26. With the exception of Saskatchewan, none of the provinces require consultation with aboriginal peoples. (2) Persons who discover historic resources in the course of making an excavation for a purpose other than for the purpose of seeking historic resources are obliged to notify the Minister of the discovery. *Id.* § 27. (3) It is an offence to transport archaeological resources, designated historical resources and paleontological resources outside of the province without written permission of the Minister. *Id.* § 29. The enforcement of provincial export prohibitions is dependent upon the laws of the province within which illegally exported property is situated. In absence of interprovincial agreements or federal legislation controlling interprovincial trafficking of resources, the Crown's remedy may be limited to charging the offender under the penalty provisions of the Act. (4) Permits are required for the alteration, marking, damaging, and removal of archaeological resources. *Id.* § 30. Designated property is also protected from damage and alteration. *Id.* §§ 15(5), 16(9),

Although the legislation may operate to the detriment of aboriginal peoples in the context of repatriation of archaeological resources, it can also be invoked to protect their resources. For example, aboriginal groups could use section 5¹¹⁰ to arrange for protection of and proper care for communal cultural property which they are currently unable to protect themselves. Many communities lack facilities for the proper care and preservation of their cultural artifacts but wish to retain such artifacts for ceremonial, educational, and other purposes. If the Minister agrees to the Aboriginals Group's request, this property can be loaned or donated to the Minister conditionally. For example, aboriginal groups may require that the property be stored in a suitable facility close to the community, access be granted for ceremonial or other purposes, and the property be cared for in accordance with the custom of the aboriginal group and professional museum standards. Conditions could also relate to care and compensation. Through this process of cooperation, government institutions and museums can provide a safe haven for important cultural property and ensure the survival of native traditions.

Aboriginal groups can also utilize the stop order provisions of the Act where development threatens an archaeological resource. As part of their request for a stop order, aboriginal groups can seek suitable arrangements for excavation or preservation of the resources. Although consultation with aboriginal peoples is not required as part of the permit, disposition, and assessment process, consultation is unlikely to be denied upon request given the current political climate and the potential for aboriginal rights claims.

The alternative course of action in the face of activity that threatens historic sites, is to seek an injunction suspending development until the issue of ownership based on claims to aboriginal rights can be determined. Even though the Act places *prima facie* ownership of

22(6)). (5) If the Minister is of the opinion that an activity is likely to result in damage to, or destruction of, an historic resource, the Minister may issue a stop order for a period of fifteen days. The Lieutenant Governor may issue a further order suspending activity to allow salvage, excavation, or an investigation of other alternatives including designation and protection from development. *Id.* § 45. (6) Persons who contravene the Act or regulations under the Act are guilty of an offence and subject to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year or both. Further, the Crown can restore properties altered or destroyed in violation of the Act and seek compensation from the offender, or, if restoration is not possible, the Crown can sue for damages. *Id.* § 48.

110. *Id.* § 5. Section 5 allows the Minister to acquire by purchase, gift, bequest, devise, loan, or lease any historic object and lend or lease that object on any terms he or she considers appropriate. Furthermore, any property acquired under this section by the Minister by gift, bequest, devise, or loan is subject to any terms and conditions stipulated by the persons giving, etc., the property.

archaeological resources in the Crown, aboriginal groups will have standing to bring an interim injunction application as long as they can establish that there is a serious question to be tried. The success of the application will depend upon the court's assessment of irreparable harm, the balance of conveniences if damages are not an adequate remedy for the aboriginal claimant or developer, and the impact of suspending development on the economic health of the province.¹¹¹ These considerations have been applied in favor of and against aboriginal people, leaving the question of injunctive relief to protect sacred lands unanswered.¹¹²

(d) *Human Skeletal Remains*

The Alberta definition of archaeological property refers to a "work of man" and does not make specific reference to skeletal remains. As a result, it is possible that skeletal remains excavated after 1978 are not owned by the province. Ownership will be determined either by principles of common law or aboriginal rights law. If the former applies, aboriginal ownership will be measured against the rights of landowners and assessed in the context of acquisition theory discussed above, in particular the laws of abandonment. The matter has not been the subject of litigation in Canada; therefore, the common law in this area has not developed.¹¹³ The definitions of historical resources and sites¹¹⁴ are broad enough to include skeletal remains and burial sites. Consequently, the Crown may acquire rights to such property through "purchase, gift, bequest, devise, loan, lease, or otherwise."¹¹⁵ Further, limited protection from desecration is offered through the permit, reporting, assessment, stop order, and designation provisions of the Act.

Despite the above uncertainty, current archaeological practice in Alberta is to obtain a section 26 permit for excavation. First, the Royal Canadian Mounted Police are notified of the discovery of human remains in accordance with the Fatality Inquiries Act.¹¹⁶ If the remains are suspected to be of historic or prehistoric significance, a section 26 permit is required. The custody and disposition of remains are dealt with on a case-by-case basis. It is common for the police and the

111. *Tlowitsis — Mumtagila v. McMillan Bloedel* (Nov. 19, 1990) Vancouver No. 2499 (B.C.C.A.), at 4.

112. *See, e.g., McMillan Bloedel v. Mullin*, 61 B.C.L.R. 145 (1984); *Ominayak v. Norcen Energy Resources Ltd.*, [1985] 3 W.W.R. 193; *Touchwood File Hills Qu'Appelle Dist. Chiefs Council Inc. v. Davis, Lindsay & Sinclair*, [1987] 1 C.N.L.R. 180 (Sask. Q.B.).

113. *See discussion supra* text accompanying notes 51-56.

114. *See supra* note 101.

115. *Historical Resources Act*, R.S.A. ch. H-8, § 5(1)(a) (1980).

116. R.S.A. ch. F-6 (1980).

Minister of Culture to show a great deal of respect for the wishes of local bands in the determination of these matters.¹¹⁷

It is possible to argue that Indian burial grounds are governed by the provisions of the Cemeteries Act, which defines a cemetery as "land set apart or used as a place for the burial of dead human bodies or other human remains or in which dead bodies or other human remains are buried."¹¹⁸ The identification of the owner of a cemetery is not addressed; however, rules relating to disinterment, removal, and disposal of human remains are specified and limitations are placed on disposition. In particular, disinterment cannot take place until an application has been made to the Director of Vital Statistics who will issue a permit at his or her discretion.¹¹⁹ In practice, this legislation has not been applied to aboriginal burial grounds which are no longer used for burial purposes but are of sacred, scientific and historical importance.¹²⁰

The failure to address specifically the issue of aboriginal skeletal remains is common to most provincial heritage property and cemetery legislation. The exceptions are Saskatchewan and Prince Edward Island. The Saskatchewan Heritage Property Act provides that all skeletal material not found in a recognized cemetery or otherwise, is the property of the Crown.¹²¹ However, excavated or naturally exposed Amerindian¹²² skeletal material postdating 1700 A.D. is to be made available to the Indian Band Council nearest the discovery site for disposition following appropriate scientific examination or educational use.¹²³ The Saskatchewan court of Queen's bench has interpreted this provision to recognize sufficient legal rights in the band councils nearest the discovery to claim an interest in the skeletal material and support an application for an interim injunction so that they can deal with the remains.¹²⁴ In Prince Edward Island, special legislation has been enacted to protect ancient burial grounds. Burial grounds no longer used for burial purposes that are not vested in a corporation or trustee are

117. Woodward, *supra* note 18, at 342.

118. Cemeteries Act, R.S.A. ch. C-2, § 1(b) (1980).

119. *Id.* § 12.

120. To the extent that such legislation can be characterized as relating to "health," it may apply to aboriginal cemeteries currently in use located on and off reserve lands. The Indian Health Regulations, which require Indians to comply with all laws and regulations relating to health and sanitation, was enacted by the province. Letter from Charles Webb, Director of Band Governance and Indian Estates Directorate, to Catherine Bell (Dec. 5, 1990).

121. Heritage Property Act, S.S., ch. H-2.2, § 65(3) (1979-80).

122. The term "Amerindian" is not defined in the Heritage Property Act, S.S., ch. H-2.2. It is likely used to refer to American Indians.

123. Heritage Property Act, S.S., ch. H-2.2, § 65 (1979-80).

124. Touchwood File Hills Qu'Appelle Dist. Chiefs Council Inc. v. Davis, Lindsey & Sinclair, [1987] 1 C.N.L.R. 180, 185-86 (Sask. Q.B.).

vested in the Crown. Legal action necessary to protect these lands from trespass, defacement, and damage can be brought by the Minister. The Minister is also empowered to grant permits to persons who wish to visit such grounds.¹²⁵

2. *Other Provincial Legislation*

Claims for the recovery of cultural property may also be affected by the Provincial Parks Act¹²⁶ and the Foreign Cultural Property Immunity Act.¹²⁷ Provincial parks legislation enables the provincial government to designate provincial lands as parks or historic sites and to purchase, expropriate, or otherwise acquire privately owned areas of historical interest. Ownership of provincial parks is vested in the province.¹²⁸ Artifacts recovered from the surface of these lands are subject to the common law on the rights of finders and prior possessors, but power is given to the Minister to dispose of chattels found in parks or historical sites if, upon reasonable inquiry, the owner cannot be found. Objects under the land are presumed to be owned by the province. They are subject to regulation by the Lieutenant Governor in Council and may fall within the scope of the Historical Resources Act.¹²⁹

The Foreign Cultural Property Immunity Act¹³⁰ applies to cultural property which is ordinarily kept in a foreign country but is brought into Alberta pursuant to an agreement between an owner or custodian of the cultural property and the government of Alberta or any other cultural, educational, or research institution for the purpose of temporary exhibition, display, or research.¹³¹ If the Lieutenant Governor in Council orders that the property is "of significance" and publishes the order in the *Alberta Gazette* prior to the property's entering Alberta, proceedings in Alberta courts for the custody or control of such property are barred. Further judgments, decrees, or orders that have the effect of depriving the government or custodial institution of care and control will not be enforced.¹³² The Act does not preclude actions on the agreement between the domestic and foreign parties or actions against carriers under a contract of transportation. Cultural property is defined to include products of archaeological excavations

125. Ancient Burial Grounds Act, R.S.P.E.I., ch. A-9 (1974).

126. R.S.A. ch. P-22 (1980).

127. R.S.A. ch. F-12.5 (1985).

128. Examples of parks established because of significant aboriginal cultural interest are Head Smashed in Buffalo Jump in Alberta, St. Vectors Petroglyphs Historic Park in southern Saskatchewan, and the Nanaimo Petroglyph Park in British Columbia.

129. R.S.A. ch. H-8 (1980).

130. R.S.A. ch. F-12.5 (1985).

131. *Id.* § 2(1).

