

Reconciling Title to First Nation Archaeological Property in British Columbia

In 1993, *The Midden* published an editorial titled, "Bowl 'Purchase' Aimed at Changing Heritage Laws", about the SFU Museum of Archaeology and Ethnography and the Saanich Native Heritage Society's decision to buy a seated human figure bowl, known as the Mount Newton Cross Roads Bowl, as a last ditch effort against its sale and export to the United States. The intention to purchase this bowl against prevailing archaeological ethics, as described, was not only to ensure this heritage object remained in Canada, but to bring attention to the need to change the provincial and national laws that fail to protect artifacts against commercialization and loss by export. Over a decade later, this issue in law remains unchanged. Inevitably, history repeats.

The public auctioning of the Fulford Harbour Bowl, therefore, as witnessed from different perspectives, may be described as either a week-long, dramatic cliff hanger, a frustrating comedy of errors, or just the same old, tired tragedy. From the latter perspective, despite the different characters and subject, the Fulford Harbour Bowl auction essentially follows the same storyline destined by a tragic flaw — the failure of government to reconcile with First Nations over the difficult questions concerning title to archaeological property in heritage legislation.

While a complicated legal, political and social problem rooted in our still unsettled relationship with aboriginal peoples in Canada, there are solutions outside of the marketplace. In this article, I briefly outline the historical problem and consequences of the privatization of First Nation archaeological property in British Columbia and explore options to manage, if not reconcile, this colonial legacy.

Going, Going...Gone —

The Commercialization of Archaeological Property in B.C.

The private ownership and commercialization of First Nation archaeological heritage sites and property is a practical reality in British Columbia. Today, the majority of the over 5,000 recorded archaeological sites in urban southwestern B.C. are situated on

private fee-simple lands. On Salt Spring Island — home of the Fulford Harbour Bowl — approximately 80 percent of 158 recorded sites are located on private property. The Royal BC Museum in Victoria documents tens of thousands of artifacts held in the possession of property owners and private collectors from Vancouver Island, Gulf Islands and Lower Mainland sites. Most of these artifacts have been fortuitously discovered over the years by people working in their backyards, building houses and roads, and walking along beaches; however, it is recognized there is a small, but active number of persons who seek out artifacts for personal profit. The sale of such private collections at flea markets, antique stores, public auction houses and online websites, such as eBay, is an undeniable, if unregulated, truth.

Professional and avocational archaeological organizations throughout the world campaign against the loss of archaeological heritage to the antiquities market. The Archaeological Society of BC's own membership code requires that each member uphold the ethic, "to discourage the sale of or the placing of commercial value on any artifact". While it may be questioned if such an ethic may be a remnant colonial attitude to control First Nations and their heritage, the fundamental principle behind this interest is very clear: putting price tags on artifacts encourages the looting of archaeological sites (Vitelli 1984). It is not a question whether or not we think First Nation artifacts should have commercial value or not — obviously they do — it is a question of whether or not we encourage the exploitation, loss and destruction of First Nations' archaeological heritage for individuals' private financial gain.

UNSOLD!

Crown Omission of Title in B.C. Heritage Legislation

As stated by the Archaeology Branch in this issue, the current provincial Heritage Conservation Act [R.S.B.C 1996, c. 187] is silent on the question of ownership of archaeological property. In the absence of any ownership clause in legislation

and the lack of a provincial system for the practical enforcement and monitoring of heritage sites, British Columbia has for all present purposes abandoned the conservation of First Nations' archaeological property to the law of "finders-keepers" and the will of the marketplace.

This is not the case in most Canadian provinces. In neighbouring Alberta, for example, the Historic Resources Act [R.S.A. 2000, c. H-9] provides a positive statement of Crown ownership to First Nations' archaeological heritage sites and objects, under s. 32 Title to Archaeological Property:

32(1) Subject to subsections (2) and (3), the property in all archaeological resources and palaeontological resources within Alberta is vested in the Crown in right of Alberta.

Similar positive statements of Crown or State ownership to archaeological property can be found in the heritage laws of Saskatchewan, Manitoba, Québec, Prince Edward Island, Newfoundland, and Yukon Territory. State ownership of archaeological property as a public trust — beyond any claims by individuals who may discover or possess artifacts — is an effective mechanism for governments to regulate the conservation of heritage sites on private lands and place restrictions on their commercial market of archaeological property. In the public trust, several provinces in Canada expressly prohibit the commercialization of artifacts. As stated in the Saskatchewan Heritage Property Act [S.S. 1979-80, c. H-2.2], s. 66 Ownership of Objects:

66.1 (7) No person shall buy, sell, offer for sale, trade, or otherwise dispose of or remove from Saskatchewan any archaeological object or palaeontological object found in or taken from land in Saskatchewan without the written permission of the minister.

