# Justifications and Legal Considerations for Repatriation of First Nation Material Culture in Canada

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The topic of repatriation of cultural items creates some discomfort as it may generate polarized perspectives and bring into focus issues of intercultural understanding, ethics, law, politics, knowledge, power, values, and economics. Questions such as "Who owns culture? Whose property? Whose laws, practices, concepts and values should prevail?" imply that universal answers to such questions can be determined. However, these are questions of ongoing debate and complexity that cannot be answered in the abstract without reference to a particular item, people, or institution. This is especially so in Canada when we consider Aboriginal material culture owned or controlled under Canadian law by the Crown, or purchased with public funds, and in the possession of government-funded museums or other public institutions, such as universities.

This essay reproduces, with permission and some modifications, a paper on repatriation of First Nation material culture in Canada presented at an international conference on repatriation held in Nuuk, Greenland in February 2007 (Bell 2008). However, the section on Echo has been added and other revisions have been made[1]. This paper also forms part of a much larger research program conducted in collaboration with First Nations partners in British Columbia and Alberta and an interdisciplinary team of scholars in law, anthropology, archaeology, and linguistics[2]. More detailed discussion of law reform, case studies emerging from First Nation partner communities, and strategies for change within and outside Western legal frameworks in a wider range of cultural heritage matters are

contained in two volumes currently in press and from which some excerpts in this paper are drawn (Bell and Napoleon 2008, Bell and Paterson 2008)[3]. The Aboriginal peoples of Canada are defined in s. 35 (1) of Canada's Constitution Act, 1982 as "the Inuit, Indian and Métis peoples". Many Indian nations self-identify as "First Nations". The focus of our research has been on issues faced by our First Nation partners. However, the legal and policy environment discussed below is also applicable to other First Nation, Inuit, and Métis peoples in Canada.

## The story of Echo

There is a story I often share when discussing matters of repatriation. It reveals not only challenges in reconciling differing concepts of property, legal orders, policy considerations, and relationships, but also how the existing legal environment is uncertain in matters of law reform. It is a well-known story among many engaged in repatriation efforts in Canada about a mask, approximately one hundred and forty years old, known as the Echo Mask[4]: "The mask represents Echo, a supernatural being resident on earth, and the transformation of the supernatural to the natural world. It is capable of transforming multiple mythical identities (…) and carries with it a web of rights and responsibilities including societal status, spirit powers, names, songs, legends, and dances" (Bell 2006: 69). Rights to dance the mask and to other prerogatives associated with it have individual and collective dimensions. Under Nuxalk Law, a case can be made that the mask is both a societal privilege (i.e., members of the society can dance the mask to bring out its supernatural powers) and a family privilege with the mask and associated prerogatives held in trust by a family member, traditionally "the eldest male heir or chief, who would inherit custodial rights in the name of his entire family" (Kramer 2006: 91). "The keeper of the mask must care for it and bring it out to be danced for the potlatch. It can not be sold by an individual outside the community and is to stay in the community to use in potlatch ceremonies" (Bell 2006: 70). As Echo had and continues to have a significant role in Nuxalk spiritual and ceremonial life, entitlement and responsibilities also have broader community dimensions.

Until the 1950s, Canadian law prohibited the potlatch ceremony and other ceremonial structures in which First Nation materials, such as the Echo mask, were used. These legal attacks on First Nation culture along with other influences, such

as Christian control and conversion, the residential school system, and dismantling of First Nation institutions, were part of an official policy of assimilation and contributed to the proliferation of trade in First Nation cultural items. So too did the efforts of social scientists and other collectors, largely but not always in good faith, to gather and preserve as much as they could out of fear that First Nation cultures in Canada might vanish (see e.g., Cole 1995: 295-7). Disease and economic duress also wreaked havoc on many First Nation communities, generating in some instances confusion or abeyance in the legal and social institutions whose revival is now being sought. As a consequence of these and other circumstances, such as donation and creation of cultural items intended for trade and sale, museums, government agencies, and other institutions in Canada may have items in their collections obtained legitimately not only under Canadian laws and those of affected First Nations, but also under questionable legal or ethical circumstances (Bell "Restructuring" 2008: 21). As elaborated below, this is acknowledged as ethical grounds for entering into repatriation negotiations by many major institutions in Canada.

Throughout this time period, the Echo mask was danced, transferred, and protected through Nuxalk legal and ceremonial processes. However, "in the late nineteen eighties, an art dealer befriended an elderly woman in possession of the Echo Mask. Over the course of several visits to the community, she agreed to sell the mask for $35,000. In 1995, the dealer applied for an export permit under the CPEI [*Cultural Property Import and Export Act,* 1985] to sell the mask outside of Canada for US$ 250,000. After identifying the item as one subject to export control, the permit officer refused the permit based on the recommendation of an expert examiner" (Bell and Paterson "International Movement" 2008: 79. See also Kramer 2006: x-xii).

