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Fact Sheet
The Non-Protection Of Canadian Aboriginal Heritage
(Burial Sites And Artifacts)
by Dr. Peggy J. Blair

Aboriginal burial grounds are the places where Aboriginal peoples buried their dead, often along with personal belongings intended to ensure their owners' safe passage into the spirit world.

Differences Between Burial Grounds and Cemeteries

Provincial statutes define 'cemeteries' as lands or places which were set apart and used for the burial or 'interment' of human remains. Aboriginal burial grounds and cemeteries were used for the same purpose. However, they differ in a number of ways from European or Euro-Canadian cemeteries. First of all, they are often significantly older. Some Aboriginal burial grounds are thousands of years old, whereas the oldest of the European cemeteries were not established in North America until after European arrival in the 1600s.

Aboriginal burial often involved very distinctive cultural rituals such as the use of burial mounds, or burial sites built above ground, drying and embalming the remains, burying bodies in a sitting position, or marking them with red ochre. These were very different practices than those used by Europeans. Because of this, and as Aboriginal burial grounds contain both remains and artifacts, they have often been subjected to archaeological digs and excavations. In many instances, the human remains and belongings found in Aboriginal burial grounds have been removed and placed in museums, or kept for scientific testing.

Unlike the remains in cemeteries, those of Aboriginal peoples are often treated as sources of scientific data, or as 'property.' For example, the *Saskatchewan Heritage Property Act* states that all buried human skeletal material not found in a recognized cemetery is the property of the Crown.¹ If it pre-dates 1700, it is to be forwarded to the Minister of Heritage for reinterment following scientific examination or any use for research or educational purposes that the Minister shall decide. If the 'skeletal material' post-dates 1700, it is to be made available to the nearest Indian Band Council, but only after scientific examination or any use for research or educational purposes that the Minister shall decide.

¹ *Heritage Property Act*, S.S. 1979-80, c. H-2.2, s. 65.

Collection and Study of Burial Ground Artifacts

Items found in Aboriginal burial grounds are often removed by scientists and curators and placed in museums or private collections. Some provincial legislation prevents such items from being removed from burial grounds, but it is very narrow. For example, under the British Columbia *Heritage Conservation Act*,² it is illegal to 'damage, desecrate or alter a burial place that has historical or archaeological value or remove human remains or any heritage object from a burial place that has historical or archaeological value' unless authorized by permit. However, under Section 13(d), while it is illegal to remove a heritage object from a site that was in use before 1846, it is not illegal to remove such an object from a more recent one.

Once cultural items have been removed, little can be done to compel their return. The federal *Cultural Property Export and Import Act* offers a way to repatriate cultural items taken from First Nations communities and grave-sites by allowing the Canadian Cultural Property Export Review Board to help qualified institutions purchase artifacts from museums through grants and loans.³ Under the provisions of the *Cultural Property Act* however, an Aboriginal group seeking to have an object returned, or to prevent it from being exported, must have the support of an established cultural institution. If they do not, the act does not apply.

The Protection of Aboriginal Burial Grounds

Unlike most cemeteries which are fenced or contain headstones and other kinds of monuments, Aboriginal burial grounds are often not easily identifiable. Although some Aboriginal-Christian cemeteries date back to the 18th and 19th centuries, most burial grounds are much older than that, and have often been overgrown or buried due to changes to the landscape. In Nova Scotia for example, a M'ikmaq burial ground marked by rocks in accordance with M'ikmaq cultural practices was described as already overgrown with 'wild creepers' by the mid-1840s.⁴ Because of this, Aboriginal burial grounds are often discovered by accident during land development or construction. In some cases, burial grounds have been paved over, or built upon or even flooded, sometimes even when the lands being developed were known to contain Aboriginal remains.

Legislation to Protect Burial Grounds

Most provinces have legislation protecting cemeteries, but very little legislation protects Aboriginal burial grounds from the damage caused by development and excavations. Most provincial statutes have provisions intended to protect headstones, monuments, and other tombs placed in designated cemeteries from being disturbed or damaged. These sections are often not applicable to burial grounds which do not contain headstones or tombstones. Even when they are, the fines and penalties can be low. For example, under the *Manitoba Cemeteries Act*, 'any person who willfully destroys, mutilates, defaces, injures or removes any tomb, monument, gravestone, or other structure placed in a cemetery is guilty of an offence and liable, on summary conviction, to a fine of not less than \$4, and not more than \$40 for each offence'.⁵

² *Heritage Conservation Act*, R.S.B.C. 1996, c. 187, s. 13(b).

³ R.S.C. 1985, c. C-51.

⁴ Ruth Holmes Whitehead *The Old Man Told Us: Excerpts from Micmac History 1500-1950* (Halifax: Nimbus, 1991) at 214.

⁵ *Cemeteries Act*, C.C.S.M. c. C30, s. 35.

