LIMITATIONS, LEGISLATION AND DOMESTIC REPATRIATION

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Introduction

For many aboriginal peoples in Canada the concept of aboriginal rights includes a right to exercise control over cultural property.[1] To date, the assertion of this right has, in most cases, been limited to extra-judicial negotiation.[2] For example, modern land claims agreements such as the Nunavut Settlement Agreement provide for greater aboriginal participation in heritage resource management and federal assistance in repatriation of heritage resources.[3] Museums and aboriginal peoples are also cooperating in the development of repatriation, management, access and custodial policies.[4] However, an underlying assumption by non-aboriginal participants in both of these processes is that a strict legal

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1 The term cultural property is used in this article to describe movable objects which have sacred, ceremonial, historical, traditional or cultural importance and may be viewed as collective property of the First Nation asserting a claim. Aboriginal perspectives on issues such as identification of cultural property and persons with authority to alienate or convey such property may vary in accordance with the laws, traditions and property systems of claimant groups.

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

3 See *e.g. Agreement-in-Principle Between the Inuit of the Nunavut Settlement Area and Her Majesty in The Right of Canada* (Ottawa: Department of Indian Affairs and Northern Development, 1990) arts. 36 and 37.

4 A recent example of this approach is reflected in the recommendations of the report of the Task Force on Museums and First Peoples, which emphasizes full involvement of First Nations as equal partners and the resolution of repatriation claims on a case by case basis which is not limited to strict legal considerations. See *Turning the Page: Forging New Partnerships Between Museums and First Peoples* (Ottawa: Assembly of First Nations and Canadian Museums Association, 1992). For further discussion of the Task Force recommendations see C. Bell, "Reflections on the New Relationship: Comments on the Task Force Guidelines for Repatriation" in *Legal Affairs and Management Symposium* (Ottawa: Canadian Museums Association, 1992) at 55.

analysis of ownership will not favour aboriginal claimants. A distinction is drawn between existing legal rights and moral obligations, leaving aboriginal negotiators at the mercy of non-aboriginal concepts of fairness, professional ethics and political obligation.

The presumption of ownership by government and museums is based in traditional legal analysis which looks to the common law of property and legislation to resolve ownership claims.[5] The application of common law principles requires an analysis of the chain of title through which ownership is asserted. Loss, theft, finding, abandonment and authority to transfer title are important factors in determining which principles should be applied. In some cases, such as when a museum is in possession of property that has been stolen, the common law will place ownership in aboriginal claimants. However, common law rights of ownership may be superseded by legislation.[6] Of particular significance are provincial heritage conservation laws and limitations of actions legislation. The former laws vest ownership of archaeological resources located on provincial lands and private lands in the provincial Crown. Definitions of archaeological property are broad enough to bring some aboriginal cultural property within the scope of the legislation.[7] Limitation of actions legislation requires that actions for the recovery of property be brought before Canadian courts within a specified time. In many provinces, failure to assert a claim before the expiration of the limitation period results in extinguishment of common law rights to ownership and statutory ownership by the current possessor.[8] Although recent developments in Canadian aboriginal rights law generate compelling arguments that challenge the extinguishment of aboriginal ownership by provincial statutes, these arguments have yet to be considered by the courts and have had no bearing on the negotiation process.[9]

The influence of provincial laws on the determination of legal ownership highlights the significant role a province can play in supporting

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5 Few federal and provincial statutes expressly address aboriginal cultural property. Notable exceptions include s. 91 of the *Indian Act*, R.S.C. 1985, c. I-5 (which provides that no person may acquire title to specified ceremonial and totemic objects) and provisions in some provincial heritage legislation concerning Indian burial grounds. See *e.g. Heritage Property Act*, S.S. 1979-80, c. H-2.2, s. 65.

6 For further discussion of common law arguments see C. Bell, "Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate" (1992-93) 17:2 Am. Indian L. Rev. 457 at 465-81.

7 For further discussion of provincial heritage conservation legislation see *ibid.* at 481-90.

8 See *e.g. Limitations Act*, R.S.B.C. 1979, c. 236, s. 9. For a general discussion see: J. E. Cote, "Prescription of Title to Chattels" (1968-69) 7 Alta. L. Rev. 93.