Exports of Canadian material culture are controlled by the *Cultural Property Import and Export Act,* 1985 (CPEI). One of the primary objectives of the CPEI is to keep within Canada through a system of notification, tax benefits, repatriation loans and grants, and delay of export permits any object of "outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of arts and science" and "of such a degree of national importance that its loss to Canada would significantly diminish

the national heritage" (CPEI s.11 (1) (a) – (b))**.** Cultural property that is at least fifty years old and was made by someone who is no longer living may be placed on an export control list, but one has to go to the list itself to identify what items are subject to export control (CPEI s.8 (3); Canadian Cultural Property Export Control List). This currently includes among other things archaeological material of any value and non-archaeological Aboriginal objects of a fair market value of more than three thousand Canadian dollars.

In this case the dealer appealed the permit to the Cultural Property Export Review Board ('the Board'), which has the power to delay for six months, but not prohibit, an export permit (CPEI s.29 (5) (a)). It is hoped that, with the aid of tax incentives for donations to Canadian institutions and with repatriation funding, an institution or institutions so notified (mostly museums and art galleries established primarily for the purpose of exhibiting, collecting, and preserving cultural material) will negotiate with the sellers to purchase the cultural items and prevent their export. However, there is no legal obligation or federal policy to notify originating First Nation communities and few meet the criteria for notification. Further, there is no obligation under the Act for First Nations to be consulted on what goes on the control list or to be represented in decision making and no mechanism under the CPEI to challenge Board decisions without recourse to the courts. The Museum of Archaeology and Ethnology at Simon Fraser University received notice of the pending export. Luckily for the Nuxalk, the chair of the University's archaeology department learned of the export permit application and notified the Nuxalk Band Council.

With a coalition of supporters, including the Royal British Columbia Museum (RBCM), the First Peoples' Cultural Foundation, Simon Fraser University, the University of British Columbia, the University of Victoria, and employees within the Moveable Cultural Property Division of the Department of Canadian Heritage administering aspects of the *CPEI*, the Nuxalk were able to access repatriation funding and begin negotiations with the dealer of the Echo Mask. However, as initial requests to see the mask and title documents were refused, litigation was commenced to seek a declaration that Echo could not be sold, traded, or given away to a non-member, to obtain an injunction preventing the sale and export of

the mask, and to bring about Echo's return. After a year of negotiations, the dealer agreed to sell the Echo Mask back to the Nuxalk for $200,000 CAN.

The CPEI itself places no conditions on funding, but as a matter of policy the department usually requires payment of up to one half the purchase price by the organization applying for the grant, but this can be reduced or waived depending on the size and resources of the organization. The Nuxalk had to raise thirty per cent of the purchase price, a portion of which was ultimately donated by the art dealer. Conditions often but not always found in negotiated repatriations between First Nations and museums and government agencies, particularly those negotiated outside the framework of modern treaty and land claim negotiations, were included in the grant such as the requirements that the mask be kept in a secure, public facility under museum-like conditions. At the time of writing, the mask was still on display in a secure and environmentally controlled case at a bank in the town of Bella Coola since there was no location on the reserve that met the funding criteria.

This is a story of success and frustration. It highlights the positive relationships that have been developed and imaginative solutions that have been created through collaborations between First Nations, museums, and government agencies. At the same time it provides an example of inequity in Canadian law, the need to review our legal regime in light of these concerns and emerging laws on Aboriginal constitutional rights, and the challenge of communicating across cultures and reconciling vastly different legal orders. It also brings to mind the potential for dealer manipulation and the limits of Western legal understanding of "property," in particular the tendency to divide property into categories such as tangible, intangible, communal, individual, intellectual, and material may not be appropriate in many contexts. "Like the Echo Mask, Aboriginal property does not always fit neatly into these categories. Echo is an object but also has associated intellectual property (songs, dances, responsibilities) and is connected to the land (it carries with it territorial rights, ancestral connection, and testimony in relation to a particular piece of land)" (Bell 2006: 73). The terms "culture," "property," and "ownership" are also Western legal constructs that in some circumstances may be incomprehensible, inappropriate, or inadequate to describe a relationship between a particular First Nation and a cultural item claimed (Bell and Napoleon, "Introduction": 6). Nevertheless it is impossible to avoid using such classifications

and terminology if the goal is to address existing law and institutional policy with a view to affirmation or change.

For these reasons, when speaking about repatriation of intangible First Nation cultural heritage and law reform in Canada, it is important to look beyond the Western intellectual property law regime. Consideration of the limitations and possibilities of this regime is important for First Nation cultural sustainability and revitalization and forms an important part of the larger research program mentioned above in the introduction to this paper. However, in this paper intangible heritage is addressed only in the context of repatriation of what Western law would conceptualize as "material culture" and cultural knowledge inseparable from material manifestations of that knowledge.