132. *Id.*

or discoveries, elements of artistic or historical monuments or archaeological sites that have been dismantled or dismembered, and objects of artistic or ethnological interest.¹³³

Because the Act applies to "custodians" of property ordinarily kept in a foreign country, the Act could be used to bar claims by aboriginal peoples for cultural property exported to foreign countries which is temporarily in the province for the purpose of display or research. Even if the legal rights of the foreign custodian are dubious, custody and control by the government of Alberta or Canadian institutions could not be challenged in face of the Lieutenant Governor's order. The application of this Act to repatriation claims was raised in the pleadings filed in "The Spirit Sings" repatriation claim against the Glenbow-Alberta Institute.¹³⁴ Some of the artifacts in question were loaned by museums in Europe and the United States and were designated as significant cultural property in accordance with the Act. As a result, the Glenbow-Alberta Institute pled that all proceedings regarding items designated as culturally significant were barred.¹³⁵ The plaintiff's response was as follows:

The Foreign Cultural Property Immunity Act of Alberta, . . . is ultra vires, unconstitutional, a denial of the rule of law, equality before the law and equal protection of the law, a violation of the Canadian Charter of Rights and Freedoms, section 35 of the *Constitution Act, 1982* and section 91(24) of the *Constitution Act, 1867* and in any event inoperative.¹³⁶

The court has yet to rule on the validity and application of this legislation to aboriginal repatriation claims. It is beyond the scope of this article to scrutinize the strength of the above arguments. However, the question of application of general legislation to aboriginal rights is examined to a limited extent below.

B. Federal Legislation

1. Existing Legislative Framework

(a) Ownership

The federal government has not asserted a comprehensive legislated claim to ownership of cultural property located on federal lands.

133. *Id.* § 1.

134. Statement of Claim of the Mohawk Bands of Kahnawake, Akwesasne, and Kanesatake et al. at para. 44, *Mohawk Bands v. Glenbow-Alberta Inst.*, [1988] 3 C.N.L.R. 70 (No. 8801-00657); Statement of Defence of the Glenbow-Alberta Inst. at para. 9, *Mohawk Bands* (No. 8801-00657).

135. Statement of Defence of the Glenbow-Alberta Inst. at para. 9, *Mohawk Bands* (No. 8801-00657).

136. Statement of Claim of the Mohawk Bands of Kahnawake, Akwesasne, and Kanesatake et al. at para. 44, *Mohawk Bands* (No. 8801-00657).

Consequently, the common law of property is the basis for determining most questions of ownership, unless aboriginal rights law gives rise to an alternative legal framework. Aboriginal rights to property buried or partially buried in the land, other than reserve lands, will be measured against the rights of the federal government as "landowner." The policy of the federal government is to assert ownership to archaeological resources in federal Crown lands.¹³⁷ Rights to objects lying on the surface of federal lands are measured against the rights of finders and prior possessors.

Unless the Crown evidences an intent to control the land and all objects upon it, its rights may be inferior to those of a finder. Public access to Crown lands will be considered in assessing the intent to control.¹³⁸ In absence of control, the Crown's claim will be inferior to rights of previous possessors unless prior rights have been extinguished through transfer, abandonment, or some other legally recognized method. The uncertainty of Crown title to articles lying on the surface of the ground is "particularly pressing in the territories because in many Arctic regions, sites are exposed and artifacts lie on the surface of the land."¹³⁹ The failure to exercise control over these resources through legislated ownership or physical control over access to the lands may result in finders acquiring superior title to the Crown. For these reasons, Northern aboriginal peoples are insisting that ownership and protection of heritage resources be addressed in modern land claims agreements.

Ownership of aboriginal cultural property on reserve lands is governed by the Indian Act.¹⁴⁰ Although the Crown does not claim ownership of personal property located on reserve lands, restrictions have been placed on the disposition of specified articles of cultural property. Section 91 of the Act provides that written consent of the Minister is required for the transfer of title to Indian grave houses, totem poles, carved house posts, pictographs, and petroglyphs situated on reserves. The section also prohibits their destruction or vandalism. Persons who violate this section are guilty of an offense and are subject on summary conviction to a fine not exceeding \$500; an ineffective deterrent if property of significant monetary value is involved. Persons claiming title through the offender would be mere custodians of the property and subject to repatriation claims by the Minister on behalf of the Indian band occupying the reserve. Any other form of personal prop-

137. Federal Archaeological Heritage Protection and Management: A Discussion Paper at 57-59 (Ottawa: Dept. of Communications, April 1988) [hereinafter *Federal Archaeological Protection*].

138. *Parker v. British Airways Bd.*, [1982] 2 W.L.R. 503, 516 (Eng. C.A.).

139. Federal Archaeological Protection, *supra* note 137, at 58.

140. R.S.C. ch. I-5 (1985).

erty situated on a reserve may be disposed of in accordance with principles of common law, provincial laws of general application, and section 45 of the Indian Act which regulates devising of property by will.

The Indian Act defines reserve lands as tracts of land, "the legal title to which is vested in Her Majesty, that [have] been set apart by Her Majesty for the use and benefit of a band."¹⁴¹ Consequently, one could argue that artifacts in or under the ground belong to the Crown. However, this presumption can be displaced at common law by proof of prior possession. The obligation of the Crown to manage reserve lands for the use and benefit of the Indian band most likely extends to the management and disposition of archaeological resources. In fact, one might argue that the Crown has a fiduciary obligation to institute protective measures where the band council has failed to take initiative under its general bylaw making powers.¹⁴²

(b) Protection

Protection of historical resources extends to archaeological resources and lands of historical significance. Some protective devices may affect acquisition of title. For example, custodians of property obtained in violation of permit requirements could not assert ownership rights against the Federal Crown if the Crown could prove prior possession as "landowner." Existing policy regarding the protection and custody of cultural property includes the following:

(1) Section 91 of the Indian Act prevents damage or destruction of specified cultural property. General protection of property is offered by the trespass and development provisions of the Act and trespass and land use bylaws enacted by the band council.¹⁴³ Pursuant to these powers, some band councils require archaeologists to apply for permits to conduct research on their reserves.¹⁴⁴

(2) Archaeological resources located in national parks are protected by the Canadian Parks Service under the National Parks Act and its accompanying regulations.¹⁴⁵ Pursuant to this legislation, archaeological sites and historic lands, including those on Indian lands, can be expropriated, purchased, or otherwise acquired for the purposes of

141. *Id.* § 2(1).

142. The concept of fiduciary obligation originating in *Guerin v. The Queen*, 13 D.L.R.4th 321, 340-50, 376 (1985) (Can.), has recently been extended in *Regina v. Sparrow*, 70 D.L.R.4th 385 (1990) (Can.). The extent of this obligation is uncertain. See generally WOODWARD, *supra* note 18, at 110-14.

143. R.S.C. ch. I-5, § 91 (1985).

144. See Federal Archeological Protection, *supra* note 137, at 55.

145. R.S.C. ch. N-14, § 6(3) (1985).

establishing a park.¹⁴⁶ Canada Parks Services also conducts inventories of archaeological resources in national parks and historic sites and may issue collection permits to archaeologists working in national parks. General protection is offered to cultural property through the trespass provisions of the Act.¹⁴⁷

(3) Canada has the power to designate, and enter into agreements to protect, archaeological sites recognized as nationally significant by the Historic Sites and Monument Board of Canada.¹⁴⁸ However, the Minister of the Environment is not bound to accept Board recommendations or act upon them. An inventory of archaeological resources in historic sites is kept by the federal government on a departmental or project basis but a systematic mechanism for issuing permits for all excavation in historic sites has not been developed.¹⁴⁹

(4) The Territorial Lands Act prohibits land use operations within 30 meters of a known archaeological site without a permit. Further, authorities must be notified if archaeological resources are discovered.¹⁵⁰ Archaeological sites regulations under the Yukon Act and the Northwest Territories Act govern the issuance of permits to archaeologists.¹⁵¹ The regulations are administered by the territorial governments.

(5) The federal government operates several repositories for archaeological artifacts depending upon the location of the excavation and the identification of the excavator.¹⁵² Under the Museums Act,¹⁵³ the Canadian Museum of Civilization acts as the repository for collections generated by its research activities and other archaeologists operating in areas of federal jurisdiction.¹⁵⁴ The Act provides for curation and conservation of the artifacts.

(6) The federal Environmental Assessment and Review Process has been used to protect archaeological resources. However, the existing guidelines do not require that threats to archaeological resources be considered.¹⁵⁵

(7) In 1976, Canada ratified the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the

146. For example, property in Indian burial grounds, petroglyph sites, and archaeological sites has been vested in the federal Crown in the designation of Kouchibouguac National Park in British Columbia, Kejimikujik National Park in Nova Scotia, and Choix National Historic Park in Newfoundland.

147. National Parks Act, R.S.C. ch. N-14 § 30 (1985).

148. WOODWARD, *supra* note 18, at 344.

149. Federal Archeological Protection, *supra* note 137, at 51, 53, 55.

150. *Id.* at 48; WOODWARD, *supra* note 18, at 129.

151. Federal Archeological Protection, *supra* note 137, at 55.

152. *Id.* at 61-62.

153. Museums Act, 38 Eli II: ch. 3 (1990).

154. *See* Federal Archaeological Protection, *supra* note 137, at 61.

155. *Id.* at 50, 59.

