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"CARRYING THE BATTLE INTO THE FORM:"¹ REPATRIATING FIRST NATIONS' CULTURAL ARTIFACTS

NATALIE CUK†

The healing of Canada's First Nations depends directly on their ability to re-establish control over their own cultures, to which cultural artifacts are integrally related. Thus, the article is premised on First Nations having a right to their cultural artifacts. To halt and reverse the exploitation of Aboriginal peoples, cultural artifacts displayed in museums and non-Aboriginal public institutions must be repatriated to the First Nations source groups. The article assesses both legal and non-legal methods for repatriation. The author suggests that a declaration of the existence of an Aboriginal right under section 35(1) of the Constitution Act, 1982 is the best way to initiate the flow of repatriation immediately. It is proposed that, in time, methods for ensuring cultural restoration can move beyond the legal framework and eventually be based on mutual agreement.

La consolidation des premières Nations au Canada dépendra directement sur leur capacité de reprendre le contrôle de leur propre culture, dont les objets culturels font partie intégrale. Donc, ce travail est basé sur le principe selon lequel les premières Nations ont des droits envers ces objets culturels. Pour cesser l'exploitation des Autochtones et pour la mettre en marche arrière, les objets culturels exposés dans les musées et dans les institutions publiques non-Autochtone doivent être rapatriés par les premières Nations. Ce travail analyse à la fois certaines méthodes de rapatriement qui sont fondées en droit et certaines qui ne le sont pas. L'auteur suggère que la meilleure façon d'initier ce rapatriement est par une déclaration des droits Autochtones en vertu de l'article 35(1) de l'acte constitutionnel, 1982. L'auteur propose que certaines méthodes en vue d'assurer la restauration de la culture Autochtone pourrait, avec le temps, aller au-delà du cadre juridique pour être fondée éventuellement sur des accords mutuels.

¹ Sakej Youngblood Henderson, "Creating Post-Colonial Law" (Lecture at Dalhousie Law School, 7 February 1996) [unpublished].

† B.A. (British Columbia), LL.B. anticipated 1997 (Dalhousie).

There are more ways to kill a nation, and to destroy a people, than with physical violence. A more subtle but effective way of doing it is to take away everything that makes them that nation . . . the tangible expression of the people.²

I. INTRODUCTION

Cultural artifacts are an integral aspect of Canada's First Nations' cultures. When they are displayed in museums and public institutions, the artifacts are alienated from the Peoples who created them and presented instead as frozen documents of Western imperialism.³ This practise is a continuation of the government assimilationist policies that have undermined the cultural autonomy of First Nations since colonial times.⁴ Decontextualized, these artifacts are separated from their original cultural significance and interpreted as the representation of a culture that is dead or dying, unable to speak for itself. Through these abuses the Native voice is appropriated, denying First Nations their existence as living, changing, creative peoples engaged in contemporary struggles. Aboriginal healing necessitates First Nations cultural restoration, a fundamental aspect of which is the repatriation of cultural artifacts. Halting the continued exploitation of tradition and culture by Western scholars and museums, repatriation restores Indigenous

² D. Opekokew, "International Law, International Institutions and Indigenous Issues" in R. Thompson, ed., *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (Saskatoon: University of Saskatchewan Native Law Centre, 1989) at 5, as quoted in R. Clements, "Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law" (1991), 49 U. T. Fac. L. Rev. 1 at 24 [hereinafter Clements].

³ R.J. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6 C.J.L.J. 249 at 278.

⁴ Other examples of alienation from cultural traditions include the 1884-1951 outlawing of the Northwest coast Potlatch ceremony, a method for political, social and, economic organizing. The residential school system and the *Indian Act* are manifestations of assimilationist policies.

Peoples' dignity, privacy, and identity by re-establishing control over the further interpretation and use of their heritage.⁵

Informal repatriation successes resulting from *ad hoc* guidelines are uncertain and unpredictable. While consensus-based repatriation would be ideal, its limited record of success renders it unsatisfactory at present. Instead, Canadian courts must articulate and extend a legal obligation to museums and public institutions, ensuring the repatriation of Native artifacts. The Anglo-Canadian common law system has proven to be inadequate where this aim is concerned. Accordingly, this article argues an Aboriginal right to First Nations' cultural artifacts should be declared through section 35(1) of the *Constitution Act, 1982*,⁶ which would take into account the cultural significance of the artifact to the Native Peoples. A firm constitutional and Aboriginal right could ensure the repatriation of artifacts currently in the possession of museums and public institutions to the source Nations by whom they were created. In time, Canadian society will gain awareness of the need for repatriation, and an agreement-based approach to cultural restoration could be achieved.

II. DEFINITION

The "cultural artifacts" referred to in this article encompass those items created by a group of Aboriginal Peoples which are significant cultural representations elementary to the group's self-knowledge. A cultural artifact is defined broadly because the test used to define its significance focuses on a given object's necessity to the restoration and preservation of the culture from which it originated. This is not a strict test, for each First Nation must ultimately determine for itself what it considers unique and definitional of its own cultural existence. Referred to in this discussion, however, are

⁵ The use of the term "repatriation" rather than the museum terminology of "restitution," is deliberate. While the former applies by definition to people, the latter is used for objects. It is hoped that the development of this article, and in particular the assessment of the Native world view, will demonstrate that cultural artifacts are considered integral to Aboriginal culture in so many ways as to elevate their significance above being important simply as "objects."

⁶ *Constitution Act, 1982*, s.35(1) being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Constitution Act*].

tangible culturally significant objects such as ceremonial masks, feast dishes, totem poles, burial boxes, and the human remains of Aboriginal Peoples.⁷

III. FAILED REPATRIATION ATTEMPTS AND A PROPOSED SOLUTION

Canadian case law on the repatriation of Native artifacts is sparse; the failed repatriation claims that have been litigated are demonstrative of the difficulty in using a European-based legal system to achieve First Nations' goals. One such case dealing with an unsuccessful attempt to repatriate cultural artifacts is *Mohawk Bands of Kahnawake, Akwesasne and Kanesatake v. Glenbow-Alberta Institute*.⁸ During the 1988 Calgary Winter Olympics, the Glenbow Museum in Alberta assembled fifteenth, sixteenth, and seventeenth century North American Indian artifacts from around the world for their exhibit entitled *The Spirit Sings*. A group of Mohawk from the Kahnawake reserve in Quebec objected to the Glenbow Museum's display of a false face mask that had been owned by the Royal Ontario Museum (ROM) for sixty-six years. Explaining that the mask was possessed of great spiritual power and religious significance, counsel for the plaintiffs remarked that its display in *The Spirit Sings* was "equivalent to putting the Catholic Host in a strip show."⁹

When both the ROM and the Glenbow refused to keep the mask out of the exhibition, the Mohawk sought an injunction to block its display. Shannon J. of Alberta's Court of Queen's Bench initially allowed an interim injunction but ultimately reversed his decision when the respondents produced evidence proving that the items had been on display at a number of museums for the past thirty years. Shannon J. found that the Mohawks failed to prove sufficient suffering as a result of the exhibition. He held that as the masks and

⁷ Excluded from this discussion are the stories, songs, dances, and ceremonies that clearly also comprise a vital aspect of a culture based on oral tradition, and are considered by First Nations as "property."