## Rationales, relationships, and reform

The historical treatment of Aboriginal peoples in Canada, increased public and political sympathy, contemporary museum ethics, and evolving jurisprudence on Aboriginal constitutional rights call into question normative and legal justifications relied upon in the past to support museum and Crown title to some items claimed. Normative rationales for repatriation vary and are rarely offered in isolation. Repatriation claims are linked to a wide range of concerns that include adherence to laws of source communities, respect for human rights and religious practices, preservation of cultural identity, physical well-being, concerns about use of images depicted on items or associated information, and the belief that items sought are a fundamental means to transmit and retain vital cultural knowledge. There are varying degrees of societal and cultural change brought about by legislated discrimination, residential schools, economic duress, and other external and internal pressures. These factors, combined with the passing of knowledgeable elders, have fostered a sense of urgency in some communities to recover, obtain copies, or improve access to items and oral material considered vital to knowledge transfer. In this way, repatriation is inextricably linked to concerns about continuity, revival, and preservation of languages, values, and practices that are considered integral to a community's cultural identity and survival. For this reason, although often given priority, repatriation efforts by First Nations in Canada extend beyond seeking return of ceremonial items (see e.g., case studies in Bell and Napoleon eds. 2008).

An issue raised in the story of Echo is respect for First Nation laws and processes that exist at the time an item is separated from the community. Within an environment of economic, political, and cultural duress, items not intended for commercial sale have been sold in breach of First Nations laws and protocols that may, or may not, have been in abeyance at the time an item was separated from the community. For some First Nations, seeking recognition of laws in repatriation and other contexts is as fundamental as, for example, respect for religious freedom when items at issue were or are used for spiritual purposes. This point is demonstrated by repatriation claims to medicine bundles by the Blackfoot, who have specific performance-based laws concerning control, use, treatment, and transfer of medicine bundles. These bundles contain numerous ceremonial items associated with visions, songs, dances, and other cultural knowledge necessary for performance of ceremonies and transmission of knowledge within Blackfoot societies (see e.g., Bell, Statt and Mookakin 2008:205-08 and 228-33).

Of concern to many First Nations is loss of traditional cultural knowledge and strengthening and renewal of that knowledge. This loss can occur as a result of separation from material culture and inability to disseminate attendant knowledge. Thus the value of some forms of material culture may be measured not by necessity for contemporary use, but by the educational and cultural knowledge it represents (see e.g., Bell and McCuaig 2008: 341-2 and Bell "Restructuring" 2008: 22). In some instances, laws of the affected First Nation may be more concerned with control over display and use of images depicted on items than with recovery of the items themselves (see e.g., Overstall 2008). Repatriation is also viewed by some as an important strategy in language preservation and revitalization as access to objects can foster language use as elders and other knowledge keepers recall and share associated information using words and concepts that have fallen out of regular use (see e.g., Bell "Recovering"2008: 43 and Bell "Restructuring" 2008: 23). Where this is the primary motivation for repatriation, First Nations may be more open to loans, replicas, virtual representations, co-operative management strategies, or "negotiating other means for gaining access to and controlling information (sometimes referred to in museum discourse as "information repatriation")" (Bell "Restructuring" 2008: 23).

For some First Nations, repatriation is also part of a broader struggle for recognition of injustices suffered and for restoration of human rights, including the right of political and cultural self-determination. For example, one of the best-known and earliest examples of repatriation is the return of potlatch items to the U'mista Cultural Centre in Alert Bay, British Columbia (see Bell, Raven and McCuaig 2008: 46-87; Cranmer Webster 1995 and 1988). Potlatch celebrations and practices associated with ceremonies such as the Blackfoot Sundance and Cree and Saulteaux Thirst Dance were banned under federal Indian legislation from 1884 until 1951 (An Act Further to Amend the Indian Act, 1880). Following a large potlatch held at Village Island in 1921, forty-five people were charged with offences, including making speeches, dancing, arranging articles to be given away, and carrying gifts to recipients. Regalia were seized not only from those charged with offences, but also from individuals threatened with criminal charges if their regalia were not surrendered (Cranmer Webster 1995: 138).