"Protection of the World's Cultural and Natural Heritage." Anthony Island in the Queen Charlotte Islands is the home of an ancient Haida village and has been declared a UNESCO world heritage site.¹⁵⁶

(8) In 1978, Canada assented to the 1970 UNESCO Convention on the "Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property."¹⁵⁷ The Cultural Property Export and Import Act is enacted in accordance with this convention. Pursuant to the Act, Canada can restrict the export of cultural property enumerated on the Canadian Cultural Property Export Control List. The definition of cultural property is broad enough to include aboriginal archaeological and non-archaeological property of historic, artistic, or scientific interest. However, such items must be worth a minimum of \$2,000. If an object is on the control list, an export permit is required unless the object is less than fifty years old or the creator is still alive. The Act does not control dispositions within Canada. Where a permit is refused, an appeal can be made to the Canadian Cultural Property Expert Review Board. If it is unlikely that a Canadian institution or public authority will purchase the object, a permit must be issued. The Act also provides tax incentives for the donation of nationally significant cultural property to designated Canadian institutions and provides grants and loans to these institutions for the purchase of objects.¹⁵⁸ Exports that violate the Act will not be effective to transfer legal title. However, the success of repatriation claims will depend on treaties with, and legislation of, the countries which receive the illegal imports. An excellent illustration of this point is Canada's request that the United States impose restrictions on the importation of specified types of endangered archaeological and ethnological artifacts. The Canadian request suggests that perpetrators of illegal collecting are usually Canadian citizens, but because Canadian museums refuse to purchase items illegally obtained, the United States is the major market for Canadian artifacts. However, under United States law, establishing activities detrimental to Canadian cultural property is not enough to justify a treaty or unilateral action by the President. Rather, a request must establish a situation of pillage threatening the cultural heritage of mankind or an emergency necessitating immediate action. Unfortunately the Canadian government listed only one contemporary example of pillage in support of its request. As pillage is a prerequisite to an agreement, this may be the reason why the request was denied. The purpose of the Canadian request was to provide Canada with practicable legal means to recover stolen and illegally

156. *Id.*

157. WOODWARD, *supra* note 18, at 343.

158. See Aaron Milrad, *The Cultural Export and Import Act*, 19 J. ARTS MGMT. & L. 15 (1989).

exported property from the United States. The effect of the refusal is that Canada will have to resort to American courts and domestic American law for the recovery of stolen and illegally imported property.¹⁵⁹

2. *Archaeological Heritage Protection Act*

The proposed Archaeological Heritage Protection Act will apply to all lands owned by the Canadian government (public lands) including Indian lands and lands in the Yukon and Northwest Territories. The resource management envisioned by the legislation is similar to provincial schemes in that ownership of archaeological property is vested in the Crown and a permit scheme is developed to regulate excavation and disposition. Consequential amendments are also made to the Cultural Property Export and Import Act to further restrict the export of archaeological items from Canada.¹⁶⁰ Unlike most provincial legislation, the Act contains specific provisions relating to aboriginal burial sites.

(a) *Ownership and Control of Archaeological Resources*

Section 5 of the Act gives the Federal Crown ownership of artifacts found on public lands that are described in a list of protected artifacts, burials, wrecks, specimens, and sites. The definition of public lands does not include Indian lands. 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."¹⁶¹ The definition is not limited to articles buried or partially buried. Whether an object has been discarded, lost, or abandoned for over fifty years will be a question of fact and law.

Section 5 bars claims by prior possessors to artifacts discovered and disposed of after the legislation is enacted. In the context of repatriation, this means aboriginal groups cannot claim common law ownership rights to artifacts found in or upon public lands after the enactment of the legislation unless they can establish that (a) the object is not an artifact within the meaning of the Act, or (b) the artifact is not contained on the list of protected objects and sites. The inherent weakness of the latter argument is that it can be defeated by placing an artifact on the protection list. If the elements of the definition are met, then the Crown and all persons claiming title or custody through the Crown, are insulated from repatriation claims unless the right to

159. See generally William Kaplan, *Assistance Under the 1970 UNESCO Cultural Property Convention: Canada's Request to the United States*, 22 STANFORD J. INT'L L. 123 (1986).

160. *Id.* § 28.

161. *Id.* § 2(1).

aboriginal cultural property is successfully asserted as an aboriginal right.

A possible loophole in the definition of "artifact" is that it does not appear to extend to objects intentionally placed, concealed, or hidden for religious or other purposes. For example, the Zuni War Gods discussed earlier are intentionally placed in sacred locations and left to be eroded by nature. Clearly, the War Gods are not abandoned. As the act of discarding implies the rejection of an object as "unwanted," the definition of "artifact" may not encompass objects like the War Gods. This omission may have a significant effect in future attempts by aboriginals to reclaim sacred or ceremonial objects.

Ownership provisions do not apply to reserve lands, but the legislation implements mechanisms to ensure some protection of artifacts and sites located on reserve lands. Issues relating to ownership continue to be governed by the Indian Act.¹⁶² As legal title to Indian reserves lies in the Crown, the Crown may find it necessary to bring repatriation claims for illegally excavated objects on behalf of the Indian band. Permits for excavations will likely continue to be issued by the Department of Indian Affairs or in accordance with band council bylaws. Additional powers are likely to be granted to the Minister under the new Act, including the power to require emergency impact assessments, grant stop orders, and grant inspection orders to ensure compliance with the Act.¹⁶³

Consultation with descendants is required when burial sites are discovered on Indian lands, Northern lands, or other public lands. The definition of burial site includes human remains, objects placed with human remains at the time of death, and objects later found in conjunction with the human remains.¹⁶⁴ Section 8(2) provides that the Minister must be notified upon the discovery of a burial site and the burial must be treated with dignity and respect. Further, burial sites are not to be disturbed except in accordance with regulations and with the agreement of the appropriate land manager and representative of the deceased. "Representative of the deceased" is defined to include a direct descendant, or where the location of a direct descendant is not feasible, a representative of the cultural or religious group most closely affiliated.¹⁶⁵

Although the legislation recognizes the interest of aboriginal groups in ancestral burial sites, this recognition is likely to be viewed as insufficient to acquire standing in claim for ownership of skeletal remains where the claim is based on common law principles of own-

162. See discussion *supra* text accompanying notes 140-42.

163. GLOBE & MAIL (Toronto), *supra* note 42.

164. Archeological Heritage Protection Act, § 2(1).

165. *Id.* § 8(3).

er ship. Skeletal remains and funerary objects fall within the definition of specimens and artifacts that are subject to federal ownership and protection.¹⁶⁶ Consequently, repatriation claims for burial items illegally obtained from public lands after the enactment of the AHPA may have to be brought by the Minister.

Section 6 of the Act enables the Minister to enter into agreements for transfer of ownership, conservation, management, or protection of any archaeological artifact, wreck, specimen, or other matter pertaining to archaeology. Pursuant to this section, the Minister can enter agreements with aboriginal peoples for ownership and control of archaeological resources on conditions stipulated by the Minister. The inclusion of this provision is important because ownership of heritage resources is currently being addressed in land claims and self-government negotiations.¹⁶⁷ Section 6 also permits the Minister to enter into agreements with museums and other institutions engaged in researching and exhibiting archaeological artifacts for long-term management or ownership of collections. The legislation does not address the question of repatriation, but this issue could easily be the subject of a section 6 agreement.

Finally, it should be noted that the Crown is granted ownership of all wrecks named in the protection list, found on public lands or waters, or that have been lost or abandoned for fifty years or more. The definition of wreck is broad enough to include native craft.¹⁶⁸

(b) Protection

As in the case of provincial legislation, acquisition of archaeological property in breach of the protective provisions of the Act precludes the acquisition of title enforceable against the Crown.¹⁶⁹ However, the ability of the Crown to recover such property will be limited if property is exported outside of the country. The issue of policing is addressed through the appointment of land managers for designated areas, the maintenance of a register, the power of inspection, the obligations to report findings, and penalty provisions for reported violations. However, the problems associated with policing of archaeological sites in remote unsupervised areas remains. The key protective provisions are:

(1) Activities which have the potential of adversely affecting any artifact, burial, wreck, specimen, or site cannot be undertaken until an impact assessment is made and a permit issued.¹⁷⁰

166. *Id.* § 2(1).

167. *See, e.g., supra* notes 1-2.

168. Archeological Heritage Protection Act, §§ 2(1), 5.

169. Unlike provincial legislation, the federal legislation specifies the legal effect of invalid transfers rather than leaving the conclusion to be drawn by common law. *Id.* § 12.

170. *Id.* § 7.

(2) Permits are required by persons proposing to explore for, or investigate, property protected by the Act. Permits will specify conditions for exploration, disposition, reporting and restoration. Before issuing a permit, the Minister is required to consider the professional qualifications of the applicant, the scientific merit of the proposed exploration, and the suitability of proposed repositories. Permits are revocable for noncompliance.¹⁷¹

(3) Persons who discover archaeological property are obligated to report the discovery to the land manager of the area and the Minister.¹⁷²

(4) In the event of an emergency, the Minister can issue orders providing for immediate protection of archaeological properties.¹⁷³ The Minister may also issue stop orders where she or he deems it necessary to protect archaeological property.¹⁷⁴

(5) The Minister may appoint inspectors to ensure compliance with the Act. Inspectors have the power to enter all federal lands, including reserves, but must obtain an order from the Justice of the Peace to enter a dwelling place without the consent of the occupant. Use of force is allowed only if the inspector is accompanied by a police officer.¹⁷⁵

(6) Contravention of the Act is an offense punishable by summary or indictment. Summary offenses result in a fine not exceeding \$2,000 dollars or imprisonment not exceeding six months or both. If the offense is indictable, the penalty is a fine not exceeding one million dollars or a term of five years in prison or both. Where more than one artifact is involved, the fine imposed on conviction may be computed in respect of each artifact as if separate complaints had been filed. Objects obtained as a result of an offense may be forfeited to the Crown.¹⁷⁶ The Act also provides for the issuance of tickets for minor offenses.¹⁷⁷ Special provisions deal with offenses by employees, and the Attorney General of Canada is granted authority to apply for prohibitory injunctions to prevent anticipated violations of the Act.¹⁷⁸

(7) Section 14 of the Act addresses the jurisdictional problems faced by provinces attempting to reclaim property transported to other provinces. Transporting provincial resources in violation of provincial legislation is a federal offense. Further, title cannot be acquired in illegally transported goods. In the event of a section 14 violation, the province can request that the federal government act on behalf of the province

171. *Id.* §§ 9-10.

172. *Id.* § 11.

173. *Id.* § 13.

174. *Id.* § 19.

175. *Id.* §§ 16-17.

176. *Id.* § 20.

177. *Id.* § 21.

178. *Id.* §§ 18, 25.

through the enforcement of the penalty provisions and initiation of repatriation claims.¹⁷⁹

The Office of Archaeological Resource Management has been created to administer the Act. The work of the office will include administration of the certification system, offering advice on standards and procedures for impact assessments, responding to emergency situations, and developing programs to assist repositories in gaining access to archaeological collections. Current federal policy states that the office will assist aboriginal peoples in developing the resources required to manage their archaeological property.¹⁸⁰

C. Land Claims Agreements

Control over aboriginal cultural property may be the subject of modern land claims and self-government agreements. For example, the Yukon Comprehensive Land Claim Agreement¹⁸¹ provides for cooperation with Yukon First Nations in the management of heritage resources.¹⁸² Management schemes are to be developed by the parties to the agreement in accordance with stated principles, including reasonable access to artifacts by Yukon First Nations, protection of First Nation resources in priority over other Yukon Heritage Resources, preparation of an inventory of Yukon ethnographic resources, and establishment of standards for protection, care, and custody. The Agreement further provides for consultation in the formation of government policy and legislation. A Yukon Heritage Board composed of representatives from First Nations and the Government is to be established for the purpose of recommending heritage resource policy. Provision is also made for designation of heritage parks, sites, landmarks, and watercourses; the management of documentary resources; and consultation with affected Yukon First Nations before naming of geographical areas. First Nation approval is required for access to burial sites and consultation is required to determine the proper treatment of these sites. The government also agrees in principle to assist in the repatriation of resources originating from the Yukon.