9 For discussion of aboriginal rights arguments see Bell, *supra* note 6 at 501-20. See also C. Bell "Repatriation of Cultural Property and Aboriginal Rights: A Survey of Contemporary Legal Issues" (1992) 17:2 Prairie Forum 313.

aboriginal cultural autonomy. Although it is arguably beyond the scope of provincial power to pass a specific aboriginal cultural property law with the intent of regulating potential aboriginal rights to ownership, a province may narrow the scope of existing property laws of general application that have the potential effect of nullifying aboriginal ownership claims.[10] A province committed to aboriginal control of aboriginal cultural property could, within the framework of general property legislation, significantly increase the current bargaining power of aboriginal participants in repatriation negotiations. To illustrate this point, this paper will examine the potential impact of provincial limitation of actions legislation on repatriation claims and recent initiatives by the province of British Columbia to strengthen aboriginal control over archaeological resources.

Potential Impact of Limitation of Actions

All provinces in Canada have enacted legislation that requires lawsuits to be brought before the courts within what the legislature defines as a reasonable time.[11] The general rationale for such legislation is the notion that individuals should not be "subject indefinitely to the threat of being sued over a particular matter."[12] Such legislation is also intended to address evidentiary problems such as death of witnesses, lapse of memory and destruction of documents, which arise as time passes.[13] Although the scope of the legislation varies from province to province, all provinces have provisions limiting the time within which actions can be brought to recover personal property. In most cases, time begins to run at the date of wrongful interference with the property at issue. The extent of the limitation period varies from province to province. These limitations are justified on the basis that they provide for greater certainty of title, encourage prompt settlement of disputes and protect

10 Under s. 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, the federal government is given jurisdiction over Indians and lands reserved for Indians. S. 88 of the *Indian Act*, R.S.C. 1985, c. C-51, by reference incorporates provincial law that incidentally affects "Indianess" as federal law and renders it applicable to Indian peoples in some circumstances. Recent court decisions suggest "Indianess" refers to Indian status and aboriginal rights such as traditional hunting. This concept could be expanded to include other aboriginal rights as they emerge. However, legislation which intentionally and expressly singles out Indian people for special treatment is *ultra vires* the jurisdiction of the provincial government. See *Dick* v. *R.* (1985), 23 D.L.R. (4th) 175.

11 If action is brought in the Federal Court, applicable provincial limitation periods are incorporated pursuant to s. 38(1) of the *Federal Court Act*, S.C. 1970 (2d Supp.), c. 10.: *Apsassin* v. *Canada*, [1988] 1 C.N.L.R. 73 (F.C.T.D.), aff'd [1993] 2 C.N.L.R. 20 (F.C.A.).

12 Ontario Law Reform Commission, *Report on Limitation of Actions* (Toronto: Dep't of the A.G., 1969).

13 *Ibid.* For a general discussion of limitations rationale see also R. Bauman, "The Discoverability Principle: A Time Bomb in Alberta Limitations Law" (1993) 1 Health L.J. 65 at 67-68.

reasonable expectations of innocent purchasers. In most provinces, failure to bring an action within the designated time extinguishes the claimant's rights to ownership.[14]

In the United States there is a policy against the application of limitation periods to aboriginal claims in absence of clear federal statement to the contrary.[15] In Canada the issue has yet to be resolved. The application of limitation periods to aboriginal property claims has only been addressed by the Supreme Court of Canada in circumstances where established common law exceptions were available and relied upon to suspend the operation of the provincial legislation.[16] However, the common understanding regarding repatriation negotiation is that such legislation applies in absence of express provincial exceptions to the contrary. Support for this position can be drawn from lower court decisions which have applied limitation periods to deny aboriginal land claims and claims against the Crown for breach of fiduciary obligation.[17] As many contemporary repatriation claims arise from actions which took place a long time ago, the presumption of museums and other custodians of aboriginal cultural property involved in repatriation negotiations is that any legal rights which aboriginal claimants may have had are now statute barred. However, close examination of limitations law does not automatically give rise to such broad conclusions.