Efforts to recover this material began in the 1960s. In 1975 the Museum of Man (now the Canadian Museum of Civilization) agreed to repatriate items from the Village Island potlatch on condition that a museum be built to house them. However the Royal Ontario Museum (ROM) sought solutions that fell short of return, asserted its claim to ownership was "as strong as anyone else's," and sought compensation for expenses such as "curatorial care, conservation, [and] insurance"(Cranmer Webster 1988: 43). It was not until 1988, after the intervention of the Minister of Indian Affairs, that items from the ROM were returned. After years of negotiations, in July 2000 the National Museum of the American Indian [(NMAI)] agreed to repatriate another sixteen pieces. Most recently potlatch items have also been returned on long-term loan by the University of British Columbia Museum of Anthropology (MOA) and the British Museum (Bell, Raven and McCuaig 2008: 69-70). Although many affected families attest to the importance of returning these items for healing, and items not too fragile may be used by entitled families or individuals for ceremonial purposes, this was not the primary motivation for seeking their return (Bell, Raven and McCuaig 2008: 70-71). As Gloria Cranmer Webster, founder and former Director of the U'mista Cultural Centre explains:

> Most demands for potlatch items are based on the argument that treasures are vital to the spiritual health of the communities. That was not the basis in our case. We did not need our masks returned so we could use them... Our goal in having our treasures come back was to rectify a terrible injustice that is part of our history... Our concept of ownership differs from that of other people in that while an object may leave our communities, its history and the right to own it remain with the person who inherited it (Cranmer Webster 1995: 140-1).

Assertions of rights and ownership characterizing earlier Canadian repatriation disputes do not prevail now. Today most major museums and government agencies in Canada are sympathetic to the above normative rationales for repatriation and seek to resolve claims based on contemporary ethics and collaboration. Influential in restructuring relationships have been the Report of the Canadian Museum's Association and Assembly of First Nations Task Force on Museums and First Peoples (the "Task Force") (AFN/CMA 1992), a desire to maintain positive relationships with Aboriginal communities represented in collections, and inclusion of repatriation and cultural heritage matters in modern treaty and land claims processes. Policy development has also been influenced by the content of, and experience with, the Native American Graves Protection and Repatriation Act (NAGPRA 2001). This law, which came into force in the United States in 1990, was studied by the Canadian Task Force and has influenced some museum, university, and government agency policies in areas such as definitions of cultural patrimony eligible for repatriation claims, identification of affiliated groups, disposition in situations of competing claims, and the nature of evidence necessary to prove claims. However, also aware of problems that arose in the early years of implementing NAGPRA, the Task Force "[w]hile not ruling out the possibility of legislation in the future recommended a case-by-case collaborative approach to resolving repatriation based on moral and ethical criteria..." (AFN/CMA 1992: 5).

Against this backdrop, Canadian museums and federal and provincial governments have demonstrated increased willingness to repatriate and relinquish control over a wide range of items through specific Aboriginal repatriation policies, general deaccessioning policies, and land claim and treaty negotiations. Unlike the United States, Canada does not have a national repatriation law but some provinces have legislated in this area. For example, Alberta's *First Nations Sacred*

*Ceremonial Objects Repatriation Act* (2000) facilitates return of "sacred ceremonial objects" by the Glenbow Institute and the Royal Alberta Museum to First Nations in Alberta, and in British Columbia the *Museum Act* (2003) has been amended to address the interplay of repatriation with treaty negotiations in that province and statutory and common law obligations of museums. The willingness of governments and museums to relinquish control through these processes reflects fundamental changes in how museums regard their relationship to Aboriginal peoples.

Yet compelling justifications to exercise caution in face of repatriation claims continue to exist. For example, museums holding government and other collections have statutory mandates that oblige them to preserve, educate, and promote public access to their collections (including access by increasing numbers of off-reserve Aboriginal peoples).

> [T]he broader Canadian public [also] relies upon preservation and protection of [Aboriginal material culture] to understand its national and regional history and the role of Aboriginal peoples in the formation of current economic, political, social and other institutions (Bell and Paterson 1999: 192).

Return of items may also operate to the detriment of originating communities, as important associated knowledge could be lost if sufficient funds and facilities are not available for physical preservation. Consequently, lack of financial and human resources may act as a barrier to return. Further complicating the situation is (1) differing views and priorities among First Nations regarding repatriation and (2) inclusion in many collections of items created for the purpose of sale or donation. Many First Nations also respect the role museums have played and continue to play in research, education, preservation, and facilitating understanding of different cultures. Need and preparedness (financial, spiritual, and otherwise) varies according to the community and item, with many items remaining in collections for diverse reasons by agreement. In such circumstances Canadian museums have continued holding and caring collaboratively with communities affected in relation to items in transition.

It is beyond the scope of this paper to delve into museum policy development and all of the rationales for and against repatriation. Rather, the intent here is to introduce the complexity of the policy and legal environment for negotiating repatriation in Canada and raise some questions about the need for and desirability of Canadian law reform.

## Why talk about law and law reform?

Given improved relations between museums, other custodians of material culture, and First Nations, some question the need for and desirability of discussing legal rights and law reform. In Canada, repatriation is currently negotiated on a case-by-case basis in accordance with the institutional policies of the custodial institution. A benefit of the current policy is its ability to accommodate diversity in areas such as community preparedness, access requirements and restrictions, levels of interest in repatriation, and First Nations laws and protocols to name a few. Some fear that considerations of law and legislative intervention will reduce this flexibility and generate either/or thinking. However, may assume that law is not currently playing a significant role in current negotiations and that legislation must be mandatory in its application to the exclusion of other processes. Neither is necessarily or always true.

