ABSTRACT

Policy Approaches to Repatriation in Canada - Where we are in 1999

Presented by Ellen R. Lee, Acting Director, Archaeological Services Branch, National Historic Sties Directorate, Parks Canada, Canadian Heritage, at the World Archaeology Congress in Cape Town, South Africa, January 10 - 14, 1999.

DRAFT - NOT TO BE QUOTED WITHOUT AUTHOR'S PERMISSION

ABSTRACT

Repatriation in Canada has a very diverse nature. It proceeds generally through policy development and evolution, but is also the subject of land claim and treaty negotiations. Human remains and funerary objects, and sacred objects have been the primary focus of this activity. However, other ethnographic objects and archaeological collections have also been the subject of considerable discussion and negotiation between Aboriginal Peoples, Governments and Museums. A Supreme Court of Canada decision, "The Delgamuukw Decision" has added an extra element to the discussion, by indicating that Aboriginal title includes proprietary rights to land, and may coexist with Crown title. How this will affect the ownership of archaeological specimens remains to be determined. In my presentation, I will try to explain the Canadian situation as it exists today and how we got here.

Policy Approaches to Repatriation in Canada
Where we are in 1999

When Tim asked me to present a paper on repatriation in Canada, I spent considerable time thinking about what to call it and how to present it. Canada does not have general legislation dealing with repatriation. There was a major national initiative in the early 1990s, which attempted to improve upon relationships and build long-term partnerships between Aboriginal people and Museums, and repatriation was part of the discussion. Institutional policies related to participation, access, control of interpretation and repatriation have evolved considerably the last 15 years. In addition, the negotiation of comprehensive land claims since the mid-1980s have dealt with heritage issues, including repatriation. But before I get into the details, I would like to explain the Canadian context to you, so you will have some sense of how we got to where we are now.

The Canadian Context

As you may know, Canada is a very large country, made up of ten provinces and two (soon to be three) territories in the north. Constitutionally, the federal government has responsibility for Aboriginal Peoples, except in areas of jurisdiction that have been transferred to provinces. While the federal government has some pieces of legislation relating to specific aspects of heritage, it has no comprehensive heritage legislation that protects archaeological sites on federal land or sites associated with the history of Aboriginal Peoples. All of the provinces and territories have heritage legislation of some form or another that provides some protection for archaeological sites, and in some cases asserts ownership of archaeological artifacts on behalf of the crown.

X Aboriginal Peoples in Canada

Estimates vary as to the Aboriginal population of North America at the time of sustained contact in the 16th century, from 500,000, to as high as over 2 million. There is general acceptance of the theory that there were massive die-offs of Aboriginal populations (sometimes as high as 80 to 90 per cent) as a result of epidemics of European diseases at various times between the 16th and 19th centuries. The population of Aboriginal Peoples in Canada is estimated at over 800,000 today, roughly 2.7 per cent of the Canadian population. They consist of First Nations (historically called Indians), Inuit and Metis Peoples, of approximately 60 different language groups. The Aboriginal peoples of Canada are widely distributed across a large geographical area, and as might be expected in such a large country, have had quite varied experiences and histories with regard to when and how their areas were colonized by Europeans. Some generalizations however can be made.

X History of Colonization

As in many other parts of the world colonized by the Europeans, relationships were generally co-operative to begin with, as Europeans were seen as valuable trading partners, needed help to survive, and valued the Aboriginal nations as allies against other European competitors. However, once the Europeans had established a solid foothold, had become acclimatized and began to want land for settlement or development, the relationship changed and the pressures on individual Aboriginal communities and nations to give up land and restrict their movements and activities began to mount.

- **Treaty making between the Canadian Government and Aboriginal Peoples**

Treaties between Aboriginal Peoples and the Canadian Government fall into three categories:

1. Many Peace and Friendship Treaties were signed between 1725 and the early 1800s. These were generally alliances or agreements for peaceful coexistence, not involving the surrender of land. They occurred primarily in Eastern Canada.