⁸ *Mohawk Bands of Kahnawake, Akwesasne and Kanesatake v. Glenbow-Alberta Institute*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.) [hereinafter *Mohawk*].

⁹ R. Clements, "Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law" (1991), 49 U. T. Fac. L. Rev. 1 at 10.

other items in question had been on display at a number of museums, there was no urgency in having it removed from public display. The plaintiffs will not suffer irreparable harm if the mask is displayed in view of the fact that it has been previously displayed, and that the plaintiffs had never objected in the past to the display of this mask.¹⁰ The Mohawk people also applied for a permanent injunction to regain ownership of an assortment of artifacts on display in the Glenbow Museum, but this application was also refused. Today, the false face mask, one of the artifacts in dispute, remains in the ROM's collection.

Attempts to "battle" for Native artifacts within the "form" of the Anglo-Canadian legal system have failed thus far because the cultural significance of the objects has not been taken into account by courts deciding the various claims. Importantly, this is due to the separation of the objects from their respective source cultures. A successful solution for repatriation within the Canadian legal framework is dependent upon the artifact being re-invested with its cultural significance and integral importance to the culture of its Peoples of origin. Once this significance is restored, an object can be proclaimed an integral part of Aboriginal life and a right to repatriate the artifact under section 35(1) of the *Constitution Act* will be litigable. To understand the significance artifacts assume in First Nations' cultures necessitates an exploration of the cultural differences manifested in the European and Aboriginal world views.¹¹

IV. THE ABORIGINAL WORLD VIEW

In Canada, attempts to assess the traditional Aboriginal world view are limited by the non-Aboriginal capacity to adequately comprehend this unique perspective. As Sakej Henderson astutely observes, "you can never understand another world view in a foreign language."¹² In his account *Dancing With A Ghost: Exploring Indian*

¹⁰ *Supra* note 8 at 71.

¹¹ To establish a polarity between the colonizer and the Aboriginal peoples is not to pit the systems against each other in furtherance of the "warfare of consciousness," but to gain an understanding of the difference so that we can then begin to work on bridging it, see Henderson, *supra* note 1.

¹² *Supra* note 1.

Reality,¹³ criminal lawyer Rupert Ross explains that "our two cultures are . . . separated by an immense gulf, one which the Euro-Canadian culture has never recognized, much less tried to explore and accommodate."¹⁴ While Anglo-European intellectual history began with the Mediterranean world view, classically enunciated by Plato and Aristotle, the Aboriginal Peoples of Canada originated in Asia, and imported their nomadic existence to this continent. Ours is an absolutist system, inspired by empirical philosophy, sovereignty, an artificial state and positive law; theirs can best be characterized as a circular, spiritually integrated, communal world view.

1. A Circular Vision of Existence

Ross states that "we [non-Aboriginal people] see ourselves on a road, moving forward, progressing down some linear track that promises constant improvement and discovery."¹⁵ He then posits the western European conviction contends that one is born to continue travelling down an infinitely changing road, while Aboriginals conceptualize their destiny as the cyclical repetition of previous events and experiences. Ross further describes this cyclical process as:

walk[ing] in the footsteps of all who had gone before . . . to take in effect their place on the slowly revolving wheel of eternally repeating existence . . . and define their lives not as occupying the new ground of their own discoveries, but as revisiting ground already occupied by all their ancestors.¹⁶

The metaphorical shape of existence from an Aboriginal perspective is circular rather than linear, revolving not evolving. Native people tap conceptually into the communal and repeating past, present and

¹³ R. Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham: Reed Books Canada, 1992). Ross himself is not a First Nations person, and though it may seem bitterly ironic to be using a non-Native person's account to gain an understanding of the Aboriginal world view, I think it appropriate because the book was written for non-Natives to grasp the immense gulf between the two cultures.

¹⁴ *Supra* note 13 at xxii.

¹⁵ *Ibid.* at 89.

¹⁶ *Ibid.* at 89-90.

future, through land and surroundings, but also through their cultural artifacts. Cultural objects that are of historical and aesthetic interest to non-Aboriginals, perpetuate the present for Native Peoples.

Leroy Little Bear similarly characterizes this circular world view. He contrasts the linear, occidental relationship to the world with the Aboriginal philosophy of viewing the world in cyclical terms. Using images to illustrate the Aboriginal perspective, he states: the "[cyclical] philosophy is the result of a direct relationship to the macrocosm. The sun is round, the moon is round, a day is a cycle."¹⁷

2. A Spiritual Outlook on Life

While many non-Aboriginals conceive of the universe in a strict scientific sense, Native people have traditionally held a pantheistic, supernatural view of the universe.¹⁸ For Native people there are supernatural explanations for natural phenomena and the behaviour of creatures in their midst. From this point of view, effective human intervention or control in the universe is minimal, except through supplication to the spirit world. Ross further explains this notion: "I don't think it is open to doubt that in Native approaches to life there is an interplay between the spiritual and physical planes which is central to the individual characteristics of both."¹⁹

3. A Holistic World View

Aboriginal Peoples perceive the human, natural, and spiritual worlds as a totality that influences every aspect of daily life.²⁰ Little Bear supports this notion, contrasting the linear and monotheistic philosophy of Western cultures with an Aboriginal cyclical philosophy "that does not lend itself readily to dichotomies or categorization, not to fragmentation or polarizations."²¹

¹⁷ Leroy Little Bear, "Aboriginal rights and the Canadian 'Grundnorm'" in J. R. Ponting, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) at 244.

¹⁸ Ross, *supra* note 14 at 51.

¹⁹ *Ibid.* at 49.

²⁰ Clements, *supra* note 2 at 6.

²¹ *Supra* note 17 at 246.

4. Communal Rights

For the most part, the Native world view is expressed in terms of communal rather than individual rights. The concept of "property" in Native terms then, also relates to relationships that are far broader than notions such as the exclusivity of possession and the right to alienate property that dominate the Anglo-Canadian legal tradition. Within the Native world view there is not a sense of private property, but rather concepts of property that recognize the interdependence of communities, families, and nations. Any sense of ownership does not preempt the rights and privileges of others.²²

These doctrines are woven into the very essence of Aboriginal cultural artifacts. In the words of Onandaga Chief Owen Lyons:

[t]ribal customs and religious ordinances are synonymous. All aspects of life are tied to one totality. Artifacts are equally important: for example, wampum (beads made from shells) is artwork, religious object, historical document, and representation of current existence.²³

When cultural artifacts are understood in terms of this Aboriginal world view, it becomes clear that these items are not merely historical documents; they are communally shared symbols of contemporary culture, imbued with spirituality. Hence one interprets these artifacts as manifesting a united and cyclical whole, which integrates humankind, nature and the spirit world. In Aboriginal culture these aspects cannot be separated, and the concept of a cyclical existence is inherent in the cultural artifact itself. Naturally connected to the peoples who created it, the artifact is an extension of their existence as a holistic, spiritually associated peoples, and a tangible manifestation of the human, natural, and spiritual worlds.