Although it is true that emphasis on legal rights can create adversarial relationships and discourage thinking about a wider range of solutions based on identifying mutual interests, it is equally true that, regardless of attempts to avoid assertion of legal positions, law is used to assess best and worst alternatives to negotiated agreements, liabilities, and parameters for negotiation. Indeed the role of law is sometimes stated explicitly in repatriation policy. For example, the Repatriation Guidelines of MOA recognize that "First Nations are governed by their own legal traditions and policies" but at the same time note "MOA's negotiation position is guided by Canadian law and international agreements signed by Canada, and by the governing body of UBC" (Museum of Anthropology (MOA) 2007: para. 3). Reliance on museum policy and good will also raises issues of power and equality of participation. Even where sincere attempts are made to give equal consideration to different cultural understandings by museum, government, and other personnel, final discretionary authority remains with custodial institutions, or in some cases, government officials. The only recourse if

negotiations break down is expensive litigation before Canadian courts. Regardless of good intentions, retention of this power, absent recourse to a more interculturally legitimate process, may perpetuate colonial relationships of dependency.

Other problems may potentially arise if repatriation negotiations remain guided by policy alone. These include increased time and costs associated with absence of uniform procedure from one institution to the next, insufficient funding and research support for parties to negotiations, varying levels of commitment to repatriate, conscious and unconscious bias in favour of documentary evidence, disagreement between and among First Nation claimants, differing perspectives on appropriate conservation and preservation (including the need for museum-like facilities), reliance on personal relationships with staff and within First Nation communities, and the limited scope of material some institutions are willing to repatriate outside the realm of federal and provincial treaty and land claim negotiation processes. In situations where these and other problems are overcome through collaborative negotiation, further barriers may be created by laws or concerns about potential museum liability. Potential liability may influence positions on standards of proof, on public notification, on response to competing claims, on use, preservation, and other conditions placed on return, and on proposal of solutions that fall short of return.

Those who emphasize the benefit of policy frameworks based on moral and ethical considerations may also assume that reliance on legal rights will operate to the detriment of First Nation claimants. However, Canadian law affecting ownership and control of Aboriginal cultural heritage is becoming increasingly complex and uncertain. Canadian law affecting repatriation claims is informed by various streams including common law of property, emerging law on Aboriginal constitutional rights, laws concerning museum obligations, limitation of actions legislation, provincial heritage conservation legislation, federal import/export and parks legislation, and issues of jurisdiction. Further, much of the legislation that affects issues of ownership and control is largely dated, fails through express language to address existing and potential Aboriginal rights and other interests, and may not reflect changes in policy and practices of institutions charged with implementing it. This is not surprising as such legislation was enacted largely before Aboriginal rights were recognized in Canada's constitution.

These and other concerns suggest some changes to Canadian law may be necessary, albeit not necessarily through repatriation legislation *per se*. For example, legislation addressing common law obligations of museums and public ownership or beneficial interests may be necessary to facilitate unconditional repatriations, particularly of a large number of items, outside public treaty and land claim negotiation processes, as was the case when the Glenbow Alberta Institute transferred 251 cultural items without condition to the Blackfoot in Alberta (Bell, *et. al.* "Survey" 2008: 369-70; Bell, Statt and Mookakin 2008: 238). Regardless of the approach taken, mandatory and uniform repatriation legislation is not likely to be welcome in Canada. For many Aboriginal peoples, matters of cultural heritage are considered an area of inherent jurisdiction. Given this, and the diversity of cultures, priorities, and relationships with museums and other custodial institutions, any effective repatriation legislation, if considered, must be designed to facilitate the negotiation process and act as a safety net for those Aboriginal claimants who choose to invoke it.

In Canada, we already have several examples of what we call "opting in" legislation in the First Nations context. Elsewhere I have considered in greater detail legal arguments and the potential benefits and detriments of law reform in a range of areas implicating repatriation negotiation (e.g., Bell and Paterson 1999; Bell 2008). Here, I will introduce key features of the legal environment and give examples of two areas of law reform: dispute resolution and museum liability. I conclude with a case study demonstrating the context, strengths, and weaknesses of *Alberta's Sacred Ceremonial Objects Repatriation Act* 2000.

