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

Introduction

For several centuries, Western scientists have disinterred Aboriginal human remains and cultural items for collection and study. Often, the everyday and sacred objects found in burial grounds have been retained in private collections and museums rather than being returned to or re-buried in their community of origin. Under current federal legislation, unless those holding such items agree to return them voluntarily, little can be done.

Burial sites and the artifacts within them are also at risk from road building, vandalism, construction and flooding. Provincial laws have proven to be ineffective in protecting burial grounds and their contents.

A. Museums and Private Collections

The Moose Bay Mound at Crooked Lake Provincial Park marks an ancient Aboriginal burial ground almost 1,000 years old. It was first excavated in 1968 by archaeologists from the Saskatchewan Museum of Natural History. The team found eight burial units consisting of nine bundled remains, including those of children, surrounded by mortuary offerings of decorated pottery vessels, birch bark containers, tubular stone pipes and bone tools.

For the Moose Bay peoples, mound burial was the final step in a long and complex mourning ritual to establish a peaceful after-life for the deceased. The body was tightly wrapped in buffalo hides and placed upon a scaffold with gifts of food and implements. A period of intense mourning was followed by distribution of the deceased's possessions, and a feast. A year later, the bones were removed from the scaffold, rubbed with ochre, rebundled, and carefully arranged around a central post along with items needed in the deceased's next life. Over this, a low tipi-like structure was built and covered with tons of earth so the bodies would not be disturbed.¹

Thousands of similar mounds representing different cultures exist throughout North America, including the famous 60-foot long Serpent Mound at Rice Lake, near Peterborough, Ontario which archaeologist James Wright indicates was built some 2,000 years ago.² This mound and a dozen similar ones were excavated in 1896 by the curator of the Archaeological Museum of Toronto, accompanied by an 'amateur enthusiast'. They found the mounds contained 'pre-historic' and 'modern' skeletons buried

¹ *Moose Bay Burial Grounds*, Canada's Digital Collection.

<http://collections.ic.gc.ca/MarievalHistory/Qu%27Appelle%20Valley/moosebayburialgrounds.htm>.

² James V. Wright, *Before European Contact*, Edward S. Rogers and Donald B. Smith eds. *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994) at 30.

in a sitting position, with their knees drawn to their chins.³

Often, the human remains and cultural items found in burial grounds such as these have been retained in private collections and museums rather than being returned or re-buried. On occasion, they have been shipped to faraway museums, to be studied and displayed. Items taken from Aboriginal peoples and communities over the years have included everyday objects such as tools and clothing, as well as articles with special significance such as medicine bundles, and wampum belts.

In 1977, Walter Kenyon, the associate curator at the Royal Ontario Museum in Toronto, was fined \$200 for taking skeletal remains from an Aboriginal burial ground at Grimsby, Ontario. When asked if he would stop this practice, Mr. Kenyon replied that he was 'completely unrepentant'.⁴ As Anthony Hall describes, '[t]he practice of executing ... grave robbery in the persona of the 'objective' scientist speaks of the persistence of certain professional attitudes that have done much to discredit archeology, anthropology, museology and ethnography in the eyes of many native people'.⁵

Anger at grave-site vandalism is shared by non-Aboriginal people. However, when Aboriginal burial grounds are dug up by archaeologists, the public does not always perceive this as vandalism or damage, but as scientific research.⁶ As the Royal Commission on Aboriginal Peoples reported, 'A final threat to the integrity of sacred and historical sites comes not from development or legislation but rather from archaeological endeavours. The search for historically and culturally significant objects often leads archaeologists to burial grounds. Aboriginal people have asked that these objects be left in the ground and that graves not be disturbed out of respect for the dead and in recognition that the burial grounds remain the collective property of Aboriginal people'.⁷ Nonetheless, as the non-binding *Code of Ethics* for researchers from three main research societies in Canada notes, on occasion '[t]he cultural property and human remains of indigenous peoples have been expropriated by researchers for permanent exhibition or storage in institutes, or offered for sale. Researchers have sometimes treated groups merely as sources of data...'.⁸

Repatriation

The Royal Commission on Aboriginal Peoples has stated that sacred objects and human remains should be repatriated (returned) to the nation to which they belong.⁹ The federal *Cultural Property Export and Import Act* offers a way to repatriate cultural items taken from First Nations communities and grave-sites. The Canadian Cultural Property Export Review Board helps qualified institutions buy back artifacts from museums by granting or lending up to two-thirds of the cost.¹⁰ Under the provisions of

³ *Another Rice Lake Serpent Mound; Asphodel (township) Furnishes the Second Great Find*, Peterborough Examiner, 5 September 1896.