²² Little Bear, *supra* note 17 at 284.

²³ B. Blair, "Indian Rights: Native Americans Versus American Museums Battle for Artifacts" (1979) 7 Am. Indian L. Rev. 125 at 127.

V. THE NECESSARY INCLUSION OF THE NATIVE WORLD VIEW

When judges decide Aboriginal claims in the absence of an understanding or consideration of this Native world view, the claim is destined to fail. This is exemplified in the case of *R. v. Jack and Charlie*.²⁴ The appellants in this case are members of the British Columbia Coast Salish First Nation. The charges brought against them were for hunting and killing a deer out of season off the reserve. Defence counsel argued that the deer in question had been shot in preparation for a religious ceremony, which involved the burning of fresh meat to satisfy the spirits of the ancestors by serving food. Defense counsel explained that the essence of the deer would be transmitted through the smoke to the essence of the ancestral spirit. However, Beetz J. determined that "there was no evidence that the use of defrosted raw deer meat was sacrilegious."²⁵ By ignoring the Aboriginal world view, the Supreme Court of Canada assumed that the spirit of the deer could be separated from the flesh. The judge's failure to appreciate the differing Aboriginal view resulted in upholding the conviction of the Native appellants.

Like the deer meat in the *Jack and Charlie* case, so too are Aboriginal cultural artifacts seen without recognition of their cultural significance, when the Native world view is left out of the conceptual framework. With the world view separated from the object, the integral and integrated aspects of the artifacts to the First Nations culture are ignored, and replaced with, "the range of western beliefs that define intellectual and cultural property laws—that ideas can be easily separated from expressions, that expressive worlds can be abstracted from the meaningful worlds in which they figure, to circulate as the signs of unique personality."²⁶ What happens to our conceptualization of the object, and in turn to the source cultures we connect with the object, when they are placed under glass in museums or similar institutions?

²⁴ *R. v. Jack and Charlie*, [1985] 2 S.C.R. 332. [hereinafter *Jack and Charlie*].

²⁵ *Supra* note 24 at 334.

²⁶ Coombe, *supra* note 3 at 285.

VI. ARTIFACTS ON DISPLAY: REPERCUSSIONS FOR THE SOURCE CULTURE

Two major consequences of extracting an artifact from the source culture and putting it on display in a public, non-Aboriginal institution, are:

- i) the artifact is disconnected from its holistic involvement and significance in the larger source culture. The Native world view is separated from the artifact, and replaced instead by a European conceptualization of art that justifies the artifacts presence in the museum and makes repatriation difficult.
- ii) the source culture is deprived of any recognition of present contemporary existence, and relegated to an ahistorical suspension in time. Their culture is thus appropriated, and Native Peoples denied their own past and contemporary present.

1. The Conceptual Shift Between Artifact and Art

Upon seeing a cultural artifact on display in a museum or public institution in Canada, the viewing public assumes that the artifact had historical significance, and presently has only aesthetic and educational value. When viewing artifacts in a museum environment, the jump from artifact to art is an easy and unconscious transition in thought, which most people are unaware is happening. Identifying this transition is a crucial step toward understanding both the difficulty and the necessity of repatriating cultural artifacts to their creators.²⁷

²⁷ Within the property law system of the Anglo-European tradition, property regimes are divided into a "continuum" located between the poles of "cultural property" and "intellectual property." While this may perhaps be seen as a sliding scale of definition, in the sense that objects may in fact move over time from one realm into the other, it is also possible to conceive of this as a hierarchy of property. Copyright and trademark laws apply only to intellectual property, thus cultural property is not given the guarantees of such protection. It remains closer to the "ethnographic specimen" side as distinct from the finer arts of intellectual property, see B. Sherman, "From the Non-Original to the Aboriginal: A History" in B. Sherman and A. Strowel, eds., *Of Authors and Origins: Essays on Copyright Law* (Toronto: Clarendon Press, 1994).

The display of an artifact leads to a "recognition of the greatness of tribal works, . . . thereby bestowing on those objects the status of 'art' in place of their former lowly designation as ethnographic specimens."²⁸ Cultural artifacts that become Indigenous art are commodified, objectified, and reified for purposes of collection, observation, and display. The artifacts are disconnected from the Peoples who created them and from the spiritual or religious significance the object has in society. Emptied of meaning, the artifact becomes instead one individual's aesthetic object, allowing it to be imbued with European concepts of art and thus deserving of the same possessive notions that justify housing all great works of art as contributions to the universal culture of humankind.

Art exhibited in galleries is seen to exemplify human creativity that transcends the limitations of time and place, while commenting on the human condition. As R. J. Coombe suggests,

[W]hen non-Western objects fully pass from the status of authentic artifact to the status of art, they . . . enter into a 'universal' history . . . [t]hey become part of a human cultural heritage . . . rather than objects belonging to the 'cultures.'²⁹

Williams makes a similar point:

Works of art and sculpture, artifacts, great monuments and temples have been prized throughout history as being of significant importance. This has been so, not only because of their aesthetic worth, but also because they represent the talent and endurance of man.³⁰

A universal collection of human cultural heritage "must be well preserved to ensure that future generations can see and marvel at the accomplishments of their own epoch and those that came before."³¹ It was during the twentieth century that this concept of universal patrimony was born.

²⁸ *Supra* note 3 at 257.

²⁹ *Supra* note 3 at 258.

³⁰ S. A. Williams, *The International and National Protection of Movable Cultural Property* (New York: Oceana Publications, 1978) at 258.

³¹ *Ibid.*

i. Tracing the Notion of a Universal Collection

In 1939, the International Council of Museums undertook a study that pronounced the conservation of artistic and cultural heritage to be in the interest of all nations in their collective capacity. From this perspective, countries possessing significant cultural and artistic wealth are seen simply as repositories for objects generally benefiting all humankind.³²

The 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* established a mandate seeking to give protection to all property (irrespective of origin or ownership) viewed as being of importance to the cultural heritage of all peoples. Damage to cultural property belonging to any people whatsoever meant damage to the cultural heritage of all humankind, since "each people makes its contribution to the culture of the world," and each country is simply a custodian of its treasures for the world at large.³³

The 1970 UNESCO *Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* was the first multinational convention aimed at protecting cultural property from destructive threats in times of peace. At this international forum it was declared that, "it is incumbent on every state to protect the cultural property existing within its territory, against the dangers of theft, clandestine excavation and export."³⁴

The 1972 *Paris Convention Concerning the Protection of the World Cultural and Natural Heritage* also stressed the national self-regulation and protection of cultural artifacts, noting that "the deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world."³⁵ The state custodian was thus required to preserve and protect art.