## The legal environment

Developments in Canadian Aboriginal rights law and the growing international and interdisciplinary moral primacy of human rights have expanded the boundaries for determining entitlement to Aboriginal material culture. At one time, legal analysis was confined to the common law of property and the impact of legislation on that law. However, inclusion of Aboriginal rights law in the analysis suggests that the journey of the item be considered within a particular cultural context. For example, under common law, a person cannot transfer greater rights to property than she or he has. A key legal issue may be the capacity of an individual to transfer title. If the object was, and continues to be, "integral to the culture" of a

claimant First Nation, the laws of that Nation may be the appropriate source to determine rights, obligations, and authority to transfer (*R. v. Van der Peet* 1996). Analyzed in this way, the superior claim to ownership may lie with the claimant First Nation.

The requirement to consider Aboriginal and treaty rights arises from section 35 (1) of Canada's *Constitution Act, 1982*, which recognizes and affirms "the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada." In *Kitkatla Band v. British Columbia* (2002), at para. 78, the Supreme Court of Canada also acknowledged that "[h]eritage properties and sites" may in some cases form "a key part of the collective identity of a people" and that "some component of cultural heritage" might be so tied to identity as to affect issues of jurisdiction. If it can be established that an aspect of cultural heritage is integral to Aboriginal identity, this supports the finding of an Aboriginal right.

There are numerous arguments that support the existence of Aboriginal rights to certain forms of cultural material, which I have elaborated in other publications listed in the references below and summarized here. Although there is no Canadian case law directly on point, when we examine various streams of Aboriginal and treaty rights jurisprudence, the following specific arguments in favour of First Nation ownership and control of material culture emerge. They include but are not limited to the following arguments derived from Supreme Court of Canada rulings in *R. v. Van der Peet* (1996), *R v. Sappier* (2007), and *Delgamuukw v. British Columbia* (1997):

1. Rights to cultural property may form part of a broader claim to Aboriginal title.

2. Rights may also exist if an object is an integral part of an activity, custom, practice, or tradition that was historically, and continues to be, integral to the distinctive cultural identity of a First Nation. Given the disruption of Aboriginal communities and the difficulties of proof associated with oral cultures, it is not necessary to prove an unbroken chain of continuity.

3. Rights may also be sourced in pre-contact indigenous customs integral to the distinctive culture of the claimant group. Like Canadian law, First Nations laws have evolved and been affected by the existence of other legal systems. A court will take this into consideration.

4. Rights may also be sourced in express and implied terms of treaty.

5. The treaty relationship, existence of Aboriginal rights to cultural property, and assumption of federal and provincial jurisdiction over Aboriginal cultural property may also give rise to a fiduciary responsibility of protection and consultation.

These rights are not absolute. This is because legislation that meets certain judicial criteria may terminate Aboriginal rights, or limit how they can be exercised. In the 1990s, the Supreme Court of Canada held *in R. v. Sparrow* (1995) that Aboriginal rights continue to exist and are protected by the *Constitution Act, 1982*, so long as these rights have not been terminated by clear and plain legislation or other valid acts of State prior to 1982. There is no Canadian legislation that clearly and plainly terminates potential Aboriginal rights to material culture based on any of the above arguments. In Canada, jurisdiction to pass laws is divided between the federal and provincial governments. Provincial governments may not terminate Aboriginal rights. Provincial legislation may, however, regulate and limit the exercise of Aboriginal rights (e.g., by addressing excavation and preservation of archaeological property discovered on provincial or private land). Laws that interfere or potentially interfere with an Aboriginal right can be enacted and implemented so long as there is a valid legislative objective and the provincial Crown's fiduciary obligations are met. This duty includes consulting with affected First Nations concerning potential and actual interference with potential and existing Aboriginal rights with a view to seriously addressing their concerns.

Aboriginal rights and interests are also implicated by federal legislation designed to protect Canada's cultural heritage, such as the CPEI discussed above. Viewed through the Aboriginal rights lens, there are potential problems with this legislation, including the absence of a mandatory mechanism to notify First Nation communities if an item intended for export has originated from their community

and lack of First Nation representation at various levels of the decision-making process. The act is also subject to dealer manipulation resulting in First Nations and Canadian institutions having to buy back material at significantly inflated prices. The lack of direct consideration of First Nation interests in the legal framework is not surprising, as the legislation had been enacted before Aboriginal rights were recognized in our Constitution.

Further complicating the legal environment is consideration of museums and archives law. Together with the common law of negligence and fiduciary obligation, these considerations may place legal restraints on the ability to repatriate even in negotiations where parties seek to negotiate outside a rights framework. Legal obligations of museums are found in legislation, common law, incorporating documents, and internal policies. For example, public museums and those holding Crown property have public mandates charging them with preserving the material within their collections for a broader Canadian public. The public mandate of museums requires that they balance interests of the public against those of claimant First Nations. Although many Canadian museums interpret public mandates to include repatriation of significant cultural items to Aboriginal peoples, such mandates may also affect the scope and/or quantity of items considered for repatriation, particularly outside treaty and land claim processes (see Bell "Restructuring" 2008: 38-41). Their legal obligations may also include the duty to exercise the care a reasonably prudent person would in dealing with her own property (Gerstenblith 2004: 293). In short it is not clear how obligations to the broader Canadian public are to be interpreted in light of the special interests and rights of Aboriginal peoples.