⁴ Peter Moon, *Globe & Mail*, 2 January 1998.

⁵ Anthony Hall, *Review of Ingeborg Marshall, A History and Ethnography of the Beothuk*, (McGill-Queen's University Press) at <http://www.shunpiking.com/mikmaq/his-beothic.htm>.

⁶ *Funeral, Burial and Cremation Services Act*, (2002) S.O. 2002, c. 33.

⁷ Canada: *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (Ottawa: The Commission, 1996), Chapter 6, 'Arts and Heritage'.

⁸ *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* Section 6, *Research Involving Aboriginal People*, http://www.ncehr-cnerh.org/english/code_2/sec06.html. The three councils were the Medical Research Council (now Canadian Institutes for Health Research), Natural Science & Engineering Research Council and Social Sciences & Humanities Research Council.

⁹ *Supra* note 7.

¹⁰ R.S.C. 1985, c. C-51.

the 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. Some Aboriginal-controlled institutions such as the Woodland Cultural Centre in Brantford, Ontario are eligible. But the grounds for determining whether a particular cultural item should be repatriated are relatively narrow and do not always address the needs of First Nations peoples.¹¹ Little recourse is available to Aboriginal peoples except public appeals, political lobbying or litigation if museums or scientists do not agree to return the requested items.

In some recent instances, museums holding Aboriginal remains have voluntarily agreed to return them. On September 18, 2002, Haida representatives from British Columbia's Queen Charlotte Islands traveled to the Museum of Natural History in New York City to reclaim the remains of 48 of their ancestors. As the Associated Press reported, 'they are about to gather up their dead and bring them home, rescuing them from the role of artifacts and repatriating them as ancestors'.¹² However, this willingness to repatriate human remains has not been shared by other institutions. For example, several hundred Haida remains are still being held as cultural artifacts by the Field Museum in Chicago, Washington's Smithsonian Institution, and the British Museum in London. There may well be thousands of other Aboriginal remains held in institutions and private collections world-wide.

In December 2002, the Canadian Museum of Civilization in Ottawa-Hull announced that it was also preparing to return to local Algonquin peoples dozens of bones unearthed in the 1800s from Algonquin burial grounds. According to the *Ottawa Citizen*, about 20 Aboriginal skeletons had been dug up in the 1840s near the Museum's present location, as well as a single forearm bone believed to have come from a burial site excavated in 1843. These remains, and others taken from sites west of Ottawa and in the Ottawa Valley, were to be subjected to radiocarbon testing to help the scientists confirm a connection to contemporary Algonquin communities.¹³ The idea that human remains should be subjected to scientific testing reflects a profound difference between Aboriginal and western views.

Issues Around Scientific Testing

To Aboriginal peoples, burial grounds are not archaeological sites, and human bones are neither artifacts to be displayed in museums, nor scientific resources to be mined; the remains of ancient ancestors are to be accorded proper respect. For many Aboriginal cultures, the belief that a spiritual 'essence' remains bound to the body after death means that remains should never be disturbed. The Anishnabe of south-western Ontario traditionally believed that humans consisted of three parts - a corporeal body that decayed and disappeared after death, a soul that traveled to the land of the souls, and a shadow spirit that roamed around the earth but generally remained with the grave. According to these beliefs, a disturbance of the grave disturbs the shadow spirit.¹⁴

During the Ipperwash inquiry, Stoney Point elder Clifford George said it bothered him to hear of gravesites in the park being bulldozed to create a provincial park for tourists, since 'disturbing the dead disturbs the soul. They become restless'. Darlene Johnston, called as an expert witness during the inquiry, testified that the living have a very strong sense of obligation to the dead, and that

¹¹ Supra note 7.

¹² Paul Sullivan, 'Gathering Up the Dead and Bringing them Home', *Globe and Mail*, August 28, 2002.

¹³ 'Museum of Civilization to Return Algonquin Bones', Associated Press, 31 December 2002.

¹⁴ *Ibid.* at 87.

'proximity to the graves of one's ancestors ... is one of the most powerful forces in the world view of Anishnaabeg people'.¹⁵

One of the best examples of differing world views concerning the disposition of human remains involves the discovery of Kennewick Man, the 'Ancient One', whose skeletal remains were found on the banks of the Columbia River in Kennewick, Washington in July 1996.