These theories of housing and protecting works of art were developed in accordance with European aesthetic standards and

³² *Cultural Rights as Human Rights: Studies and Documents on Cultural Policies* (Paris: UNESCO Educational, Scientific and Cultural Organization, 1977) in Williams, *ibid.* at 53 [hereinafter UNESCO].

³³ Williams, *ibid.* at 34.

³⁴ Williams, *supra* note 30 at 54.

³⁵ *Ibid.* at 54.

have been applied to Aboriginal artifacts. The artifacts have been decontextualized in museum displays, making it all the more easy for non-Aboriginal value systems to operate and go unchallenged. The fact that these value system are often so deeply ingrained as to be unrecognizable and therefore difficult to challenge only exacerbates the problem. This problem is part of the reason repatriation attempts have failed.

2. Cultural Assimilation and Voice Appropriation

A further consequence of displaying artifacts is that the culture behind the work is denied a contemporary and dynamic present, thus being further assimilated into the dominant culture through appropriation of cultural voice.³⁶ Under the guise of protection, Native cultures are frozen in time and rendered ahistorical. Museum exhibits create the perception of vanishing Native traditions and cultural destruction. Native artifacts are appreciated in terms of their historical value and not as the ongoing expressions of Peoples engaged in contemporary struggles. Native cultural identity is "... extinguished, denied, suppressed and/or classified, named and designated by others."³⁷ Artifacts collected and housed in museums are valued as authentic artifacts of a dying culture and disappearing race. Joanne Cardinal-Shubert, an Aboriginal curator and anthropologist, makes a similar argument with reference to the Glenbow exhibit, which was at issue in the *Mohawk*³⁸ case. The Glenbow exhibit, she explains, "took ceremonial reliquae out of their contexts in community life, portrayed them as lifeless objects and pushed the notion that Native culture was dead, wrapped up, over and collected."³⁹ The displaying institution projects an image of Native "Indianness," while the living human beings with Native ancestry are treated as dead, dying, vanishing, or victimized, and in need of others to speak on their behalf.

The Aboriginal experience has been described as the "experience of everywhere being seen, but never being heard; of constantly

³⁶ For an excellent summary of the "appropriation of voice" debate that centers around the telling of aboriginal stories, see S. Godfrey, "Canada Council Asks Whose Voice is it Anyway?" *Globe and Mail*, (21 March 1992) C1.

³⁷ Coombe, *supra* note 3 at 272.

³⁸ *Supra* note 8.

³⁹ Cardinal-Shubert, as quoted in, Coombe, *supra* note 3 at 277.

being represented, but never listened to, being treated like an historical artifact rather than a human being."⁴⁰ Aboriginal contemporary culture is being spoken for, and this appropriation of voice constitutes the final stage of colonialism and cultural genocide.⁴¹ Colonized peoples suffer the loss of control over many aspects of their society, including the ability to control the information being transmitted about their own culture (which may be inaccurate or plainly wrong) and the ability to carry out their religious or spiritual practices.⁴²

i. Denial of Religious and Spiritual Practices

The Zuni Pueblo in New Mexico had stolen from them wooden carvings of their war gods which later were sold to American museums.⁴³ The carvings were used in an annual religious ceremony and after left placed, undisturbed, on Zuni land to fulfill their religious purpose. The museums housing these artifacts varnish them each year, although, as objects of religious significance, this tampering is offensive and sacrilegious to the group from which they were taken. These, as many ceremonial artifacts on display in museums, are of vital importance to a specific Native community and are integral elements of its religious ceremonies. Without the items the ceremonial rites cannot be exercised. The objects are necessary for the religious survival and maintenance of cultural integrity: "failure to perform the rituals rips at the fabric of Native American culture and inevitably leads to the destruction of the cultural integrity of individual North American societal groups."⁴⁴

The pattern of denying Natives their religious or ceremonial practices has been repeated in Canada. One example, shared by Margaret LaBillois, an elder of the Eel River Bar First Nation, concerns the storage in a Fredricton museum of ancestral remains.

⁴⁰ *Ibid.* at 279.

⁴¹ Commission on Human Rights, *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*, Report on the Forty-Sixth Session, [1994] 4 C.N.L.R. 17 [hereinafter *Draft Principles*].

⁴² Obviously it is not simply the presence of the object in the museum. There are also many social factors that are at work in forming the general society's perception of aboriginal artifacts as "art." For a broader reference to this, see Sherman, *supra* note 27 at 122.

⁴³ See Clements, *supra* note 2 at 6-7.

⁴⁴ Blair, *supra* note 23.

Unable to influence the museum's treatment of the remains, this northern New Brunswick community could not inter the remains and put their ancestors to rest. Dean Jacobs observes: "the thing that non-natives don't understand is that the spirit of an Indian doesn't die. It's an ongoing journey. When bones are disturbed and removed, the journey is interrupted."⁴⁵ The result in this case was that Aboriginal people were robbed of ultimate control over religious and ceremonial life—that of burying its dead.⁴⁶

VII. ARGUMENTS AGAINST REPATRIATION

One argument against repatriating artifacts from public institutions is the need to protect and preserve artifacts for posterity in order to educate future generations. This argument makes three problematic assumptions: first, it implies that preservation is a desirable end; second, that museums are better placed or more capable of protecting Native artifacts than the source cultures themselves; and third, that the human culture is enhanced, despite cultural knowledge being transmitted second hand and through persons other than those from the source culture.

The attitude that "many source nations retain cultural works that they do not adequately conserve or display and if such works were removed to another nation, they would be better preserved, studied and exhibited"⁴⁷ assumes preservation to be a desirable goal. The cultural insensitivity of this presumption is illustrated by First Nations' belief that totem poles *are* meant to decay, following the same cyclical pattern of all living things.

Furthermore, the notion that Native Peoples lack the cultural expertise and organization to deal with cultural property as a resource is grossly paternalistic and discriminatory. It is insulting and hardly short of racist to presume that First Nations are incapable of protecting and caring for the products of their own creation.

⁴⁵ D. Henton, "Outrage: Native Challenge Study of Sacred Bones" *Toronto Star* (26 August 1989) A14, in Clements, *supra* note 2 at 8.

⁴⁶ The Canadian Museum of Civilization alone holds roughly 3000 partial or complete skeletons in its collection, Clements, *supra* note 2 at 7.

⁴⁷ J. H. Merryman, "Two Ways of Thinking About Cultural Property" (1986) 80 A.J.I.L. 831, as quoted in Coombe, *supra* note 3 at 261.