In British Columbia, however, the unresolved nature of aboriginal title and rights by First Nations challenges the entertaining of similar provisions regarding Crown ownership in provincial heritage legislation. The 1987 discussion paper, "Stewardship and Opportunity: The Report on the Ministerial Task Force on Heritage Conservation" (Ministry of Tourism 1987: 35), concisely acknowledged this situation:

Native archaeological artifacts in particular have frequently been illegally removed from sites or otherwise acquired, sold and/or removed from the province. The difficulties in attempting to control this activity are both pragmatic and legal, as reflected in the problems with policing, determining ownership and the absence of significant penalties. We also noted the assertion by Indian bands that Native archaeological objects belong to the Native community. Other jurisdictions have addressed this problem, in part,

through declaring public ownership of all objects and associated materials from archaeological sites, and by imposing substantial penalties for contravening the legislation.

The Ministerial task force advocated: "the Province should enter into a process of consultation with Indian Bands regarding the ultimate ownership and stewardship of Native archaeological resources." Despite consideration of First Nations' assertions, the report concluded in recommending that "the ownership of all pre-contact North American Indian archaeological artifacts discovered after passage of new legislation should be assigned to the Crown in trust." (Ministry of Tourism 1987: 35).

In 1992, a draft version of the Heritage Conservation Act was introduced that proposed Crown title to archaeological artifacts pre-dating A.D. 1858. A number of First Nations are reported to have summarily rejected this proposal in concern for potential infringement, if not extinguishment, of their asserted aboriginal rights to their cultural heritage (Bell and Patterson 1999:192-194). The province withdrew its statement of Crown ownership, as reflected in current law, without further negotiation with First Nations over legislative reform. Today, we are left with the consequences of British Columbia's decision to sidestep this difficult question at the expense of provincial legislation, First Nations, and the preservation of their archaeological heritage.

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Options for Respect and Reconciliation

In the following, I review a brief selection of options for discussion that may help address the mutual interests of First Nations, the province and the archaeological community — namely, the unsustainable and unregulated loss of First Nations' archaeological property to private and commercial interests in British Columbia.

A). *Treaty Negotiations and Provincial Legislative Reform*

The Nisga'a Final Agreement and the three recent unratified Final Agreements under the B.C. Treaty Process make positive statements defining title to archaeological property on treaty settlement land. For instance, in the recent Tsawwassen First Nation Final Agreement:

Chapter 14: 13 Tsawwassen First Nation owns a Tsawwassen Artifact discovered, after the effective Date, on Tsawwassen Lands in an archaeological context.

Importantly, these Final Agreements create space for First Nations to establish their own heritage conservation laws under self-government on treaty settlement lands, including title to ar-

chaeological property. British Columbia and Canada also offer to negotiate custodial arrangements, such as the lending or transfer, for First Nations' artifacts that may come into governments' "permanent possession" (see Nisga'a Chapter 17:40-42).

Under these treaty settlements, a division of jurisdiction is created between treaty settlement land and non-treaty settlement land. The Nisga'a Final Agreement explicitly affords jurisdictional space for British Columbia to "develop or continue processes to manage heritage sites" outside of Nisga'a Lands (Chapter 17:37). There are expectations for British Columbia and Canada to apply processes that establish permanent possession over archaeological property outside of treaty settlement lands. That is, for government to be in a position to negotiate the repatriation of artifacts held in its permanent possession to First Nations, the state must have the authority to control archaeological property. Such authority, it is speculated, may involve reforming provincial legislation to establish Crown title over archaeological property in order to meet treaty commitments. Unfortunately, none of these Final Agreements provide any clarity about questions of ownership, jurisdiction or co-management of First Nations' heritage conservation interests in provincial jurisdiction outside of treaty settlement land. It is interpreted, however, that British Columbia will maintain its legislation and continue to have a leading role in heritage management.

The Yukon Umbrella Final Agreement and the amended *Yukon Historic Resources Act* (R.S.Y. 2002, c.109) provide a comparative case study for recent comprehensive land claims with First Nations in Canada. Under Yukon heritage legislation, provisions are set out for the ownership of archaeological property vested in the Government of Yukon and Yukon First Nations in their respective jurisdictions after the *Act* comes into force. To address third party private collections of artifacts, the *Act* sets out a three-year expiry limit to "register" artifacts before the Government of Yukon may declare its state ownership. If registered, persons may legally own and possess these artifacts. After the *Act* comes into force, persons in possession of artifacts may hold them in trust for the Government of Yukon under custodial arrangement.