More detailed provisions are made in the Nunavut Settlement Agreement-in-Principle.¹⁸³ Priority is given to developing protective mechanisms and a suitable repository for archaeological resources in the Nunavut area. Provision is also made for Inuit participation and training in resource management. Of particular interest is the acknowl-

179. *Id.* § 14.

180. See Masse, *supra* note 96, at 11-12.

181. Yukon Comprehensive Land Claim Umbrella Final Agreement (Ottawa: Department of Indian Affairs and No. Dev., 1990).

182. *Id.*

183. Nunavut Agreement-in-Principle, *supra* note 1.

edgement in the Agreement that the parties do not agree on the issue of title to archaeological specimens. This matter is left to be determined by the parties in the final negotiations of the agreement. Ethnographic objects and archival materials are dealt with independently of archaeological materials. Obligations are imposed on the Canadian Museum of Civilization and territorial ethnographic agencies to lend the maximum number of ethnographic objects to institutions in the Nunavut area and to the Inuit Heritage Trust. Loan requests from the Inuit Heritage Trust are not to be refused unless certain enumerated factors can be established, such as that the Trust is unable to maintain the object without risk of damage, it is unable to provide access commensurate with scientific or public interest, the federal agency is unable to loan the object because of a term in its original acquisition, the agency requires the object for its own active research or display, or the condition of the object prohibits its movement. With the exception of the loan provisions, the issue of repatriation is not addressed.

D. Summary of Legislated Regime

Provincial and federal heritage legislation will affect repatriation and other ownership claims to objects found under or on public lands and private. Objects found buried or partially buried in private lands or provincial lands after the 1978 amendments to the Historical Resources Act belong to the provincial Crown.¹⁸⁴ Persons acquiring title through the Crown after 1978 may be immune to repatriation claims. However, if possession has been acquired in violation of the Act, or if aboriginal resources are threatened by violation of the Act, aboriginal groups may seek the assistance of the Crown to act on their behalf. Where such objects have been illegally exported from the province, the province is left to the mercy of the laws of the recipient province. This situation may be changed by the enactment of the federal archaeology bill.

Under the new federal bill, artifacts under or *upon* federal lands, other than Indian lands, will belong to the Federal Crown if the artifacts are enumerated on the list of protected property. However, such artifacts must be or have been lost, discarded, or abandoned and be over fifty years old. Artifacts that fall within this definition cannot be the subject of repatriation claims by aboriginal groups if such claims are based on common law principles of ownership. Where title is acquired in violation of the legislation, or where resources are threatened by violation of the act, aboriginal groups can seek the assistance of the Federal Crown. Consultation and agreement with direct descendants of the deceased regarding management of aboriginal burial sites is required in decisions regarding protection and manage-

184. Historical Resources Act, R.S.A. ch. H-8 (1980).

ment of these sites. If a direct descendent cannot be identified, a representative of the cultural or religious group of the deceased must be consulted. Where objects are illegally exported from the country, the issue of repatriation will be governed by the law of the situs of the object or by international agreements.

The existing federal scheme does not make a comprehensive claim of ownership to cultural resources, and protective measures are scattered throughout various bits of legislation. Consequently, common law principles currently govern the determination of ownership issues relating to property on or under federal lands and non-archaeological property located on provincial and private lands. The ownership of skeletal remains on private and provincial lands is uncertain, but it may be determined in Alberta by principles of common law, as skeletal remains do not fall within the definition of archaeological resource in the Historical Resources Act.¹⁸⁵

It is interesting to compare Canadian protection of aboriginal archaeological property to the approach taken in the United States. Where the former presumes ownership in the landowner or prior possessor by application of common law principles, the latter presumes ownership by aboriginal peoples arising from aboriginal property rights and sovereign rights to control the disposition of communal cultural property. Where the former legislates changes to the common law to protect property of provincial or national interest, including aboriginal property, the latter legislates respect for aboriginal cultural and religious rights. Finally, where the former assumes trust and cooperation on the part of the Crown, the latter demands it through positive legislated obligations.¹⁸⁶

V. Impact of Aboriginal Rights Law on Claims to Cultural Property

Consideration of the American approach introduces the third stage of the repatriation analysis: the impact of aboriginal rights law on

185. R.S.A. ch. H-8, § 1(a) (1980).

186. The new Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), Pub. L. 101-601, 104 Stat. 3048 (codified as amended at 25 U.S.C.S. §§ 3001-3013 (Law. Co-op 1983 & Supp. 1992)) illustrates this point. It requires all federal agencies to compile an inventory of aboriginal skeletal remains and funerary objects in their collections and to make such inventories available upon request to aboriginal groups. NAGPRA, 25 U.S.C.S. § 3003(B)(1)(C). A summary must also be made of other cultural objects that fall within the definition of cultural patrimony. *Id.* § 3004. If a request is made for the return of these items by a group establishing sufficient cultural affiliation, such items are to be expeditiously returned. Museums which repatriate items in good faith are not liable for claims by aggrieved parties. *Id.* § 3005(f). In the event of competing claims, the federal agency may continue to hold the objects until the court resolves the matter. *Id.* § 3005(e).

claims to cultural property. The extent of the impact will depend upon the resolution of several issues yet to be considered by Canadian courts. Recent trends in Canadian aboriginal rights law appear to support the expansion of aboriginal rights to include collective or communal ownership of moveable cultural property. Further, the recognition and affirmation of "the existing aboriginal and treaty rights" in the Constitution Act, 1982, could act as a catalyst for a new approach to defining aboriginal rights which draws upon two historical streams: tribal law and common law. However, recent comments by the Supreme Court of Canada cast doubt on its willingness to recognize political sovereign rights of aboriginal peoples and to subordinate Canadian law to tribal law and custom. Although there is some willingness to blend both traditions in the interpretation and definition of rights, the reluctance of the Supreme Court to accept aboriginal sovereignty may mean that questions concerning validity of transfer, sufficient cultural affiliation, abandonment, and other ownership issues will be determined through an extension of principles of common law and equity rather than the application of tribal law or blending of traditions.

An aboriginal rights analysis of the property debate requires consideration of the following issues:

(1) Do aboriginal groups have an aboriginal right to ownership of moveable cultural communal property?

(2) Is the right an "existing" right protected by section 35(1) of the Constitution Act, 1982, or has the right been extinguished by heritage conservation or limitation of actions legislation? What is the legal status and effect of the proposed Archaeological Heritage Protection Act?

(3) What laws should be applied in the resolution of ownership issues: tribal customary laws, common law principles of property law, or both?

A. Aboriginal Right to Moveable Cultural Property

The Supreme Court of Canada has yet to render a comprehensive definition of aboriginal rights that embraces all of the uses of the term. To date, aboriginal rights have been defined on a case-by-case basis, arising from aboriginal claims to land or land use rights such as hunting, trapping, and fishing rights.¹⁸⁷ This has given rise to the view that aboriginal rights are a bundle of property rights associated with title claims of aboriginal groups to specific parcels of land. According to this view, aboriginal rights do not exist independent of

187. For an interesting discussion on different classes of aboriginal rights, see generally Michael Asch & Patrick Macklam, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow*, 29 ALTA. L. REV. 498 (1991).

aboriginal title. The law concerning proof of title is undeveloped and has yet to receive authoritative treatment by the Canadian Supreme Court. However, where an aboriginal group is claiming aboriginal title to land currently in its possession, lower courts have required proof that the claimant group is an organized society and it occupied the territory at issue to the exclusion of other societies since time immemorial.¹⁸⁸ Time immemorial suggests that the group must have occupied the lands continually until the date that the British asserted sovereignty in the area at issue. The requirements of organization and occupation are interpreted flexibly, given the character of the lands and the way of life of the aboriginal group. Although it is beyond the scope of this article to analyze the legitimacy of these prerequisites, it should be noted that the criteria for exclusivity and possession since time immemorial are subject to much criticism.¹⁸⁹ Where a native group asserts that it has title to lands and was unlawfully dispossessed, the criteria of proof should apply at the date of dispossession.¹⁹⁰

This traditional definition of aboriginal rights can be contrasted to the emerging theory that aboriginal rights are rights defined by pre-existing Indian social order. Property rights to land are just one subset in the entire bundle of interrelated rights including cultural, religious, and political rights. For many aboriginal groups, the most important right of aboriginal nations is the right to govern their people, their affairs, the land, and its use.¹⁹¹ The land is a sacred and integral part of life which cannot be dealt with in isolation. To date, there are very few incidents in which Canadian courts recognized the interrelatedness of rights or aboriginal rights other than title and land use rights. A

188. See, e.g., *Hamlet of Baker Lake v. Minister of Indian Affairs & Northern Dev.*, 107 D.L.R.3d 513 (Fed. Ct. 1979); *Ontario v. Bear Island Found.*, [1989] 2 C.N.L.R. 73 (Ont. C.A.); *Delgamuukw v. British Columbia*, 79 D.L.R. 4th 185 (1991); see also *WOODWARD*, *supra* note 18, at 216-18. Only the criteria of organization and occupation prior to the coming of European settlers have been applied by the Supreme Court. See *Regina v. Sparrow*, 70 D.L.R.4th 385 (Can. 1990); *Calder v. British Columbia*, [1973] S.C.R. 313 (Can.).

189. See, e.g., *WOODWARD*, *supra* note 18, at 216-18; *Slattery*, *supra* note 20, at 756-62.

190. *Slattery*, *supra* note 20, at 756.