To argue that world culture is enhanced when artifacts are housed in public institutions, makes individual nations responsible to the international community for the preservation of cultural property situated on their territories.⁴⁸ This prioritizes the education of Anglo-Europeans and tourists over the education and continuation of the Peoples to whom the artifact belongs and to whom it is rendered inaccessible. Further, if cultural diversity contributes to the general cultural wealth of humanity, then it should be encouraged. The most accurate knowledge of each unique culture is best transmitted by the original owners. Contesting the view of a unified universal human culture is the idea that "cultural diversity contributes to the adaptability and creativity of the human species as a whole,"⁴⁹ leading to a long term benefit to all humanity. In order to diversify and enrich the human culture overall, Indigenous peoples should be recognized as the primary guardians and interpreters of their cultures. Finally, one must realize that the price being paid for the education of the dominant culture is the destruction of the Aboriginal minority.

VIII. THE LEGAL FRAMEWORK FOR REPATRIATION

The strong social and moral arguments for repatriation, discussed above, can be made in hopes of influencing policy choices made by government administrations, legislatures, and ultimately the courts. Despite their consciousness raising effect, moral arguments provide only limited success and legal arguments surrounding repatriation claims must therefore be explored.

In order to bring a legal claim for cultural artifacts, Native people must use the dominant language or "form" of the Anglo-Canadian legal system. Consequently, they are forced to use categories that are antithetical to their needs. Recognizing the problem in using the dominant Canadian system to argue an Aboriginal claim, it is of little surprise that what has often foiled attempts at repatriation is the common law itself. A brief analysis of common law principles and Aboriginal needs reveals why.

⁴⁸ *Supra* note 30 at 64.

⁴⁹ *Ibid.* at 21.

While the Aboriginal holistic world view assumes the integration of all aspects of life (e.g. ceremonial wampum beads support culturally significant ideas on several planes) the English common law system divides the world in a fashion both hostile and foreign to Aboriginal needs, rigidly demarcating intangible works and cultural objects. As R. J. Coombe states, "the law rips asunder what First Nations people view as integrally related."⁵⁰

Native ownership of property, like the First Nations relationship to the world, is holistic. Land is communally owned, and ownership rests not in any one individual but rather belongs to the band as a whole.⁵¹ Native concepts of property are based on notions of communal rights and collective ideology, where access to and use of resources is determined by the collective interests of society as a whole; in contrast, the non-Aboriginal view is based on individual possessory rights. The Aboriginal concept of property incorporates relationships that are far wider than the exclusivity of possession and rights to alienation dominating the Anglo-Canadian system.

The idea of communal title is found among the various conceptions of property held by Canada's First Nations. The rights belong to members of Aboriginal communities because they hold membership and these rights cannot be alienated.⁵²

The Anglo-European property law system, however, is predicated on the necessity of identifying and isolating an individual owner in resolving ownership disputes. Therein lies the difficulty in applying this legal system when ownership does not lie with the individual, but with the community.⁵³

On a perusal of the dichotomy between communal ownership and individual ownership, it might be assumed that the repatriation issue can be framed in common law terms by the museum's refusal to return "stolen property," giving rise to a cause of civil action in conversion. The First Nation could also employ the rule against transferring greater rights in property than one has: *nemo dat quod*

⁵⁰ *Supra* note 3 at 269.

⁵¹ Little Bear, *supra* note 17 at 245.

⁵² B. Ziff, *Principles of Property Law* (Scarborough: Carswell, 1992) at 282.

⁵³ Another inherent problem, that is perhaps less pronounced because more nebulous, is that of the use of the term "ownership." Communal cultural property is guarded or cared for, but not necessarily "owned" in the western sense of the word.

non habet.⁵⁴ The individual who transfers title in an artifact to a museum could be argued to have done so without the consent of all the affected members of the band; and due to the communal ownership of property, this Native individual would have given greater rights in the object than he or she had to offer.

Thus, it might appear that communal ownership rights of personal property can be protected by the common law umbrella. However, there is the problem of the evidentiary burden required by Anglo-Canadian common law edicts. One problem of proof in assessing and determining the legality of a museum's possession of Native artifacts is the necessity of proving through witnesses the theft or transfer. Since the vast majority of any eyewitnesses to the theft would be long dead, the sources of proof the First Nation would rely on is oral history, and expert testimony. But the courts have demonstrated a reluctance to receive oral testimony,⁵⁵ despite the significance oral tradition has within First Nations' communities.⁵⁶

Finally, the issue of good title must be explored. The common law always presumes title in the landowner or person in possession of the artifact.⁵⁷ Museums who possess cultural artifacts would therefore be presumed to have good title. Again, problems of proof would make it difficult to overcome that presumption. Repatriation claims within the common law framework could also be defeated by limitations of actions and the doctrine of laches. Therefore, effective arguments for repatriation must be sought outside the common law framework.

IX. EFFECTING CHANGE

The shortcomings revealed in using common law arguments to effect repatriation beg the question whether these difficulties can be surmounted, and if so, how. The common law system is fluid by

⁵⁴ Ziff, *supra* note 52.

⁵⁵ *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) [hereinafter *Delgamuukw*].

⁵⁶ Documented written evidence from the post-contact period does exist, but as it is written from the Settlers' perspective, it is so biased and self-serving as to be at cross-purposes with the aim of repatriation, if admitted in evidence.

⁵⁷ *Supra* note 52.

nature, and has the ability to evolve to suit society's needs. Change in the surrounding social structures, tendencies, and beliefs eventually reaches the courts and effects modification there. Transforming social policy creates conceptual shifts that are eventually reflected in our laws.

The example of matrimonial property legislation demonstrates this progression and reform over time. Changes in the common law, equity, and finally legislation in the form of the *Married Woman's Property Act* of 1883, exemplify how the common law progressed over time, reflecting changes in society by changes in the law.⁵⁸ The common law reflects the ongoing dialectic between society and the legal system; these are mutually informing processes, sensitive to and receptive of change. The caveat to be noted here, however, is that this change can be very slow, as demonstrated by the torpid evolution of the laws surrounding married woman's property. The following is an analysis of some of the forces of social change and pressure that one can hope will exert some impetus for innovation in the legal system. These are some solutions to repatriation that have been reached outside of the sphere of this country's courts.

1. Land Claims Settlements

The possibility of including the requested artifacts for repatriation in land claim settlements has been established in connection with the Nisga'a Band of northwestern British Columbia.⁵⁹ One problem with this approach is that it is slow and those in control do not want relinquish control. The Nisga'a settlement serves as an example: "It's doubtful that any pieces will be moved to British Columbia until the Nisga'a build facilities

⁵⁸ J. D. Johnston, "Sex and Property" (1972) 17 N.Y.U.L. 1033 at 1044.