2. Historic (some of which are referred to as "Numbered") Treaties were signed between the 1850s and the 1920s. The purpose of these was generally to clear land for development and settlement and involved the surrender of land to the crown. They provided for the establishment of Reserves, for annuities to be paid to Aboriginal people and for their freedom to hunt and fish on unoccupied Crown land. It was during this period, beginning in the 1860s, that the Canadian Government passed the first Indian Act. I won't go into the details of this act, which was amended many times over the years, and is still in effect today. However, there was one significant aspect of this act that has had a major influence on Repatriation issues in Canada. As part of the measures taken to attempt to assimilate Canada's Aboriginal Peoples in the late 19th and early 20th centuries, important religious and cultural ceremonies such as the potlatch and the sun dance were banned in an Amendment to the Indian Act. For those of you who are not familiar with the potlatch, it involved the ritual redistribution of wealth as part of ceremonies to mark important events in the social life of the community. In Canada, the potlatch occurred on the West Coast, primarily in British Columbia. In addition to the potlatch being banned, large collections potlatch related cultural property were seized and many people were arrested. The material that was seized by government found its way into major museums in Canada and in other countries. The law banning the potlatch was rescinded later in the 20th century. The presence of potlatch artifacts in museums has been a significant source of pressure for repatriation initiatives in Canada in the latter part of this century.

In addition to the usual ways in which Aboriginal artifacts found their way into museums and other institutions, such as archaeological excavation, purchase, donation and unethical acquisitions related to coercion, purchase, donation, etc., we can add confiscation by

government.

3. Modern Treaties/Comprehensive Claims. A combination of factors led the Canadian government to develop its comprehensive claims policy in 1973. There was growing political activism on the part of Aboriginal people at that time as a result of either violations or lack of implementation of government obligations related to historic treaties. There was a backlash against government attempts in 1969 to deny the existence of Aboriginal rights and abandon the special constitutional relationship between the federal government and Aboriginal people. In 1973, a landmark decision of the Supreme Court of Canada recognized the existence of Aboriginal rights and title. This forced the federal government to recognize the concept of Aboriginal title and rights. In 1982, these were affirmed, although not defined in the Canadian constitution.

In 1973, Government began to negotiate Comprehensive Claims or modern treaties with Aboriginal groups who had not been part of the historic or numbered treaties. These are still on going, and a presentation on this is being presented today by Olga Klimko, my colleague from British Columbia in the session entitled "Archaeology, indigenous land rights and settler societies into the 21st century". The first modern treaties negotiated in the 1970s and early 1980s did not include provisions to deal with heritage matters. However, all negotiations undertaken or concluded since 1984 have included heritage provisions.

Repatriation Provisions in Land Claim Agreements

The first four comprehensive claims to have heritage provisions were in northern Canada. Repatriation is mentioned in three of them. In one case, the provisions mainly obligate government to assist First Nations to develop facilities to enable repatriation. In the two other cases government agrees to co-operate with the First Nations to try to bring material back to the north (for the benefit of all northerners, not just the Aboriginal group), provided that appropriate facilities and expertise are available for their proper care. In the fourth agreement, repatriation is not mentioned. However, in this case, government has agreed to joint ownership with an Inuit cultural organization of all archaeological specimens within the entire area. Therefore, decisions regarding the disposition of these specimens require consent of both parties. There are some limitations placed on conditions under which the Inuit organization can request material, including having the capability to maintain the specimens without risk. It is interesting in this case, that the specimens jointly owned include all artifacts, whether they are associated with Inuit history or not.

The first modern treaty to be negotiated in southern Canada, in British Columbia is the Nisga'a Agreement which has been signed and is currently in the process of ratification. It is the first in Canada to include major provisions for repatriation. This is not surprising, given the history of confiscation of potlatch artifacts in British Columbia. By the terms of the Nisga'a Agreement, a selection of specific objects from the collections of the Canadian Museum of Civilization and the Royal British Columbia Museum will be transferred without condition to the Nisga'a Central

Government. The objects in question are actually listed in the appendices to the Agreement. Another list of material from the Canadian Museum of Civilization is the subject of a shared custody agreement between the museum and the Nisga'a. It is almost certain that most, if not all of the other First Nations in British Columbia which have significant collections in Museums will work towards, and likely get a similar arrangement. To date, that is the extent of legally binding requirements to deal with repatriation requests in Canada.

Non Legislative Attempts to Address Repatriation Issues

- **Task Force on Museums and First Peoples**

In 1988, an exhibit at the Calgary Olympics entitled "The Spirit Sings" was sponsored by an oil company that was in working in an area under disputed, unresolved land claim. This led to a boycott of the exhibit by many Aboriginal groups. The boycott led to an agreement between the Assembly of First Nations (the largest Canadian national Aboriginal organization) and the Canadian Museums Association to conduct a national workshop to discuss their differences and determine how they might work together in areas of common interest. The mission of the Task Force that subsequently developed, through a series of regional working groups was:

> "To develop an ethical framework and strategies by which Aboriginal Peoples and cultural institutions can work together to represent Aboriginal history and culture." (Task Force Report on Museums and First Peoples, Turning the Page: Forging New Partnerships Between Museums and First Peoples. A Report jointly sponsored by the Assembly of First Nations and the Canadian Museums Association, Ottawa, 1992).