The determination of whether a particular claim by an aboriginal group is unenforceable in Canadian courts may rest on the application of existing common law and statutory exceptions, which are not unique in their application to aboriginal peoples as a group or aboriginal cultural property as a special class of property. For example, where there has been fraudulent concealment of the existence of a cause of action, "the limitation period will not run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it."[18] Dishonesty or improper motives are not necessary to

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14 Some legislation, such as the Alberta *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 15, is silent on this point. Consequently, it is unclear whether failure to bring an action on time operates to extinguish rights or merely deprives the owner/prior possessor of an action in court. This issue is of some importance because the common law remedy of recaption may not be affected if title is not extinguished.

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

16 Limitation periods were raised in *Guerin* v. *R.*, [1984] 2 S.C.R. 335. The Supreme Court held limitations legislation did not apply on the facts, based on the established rule that where there is fraudulent concealment of an action, time limits will not run until fraud is discovered or ought to have been discovered with reasonable diligence (at 390).

17 See *e.g. Apsassin* v. *Canada* (F.C.A.), *supra* note 11 at 59-65, Stone J.A. Application for leave to the Supreme Court of Canada has been granted and the issue of limitations will be addressed on appeal. See also, W. B. Henderson, "Litigating Native Claims" (1985) 19 L. Soc. Gaz. 174 at 191-92.

18 *Supra* note 16 at 345.

establish fraud. Rather, conduct which is considered unconscionable given the special relationship between the parties is sufficient.[19] Even in absence of fraud or unconscionable conduct, limitation periods may not run against a claimant where facts relevant to determining a right of action are not reasonably known to the claimant until they are actually discovered. According to the doctrine of reasonable discoverability recently articulated by the Supreme Court, the commencement date for a cause of action should be the earlier of (1) the date the claimant discovered the facts material to the cause of action or (2) the date the claimant, exercising reasonable diligence, should have discovered these facts.[20] As a result of this doctrine, it is now possible to bring litigation arising from events which occurred decades ago. Consequently, some courts have been reluctant to enforce the doctrine of reasonable discoverability.[21] Further, in response to this development, the Province of British Columbia enacted a so-called "ultimate" limitation period of thirty years to which the doctrine of reasonable discoverability does not apply.[22]

The running of time may also be postponed because the potential plaintiff is under a disability such as unsoundness of mind or infancy.[23] These arguments may be applied by analogy to aboriginal claimants if their relationship to the defendant is viewed as one of dependence or they suffer from an educational or similar disadvantage. For example, in his dissenting opinion in the *Apsassin* case, Isaac C.J. argued:

> Like victims of childhood sexual abuse, the appellants were simply unable to appreciate the fact that when the Crown "suggested" that they surrender their Native rights to lands, they might be giving up something of legal value.[24]

Depending on the facts, similar analogies might be drawn in a repatriation claim. However, the paternalistic nature of this argument may be offensive to some litigants and in my opinion should be avoided if possible.

One might also try to challenge the constitutional validity of the application of limitation periods to aboriginal peoples based on the equality rights provisions in s. 15 of the *Canadian Charter of Rights and*

19 *Ibid.*

20 See *City of Kamloops* v. *Nielson*, [1984] 2 S.C.R. 2 and *Central Trust Co.* v. *Rafuse*, [1986] 2 S.C.R. 147 at 224. For a discussion of this doctrine and its application see Bauman, *supra* note 13 at 70-78.

21 Bauman, *ibid.* at 74-78.

22 *Limitation Act*, R.S.B.C. 1979, c. 236, s. 8; *Apsassin* v. *Canada*, *supra* note 11 at 64, 72, 96.

23 Ontario Law Reform Commission, *supra* note 12 at 91, 96-100.

24 *Appasin* v. *Canada* (F.C.A.), *supra* note 11 at 95.