⁵⁹ P. Gessell, "Nisga'a Get Museum Pieces in Land Claims Settlement" *Ottawa Citizen* (17 February 1996) A12. As reported in the *Ottawa Citizen*:

The Canadian Museum of Civilization is transferring the ownership of 'a few hundred' aboriginal artifacts to the Nisga'a tribal government as part of this week's tentative land-claims agreement with the British Columbia band. The Nisga'a deal is different from most demands for artifacts acquired legally or illegally by museums, in that the cultural artifacts are linked directly to a land-claims agreement.

equipped to preserve the artifacts and more people are trained to care for the fragile materials.”⁶⁰ Moreover, there is some speculation as to whether the current agreement will settle the dispute, as the Nisga’a have been arguing their land question for almost a century now.

2. Legislation

In 1990, the United States Congress enacted the *Native American Grave Protection and Repatriation Act*, mandating the return of a large number of culturally significant objects.⁶¹ The *Repatriation Act* is a prodigious effort of Congress to return Native American cultural property, requiring all federal agencies to compile an inventory of Aboriginal skeletal remains and funerary objects in their collections, and to make these inventories available on request. If a request is made for the return of these items by a group establishing sufficient cultural affiliation, such items are to be expeditiously returned.⁶²

3. Bands Working Independently with Museums

Subsumed under this heading are partial solutions to repatriation that are less adversarial than litigation. Cooperative efforts have been employed to develop management, access, use, and custodial policies between the museums housing the objects and the First Nations to whom they belong. For example, the *Task Force Report on Museums and First Peoples*, advanced the idea of a partnership relationship between Canadian museums and First Nations Peoples “guided by moral, ethical and professional principles.”⁶³ An instance of a museum putting this method into practice is observed in the Museum of Anthropology (MOA), Vancouver, British Columbia. The MOA has a lending system to promote access to the artifacts, whereby ceremonial items such as feast dishes can be “borrowed”

⁶⁰ *Ibid.* at A12.

⁶¹ *Native American Grave Protection and Repatriation Act of 1990*, Pub. L. No. 101-601, 104 Stat. 3048 (codified as amended at 25 U.S.C. para. 3001-2013 (1983 and supp. 1992) [hereinafter *Repatriation Act*]).

⁶² *Repatriation Act*, Pub. L. No. 101-601, 104 Stat. 3048 (codified as amended at 25 U.S.C. para. 3001-2013 (1983 and supp. 1992) at para. 3004.

⁶³ C. Bell, “Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate” (1992) 17 Am. I. L. R. 457 at 457.

by the source culture for the duration of a particular event or celebration. In addition, the museum consults with aboriginal peoples about the display, care, and cultural significance of the artifact.⁶⁴

A problem with cooperative efforts between museums and First Peoples is the limited control relinquished to the First Nation. Although some museums may adopt access and lending practices, the terms of such arrangements will be dictated by the museum. While museums are often willing to "share" the artifacts, they are reluctant to relinquish control over them. "We're not emptying out the vaults," says George MacDonald, the MOA's executive director, "what we're doing is sharing with them, and pieces will move back and forth."⁶⁵

One successful repatriation reached through independent work with a museum, is the Canadian Museum of Civilization's return of the Starlight Bundle, a sacred relic of the Sacree people of Alberta, in 1989. The board of trustees of the National Museums of Canada had voted to return the bundle because "of the importance of the bundle to the band in conducting tribal ceremonies, its intended use in educating young Sacrees about their heritage, and the band's assurances that the bundle would be well-preserved."⁶⁶

Problems with the court system, including cost, time consumption, and the adversarial nature of the litigation process, all render consensual solutions as better suited to the repatriation goal. Unfortunately, however, so many of these consensus-based claims have failed: "clearly the success rate of non-legal claims for restitution is very low, no matter whether the claim is based on religious or kinship grounds, proprietary or spiritual rights, wrongful taking or wrongful display."⁶⁷ The story of the Big Bear Spiritual Run is an example of an unsuccessful non-legal attempt to repatriate cultural artifacts. Jim Thunder, an Alberta Cree, ran from Edmonton to New York City in an effort to persuade the American Museum of Natural History to return to the Plains Cree a calico-

⁶⁴ Author's telephone interview with Jennifer Webb of the *Museum of Anthropology*, Vancouver B.C. (26 April 1996).

⁶⁵ MacDonald as quoted in Gessell, *supra* note 59.

⁶⁶ D. Henton, "Fight Continuing for Sacred Bundle of Chief Big Bear" *Toronto Star* (17 April 1989) A11.

⁶⁷ Clements, *supra* note 2 at 10.

wrapped sacred bundle (containing a grizzly bear paw, a sweetgrass braid and tobacco plug). The bundle had belonged to Plains Cree Chief Big Bear until his death in 1888. The museum had been given the bundle fifty years earlier by an unnamed Native, with the instructions to "keep it well." The museum refused to return the bundle and argued that Thunder's claim could not be substantiated.⁶⁸

There are many forces at work within contemporary Canadian society that are raising the issue of repatriation and apprising Canadians of the current debate. While we have seen a few successful attempts, one is also reminded of how ineffective and uncertain these policies can be. Most importantly, for Aboriginal people, there is a pervasive element of urgency underlying the repatriation debate. First Nations cultures are being eroded. This is evidenced by the intolerable conditions found on many reserves and the over-representation of Native people in the penal system. The urgency thus eliminates the option of using societal pressure to force the recognition of a legal right to the artifacts; it simply takes too long. The recognition for the right to repatriation must flow from the legal system to society. One cannot wait any longer for the "form" to fit before engaging in the "battle." By necessity, the claims for repatriation must be advanced in Canadian courts.

If Aboriginal claims to cultural artifacts are recognized under section 35(1) of the *Constitution Act*, the common law form and the English common law rules of property can be abandoned.⁶⁹ Once the courts have articulated a constitutional right to First Nations cultural artifacts, the groundwork for successful repatriation claims on a consensus basis will have been established.

⁶⁸ Henton, *supra* note 66.

⁶⁹ Bell, *supra* note 63 at 465, states:

one should not assume that Canadian courts will not reformulate the rules of property to accommodate an aboriginal perspective. Despite its firm roots in the private property rationale, Canadian law is unique in that it often seeks to find a compromise between liberal ideologies that promote the rights of individuals and collective concerns that promote the welfare of the communities.

X. AN ABORIGINAL RIGHT TO CULTURAL ARTIFACTS

The notion of an Aboriginal right to cultural artifacts is also based on a human right to culture; and while Aboriginal right to the former has not been established, human rights are firmly entrenched in popular beliefs and international human rights law.