191. The sources are numerous. See generally David Ahenakew, *Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition*, in *THE QUEST FOR JUSTICE* 24 (Menno Boldt et al. eds., 1985); MICHAEL ASCH, *HOME AND NATIVE LAND: ABORIGINAL RIGHTS AND THE CANADIAN CONSTITUTION* (1984); FRANK CASSIDY & ROBERT L. BISH, *INDIAN GOVERNMENT: ITS MEANING IN PRACTICE* (1989); Douglas Sanders, *Pre-Existing Rights: The Aboriginal Peoples of Canada (Sections 25 and 35)*, in *CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY* 707 (Beaudoin & Ratishin eds., 1984); *GOVERNMENTS IN CONFLICT* (Long & Boldt eds., 1988); EVELYN PETERS, *ABORIGINAL SELF-GOVERNMENT IN CANADA: A BIBLIOGRAPHY* 1986.

notable exception are decisions rendered recognizing native customary laws of adoption.¹⁹²

Recent decisions of the Supreme Court suggest that Canada is moving toward a broader definition of aboriginal rights. Arguments to support a broader definition of aboriginal rights are drawn in part from the recent shift in Canadian law from a contingent theory of aboriginal rights to an inherent theory of rights. The contingent theory presumes that aboriginal rights are contingent upon Crown grant or recognition and that such rights exist at the pleasure of the Crown. The latter aspect of the theory supports the notion that aboriginal rights can be terminated by the unilateral actions of the Crown.¹⁹³ The inherent rights theory presumes that aboriginal rights are *sui generis* preexisting legal rights that exist independent of creation or acts of recognition. An aboriginal right is a right recognized by an aboriginal group as an integral part of its culture. This theory is invoked, in combination with the British practice of entering treaties and early United States decisions explaining British colonial law, to support the argument that aboriginal rights may be terminated with the consent of aboriginal peoples.¹⁹⁴

While it is true that this shift in theory has taken place in the evolution of cases on land and land use rights, it can logically be extended to expand the content of aboriginal rights beyond land use rights. The basis for this expansion can be extracted from the recognition of aboriginal rights in section 35 of the Canadian Constitution and the definitional framework for section 35 set out in *Regina v. Sparrow*,¹⁹⁵ discussed *infra*. Further, it should be noted that the distinction between land use and other rights is an inappropriate categorization of rights; contrary to aboriginal perceptions of their rights. Section 35 provides the court with an opportunity to avoid such a narrow interpretation if, as *Sparrow* suggests, it is to be interpreted

192. See, e.g., *Re Katie's Adoption Petition*, [1962] 38 W.W.R. 100; *Re Beaulieu's Petition*, [1969] 67 W.W.R. 669; Norman K. Zlotkin, *Judicial Recognition of Aboriginal Customary Law in Canada*, [1984] 4 C.N.L.R. 1.

193. See, e.g., *St. Catherine's Milling Co. v. The Queen*, 14 App. Cas. 46 (P.C. 1888) (Eng.); see also Slattery, *supra* note 20, at 748; WOODWARD, *supra* note 18, at 201-02.

194. See generally Michael Jackson, *The Articulation of Native Rights in Canadian Law*, 18 U.B.C. L. REV. 255 (1984); WOODWARD, *supra* note 18, at 200-05; BRUCE A. CLARK, *INDIAN TITLE IN CANADA* 73-93 (1987) (chapter 6); *Address of the Gitskan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia*, [1988] 1 C.N.L.R. 17. Note that this line of argument has recently been rejected by the British Columbia Supreme Court in *Delgamuukw v. British Columbia*, 79 D.L.R. 4th 185, 478 (1991). The decision has been appealed to the British Columbia Court of Appeal and is expected to be appealed to the Supreme Court of Canada.

195. 70 D.L.R.4th 385, 404 (Can. 1990).

as a unique constitutional provision which draws from the common law of aboriginal rights and the traditions of aboriginal peoples. Nevertheless, it is important to note that the courts have already placed limits on the theoretical shift. First, the shift to inherent rights has not resulted in a statement from the Supreme Court that aboriginal rights may only be extinguished by consent.¹⁹⁶ Second, obiter comments in the *Sparrow* decision suggest that the inherent rights theory may not be extended to recognize aboriginal rights to sovereignty.¹⁹⁷

Sparrow is one of two landmark decisions in the development of the inherent rights theory; the other is *Guerin v. The Queen*.¹⁹⁸ Drawing on the reasoning of Justices Hall and Judson in the 1973 decision of *Calder v. British Columbia*,¹⁹⁹ the *Guerin* decision clarifies that aboriginal title is a "pre-existing legal right not created by Royal Proclamation, . . . or by any other executive order or legislative provision."²⁰⁰ Further, noting the difficulty of applying concepts of general property law to aboriginal title, Mr. Justice Dickson concludes that the nature of the aboriginal interest in land is best characterized by "its general inalienability [to persons other than the Crown] coupled with the fact that the Crown is under [a fiduciary] obligation to deal with the land on the Indian's behalf when the interest is surrendered."²⁰¹ The concept of fiduciary obligation has been extended to limit the Crown's powers to regulate aboriginal rights after their entrenchment in the Canadian Constitution.²⁰² However, it is unclear how far the courts may extend this concept as a means to measure the legality of government action towards aboriginal peoples.

Sparrow is the first statement by the Supreme Court of Canada interpreting section 35(1) of the Constitution Act, 1982, which provides that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."²⁰³ The phrase "existing aboriginal rights" was included in the Canadian Constitution without agreement on the scope and content of aboriginal rights. Section 37 of the Canadian Constitution was introduced to address the problem of definition through a series of conferences on consti-

196. Some limits have been placed on the power of extinguishment through the concept of fiduciary duty and the entrenchment of "existing aboriginal and treaty rights." See Woodward, *supra* note 18, at 206-07; Bell, *supra* note 80; William Pentney, *The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II, Section 35: The Substantive Guarantee*, 22 U.B.C. L. REV. 107 (1988).

197. See *Delgamuukw v. British Columbia*, 79 D.L.R. 4th 185 (1991). See generally Asch & Macklam, *supra* note 187.

198. [1984] 2 S.C.R. 335 (Can.).

199. [1973] S.C.R. 313 (Can.).

200. *Guerin*, [1984] 2 S.C.R. at 336.

201. *Id.* at 382.

202. *Regina v. Sparrow*, 70 D.L.R.4th 385, 408-10 (Can. 1990).

203. *Id.* at 395.

tutional matters that directly affect the aboriginal peoples of Canada. However, the conferences were unsuccessful, leaving the reconciliation of aboriginal interpretations of their rights with Canadian law and politics for subsequent negotiation. Failure of the political process left the responsibility of definition with the courts.²⁰⁴

Sparrow indicates a judicial awareness of this responsibility by providing a framework for the definition process. The appellant, a member of the Musqueam Indian Band, was charged under the Fisheries Act²⁰⁵ for fishing with a drift net longer than that permitted by his band's fishing license.²⁰⁶ The issue before the Supreme Court was whether Parliament's power to regulate fishing is limited by section 35(1) and, more specifically, whether the net length restriction was inconsistent with that provision. The Court held that the scope of section 35(1) is limited to rights "in existence when the Constitution Act, 1982, came into effect."²⁰⁷ Rights are affirmed in their unregulated form, subject only to prior extinguishment. In drawing limitations between regulation and extinguishment by legislation, the Court considered whether the Fisheries Act or its regulations demonstrate a clear and plain intention to extinguish the aboriginal right to fish. The Court concluded that permits issued under the Act were simply a matter of controlling the fisheries and not a method of defining the underlying rights of the Musqueam people.²⁰⁸ After prescribing the analytical process required to resolve the issue, the Court sent the matter back to trial court.

Rather than develop a comprehensive definition of aboriginal rights, the Court chose not 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 tested on an ad hoc basis. Of particular interest is the Court's refusal to freeze aboriginal rights at a particular point in history. Prior to *Sparrow*, it had been argued by lawyers for the Crown that aboriginal rights are limited to those traditional uses exercised by aboriginal peoples at the date Crown sovereignty was asserted over aboriginal territories.²⁰⁹ For example, one could argue aboriginal title does not include rights of ownership over objects

204. See Douglas Sanders, *Prior Claims: Aboriginal People in the Constitution of Canada*, in 1 CANADA AND THE NEW CONSTITUTION: THE UNFINISHED AGENDA 225 (Stanley M. Beck & Ivan Bernier eds., 1983); BRYAN SCHWARZ, *FIRST PRINCIPLES: CONSTITUTIONAL REFORM WITH RESPECT TO ABORIGINAL PEOPLES OF CANADA*, 1982-84 (1985).

205. R.S.C. ch. F-14 (1985).

206. *Sparrow*, 70 D.L.R.4th at 389.

207. *Id.* at 395.

208. The issue of extinguishment is discussed *infra* text accompanying notes 220-42.

209. See, e.g., *Ontario v. Bear Island Found.*, 15 D.L.R.4th 321, 341 (1985), *aff'd* [1989] 2 C.N.L.R. 73 (Ont. C.A.) (on appeal to Supreme Court of Canada); Slattery, *supra* note 20, at 746.

excavated and removed from aboriginal lands because, at the time the Crown asserted sovereignty, the group was not in the practice of excavating and controlling its archaeological heritage. *Sparrow* appears to reject this approach in favor of a flexible interpretation of aboriginal rights that allows for their exercise in a contemporary manner. Adopting Dr. Slattery's interpretation of "existing," the Court concludes that "existing rights" are "affirmed in a contemporary form rather than in their primeval simplicity and vigour."²¹⁰ Adopting this perspective, one can argue it is artificial to distinguish between the right to use and control and the particular forms of use exercised at the time of the assertion of British sovereignty.²¹¹ Applied to the right to fish, the Court implies that the practice of bartering may be revived as a modern right to fish for commercial purposes. However, as the case was not presented on the basis of an aboriginal right to fish for commercial purposes, the Court confined its reasons to the aboriginal rights to fish for food and social and ceremonial purposes.²¹²

According to *Sparrow*, a central consideration in characterizing a right as an aboriginal right is whether the right was and continues to be an integral part of the culture of the claimant group.²¹³ Although "integral" is not defined, it is important that the significance of the right is measured in the context of society as a whole. That is, the court considers the relationship of the right to cultural and physical survival of the claimant group. The right to fish is an aboriginal right not only because the salmon fishery is valuable as a food source, but also because of its role in the system of beliefs, social practices, and ceremonies of the Musqueam people.²¹⁴

Whether or not "integral" means essential to, or something between significant and necessary, depends upon how strictly the courts wish to apply the test and their willingness to expand aboriginal rights claims. Further, obiter references in *Sparrow* to "evidence of sufficient continuity of the right" could give rise to a new category of frozen rights arguments. That is, one might read a continuing use requirement from the date of British assertion of sovereignty, to the date of the claim, as part of the integral test. If successful, this interpretation would cause problems for aboriginal litigants, as repatriation claims often arise from a desire to protect traditions suspended and threatened

210. *Sparrow*, 70 D.L.R.4th at 397.

211. Despite this ruling in *Sparrow*, lower decisions have been reluctant to reject the frozen rights approach. See, e.g., *Delgamuukw v. A.C.B.C.* (Mar. 8, 1991) Smithers No. 0843, where Justice McEachern characterizes aboriginal rights as "sustenance rights" at the date sovereignty is asserted but recognizes that the use of modern implements to exercise the right does not change its nature.

212. *Sparrow*, 70 D.L.R.4th at 402-03.

213. *Id.* at 398.