Freedoms.[25] In *Andrews* v. *Law Society of British Columbia*, the Supreme Court of Canada found that a British Columbia law which excluded non-citizens from admission to the bar violated s. 15.[26] Several important principles relating to the interpretation and application of s. 15 were articulated by the court. To establish discrimination, the plaintiff group (or individual) must show it has suffered disadvantage because of the prohibited grounds in s. 15 (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability) or an analogous ground. According to McIntyre J., legislation could be discriminatory if it "has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or [it] withholds or limits access to opportunities, benefits, and advantages available to other members of society."[27] According to Wilson J., the decision that a ground or identifiable group (such as non-citizens) is "analogous" must be made "in the context of the place of the group in the entire social, political and legal fabric of our society."[28] The case also stated that discrimination does not have to be intentional or express in the wording of the legislation. Rather, discrimination can also be found if the law has a disproportionately adverse impact on a particular group or person.

The *Andrews* case may provide a foundation to argue that limitation periods barring aboriginal claims to tribal cultural property are discriminatory because such legislation has a disproportionately adverse impact on aboriginal groups claiming collective title to land or personal property. Collective aboriginal title to land was not even recognized in law until the early 1970s.[29] Collective entitlement to movable cultural property is still an emerging area of law. Unlike other claims to personal property, the vast majority of claims by an aboriginal group will be based on actions which happened decades ago when aboriginal peoples did not have knowledge of, or assistance of, the law or the law itself was

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25 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11. Section 15 reads as follows:

(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.

(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.

26 (1989), 56 D.L.R. (4th) 1 [hereinafter *Andrews*].

27 *Ibid.* at 18.

28 *Ibid.* at 32, Wilson J. It is debatable whether discrimination must be based on an immutable personal characteristic of an individual or group. See P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1167-71.

29 *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313.

discriminatory and would not withstand a contemporary *Charter* challenge.[30] Perhaps Japanese Canadians who had property confiscated by the Canadian government during the Second World War are the only other group that can assert this kind of disadvantage.

The differential impact of provincial limitations legislation was considered by the Federal trial court in *Apsassin*.[31] Aboriginal plaintiffs challenged the application of s. 8 of the B.C. *Limitations Act* on the basis that other provinces did not have an ultimate limitation period and therefore persons bringing action in British Columbia were not treated the same as plaintiffs in other jurisdictions. The Court rejected this argument, asserting that s. 15 does not provide for identical treatment for all regardless of circumstances. Rather, it merely guarantees that "persons similarly situated should receive similar treatment."[32] The *Charter* issue was not addressed on appeal. However, the plaintiffs in the case have been granted leave to the Supreme Court of Canada, and it is likely the *Charter* arguments will be raised once again. Chances for succeeding on the s. 15 argument are greater, as the decision under appeal was decided before *Andrews*, which stated that the similarly situated test was "seriously deficient" and that it should no longer be used.[33]

Where sacred objects are at issue, one might also argue that limitation periods are a violation of freedom of religion.[34] If such legislation operates to extinguish title to sacred objects of contemporary importance, this could be viewed as interference with aboriginal religious practices.

The main problem with *Charter* arguments is the many escape routes that the court can take to avoid their application, including the argu-

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30 One of the most famous extra-judicial repatriation claims involves the Museum of Civilization and the Kwakiutl Potlatch collection. In that case ceremonial objects were seized in 1922 pursuant to anti-potlatch provisions contained in the *Indian Act* from 1866 until 1951. After years of negotiation the objects were returned to the aboriginal claimants to be housed in federally funded and Kwakiutl operated museums. See C. Henderson Carpenter, "Secret, Precious Things: Return of Potlatch Art" (May/June 1981) Art Magazine at 64; B. Shein, "Playing, Pretending, Being Real" (Spring 1987) Canadian Art at 76; and G. Cranmer Webster, "The R Word" (Fall 1988) Muse 43.

31 *Supra* note 11.

32 *Ibid.* at 147.

33 *Supra* note 26 at 10-13.