Provincial Protection of Aboriginal Burial Grounds

Ontario is the only province that refers specifically to Aboriginal burial grounds in its legislation. It describes these as 'unapproved aboriginal peoples cemeteries', and defines them as lands 'set aside with the apparent intention of interring therein, in accordance with cultural affinities, human remains and containing remains identified as those of persons who were one of the aboriginal peoples of Canada'.⁶

If an investigation of such an 'unapproved aboriginal peoples cemetery' is ordered, an investigator must advise the Registrar of Cemeteries within five days of the possible cultural origins of the human remains found, and provide a report when the investigation is completed. This report is to indicate the probable cultural origin or religious affiliation of the person whose remains have been interred, a description of the boundaries of the burial site, details of the style and manner in which the human remains have been interred, a description of any artifacts that form part of the burial site, and an opinion as to whether the burial site was set aside with the apparent intention of interring human remains in accordance with cultural affinities. If the registrar declares the burial site to be an unapproved Aboriginal peoples' cemetery or an unapproved cemetery, negotiations for a site disposition agreement are to take place with the First Nation with whom the remains are affiliated, and other parties. If no agreement can be reached, the matter may be sent to arbitration.⁷ However, if the registrar decides that a 'cultural affiliation' has not been established during the investigation, no notice needs to be given to the local First Nation.

There are also regulations in the Yukon Territory governing mining activities that prevent the disturbance of archaeological sites and burial grounds. When burial grounds are found, these are to be marked, reported, and protected from further disturbance.

Aboriginal Burial Grounds Discovered on Private Property

In circumstances in which Aboriginal burial grounds are found on private property, the interests of the landowner in developing his or her land, and the interests of those who wish the grounds left undisturbed, often come into conflict.

Sometimes, the same legislation that protects cemeteries also protects the right of a landowner to develop his or her lands despite the existence of burial grounds. For example, the Nova Scotia *Cemeteries Protection Act*⁸ states that a cemetery may only be used for the burial of human remains. However, it exempts a land owner from these provisions if he or she acquired the lands without prior notice that the lands had been used as a burial ground. The *Act* requires that such a person report to the Minister if human remains are discovered under the surface, but does not require that human remains found on the surface be reported. It also allows building activities to continue so long as the remains are not disturbed.

⁶ *Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4, s. 71(1).

⁷ *Ontario Regulation 133/92*.

⁸ *Cemeteries Protection Act*, S.N.S. 1998, c. 9, ss. 7, 8.

The Rights of Scientists to Excavate Aboriginal Burial Grounds

Very little legislation is in place to prevent the excavation of lands for scientific purposes. Ontario is the only province with legislation that prevents scientific research from taking place without consent. In Ontario, a 'representative' of the person whose remains were interred must give consent before any scientific analysis is done on either remains or associated artifacts. The 'representative' is defined as being the nearest First Nations government, or other community of Aboriginal people willing to act as a representative and whose members have a close cultural affinity to the interred person.⁹

Numbers of Aboriginal Burial Grounds

No one knows how many Aboriginal burial grounds there are, as it is not certain how large the population of Aboriginal North America was at the time of first contact. Authors such as Ronald Wright estimate that 90 percent of the Aboriginal communities in North America died from epidemics introduced shortly after European contact, and suggest this number could have reached 90 million throughout all the Americas.¹⁰ However, it is likely that there are many thousands of burial sites throughout Canada. Many of the larger burial ground sites likely date back to first contact when European diseases devastated Aboriginal populations. In Nova Scotia for example, of the thousands of M'ikmaq alive at the time of first contact, by 1772 only 865 had survived.¹¹ As well, Aboriginal peoples buried their dead according to traditional practices long before European arrival, and for many decades after cemeteries legislation was introduced. Therefore, there are likely many thousands of burial grounds throughout Canada that are as yet unknown.

The Reasons for Limited Statutory Protection

The provinces have jurisdiction to deal with cemeteries because of their constitutional authority over 'Property and Civil Rights', while the federal government has jurisdiction over 'Indians, and Lands reserved for the Indians.' The provinces are generally reluctant to introduce legislation which is specific to 'Indian-ness' because these often fall within federal jurisdiction. Given that Aboriginal remains and artifacts are considered to be 'property', the federal government may not wish to enact laws for fear of encroaching into provincial jurisdiction over property and civil rights.

The Scow Institute is a non-partisan organization dedicated to addressing public misconceptions about issues relating to Aboriginal people and Aboriginal rights. For more information, please visit our website at www.scowinstitute.ca.

⁹ Supra note 7, s. 8.

¹⁰ Ronald Wright, *Stolen Continents: The New World through Indian Eyes* (Toronto: Penguin Books: 1993) at 14.

¹¹ Thomas Chandler Haliburton, *An Historical and Statistical Account of Nova Scotia*, in Ruth Holmes Whitehead, *The Old Man Told Us: Excerpts from Micmac History, 1500-1950* (Halifax: Nimbus Publishing, 1991) at 173.