214. *Id.* at 398, 402.

with risk of loss or to revive traditions which have not been exercised continuously in an attempt to rebuild the cultural heritage of the tribe. However, it is unlikely the test will be construed in this manner. First, it is contrary to the spirit of the decision which emphasizes a generous, liberal, and contemporary interpretation of "existing aboriginal rights." Second, the argument that "sufficient continuity" means unextinguished, rather than continually exercised, is consistent with the interpretive reasoning of the courts. Finally, given the historic role of the Canadian government in attempts to exterminate aboriginal culture, the equitable doctrine of estoppel may be applied against the Crown and anyone claiming rights to cultural property through the Crown.

In assessing the integral nature, scope, and content of the right, the Court considers anthropological evidence, but also emphasizes that the interpretation of the right must be "sensitive to the aboriginal perspective itself on the meaning of the right at stake."²¹⁵ Scope and content of existing rights is not to be determined by executive or legislative policy or action.²¹⁶ This approach, coupled with the Supreme Court's recognition that aboriginal rights are independent and "pre-existing" legal rights, suggests that aboriginal rights are to be defined by the traditions of aboriginal claimants as perceived by the claimant group and supported by scientific evidence.²¹⁷ In this way, the court adopts an inherent theory of rights and leaves open the possibility of rights, other than land use rights, being recognized in Canadian law.

The narrowest interpretation of the developments in *Sparrow* is that inherent rights of aboriginal peoples are limited to land and land use rights. The effect of the combined application of the doctrine of aboriginal title and the inherent rights theory is to allow the courts to extend the concept of aboriginal rights to include property rights not yet recognized in the bundle. The definition of aboriginal land rights will not be limited to traditional concepts of property law. At the same time, traditional common law rights are not automatically excluded from the bundle. This approach would subordinate the aboriginal perspective of the right at stake to a narrow analysis of the common law.

The broader and better interpretation of these developments places them in their historical and cultural context. It recognizes a general

215. *Id.* at 411.

216. *Id.* at 403.

217. Although Canadian courts have accepted the validity of oral evidence given by aboriginal persons regarding their traditions and laws, the courts have yet to recognize oral evidence as the "best evidence" in absence of scientific corroboration. *See, e.g., Ontario v. Bear Island Found.*, 15 D.L.R.4th 321, 336-40 (Ont. H.C. 1984); *Delgamuukw v. British Columbia*, 79 D.L.R. 4th 185, 252-82 (1991). Oral evidence of the native understanding of their treaty rights is also admissible in the interpretation of treaties. *See Nowegijick v. The Queen*, [1983] 2 C.N.L.R. 89 (Can.).

shift from denial to recognition of preexisting rights defined by the traditions of aboriginal peoples. This approach takes to heart the categorization of aboriginal rights as *sui generis* rights that exist independently of the common law and "inhere in the very meaning of aboriginality."²¹⁸ Rather than focus on the fact patterns and particular land rights at issue in *Guerin* and *Sparrow*, emphasis should be placed on the change in legal analysis and the spirit of these decisions to draw general definitional guidelines. Rather than extract narrow, distinguishable rules, a pattern is discerned that allows the court to draw on common law and aboriginal custom in the definition of rights and extend legal recognition of aboriginal rights beyond the concept of aboriginal title. Adopting this interpretation allows strong arguments to be made for recognition of aboriginal rights to collective or communal property where such property is linked to the cultural survival of the claimant group. As the scope and content of existing rights are not properly determined by government action alone, the court should look to the history and traditions of the claimant group to determine whether the integral test raised in *Sparrow* has been met; that is, whether title to an object is essential to the cultural integrity of the group. If the object performed and continues to perform an essential function in the cultural life of the claimant group, *Sparrow* opens the door to recognition of aboriginal ownership, subject to the law on extinguishment. Types of objects that are likely to fall within this category are religious objects, ceremonial objects, medicine objects, and objects of particular historical significance.

An alternative approach to definition arises from the acceptance of aboriginal sovereignty.²¹⁹ Here it is sufficient to note that the sovereign rights approach would subordinate common law to tribal law and resolve disputes in accordance with the traditions of the claimant aboriginal group. Further, a logical corollary of this approach is to reject the need for scientific evidence to support ownership claims if sufficient evidence is rendered in accordance with aboriginal customary law.

B. The Effect of Heritage Conservation Legislation on Aboriginal Rights

Canadian law maintains that aboriginal rights exist at the pleasure of the Crown. According to this doctrine, only those rights which are unextinguished can be legally enforced by aboriginal groups. Rights can be extinguished by unilateral actions of the Crown or by consent.²²⁰

218. Asch & Macklam, *supra* note 187, at 493.

219. For a discussion of aboriginal sovereignty, see *infra* text accompanying notes 220-71.

220. See Slattery, *supra* note 20, at 731; WOODWARD, *supra* note 18, at 206.

The predominant colonial practice in Canada was to enter into treaties with aboriginal peoples. Through this process, some rights were acquired, thereby replacing surrendered aboriginal rights with treaty rights. Others were recognized by the Crown and given legal protection through treaty. Those rights not addressed in the treaties were retained by the Aboriginal Group.²²¹ The Royal Proclamation of 1763²²² formalized the treaty making process and provided that only the Crown could purchase aboriginal lands.²²³ When the Dominion of Canada was formed in 1867, the Dominion government assumed this role. The administration of aboriginal rights policy was centralized under section 91(24) of the Constitution Act, 1867, by placing exclusive jurisdiction over Indians and lands reserved for Indians in the federal Crown.²²⁴ The practice of treaty making continued throughout most of Canada and remains the predominant practice for the resolution of land claims north of the sixtieth parallel through the contemporary mechanism of land claims agreements. Although native peoples view these agreements as recognition of their rights and that the government policy has abandoned the language of extinguishment, the government continues to view comprehensive land claims as a surrender of all rights in exchange for those articulated in the agreement.

Whether the treaties had, and contemporary agreements should have, the effect of extinguishing aboriginal rights including sovereign rights, or whether the proper interpretation of treaties is the retention and affirmation of aboriginal rights is currently a topic of legal and political debate. A separate body of law has developed concerning the interpretation and enforceability of treaty rights, an examination of which is beyond the scope of this study. However, it is relevant that prior to May of 1990, Canadian law maintained that treaty rights could be

221. In *Simon v. The Queen*, 24 D.L.R.4th 390 (1986) (Can.), Justice Dickson states that the treaty of peace and friendship at issue gave legal protection to existing rights. *Id.* at 402. Professor Noel Lyon argues that this view of treaties may not apply in all respects to treaties of surrender, but it should prevail where it is capable of applying. *Id.* The argument of retained rights is derived from terms of the various treaties and the American decision *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). To date, Canadian courts have interpreted the prairie land cession as agreements to surrender aboriginal rights in exchange for treaty rights. For a general discussion of treaty practice in North America, see RENE FUMOLEAU, *AS LONG AS THIS LAND SHALL LAST: A HISTORY OF TREATY 8 AND TREATY 11 — 1870-1939* (1973); ALEXANDER MORRIS, *THE TREATIES OF CANADA WITH THE INDIANS* (reprint 1971) (1880); Douglas E. Sanders, *The Extent of Recognition of Pre-Existing Rights of Indigenous Peoples in the Legal History of Canada* (Vancouver: University of British Columbia, 1988) (unpublished). For a discussion of the principle of consent, see WOODWARD, *supra* note 18, at 198-99, 203-05; Jackson, *supra* note 194.

222. Royal Proclamation of 1763, reprinted in R.S.C., No. 1 app. I, at 5-6 (1985).

223. *Id.*; see also WOODWARD, *supra* note 18, at 198-99; Jackson, *supra* note 221.

224. Constitution Act, 1867, reprinted in R.S.C., app. I, § 91(24) (1985).

unilaterally extinguished by the Crown. Further, treaties were not recognized as agreements between sovereigns.²²⁵ However, in May of 1990, the Supreme Court of Canada characterized the Indian-Crown relationship at the time of colonial expansion as falling somewhere between "the kind of relations conducted with sovereign states and relations such states had with their own citizens."²²⁶ Further, it concluded that the consent of the Huron was required to extinguish their treaty rights. The requirement of consent evolved from emphasis on the concepts of fiduciary obligation and the need to uphold the honor of the Crown in the interpretation of treaty rights.²²⁷ This may be evidence of a shift in treaty law away from upholding the doctrine of unilateral extinguishment.²²⁸

Although duty and honor have also been emphasized in the context of aboriginal rights, a parallel movement upholding the need for consent has not occurred. However, it is clear that consultation with affected aboriginal peoples will be a significant consideration in assessing the validity of legislation regulating aboriginal rights after their affirmation in the Constitution Act, 1982.²²⁹ The rules with respect to unilateral extinguishment prior to 1982 can be summarized as follows:

(1) Once an aboriginal right has been established, the onus shifts to the Crown to prove that it has been extinguished.²³⁰

(2) Aboriginal rights may be extinguished by the exercise of legislative jurisdiction, but the intent to do so must be clear and plain.²³¹

225. See generally PETER A. CUMMING & NEIL H. MICKENBERG, *NATIVE RIGHTS IN CANADA* 54 (2d ed., 5th prtg. 1972); Douglas E. Sanders, *Aboriginal Peoples and the Constitution*, 19 ALTA L. R. 410, 416-17 (1981); Simon v. The Queen, [1985] 2 S.C.R. 387, 400 (Can.); Bert Horseman v. Sioui, [1990] 1 S.C.R. 901, 936 (Can.).

226. Quebec v. Sioui, [1990] 1 S.C.R. 1025, 1038 (Can.).

227. *Id.* at 1063.

228. See generally Bell, *supra* note 80.

229. See Regina v. Sparrow, 70 D.L.R.4th 385, 417 (1990) (Can.).

230. Slattery, *supra* note 20, at 731.

231. See Sparrow, 70 D.L.R.4th at 401; see also WOODWARD, *supra* note 18, at 206-07; Slattery, *supra* note 20, at 765-66. Prior to Sparrow, it was uncertain whether the intent to extinguish must be clear and plain or if it was sufficient that the legislation was inconsistent with the existence of an aboriginal right. In Calder v. British Columbia, [1973] S.C.R. 313 (Can.), Justice Hall took the former position (and at one point states legislation must be specific) and Justice Judson the latter. Despite the acceptance of the clear and plain test in Sparrow, lower courts have paid lip service to the clear and plain test, but in substance have applied the inconsistent test. See Delgamuukw v. British Columbia, 79 D.L.R. 4th 185, 459-60 (1991), where Justice McEachern concludes "clear and plain" does not require express statutory language. Considering the same colonial legislation as that in issue in Calder, Justice McEachern purports to apply the Justice Hall test but achieves the Justice Judson result. The issue of whether "clear and plain" means express language or also includes necessary implication will likely be addressed on appeal.