34 *Constitution Act, 1982, supra* note 25, s. 2. Section 2 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.

ment that interferences with *Charter* rights are not unconstitutional if they can be justified in a free and democratic society.[35] The policy behind limitation of actions legislation discussed earlier in this article could be viewed by the court as fundamental in a free and democratic society despite the adverse impact of the legislation on aboriginal property claims and religious practice. Given the historic influence of policy considerations, such as certainty of title, in the evolution of Canadian law, this escape route would be alluring to a conservative court. The perceived need to know who owns what so that conflict can be avoided and productivity encouraged, could determine the outcome of the dispute.

Given the above, the likelihood of a successful challenge to limitation periods based on existing exceptions and *Charter* challenges is uncertain. Greater likelihood of success may rest in the ability to base repatriation claims in an broad concept of aboriginal rights. Although the impact of aboriginal rights law on repatriation claims has yet to be brought before Canadian courts, recent development in Canadian aboriginal rights law suggests an expansion of historical definitions of aboriginal rights beyond land rights. The legal foundation for an expanded definition may lie in s. 35(1) of the *Constitution Act, 1982*[36] and in the reasoning of the Supreme Court of Canada in the *Sparrow* decision, which calls for recognition of the traditions of aboriginal peoples in the definition of their rights and a liberal interpretation of s. 35(1).[37] A detailed analysis of the potential aboriginal right to return of movable tribal cultural property is beyond the scope of this article.[38] The point I wish to develop here is that other techniques to avoid limitation periods may be available if the courts recognize such a right.

In 1990, the Supreme Court of Canada placed significant limitations on the power of the federal Crown to extinguish aboriginal rights. Further, as a result of the reasoning in the *Sparrow* case, one might argue that the power to extinguish an aboriginal right is beyond the jurisdiction of the provinces. In *Sparrow*, the Supreme Court held that in order for legislation to extinguish an aboriginal right, a manifest intent to extinguish must be clear and plain.[39] The Court does not elaborate on the meaning of clear and plain extinguishment. In that case an express prohibition in federal fishing regulations that *no person* shall fish with-

35 *Andrews*, *supra* note 26. There is some debate whether the strict standard of justification under s. 1 should be applied to equality rights infringements. See Hogg, *supra* note 28 at 1165-67.

36 *Supra* note 25.

37 *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385.

38 *Supra* notes 6 and 9.

39 *Supra* note 37 at 401.

out a licence was found not to evidence a clear and plain intent to extinguish an aboriginal right to fish. As there are few provisions in statutes or regulations which so clearly conflict with the exercise of an aboriginal right as prohibition does, some have suggested that clear and plain means actual consideration must have been given to the impact of the legislation on the aboriginal right at issue.[40] Rights not effectively extinguished prior to the coming into force of the 1982 *Constitution Act* are protected by s. 35. Legislation limiting these rights must be justified. The Crown must establish a valid legislative objective and must show that the objective is accomplished in such a way as to uphold the honour of the Crown. Issues to be addressed in this process include the fiduciary obligation of the Crown, minimal interference with aboriginal rights, consultation and compensation.[41]

The adoption of the "clear and plain" test bolsters arguments that limitation of actions legislation cannot effectively extinguish an aboriginal right to movable cultural property. Under s. 91(24) of the *Constitution Act, 1867*, the federal government has jurisdiction over "Indians and lands reserved for the Indians."[42] Although this section has been interpreted to allow provinces to pass general laws of application that have an adverse effect on aboriginal peoples, one could argue that if such legislation purports to extinguish an aboriginal right through clear and plain intent, this is *ultra vires* the jurisdiction of the province.[43] Alternatively, applying the "clear and plain" test to limitation legislation, the court may conclude that the intent of the legislature to bar claims arising from aboriginal rights is not clear and plain. A clear intent to terminate aboriginal rights claims to property is not evidenced or necessarily implied in the policy behind the legislation. Coupled with the rule of interpretation that ambiguous phraseology is to be interpreted in favour of aboriginal peoples, this argument suggests aboriginal rights of ownership continue to exist. Consequently, the only way for this legislation to effectively extinguish or limit the exercise of aboriginal rights property claims is to meet the justification tests articulated in *Sparrow*.[44]

Of the techniques articulated to avoid the application of limitation periods, the *Charter* and aboriginal rights arguments are the most likely

40 W. I. C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning" (1990) 15 Queen's L.J. 217.

41 *Sparrow*, *supra* note 37 at 412-13, 416.