The three major issues discussed were:

- Increased involvement of Aboriginal Peoples in the interpretation of their culture and history,
- Improved access to museum collections by Aboriginal Peoples, and
- Repatriation of artifacts and human remains.

The Task Force recommendations on repatriation were broken into those dealing with human remains and those dealing with objects of cultural patrimony.

Human remains were divided into three categories, going from those who were remembered by name, to those who were directly affiliated with named First People, to those that were ancient or could not be affiliated. In the first case, the remains should be returned automatically without question. In the second case, co-operation between scientists and the affiliated First Nation was recommended, with possible re-interment according to the appropriate religious practices. In the

third case, discussion and negotiation with an advisory committee of First Peoples was recommended, with a mutually agreed upon time period, and possible re-interment according to appropriate religious practices. Two over-riding principles were strongly recommended. "Museums that acquire human remains through any means must involve the appropriate First Nation in the treatment and disposition of the remains" and "The retention of Aboriginal human remains for prolonged periods against the expressed wishes of First Peoples is not acceptable."

The principles recommended for the consideration of the repatriation of objects of cultural patrimony include moral and ethical grounds, above and beyond legal considerations. The options proposed range from restitution or reversion, transfer of title, loan of materials, replication of materials to shared authority to manage. The choice of option is to be determined upon moral and ethical grounds, as well as legal considerations, related particularly to how the objects were alienated from the Aboriginal community and how they were acquired by the institution.

The Task Force also recommended that institutions promote and help facilitate repatriation of materials from foreign holdings.

- **Canadian Archaeological Association Aboriginal Heritage Committee**

Another initiative indirectly related to repatriation in Canada was a national consultation with Aboriginal communities and organizations by the Canadian Archaeological Association in 1993-94. This initiative was an attempt through regional workshops and meetings to open dialogue and develop a code of ethics for archaeologists working on sites associated with the history of Aboriginal people. In the end, a set of fairly general, softly worded principles were agreed to, to the disappointment of some. A more strongly worded code of ethics had been desired by many, especially Aboriginal people in some parts of the country who have felt particularly poorly treated by archaeologists in the past. However, a significant portion of the archaeologists in the CAA work for government and were legally unable to agree to such wording which had legal implications for land use management.

Where we are in 1999

I have not conducted a comprehensive survey of the current situation. However, my understanding is as follows. Three large museums (two of them in British Columbia) have developed or are in the process of developing written policies on repatriation. Most other institutions, including provincial and federal governments generally return human remains upon request, as long as they are comfortable that they are being returned to the right group. Objects of cultural patrimony are considered generally on a case by case basis, primarily based on how the objects were acquired. Generally, those objects that are being repatriated are those whose acquisition was questionable, legally, morally or ethically.

Institutional policies continue to evolve and become more open, and there is considerably more

involvement of Aboriginal people in the operation of museums and how Aboriginal cultures are presented to the public. The pressure for repatriation and for government to recognize ownership of cultural material by Aboriginal groups continues to build. This is particularly the case in British Columbia, where roughly 50 more First Nations are somewhere in the process of treaty negotiation. It will soon become an issue in the Atlantic provinces, as comprehensive land claim negotiations are expected to be launched in the near future.

An added wrinkle in the question of ownership is the recent decision of the Supreme Court of Canada that where Aboriginal title has not been extinguished by treaty, Aboriginal title still remains and may include proprietary rights, which can co-exist with Crown title. What this will mean in terms of the ownership of archaeological specimens remains to be seen. The whole question of how to determine which is the appropriate Aboriginal group to have an interest in a particular artifact is often problematic. Overlaps in traditional territory are supposed to be resolved by the Aboriginal groups, but this is not always easy.

REFERENCES CITED

Royal British Columbia Museum Aboriginal Material Operating Policy, Vancouver, 1997.

Statement of Principles for the Ethical Conduct Pertaining to Aboriginal Peoples, A Report from the Aboriginal Heritage Committee, Jointly sponsored by the Canadian Archaeological Association and the Department of Canadian Heritage, Ottawa, 1996.

Turning the Page: Forging New Partnerships Between Museums and First Peoples, A Report jointly sponsored by the Assembly of First Nations and the Canadian Museums Association, Ottawa, 1992.

University of British Columbia Guidelines on Repatriation of Canadian First Peoples' Cultural Materials housed in the Museum of Anthropology, Vancouver, August 1995.