1. A Human Right To Culture

The concept of a human right to culture was solidified as early as the 1948 *Universal Human Rights Declaration*, which recognized a "right to culture" in Article 27.⁷⁰ In 1966, the UNESCO *Declaration of the Principles of International Cultural Cooperation* stated in Article 1:

[E]very people has the right and duty to develop its culture. The document states that 'culture is the essence of being human,' and the declaration identifies the 'right to freely participate in the cultural life of the community.'⁷¹

If, as the UNESCO conclusions state, "the first task of life is to live, and one of the principle functions of culture is to enable people to maintain and perpetuate life,"⁷² then surely denying access to the material objects of that culture is a violation of this basic human right. Support for this was again expressed in the 1994 *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*. This draft deals primarily with the flow of indigenous people's heritage across international boundaries, but the principles remain the same: "... the right and the duty of indigenous peoples to develop their own cultures and knowledge systems."⁷³

The right of Indigenous people to control the dissemination of their culture and all its integral aspects should be accorded constitutional protection by a declaration of the courts under section 35 of the *Constitution Act* 1982. The Constitution provides a bridge between the two world views; the rights-discourse suits the

⁷⁰ UNESCO, *supra* note 32 at 121, see also *Draft Principles*, *supra* note 41 at 19.

⁷¹ *Draft Principles*, *ibid.* at 10.

⁷² UNESCO, *supra* note 32 at 105.

⁷³ *Draft Principles*, *supra* note 41 at 21.

Anglo-Canadian framework, and the recognition of the right provides Aboriginals with a method of repatriation.

2. A General Characterization of Aboriginal Rights

Aboriginal rights arising out of a declaration under section 35 are "additional and special rights, over and above the rights enjoyed by all citizens in Canada."⁷⁴ They arise by operation of law, and do not depend on a grant from the Crown.⁷⁵ The nature and content of an Aboriginal right is determined by what the organized Aboriginal society regards as an integral part of their culture,⁷⁶ and is not limited to a use having been exercised, or occupation established, since time immemorial. All the evidence need show is that it had been in effect for a sufficient length of time to become integral to the Aboriginal society.⁷⁷ Canadian courts have identified Aboriginal rights as *sui generis*, and it has been stated that their unique nature has made them "difficult, if not impossible to describe in traditional property law terminology."⁷⁸ They are communal rights, although each member of the community has a personal right to exercise them⁷⁹ and are intimately connected to pre-sovereignty Aboriginal practices.⁸⁰ Certain activities may be regarded as Aboriginal rights if they formed an integral part of the traditional Native life prior to sovereignty.⁸¹

What is protected are rights and not habits. They must be considered by the Aboriginal people who claim them to be so important to their society, so fundamental to their basic beliefs and relationships, so much a part of the significant and distinctive characteristics of their indianness, that they serve to define what makes an indian an indian.⁸²

⁷⁴ *Delgamuukw*, *supra* note 55 at 204.

⁷⁵ *Calder et al. v. A.G. of B.C.*, [1973] S.C.R. 313 at 313 [hereinafter *Calder*].

⁷⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099 [hereinafter *Sparrow*].

⁷⁷ *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 at 575.

⁷⁸ See *e.g. Delgamuukw*, *supra* note 55 at 126.

⁷⁹ *Pasco v. C.N.R.*, [1986] 1 C.N.L.R. 34 (S.C.C.) 410.

⁸⁰ *Supra* note 55 at 204, Wallace J.

⁸¹ *Ibid.* at 129.

⁸² *Ibid.* at 278, Lambert J.

In assessing an Aboriginal right the court considers its relationship to the cultural and physical survival of the claimant group. In *R. v. Sparrow* the right to fish was recognized as an Aboriginal right not only because the salmon fishery is valuable as a food source, but also because of its role in the system of beliefs, social practices, and ceremonies of the Musqueam people. This practise forms an integral part of their distinctive culture and is not simply an incidental habit:

The English common law imposed a correlative duty upon the Crown to protect from unjustifiable interference and impairment, the Aboriginal community's right to engage in those Aboriginal customs and practices traditionally associated with the lands they occupied and used.⁸³

3. The Extinguishment Of Aboriginal Rights

It has been firmly established under Canadian law that "the laws of a conquered country continue in force, until they are altered by the conqueror."⁸⁴ In *St. Catharines Milling v. The Queen* the Privy Council stated:

[T]he acquisition of sovereignty by the British Crown did not, in itself, extinguish the right of the Aboriginal people to continue their traditional customs [and] practices in a manner integral to that indigenous way of life."⁸⁵

The onus of proving that the sovereign intended to extinguish the Native title lies on the Crown. The court will demand strict proof of extinguishment, which must be clearly and plainly established⁸⁶ Implicit extinguishment or adverse dominion do not make Native title give way, and there is no "theoretical basis for the view that a right which is not used can be treated as abandoned after 1846."⁸⁷ Although "as a common law doctrine, albeit a fundamental one, the doctrine of Aboriginal rights can in principle be overridden or modified by legislation passed by a competent legislature, in the

⁸³ *Ibid.* at 203, Wallace J.

⁸⁴ *Campbell v. Hull* (1774), 98 E.R. 1045 (K.B.).

⁸⁵ (1888), 14 A.C. 46 (P.C.) at para. 612.

⁸⁶ *Calder*, *supra* note 75 at 404.; *R. v. Simon*, [1985] 2 S.C.R. 387 at 387.,

⁸⁷ *Delgamuukw*, *supra* note 55 at 319.

absence of constitutional barriers.”⁸⁸ As long as an Aboriginal right had not been completely abrogated prior to the *Constitution Act*, it is seen by the courts as constitutionally entrenched.

4. Section 35(1) of the *Constitution Act*, 1982

Aboriginal rights are “recognized and affirmed” in the Canadian polity by section 35 of the *Constitution Act*, 1982, and guaranteed in section 35(4). The approach for interpreting section 35(1) is derived from general principles of constitutional interpretation: “the nature of 35(1) suggests that it be construed in a purposive way.”⁸⁹ In addition, because of its position outside the *Charter*, section 35 is not subject to a section 1 analysis.

XI. THE INHERENTLY PROBLEMATIC USE OF THE *CONSTITUTION ACT*: THE CONCEPT OF RIGHTS, GROUP RIGHTS AND COLLECTIVE RIGHTS

In arguing for an Aboriginal constitutional right to cultural artifacts, there is a problem of fitting First Nations’ belief system into the Canadian legal system. Why should Aboriginal peoples need to or want to fit their aspirations into the dominant and imposed constitutional framework of section 35 of the *Constitution Act*? Why should Aboriginal claims have to use the “masters” language and conceptual apparatus to dismantle the “master’s” house?

Applying the *Constitution Act* to Aboriginal claims of any type may be problematic since the Act is predicated on a notion of individual rights rather than communal rights. Communal rights are traditionally very important to Aboriginal Peoples, and are “not personal rights in the sense that they exist independently of the community, but personal in the sense that a violation of the communal rights affects individual members’ enjoyment of those rights.”⁹⁰ As the individual rights regime is dominant, sanctioned

⁸⁸ B. Slattery, “Understanding Aboriginal Rights” (1987), 66 Can. Bar Rev. 727 at 740.

⁸⁹ *Sparrow*, *supra* note 76 at 1106.