42 (U.K.), 30 & 31 Vict., c. 3.

43 Thus the *Draft Heritage Conservation Act* (British Columbia, Minister of Municipal Affairs, Recreation and Culture, 1991) and Bill 21, *Heritage Conservation Statutes Amendment Act*, *infra* note 47, contain a provision to the effect that the legislation in no way affected aboriginal or treaty rights, as previously discussed in this paper.

44 *Supra* note 37.

to succeed. However, all of the above arguments are nebulous and have yet to be given direct consideration by the Supreme Court of Canada. Strong arguments to the contrary can be raised, a few of which have been given. As a result, the most effective way to combat the potentially harsh effects of limitation periods on repatriation claims, when political will favours return of tribal cultural property, is through legislative amendment. A provincial government could expressly except aboriginal claims to aboriginal cultural property from the application of limitation of actions legislation and prevent the denial of aboriginal ownership based solely upon the operation of this statute. The removal of limitation arguments would enhance the likelihood of aboriginal claimants having the best legal claim to property judged by current legal standards to have been acquired illegally. Such action obviously does little to resolve disputes as to which laws should apply in determining the legality of acquisition, the common law of property, aboriginal rights law or the laws of First Nations. However, recognition of the complexity of the issue in light of the absence of statutory ownership could increase the bargaining power of aboriginal negotiators. The removal of limitations arguments could also strengthen claims of descendants of original aboriginal owners who lost property subject to a repatriation claim. At common law, an ownership claim by descendants of an original owner might take precedence over title acquired through a finder. As the law currently stands, limitation periods running from the date of finding could effectively bar such a claim.

Amendments to limitation of actions legislation will not affect the Crown's statutory ownership and disposition of aboriginal archaeological resources as ownership to such resources arises by operation of different provincial legislation. Again, it is possible to argue that aboriginal ownership of aboriginal cultural property is an aboriginal right and provincial legislation which interferes with the exercise of that right is *ultra vires*, or at least must be justified in accordance with the *Sparrow* test. However, the obvious course of action for a province committed to aboriginal cultural autonomy is to amend its legislation to allow for greater aboriginal control over aboriginal archaeological property. Of particular interest are recent initiatives by the Province of British Columbia. *Heritage Conservation Act* amendments proposed by the Province of British Columbia illustrate how a province can accept some responsibility for creating barriers to aboriginal property claims and selectively dismantle them through amendments to existing provincial legislation. Although limited in its scope, the proposed legislation would substantially enhance control of archaeological resources, skeletal remains and grave goods by aboriginal peoples. Although it might be

argued that sections of the legislation that single out aboriginal peoples for special treatment are *ultra vires* the jurisdiction of the province, the federal government's acceptance of the constitutional validity of the B.C. approach opens the door for a similar process to be adopted by other provinces.[45]

The British Columbia Example

The *Heritage Conservation Act* amendments originally proposed by the province of British Columbia illustrate the role that provincial legislation could have in strengthening aboriginal control over aboriginal cultural property. The legislation was intended to be independent of, and in addition to, any rights First Nations may have by operation of the common law of aboriginal rights or treaty. Of particular concern to this article is Part 4, which dealt with "Ownership of Heritage Property." The proposed legislation has been challenged for a number of reasons by various First Nations in British Columbia.[46] As a result, most of Part 4 has been dropped from the draft legislation currently tabled before the British Columbia legislature. Only the provisions which exclude application of the legislation to aboriginal and treaty rights, vest ownership in museums and heritage organizations after a designated time has passed, and empower the province to enter agreements with First nations with respect to conservation of heritage sites and heritage objects remain.[47] However, a brief review of the proposed amendments remains useful to illustrate the potential impact provincial legislation can have in resolving ownership disputes.