Unlike most other provincial heritage legislation, the Yukon Historic Resources Act is a product of heritage legislation resulting from consultation and treaty negotiation with First Nations. The legislation provides a clear process for establishing ownership of archaeological property after the effective date of legislation and provides flexibility for the collaborative management of private collections under custodial arrangements. Although there are no prohibitions on the commercial sale of these objects, the legislation begins to regulate its control. While the Yukon example may be criticized by First Nations as not workable in British Columbia, especially for its acceptance of Crown ownership of First Nation archaeological property, it represents one of the only examples in Canada where First Nations and government have negotiated and worked in partnership to reconcile their mutual interests in government heritage legislation and comprehensive land claim settlements.

B). *Court Decision*

While provincial heritage legislation continues to remain silent and treaty arrangements are distant on the horizon in British

Columbia, there is a need to fill this legal void to prevent future crises and the continuing loss of archaeological heritage on the open market. The most direct option for First Nations to establish certainty over title to archaeological property is to assert aboriginal rights in court. As stated by anthropologist Michael Asch (1997:271), a strong case could be put forth by First Nations:

Given our contemporary understanding of culture, as well as the ethical stance of contemporary Canadian society (and notwithstanding what the law now states), this principle is it is the First Nations — not Canada and/or the provinces — that are presumed to have ownership and jurisdiction over at least the cultural property that comes from their own cultures and from their own history.

Defining aboriginal rights to own archaeological property in a court decision may provide a constructive legal avenue for asserting interests in heritage conservation, although an expensive and burdensome option. Shared territory issues, especially in the Coast Salish world, may require neighbouring First Nations to join together in court to be successful in asserting common ownership of such ancient objects. While a challenging option, if successful, such a court decision could help transform the mandates of treaty tables and lead to amended provincial legislation in British Columbia. Independent of any court decision, Canadian property law relating to the heritage of aboriginal peoples is recognized to be in "dire need of reform" (Ziff 1996: 132).

C). *Public Education, Incentives for Donation, and Community Stewardship*

Despite future treaty settlements, reformed provincial legislation or court decision, it is a practical reality there are thousands of known First Nation archaeological artifacts — including at least one-third of known Seated Human Figure Bowls — held today in private collections across British Columbia. Private collections and the sale of artifacts are chronic problems to be managed — there is no quick legal fix. For this reason, there is a need to develop a broad spectrum of practical options to address this long-term management issue.

Public education is key to changing public attitudes about the collection and sale of First Nation archaeological property. Several public opinion polls over the last decade in British Columbia indicate that the public is largely unaware of provincial archaeology or heritage legislation. Further, these public opinion polls indicated that a large percentage of the public hold negative attitudes towards First Nations' assertions of legal ownership and jurisdiction over their heritage (Guppy and Pokotylo 1999). Public education and community stewardship initiatives for heritage awareness are needed, therefore, not only to help discourage the sale and purchase of archaeological property, but create a meaningful social basis for reconciliation with First Nations.

On Salt Spring Island, the Islands Cultural Heritage Group is a newly-formed association that aims to work in partnership

with First Nations to build stewardship over local archaeological heritage at the local community level. Composed of island residents with backgrounds in archaeology, history, art history and heritage conservation, the non-profit group seeks to volunteer cataloguing private collections, monitoring land development, raising heritage awareness, and researching island history. The development of such community interest groups may be valuable resources to help care for local heritage and encourage stewardship principles. From a community-based approach, less-adversarial, personal options are often available to resolve difficult situations. For instance, as one Salt Spring resident who wrote at the time of the public auctioning of the Fulford Harbour Bowl, "If the reason [for the sale] is that his wife is ill, why can't we simply offer to raise funds in the community to help her, rather than allow the bowl to be sold?"

A Final Appraisal

Seated human figure bowls represent the most elaborate and enigmatic of stone sculptural artifacts found in Northwest Coast archaeology. "What do the images mean", asked Wilson Duff (1975:12) in his book, *Images of Stone B.C.*. As described in this edition of *The Midden*, the public auctioning of the Fulford Harbour Bowl had different meanings for different persons involved. For some, the Fulford Harbour Bowl meant simply money; for others, great business advertising. For some, it signified the return of a sacred heritage object. For many, a symbol of flawed provincial legislation and stewardship.

The ownership of First Nations' archaeological property cannot be left as an open-ended legal or ethical question in British Columbia. There is a need for British Columbia and First Nations leadership to negotiate a just resolution of this difficult question. The consequences of doing nothing are the continued loss and export of this archaeological property to private collectors and the antiquities market. It is hoped that in this era of respect and reconciliation with First Nations, there may just be political will to take action. If there is one thing learned from salvage archaeology, it is that planning ahead to avoid conflict is a more sustainable and cost-effective approach than reacting to crises.

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