⁹⁰ *Oregon Jack Creek Indian Band v. C.N.R.*, [1990] 2 C.N.L.R. 88 at 88 (B.C.C.A.).

and elevated as the supreme law in Canada, conflicts are filtered through its categories and conceptual apparatus.

M.E. Turpel has unapologetically critiqued the use of an individual-rights based paradigm for arguing Aboriginal concerns. Her comments on individual rights under the *Charter* can be applied equally to section 35:

[T]he entire process and substance of constitutional development and interpretation as the construct of a highly legalistic, adversarial, and abstract set of doctrines and theories which developed according to the needs of the predominantly Anglo-European colonialists. Because no common language other than that of the predominant culture and legal system is available, Aboriginal people find themselves trapped in the colonial paradigm, facing the problem of 'being the doctor and the disease'.⁹¹

In having to rely on the constitutional individual rights paradigm: "assistance aimed at human rights progress may actually be part of the oppression cultural peoples experience."⁹²

Rather than depend on an Aboriginal right, Henderson identifies the need for a new vision of law and knowledge, which recognizes that society has many different cognitive systems operating within it.⁹³ The individual rights model may deny the existence of a difference between Aboriginal and non-Aboriginal cultures, and thus act as a political tool of cultural hegemony. To characterize a right as Aboriginal may simply serve to create a polarity between cultures, and not work to resolve the underlying divides.

The risks inherent in formulating an appeal for recognition of cultural difference in terms acceptable to the rights paradigm of the Canadian constitution are high . . . the imperative to rethink legal interpretation in light of cultural difference is obvious.⁹⁴

⁹¹ M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-1990) 6 Can. Hum. Rts. Y.B. 3.

⁹² *Ibid.*

⁹³ Henderson, *supra* note 1.

⁹⁴ *Ibid.*

XII. RESOLVING THE USE OF A RIGHTS-BASED PARADIGM

In arguing for an Aboriginal right to cultural property, and in light of the inherently problematic use of rights-based discourse for resolving Native issues, it may be preferable to rely on the aforementioned notion of the ongoing dialectic between the courts and society. If the courts can uphold a repatriation claim on the basis of an Aboriginal right to cultural property, this in turn can work to influence the public's acceptance of the need to repatriate artifacts. Over time the public will influence the legislatures and other mechanisms that react to and create social policy. Progressive legislation (like the United State's *Repatriation Act*) can ultimately take over as a preferred avenue for repatriation. The use of the rights-based paradigm is therefore only necessary to generate an impetus for repatriation. If an Aboriginal right to cultural artifacts is enunciated by non-elected, independent judges, it may well infuse the social conscience and render the future use of the Constitution and its emphasis on individual rights unnecessary.

An example of this interplay can be drawn from the *Mohawk* case.⁹⁵ The Court's refusal to allow repatriation generated public discourse, which brought to light the importance of repatriation to Native Peoples. The Assembly of First Nations invited museum curators from Canada and around the world to Ottawa in November, 1988, to discuss the display of Native artifacts. This meeting led to the creation of a joint task force between the Assembly and the Canadian Museums Association, which was dedicated to developing guidelines for the appropriate handling of Indigenous peoples remains and artifacts. Although the request for the return of cultural artifacts was ultimately refused, the mere act of litigating the *Mohawk* case resulted in the issue entering the forum of public debate.

XIII. AN ABORIGINAL RIGHT TO CULTURAL PROPERTY: FITTING THE TEST

The Supreme Court of Canada has yet to render a comprehensive definition of aboriginal rights that embraces all the possible uses of

⁹⁵ *Mohawk*, *supra* note 8.

the term. Recent decisions of the Supreme Court suggest that Canada is moving toward a broader definition of Aboriginal rights, which are not dependent on the Crown granting or recognizing that such rights exist.⁹⁶ Rather, inherent rights are presumed to be *sui generis*; preexisting legal rights that are independent of creation or acts of recognition. That the courts have chosen not to place limits on the types of rights categorized as Aboriginal rights suggests that the content of Aboriginal rights will continue to be tested on an *ad hoc* basis and could be expanded to incorporate any number of rights recognized as being integral to the culture of the First Nation.

Thus far, Canadian law has recognized an Aboriginal right to fish, hunt, and hold title to land. The time has now come for a declaration of an Aboriginal right to bury their dead, dance their own masks, feast from their own dishes, and revere their own ceremonial reliquae. In short, the time has come for an Aboriginal right to cultural artifacts.

Having explored the Native world view, the importance of artifacts to the First Nations cultures is clear. Some cultural artifacts are so central to the Aboriginal culture as to be easily discerned as integral to the culture; they *are* the culture, and are therefore important to the cultural survival of the First Nations. This has been so since time immemorial, and has been neither clearly nor plainly extinguished. Adverse dominion by public institutions housing the artifacts does not in itself extinguish the inherent Aboriginal right to those artifacts. When Aboriginal Peoples are deprived of access to their culture, the courts should regard this as a *prima facie* violation of their Aboriginal right.

XIV. ASPIRATIONS AND CONCLUSIONS

Undeniably, museums once played a vital role in the preservation of Native American culture. Museums have acted as havens for the safe-keeping of artifacts from zealous missionaries. Today, however, the continued possession of Aboriginal cultural artifacts by museums and public institutions contributes to the assimilation of First Nations into the colonizing culture, resulting in the

⁹⁶ *Delgamuukw*, *supra* note 55; *Sparrow*, *supra* note 76.

annihilation of the First Nations' cultures. Repatriation of cultural artifacts from non-Aboriginal public institutions to the source Nations is therefore desirable. Repatriation attempts that set claims to the cultural artifacts in the common law form are doomed to fail because the legal system (as exemplified by problems of proof and private ownership), makes no allowances for the fundamentally different condition of First Nations. Non-legal solutions based on mutual agreement for repatriation are the answer. To ensure success and certainty in repatriation claims that do not involve the court system, it is imperative that an Aboriginal right to cultural artifacts be articulated by the courts. Given the integral nature of the artifacts to the First Nations' cultures, support for which is found in a contemplation of the Aboriginal world view, the *Sparrow* test for a declaration of a section 35(1) Aboriginal right to cultural artifacts is easily achieved.

Until complete repatriation is realized, the following temporary improvements to the current situation of museum display are proposed:

- i) When "protection" is considered necessary, it must be mutually agreed to and cannot be forced upon the First Nation.
- ii) The free and informed consent of the original owners should be an essential pre-condition of any agreements made for the recording, study, use or display of indigenous people's heritage.
- iii) Under no circumstances should objects be publicly displayed, except in a manner deemed appropriate by the peoples concerned.

These temporary improvements will inspire greater public awareness of the problems surrounding the possession of Aboriginal cultural artifacts. However, full-scale repatriation can only begin when an Aboriginal right to determining cultural priorities and identifying what is integral to the culture and its survival, is firmly declared by the courts.