Amendments proposed by the provincial government granted the provincial Crown ownership of all objects found in or on land that "contains materials, artifacts, or features of human origin . . . that are evidence or may be evidence of human occupation or use before November 15, 1958."[48] However, the Act also clearly subordinated the Crown ownership to claims of "true owners" and subjected Crown ownership of such goods to trust obligations.[49] Retroactive recognition of "true"

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45 *Supra* note 10. To date, legislation declared *ultra vires* has applied to the detriment of aboriginal peoples. It may be argued that legislation that benefits aboriginal peoples is valid. See *e.g.* A. Pratt, "Federalism in the Era of Self-Government" in D. Hawkes, *Aboriginal Peoples and Government Responsibility* (Ottawa: 1991) 19 at 53.

46 See *First Nations Heritage Symposium Analysis and Review*, Aboriginal Consultation on Heritage Symposium (Cape Mudge, 22-24 October 1994).

47 Bill 21, *Heritage Conservation Statutes Amendment Act*, 3d Sess., 35th Leg. B.C., 1994, cls. 3.1, 3.5 and 8.2.

48 *Draft Heritage Conservation Act*, *supra* note 43, ss. 19(1)(a) and 28(2).

49 *Ibid.* s. 28(3)-(5).

ownership rights of descendants and aboriginal groups was also included in the legislation. The legislation provided that an "inalienable and imprescriptible ownership of native human remains and grave goods vests in and shall be deemed always to have vested in the native people of British Columbia" and in particular the next of kin or where identity of the deceased or next of kin is not known, the band, tribal council or other Native organization that "represents descendants of the deceased person."[50] Further, it provided that claims based on common law or statutory ownership to objects removed from pre-colonial sites, skeletal remains and grave goods could not be used to counter aboriginal claims under the legislation. The relevant section provided:

> 28(10) No person is an owner of an object described in subsection (2) [artifacts removed from pre-colonial sites] or (5) [human remains and grave goods] by reason of
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> (a) being the finder of an object,
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> (b) being owner of the land within or upon which the object is found except as provided in subsection (9)[51]
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> (c) acquiring the object, before or after this section comes into force and notwithstanding the *Sale of Goods Act*, from a person who is not a true owner, or
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> (d) the expiration of a limitation period under the *Limitation Act*.

The effect of this provision is to retroactively nullify ownership claims to the identified property based on the common law of finding. This increases the likelihood of descendants and aboriginal groups having the best claim to being "true owners" of the property in question under the legislation. At common law, there is a presumption of ownership in favour of the landowner where objects are found under or attached to privately owned land. If finding occurs on privately owned land and the object is unattached, the finder is presumed to have superior rights unless the occupier of the land has a manifest intent to exercise control over the land and all things upon it. However, loss of property does not necessarily mean loss of ownership rights. Rather, finders, owners and occupiers have an inferior claim to title than claims by prior possessors or original owners. An ownership claim by the descendant of an original or "true" owner would arguably take precedence as well, assuming personal descendance from the individual who lost the object is proven (or group in the case of collective property).

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50 *Ibid.* s. 28(5).

51 This subsection provides that a person does not become owner of an object on or under land acquired from the Crown unless the disposition expressly states that title to the object is conveyed.

Without legislated interference, claims by descendants should take precedence over common law claims based on finding.[52]

Notably s. 28(10) did not address arguments based on abandonment, intermixture, accession, alteration and laches. An owner or possessor can divest himself or herself of ownership or possessory rights through abandonment. The first person to possess property after it is abandoned has the best title to it. However, to prove abandonment one must show the owner voluntarily and intentionally abandoned ownership rights to the property in question. For example, placing an object in a sacred place for religious purposes would not amount to abandonment.[53] Owners may also lose rights through intermixture, accession or alteration of goods. Intermixture occurs when there is confusion of goods owned by different people such that the property of each can no longer be distinguished. Accession laws may come into play when an object of lesser value is attached to an object of greater value. The common law may operate to place title in the owner of the greater value. Alteration occurs when property is converted into a different species. The person who converts the property into a new form may be deemed the owner. These types of problems are most likely to occur if cultural property in poor physical condition has been restored.[54] Finally, the equitable doctrine of laches may be invoked to bar a claim where lengthy delay in the assertion of ownership rights is viewed by the court as substantially prejudicing another party. This doctrine has been applied to the detriment of aboriginal claimants on the absence of fraud.[55]