## Moving forward: issues in Canadian law reform

There are numerous ways in which legislation can assist negotiation (see Bell "Restructuring" 2008: 55-64). I offer two examples here: dispute resolution and museum or government liability arising from disposal of collections. Although major Canadian institutions holding First Nation material recognize the importance of addressing past inequities, treating First Nation parties to negotiation with respect, appreciating the complexities created by different cultural understandings, and considering evidence based on kinship, oral tradition, and other sources, the current regime nevertheless continues to place final decision-making with external

governments and legal norms. A principle for conflict resolution currently respected by many Canadian institutions and government agencies is that competing claims within a community or between Aboriginal communities are best resolved within and between those communities. This both respects matters of internal governance and avoids potential liability from returning items, albeit in good faith, to the wrong entity. There are more difficult questions: whether litigation should be the only recourse if efforts to resolve conflict between claimants fail, given the potential for this situation to indefinitely block a repatriation claim ; how to create an effective and interculturally legitimate process for resolving impasses in negotiations ; and whether resort to such processes should be mandatory before repatriation claims can be taken to Canadian courts. As effective dispute resolution needs to be anchored in the values of those it is intended to serve, and given the diversity of First Nation cultures in Canada, issues of cultural legitimacy might best be addressed by representation of claimant communities and institutions directly affected, as well as an agreed-upon neutral arbitrator (as is often the model adopted in Canadian labour disputes). However, a wide range of possibilities can be considered (see e.g., Bell 2008 "Restructuring: 58-61).

Issues of potential liability and the desire for a clear and transparent process are addressed in Alberta's *First Nations Sacred Ceremonial Objects Repatriation Act.* Although enacted in aid of specific repatriation negotiations between the Blackfoot people of Alberta and the Glenbow Institute for return of medicine bundles and other ceremonial items, it also applies to the Royal Alberta Museum and all First Nations in Alberta. Section 1(e) defines sacred ceremonial objects as objects, the title to which is vested in the Crown and is "vital to the practice of the First Nation's sacred ceremonial traditions". Although not the product of rights-based negotiation, this definition is consistent with judicial definitions of Aboriginal rights at the time of enactment as it sources the right of repatriation in customs, practises, and traditions integral to a distinctive Aboriginal culture. Prior to the enactment of Alberta's legislation, returning medicine bundles and other sacred ceremonial items could expose the Glenbow Institute and the Alberta government to legal liability as provincial law provided that objects in the Glenbow collection are held by the provincial Crown and Glenbow on behalf of the citizens of Alberta. Ministerial approval was difficult to obtain for a number of reasons including

uncertain legal status of band councils and potential conflicts that could be generated by returns.

As the Glenbow Institute and the Royal Alberta Museum were making increasingly extensive loans of ceremonial items that technically 'belonged' to the province or were held in trust for the people of the province, the government felt that a consistent and transparent process to guide such decisions was required. Failure to do this could be interpreted as a breach of trust, particularly given the number of items in issue. The new legislation facilitates return by relieving the Glenbow Institute and the province of any legal liability arising from a repatriation done in good faith pursuant to the act. As a result, title to 251 cultural items previously on loan to the Blackfoot has been transferred by the Glenbow Institute to Blackfoot communities.

This legislation is helpful but can also be criticized on several levels, including the assumption of validity of Crown ownership, its failure to include private institutions that receive provincial funding, the emphasis on sacred ceremonial property to the exclusion of other forms of cultural property, and its failure to facilitate claims by First Nations located in other provinces. Although enacted with good intentions, discretion placed in the Minister to deny claims and retention of power by non-indigenous governments over the fate of indigenous cultural items continues to generate power imbalance and runs contrary to aspirations for self-determination of many First Nations. The legislation can only be fully understood as one that is based on trust and a compromise enabling items vital to the continuity of Blackfoot ceremonies to be returned home. Further, the Blackfoot people see this as only one step in a broader repatriation effort.