(3) Aboriginal rights may be extinguished where the Crown exercises complete dominion over the land in a manner that is adverse to aboriginal rights of occupancy.²³²

In the recent *Quebec v. Sioui*²³³ decision, the court placed limitations on the occupancy theory.²³⁴ At issue was the extinguishment of a treaty right to practice religious customs in violation of Quebec Parks legislation.²³⁵ Justice Lamer held that the land at issue fell into the category of lands occupied by the Crown, since the province had set the land aside for specific use as a park.²³⁶ He emphasized that it is the physical occupation of the space, and not the legislation, that gives rise to the issue of extinguishment and concludes occupation alone is not enough to extinguish aboriginal rights.²³⁷ For rights to be extinguished, they must be contrary to the purpose of the occupancy and prevent the realization of that purpose.²³⁸ Although the rights at issue are treaty rights, the analysis could be extended to the broader category of aboriginal rights.

Where legislation or acts of occupation limit but do not extinguish aboriginal rights, the rights continue to exist as regulated rights. According to *Sparrow*, extinguished rights are not entrenched in section 35(1) of the Canadian Constitution, but regulated rights are entrenched in their original form.²³⁹ Thus, government action prior to 1982 will partially define the content of the aboriginal rights included in section 35(1) if the government has clearly operated to extinguish a purported aboriginal right. After 1982, aboriginal rights cannot be unilaterally extinguished without constitutional amendment.²⁴⁰ Further, such rights can be regulated only if regulation can be justified. If an aboriginal claimant proves the existence of a right and legislation has the effect of interfering with that right, the onus shifts to the Crown to justify interference.

The test for justification involves two steps. First, the Crown must establish a valid legislative objective such as conservation and management of natural resources. Second, the Crown must show that the

232. Prior to 1990, it was not clear whether this requires a physical occupation by the Crown or if comprehensive enactment of adverse legislation is sufficient. Further, it should be noted that this theory is subject to great criticism. For a review of methods and criticisms, see Slattery, *supra* note 20, at 764-65; Woodward, *supra* note 18, at 203-10.

233. [1990] 1 S.C.R. 1025 (Can.).

234. *Id.* at 1073.

235. Quebec Parks Act, R.S.Q. ch. P-9.

236. *Sioui*, 1 S.C.R. at 1073.

237. *Id.* at 1072.

238. *Id.* at 1073.

239. *Regina v. Sparrow*, 70 D.L.R.4th 385, 395-96 (Can. 1990).

240. There is some doubt on the continued validity of unilateral extinguishment by methods other than legislated interference. See generally Pentney, *supra* note 196.

objective is obtained in a manner consistent with upholding the honor of the Crown. In this branch of the test, the court emphasizes the concept of fiduciary duty. 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.²⁴¹

The application of these principles to existing federal and provincial legislation suggests the heritage conservation legislation and limitation of actions legislation do not extinguish aboriginal rights, but inconsistent occupation may. As existing federal legislation does not explicitly place ownership of aboriginal cultural property located on Crown lands in the federal government, it is difficult to argue that there has been a statutory expropriation of the right. A clear intention to terminate aboriginal rights is not evidenced, nor is termination necessarily implied. Coupled with the rule of interpretation that ambiguous phraseology is to be interpreted in favor of the Indians, these arguments suggest aboriginal rights of ownership continue to exist. The exercise of the right may have been regulated, but the right is entrenched in the Canadian Constitution in its unregulated form. Therefore, claims to ownership cannot be met by the defense of extinguishment. Rather, the Crown will have to justify continued regulation once the aboriginal right to ownership is established.

Where federal legislation makes specific reference to aboriginal property, the clear and plain test must be applied to determine if the right is extinguished. For example, section 91 of the Indian Act restricts the disposition of certain types of aboriginal property, but does the section extinguish the aboriginal right to ownership of that property? Arguably, in absence of a clear intention to vest ownership in the Crown, aboriginal rights to section 91 property are simply regulated.

The conclusion that aboriginal rights to cultural property located on or under federal lands are not extinguished raises the issue of the validity of the proposed federal Archaeological Heritage Protection Act. As the bill will be enacted after the Constitution Act, 1982, secured aboriginal rights, it will not have the effect of extinguishing aboriginal rights and it will regulate only the exercise of aboriginal rights to cultural property if the justification test is met. Arguably the test has been met for the protective provisions of the legislation, but perhaps not the ownership provisions. Protection of archaeological resources and the conservation of those resources is a valid federal objective. Given extensive consultation with aboriginal groups in the drafting of the Act and the current policy of helping aboriginal groups develop suitable repositories for aboriginal artifacts, it is difficult to

241. See *Sparrow*, 70 D.L.R.4th at 411.

argue the achievement of the federal objective is inconsistent with upholding the honor of the Crown. In fact, one might even argue that the federal government has a fiduciary obligation to develop or assist in the development of such a scheme.²⁴² On the other hand, provisions vesting ownership of artifacts in the Crown may not withstand aboriginal opposition because this provision offends the policy of minimal interference. Further, the Act does not include a provision for compensation of expropriated ownership rights.

A similar extinguishment analysis can be applied to the Historical Resources Act.²⁴³ Sound arguments can be made to challenge the constitutional competency of the provincial government to extinguish or regulate aboriginal rights. For example, one could argue that section 88 of the Indian Act, which reverentially incorporates provincial law as federal law upon certain conditions being met, is a breach of the federal government's fiduciary duty and an improper subdelegation of federal jurisdiction. The effect of section 88 is the abandonment of federal responsibility for Indians to the provinces and the subjection of Indians to whatever laws the provinces choose to enact. Despite these and other arguments, the courts have held in many cases that provincial legislation can limit the exercise of aboriginal rights.²⁴⁴ Assuming this position is maintained, the Historical Resources Act may affect the continuance of aboriginal rights. As discussed, the Crown purports to claim title only to objects in or under provincial or private lands unless positive action is taken by the Crown.²⁴⁵ No such action was taken prior to 1982; therefore, the only property rights that might be limited are rights to archaeological property. In absence of clear reference to aboriginal ownership of archaeological resources, one can argue that the clear and plain test renders this legislation merely regulatory of aboriginal rights. Therefore, the right continues to exist, and regulation must be justified if challenged.

Federal and provincial control of heritage resources may have extinguished aboriginal ownership rights if control arose from physical occupation of an area prior to 1982 and if aboriginal ownership of moveable property is completely inconsistent with the reason for occupation. For example, if land is set aside as a park because of its archaeological significance or for the purpose of protecting and controlling access to the site, full recognition of aboriginal ownership rights might be incompatible with the purpose of the park. However,

242. See *supra* note 117.

243. R.S.A. ch. H-8 (1980).

244. See Leroy Little Bear, *Section 88 of the Indian Act and the Application of Provincial Laws to Indians*, in *GOVERNMENTS IN CONFLICT*, *supra* note 191, at 175. But see *Horseman v. The Queen*, [1990] 1 S.C.R. 901, 936-38 (Can.).

245. See discussion *supra* text accompanying notes 138-42.

the rights limited may include only those rights that "seriously compromise the Crown's objectives,"²⁴⁶ such as the right to disposition. This compatibility analysis will have to be applied to all federal and provincial occupation of parks and other protected areas that are subject to aboriginal rights of a native group.

The clear and plain analysis can also be applied to limitation of actions legislation.²⁴⁷ In the case of provincial limitations, the constitutional jurisdiction of the Crown to extinguish aboriginal rights through limitation of actions legislation will have to be addressed. As limitation of actions legislation fails to address directly aboriginal property rights as distinct from property rights in general, the legislation is unlikely to pass the clear and plain test. Further, one might argue that its application to aboriginal groups contravenes section 15 of the Charter of Rights and Freedoms²⁴⁸ because the effects of the legislation are more severe on aboriginal rights claims than other property claims.²⁴⁹ The severity arises from the fact that aboriginal rights claims are historical claims and aboriginal rights is an emerging concept. Consequently, knowledge of enforceable rights cannot be assumed. These arguments, combined with the current confusion in Canadian law concerning the application of the legislation to aboriginal peoples, suggest that limitation of actions legislation should not be effective to bar aboriginal rights claims.²⁵⁰

Heritage conservation may also be inoperative to the extent that it affects aboriginal rights to cultural property because its application may be contrary to equality and religious freedom guarantees in the Charter of Rights and Freedoms.²⁵¹ For example, aboriginal people

246. See, e.g., *Quebec v. Sioui*, [1990] 1 S.C.R. 1025, 1073.

247. See discussion *supra* text accompanying notes 67-77.

248. Canada Act, 1982 (U.K.), 1982 ch. 11.

249. Section 15 reads as follows:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15.(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Canada Act, 1982 (U.K.), 1982 ch. 11, sched. B (Constitution Act, 1982).

250. The issue of extinguishment by operation of limitation of actions legislation will be addressed by the Supreme Court in the *Bear Island* appeal.

251. Section 2 of the Canada Act, 1982 (U.K.) 1982 ch. 11, sched. B (Constitution Act, 1982) reads as follows: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association."

could argue that the treatment of their human remains as archaeological property and the subject of scientific study offends the equality provisions of the Charter because their skeletal remains are not provided the same respect and protection as other skeletal remains.²⁵² Although there are a few non-Indian burial sites that are excavated for archaeological purposes, the vast majority of these sites are aboriginal burial grounds. Further, it is arguable that the application of heritage conservation legislation, parks legislation, and limitation of actions legislation to extinguish or limit access to sacred objects interferes with aboriginal religious practice and are therefore contrary to the guarantee of freedom of religion.²⁵³ These arguments would be subject to the argument that such limitations are justifiable in a free and democratic society.²⁵⁴ Where claims relate to cultural property that has been out of the possession of aboriginal persons for a substantial period of time, private property rationale may be invoked to save the legislation.

C. Resolution of Disputes

If aboriginal rights to cultural property are not extinguished, what laws should govern the resolution of disputes: common law principles of property law, tribal customary law, or both? The choice of law for the resolution of disputes may depend upon the willingness of the Supreme Court to recognize political sovereign rights as aboriginal rights. An examination of the concept of residual sovereignty and recognition of indigenous traditional laws in the United States provides a useful illustration of this point. The acceptance of inherent rights in the United States has led to the categorization of Indian nations as "domestic dependent nations."²⁵⁵ 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 presumed retained unless surrendered by treaty, overruled by congressional enactments, or limited by reasonable state regulation.²⁵⁶ As a result, Indian Nations in the United States have the

252. Similar arguments have been made in the United States. See Higginbotham, *supra* note 6, at 99-101.

253. Here it must be recognized that native people do not divide their lives into social, political, cultural, and other dimensions in the same way other Canadians do. However, the emphasis on the sacred in their claims to cultural artifacts could give rise to an argument within the scope of constitutional provisions which protect religious practice. For the application of these arguments in the context of American constitutional law, see *supra* notes 4-6.

254. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

255. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

256. Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637 (1978); see John D. Hurley, *Aboriginal Rights, the Constitution, and the Marshall Court*, 17 LA REVUE JURIDIQUE THEMIS 403 (1982-83); *Quebec v. Sioui*, [1990] 1 S.C.R. 1025, 1072 (Can.).

authority to enact and enforce their own property laws within their own lands.²⁵⁷

Tribal laws relating to the sale, disposition, and removal of tribal property have been applied to determine the legal validity of a property transaction in competing claims for ownership rights. For example, where an Indian woman attempted to remove tribal property in violation of a tribal bylaw preventing sale, disposition, lease, or encumbrance of any assets of the village without the consent of the tribal council, the court upheld the tribal law on the "well-established policy-rule that the courts will not interfere with the internal workings of Indian tribes."²⁵⁸ The court indicated that tribal laws will apply to tribal members, even where they reside in different states.²⁵⁹

Where tribal property has been transferred to non-aboriginal persons residing outside of Indian lands, a mixed approach has been adopted. In several cases, the validity of the transfer has been analyzed in accordance with tribal law and the effect of invalidity in accordance with American law rendering dispositions that violate tribal law ineffective.²⁶⁰ Consequently, museums and other potential purchasers of tribal property in the United States must look to tribal law and custom to determine whether an Indian transferor can convey title by gift, sale, devise, or any other manner.²⁶¹ It is no defense that an object is purchased in good faith. Rather, the innocent purchaser's remedy is against the wrongful seller, not the rightful owner.

Assuming an aboriginal right to tribal property, will the same approach be adopted in Canada? Historically, Canadian law has denied the sovereign rights of aboriginal peoples except to the extent that powers of government have been granted to aboriginal peoples by federal action and given force by legislation.²⁶² However, in May of 1990, the Supreme Court characterized the historical relations between First Nations and the Crown as nation-to-nation relations. Stating that Indian nations were recognized in their relations with European nations that occupied North America as independent nations, the court characterized the historical relationship between Indian nations and the British Crown as *sui generis* falling somewhere between "the kind of relations conducted between sovereign states and the relations that such states had with their own citizens."²⁶³ At first glance, these statements, coupled with the emphasis on consent to alter treaty rights and limi-

257. Higginbotham, *supra* note 6, at 110.

258. Johnson v. Chilkat Indian Village, 457 F. Supp. 384, 389 (D. Alaska 1978).

259. *Id.*

260. See Echo-Hawk, *supra* note 6, at 441-44.

261. See *id.* at 443.

262. See, e.g., Eastmain Band v. Gilpin, [1987] 3 C.N.L.R. 54 (Que. Prov. Ct.); Delguumkw v. A.C.B.C (Mar. 8, 1991) Smithers No. 0843, at 224-25.

263. See Quebec v. Sioui, [1990] 1 S.C.R. 1025, 1038 (Can.).

tations on occupation theory, suggest a movement toward recognition of inherent sovereign rights. However, they cannot be read independently of the *Sparrow* decision.

Although *Sparrow* suggests an inherent rights approach to the definition of aboriginal rights and the blending of Canadian law and aboriginal traditions in the definition process, the decision does not extend inherent rights to include sovereign rights. Rather, it affirms Crown sovereignty over aboriginal peoples and places limitations on that power by emphasizing fiduciary obligations, the need for clear and plain language to extinguish aboriginal rights, and the prohibition of unjustified regulation of aboriginal rights after 1982.

On the question of sovereignty, the court relies on section 91(24) of the Constitution Act, 1867, to conclude that there was "never any doubt that sovereignty and legislative power and indeed underlying title . . . vested in the Crown."²⁶⁴ The impact of this conclusion on aboriginal claims for sovereignty and the application of tribal law in the resolution of disputes is uncertain. Perhaps the court is retaining a contingent rights approach to sovereignty, suggesting that only those powers recognized and delegated by the federal and provincial Crowns to aboriginal peoples are enforceable in law.²⁶⁵ On the other hand, the Court's comments may be limited in application to external rights of sovereignty, leaving room to recognize the continued existence of internal rights to self-government. This could render the same results that arise from the recognition of domestic dependent Indian nations in the United States: the application of tribal laws to tribal members and the blending of two legal traditions where the rights of non-aboriginal persons residing outside of Indian territories are at issue.

The conclusion that all sovereign rights have been extinguished can be attacked on several grounds. First, the conclusion is inconsistent with the Supreme Court's statement that extinguishment through legislative action must be clear and plain. It is not clear that the intention of section 91(24) was to extinguish aboriginal rights nor does the enactment of section 91(24) necessarily imply sovereign rights are terminated. There is strong support for arguments that the intention of section 91(24) was simply to centralize the administration of government policy in the federal government at the time of confederation and not to change the prior practice of consensual surrender of rights.²⁶⁶ Second, the rejection of internal rights to governance is at odds with the Court's emphasis on a generous and liberal interpretation of section 35 and the recognition of aboriginal traditions in the definition of rights. Third, as argued by Asch and Macklam, the contingent rights

264. *Regina v. Sparrow*, 70 D.L.R. 385, 404 (Can. 1990).

265. See Asch & Macklam, *supra* note 187, at 508.

266. See *supra* note 194.

theory is based on colonial acquisition theory that assumes the superior rights of European nations.²⁶⁷

The underlying theory of acquisition is the settlement thesis which stipulates that discovering European nations acquired title to and sovereign jurisdiction over unoccupied lands prior to settlement by colonized nations. For the purposes of applying the theory, Indian lands were historically treated by Canadian courts as unoccupied lands.²⁶⁸ However, it is clear that the courts have completely rejected this theory in international law.²⁶⁹ Further, in support of maintaining a theory of contingent rights, Canadian courts have relied on United States decisions describing colonial law and practice which were overruled by the United States Supreme Court to the extent that they adopt this thesis.²⁷⁰ It is possible that a different view could emerge from the Canadian Supreme Court if these arguments were raised.²⁷¹

If sovereign rights have been extinguished, the resolution of disputes relating to ownership of cultural property may be governed by principles of common law and equity. Likely, the inherent rights approach will be adopted to determine whether there is a communal or collective aboriginal right to cultural property claimed by an aboriginal group. However, the denial of aboriginal sovereignty could result in the need for expert evidence to support these claims. Further, questions such as sufficient cultural affiliation of the group and the validity of transfer of title may be determined by principles of common law unless bylaws have been passed and approved under the Indian Act or other powers of control have been recognized or granted by legislation or agreement. Assuming that limitation of actions legislation does not bar aboriginal claims, this result will still favor aboriginal peoples as the recognition of a communal interest in property and the application of *nemo dat* logically lead to the conclusion that only the group can transfer valid title. However, equity could intervene to place conditions on return compatible with the private property rationale.

If aboriginal sovereignty is accepted, the resolution of disputes could follow the model of the United States which emphasizes tribal law at

267. See Asch & Macklam, *supra* note 187, at 508-12.

268. See *id.*

269. See Western Sahara I.C.J. Reports 6, at 39 (1975); Douglas E. Sanders, *The Re-emergence of Indigenous Questions in International Law*, in CANADIAN HUMAN RIGHTS YEARBOOK 29 (Jean-Denis Archambault & R. Paul Nadin-Davis eds., 1983).

270. Canadian courts rely on the decision of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), which upholds the doctrine of discovery as the foundation of Crown title and sovereignty. This position was reconsidered in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). See also Jackson, *supra* note 194. 271. These arguments have been raised in *Delguumkw v. A.C.B.C.* (Mar. 8, 1991) Smithers No. 0843, discussed *supra*. The issue will unlikely be resolved until this case makes its way to the Supreme Court of Canada.

all levels where property remains in the territorial jurisdiction of the Indian group or is transferred among members of the group wherever situated. Once non-aboriginal persons not situated on Indian lands are involved, a combination of tribal and common law principles may be applied.

The claim of the Mohawk people against the Glenbow-Alberta Institute during the "Spirit Sings" controversy is an example of a repatriation claim based on aboriginal and sovereign rights. In their claim, the plaintiffs assert that they have an aboriginal right to their own customs, cultures, traditions, spiritual and other values, and beliefs and practice of the same. Noting that the Mohawk Nation has never been conquered, has maintained its sovereignty, and has always had its own laws, the statement of claim argues that the Mohawk people own the cultural property at issue and the disposition and display of that property is in violation of Mohawk traditions and law. Consequently, it was illegally appropriated, converted, and is being wrongfully retained by the Glenbow-Alberta Institute. The plaintiffs draw on Mohawk law and Canadian law to support their claim. The Court of Queen's Bench accepted that the Mohawk pleadings evidenced a serious issue to be tried but failed to grant an interim injunction for the return of the property for reasons already discussed *supra*. The matter never proceeded to trial and is yet to be brought before Canadian courts.

Regardless of the Supreme Court's position on the retention of sovereignty, the blending of two traditions in the resolution of disputes remains a viable alternative in Canadian law. Although *Sparrow* seems to exclude aboriginal sovereignty in favor of Crown sovereignty, what may happen is an infusion of tribal and Canadian law in the interpretation and protection of aboriginal rights. It is clear that in some respects tribal custom is becoming a source of interpretation of section 35. Rather than adopting an "either/or" approach and focusing on competing sovereignties, *Sparrow* provides a mechanism for blending both traditions and recognizing a full range of rights. It is the willingness of the court to adopt a fresh, culturally sensitive perspective and not the security of Canadian sovereignty which is the real issue in determining the laws which will govern future claims.

VI. Conclusion

Relying only on principles of common law, the likelihood of a successful repatriation claim is slim. Revisions to the common law by limitation of actions legislation and heritage conservation schemes provide security of title in present custodians of aboriginal cultural property acquired either more than two years ago or after the enactment of the ownership provisions in heritage conservation legislation.

However, this article has illustrated that recent developments in the law of aboriginal rights now cast serious doubt on the security of museum title and title of other custodians of aboriginal cultural property where such property is viewed as collective property and has been disposed of by individuals. Given the complexity and cultural sensitivity of this issue, it is essential that governments and museums work in cooperation with aboriginal peoples to resolve issues concerning the management, care, and custody of cultural patrimony. A failure to do so will result in lengthy and costly litigation, to the detriment of all interested parties.