Section 28(10) arguably does not affect objects bought, taken or otherwise acquired from aboriginal people because of the language of s. 28(2) and (5), which refer to objects found in or on land and grave goods respectively. This, for example, would not aid in title claims to property currently in the custody of museums purchased or otherwise legitimately acquired by museums even where such acquisitions are in conflict with the laws of the claimant First Nation. However, property sold in violation of the Act and subsequently donated or sold to a museum is covered by the Act. An aboriginal organization may apply to the Minister for assignment of possession of these objects or apply to the Supreme Court of British Columbia under s. 32 of the legislation for an

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52 See generally *Parker* v. *British Airways Bd.*, [1982] 2 W.L.R. 503 at 514 and T. J. Follows, "*Parker* v. *British Airways Bd.* and the Law of Finding of Chattels" (1982) 12 Kingston L. Rev. 1.

53 An illustration of this point is burial of funerary objects for some customary, spiritual or religious purpose. See *Charrier* v. *Bell*, 496 So.2d. 601 (La. Ct. App. 1986).

54 See Bell, *supra* note 6 at 473-74.

55 See Henderson, *supra* note 17 at 192.

order vesting ownership in them.[56] Section 32 also addresses special court processes to determine ownership and the possibility of compensation being ordered in favour of persons that, but for the legislation, would be viewed bona fide purchasers.[57] Provision is also made for heritage organizations and museums to apply to court for an order vesting ownership after a designated time has passed and reasonable attempts have been made to find the true owner. In the case of a museum, archive or gallery, the time period is two years.

Having raised the limitations of the proposed legislation, it is important to note that it still had a significant impact in the context of pre-colonial artifacts and grave goods found and subsequently disposed of in violation of the legislation. However, even in this context interpretive problems arise which may have contributed to the defeat by First Nations of the proposal in British Columbia. Disputes are left to be resolved by the courts; litigation is costly. A more appropriate mechanism for arbitrating disputes which would guarantee aboriginal participation is more desirable. The courts should be the last resort, rather than the first, given the variety of interests involved and contrasting views of ownership and legitimate acquisition in aboriginal and non-aboriginal communities. Notification to descendants and aboriginal groups is also an important issue. For example, in the proposed legislation there would have been no obligation to notify affected aboriginal persons or groups of the discovery of objects that would have fallen within the scope of the legislation. Although government background documents suggest collective property was intended to be covered by the legislation, this is not clear in the drafting nor is it clear that the laws of First Nations may be the source to determine what is collective tribal property. Finally, the role of aboriginal law in the resolution of disputes and the conceptualization of what is defined as an object of heritage value was not addressed.

Conclusion

A review of selected portions of the proposed B.C. legislation not only reveals many deficiencies but also provides a useful model to examine the potential impact provincial legislation can have in resolving ownership disputes over aboriginal cultural property. Of particular interest are the provisions which attempt to nullify common law claims and the impact such provisions could have had on ownership claims advanced by non-aboriginal custodians of pre-colonial artifacts and grave goods. Although it would be beneficial to extend such legislation to cover more

56 *Supra* note 43, s. 29(3).

57 *Ibid.* s. 32.

forms of property and the transfer of such property, this would require consideration of several other factors before such legislation would meet the approval of a provincial legislature. Of particular concern would be the impact of such legislation on the collections of museums and galleries. Museums would likely be concerned with issues such as continued public access to certain parts of the collection, potential liability in the event of competing aboriginal claims, costs of transfer, replacement or replicas of repatriated goods and appropriate facilities to house the objects returned.[58] These concerns arise from their public mandate to preserve and care for collections and the costs of repatriation. Because of these concerns, compromises by First Nations and museums will be necessary if provincial legislation is to aid in the negotiation process and the issue of repatriation is to be effectively addressed outside of the courts.

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58 See Bell, *supra* note 4.