## Conclusion

The issue of repatriation raises many challenging questions. Museums and government agencies continue to play an important role in preserving cultural heritage and educating non-indigenous and indigenous peoples about indigenous life. For this reason, First Nations in Canada seek to work collaboratively with them and are reluctant to engage in initiatives that could undermine existing positive relationships. At the same time, the legal environment within which negotiations occur is becoming more complex with the evolution of Aboriginal

rights law and the uncertainty of museum liability in the face of repatriation claims, particularly those that affect material that is not of a sacred or ceremonial nature and large-scale repatriations outside the treaty negotiation process. Key issues in law reform are whether legislation is necessary to facilitate negotiation and, if so, how government or governments should act. Whatever answer is given to these questions, Canadian law calls for more extensive consultation with Aboriginal governments and communities of interest and their active participation from the point of inception to implementation of laws that impact, or have a potential impact, on existing or potential Aboriginal constitutional rights. What fundamental principles should guide law reform initiatives? The Canadian Royal Commission on Aboriginal People (RCAP) offers four fundamental principles for forging new relationships between First Nations and the Crown. These are mutual recognition, mutual respect, sharing, and mutual responsibility (RCAP 1996). As RCAP's principles aim to assist the process of decolonization, and as repatriation is largely concerned with this process, these principles may be helpful in shaping regulatory frameworks for repatriation. Regardless of the principles adopted, reform is meaningless without significant financial commitment from Canadian governments.

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MOTS-CLÉS Restitution – système législatif – masque « Echo » – collaboration – propriété – lois canadiennes – Potlach – réparation

1 "That Was Then This is Now: Canadian Law and Policy on First Nation Material Culture" presented in Nuuk Greenland and forthcoming *in* G. Mille and J. Dahl (eds.), 2008, *Utimut: Past Heritage-Future Partnerships. Discussions on Repatriation in the 21st Century,* Copenhagen: IWGIA & the Greenland National Museum and Archives. Portions are also drawn and modified with permission from earlier conference presentations published in conference proceedings or forthcoming in edited collections that elaborate in greater detail and with more examples concepts of property, dispute resolution, and potential museum and government liability. See Bell, C., "Repatriation of Cultural Material to First Nations in Canada: Legal and Ethical Justifications" *in* J. Nafziger and A. Nicgorski (eds.), forthcoming 2008/2009, Leiden: Brill/Nijhoff Press, and Bell, C., 2007, "Aboriginal Cultural Property and Canadian Law Reform" *in* K. Bannister and A. Johnston (eds.), *Culture, Heritage and Intellectual Property Rights: Opportunities and Challenges for Communities* (POLIS Ecological Governance Series), Victoria: University of Victoria, pp. 69-81. All of this work forms part of a much broader research program and detailed consideration of repatriation law and policy by the author found in C. Bell, "Restructuring the Relationship: Repatriation and Canadian Law Reform" [Restructuring], and with R. K. Paterson, 2008, "International Movement of First Nations Cultural Heritage in Canadian Law" [International Movement], *in* C. Bell and R. K. Paterson (eds.), *Protection and Repatriation of First Nations Cultural Heritage: Laws, Policy and Reform,* Vancouver: UBC Press: 15-77 and 78-108 (citation to this volume is to the author's page proofs as it was not in press at the time of writing this article).

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3 References for case studies are given to more detailed versions located on our website: http://www.law.ualberta.ca/research/aboriginalculturalheritage/casestudies.htm.
Shorter versions of the case studies appear *in* Bell, C. and N. Napoleon (eds.), 2008, *First Nations' Cultural Heritage and Law: Case Studies, Voices and Perspectives*, Vancouver: UBC Press.

4 This account of the Echo Mask story is an abbreviated form taken from some of my other publications including C. Bell and R. K. Paterson, "International Movement" and Bell, "Restructuring" above note 1. The former contains much more discussion on limitations of the legislation, dealer manipulation, and responses to these limitations. Information on the Echo Mask and Nuxalk law was drawn primarily from court documents filed in an action by the Nuxalk Nation (also known as the Bella Coola Band of Indians) and Chief Snuxaltwa (also known as Archie Pootlas) against Howard Roloff and Ate-Goo-Goosh Holdings Ltd. seeking a declaration upholding Nuxalk customary law prohibiting alienation of the mask outside the community, an order restoring possession to the Nuxalk, and an injunction preventing sale and export by Mr. Roloff. The matter was eventually settled out of court. Although Mr. Roloff was acting in compliance with Canadian law, the litigation challenged the legitimacy of that law in its application to the Nuxalk Nation. See Statement of Claim, Affidavit of Hereditary and Council Chief Archie Pootlas (Snuxaltwa), Affidavit of Elder and Hereditary Chief Andy Siwallace (Wits'lks, Icwapatsut, Suncwakas), and Affidavit of Jeffery Snow (7 Nispuxals) filed in Reg. No. 962676, British Columbia Supreme Court, Judicial District of Victoria. The Echo Mask story has also been updated and elaborated using J. Kramer's recent publication *Switchbacks Art, Ownership and Nuxalk National Identity*, 2006, Vancouver: UBC Press at ix-xiii, 87-96. See also S. Tanner Kaplash & Associates, Inc., *Protecting First Nations Culture*, 2003, Alert Bay: U'mista Cultural Society at 12. This brochure outlines in detail how the CPEI works and its implications for First Nations.