In 1990, the American Congress had enacted the *Native American Graves Protection and Repatriation Act* (NAGPRA) protecting Native American burial sites and preventing the removal of human remains and cultural items from federal and tribal lands.¹⁶ The *Act* requires that human remains and cultural items be returned to the appropriate tribes. Scientific study of human remains is permissible only to the extent necessary to determine whether they are 'Native American' or not. However, when the Umatilla Tribe, within whose traditional territory the Kennewick Man had been found, requested that his bones be returned to them to be buried according to their traditions, scientists contested their claim.

Over the objections of the Umatilla Tribe, 18 scientists conducted historical and scientific tests on the Kennewick Man between 1998 and 2000. These included physical examinations, Carbon-14 dating, analysis of organic content of bone samples, and skeletal DNA analysis. Sediments trapped within the skeleton's bone cavities were analyzed. Bone samples were taken and dated, and parts of the skeleton were examined using computer tomography (CT), CAT scans, and X-rays. The ancient DNA tests were inconclusive due to contamination and the passage of time, but other tests established that the bones were between 8,000 and 9,000 years old.

In February 2004, the Ninth U.S. Circuit Court of Appeals rejected an appeal by the Umatilla and three other tribes to prevent further scientific study and to return the bones for burial. Since the studies were inconclusive, the Court of Appeals concluded that the tribes had not proven that they had any connection to the Kennewick Man. His remains are now being held by the Burke Museum at the University of Washington pending further litigation.¹⁷ The response to the ruling from scientists in other countries was one of relief. As reported by the BBC, British researchers had feared they too might 'face calls to relinquish human remains held by British universities and museums'.¹⁸

The question of who 'owns' human remains, and to what extent scientific testing of them should be permitted, is a very real issue in institutions around the world. As the Kennewick Man incident demonstrates, even with very strong legislation, costly litigation is likely to be involved if agreement over the disposition of such remains is not reached voluntarily.

B. Canadian Legislation

Despite the obvious flaws in the American legislation, and the struggle for legal possession of the 'Kennewick Man', there is no similar legislation in Canada to protect Aboriginal remains from

¹⁵ Ipperwash Public Inquiry Transcript, 14 July 2004, Hon. Sidney Linden, Commissioner, http://68.146.188.247/trans/ipperwash/jul_14_04/index.htm.

¹⁶ *Native American Graves Protection and Repatriation Act*, Pub. L. 101-601, 104 Stat. 3048, 16 November 1990, 25 USC 3001 et seq H.R. Rep. N 877 (191st Cong) at 8.

¹⁷ Tom Paulson, 'Scientists Win Kennewick Man Ruling: Court Rejects Tribes' Appeal to Bury Ancient Bones', *Seattle Post-Intelligence Reporter*, 5 February 2004.

¹⁸ 'Scientists Win Battle', BBC News, 5 February 2004.

scientific study or removal from the grave-site. Legislation which appears to protect burial grounds and Aboriginal remains actually provides very little protection. For example, under the British Columbia *Heritage Conservation Act*¹⁹ 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. Under Section 13(d) it is also illegal to damage, excavate, dig in or alter, or remove any heritage object from a site that contains artifacts, features, materials or other physical evidence of human habitation or use before 1846.

However in 1995, a judge ruling in the British Columbia courts refused to issue an injunction to the Nanoose First Nation to stop a company from disinterring 100 bodies from an Aboriginal burial ground because an '...Aboriginal right has not yet been proven. There are no clear cases concerning ancient burial sites between four thousand and four hundred years old, and until there is some authority for that, it is not my view that fee simple title should be interfered with by injunctive relief from this court.'²⁰ Instead, the court concluded that a valid permit under the *Heritage Conservation Act* 'may well permit provincial interference with Indian burial grounds'.

In 2000, the Kitkatla First Nation challenged the provisions of the *Heritage Conservation Act* by attacking its constitutionality.²¹ They argued that the Act was designed to protect Aboriginal heritage objects and therefore fell outside provincial jurisdiction since it affected the 'core of Indianness'. As the BC Court of Appeal observed, more than 99 percent of the heritage objects affected by the legislation were of Aboriginal origin, including burial sites, fish weirs, fish traps, deadfall traps, pictographs and petroglyphs. It also noted that the consultations leading up to the legislation had revealed Aboriginal concerns that the previous system had been geared to 'protecting sites and objects as archaeological resources - sites and specimens for the scientific study of past cultures - rather than as the cultural legacy of a living people'.²²

The British Columbia Court of Appeal concluded that the Act's permit system did authorize the destruction of, or interference with Aboriginal heritage objects, and that this was an invasion of federal jurisdiction over Indians under Section 91(24) of the *Constitution Act, 1867*.²³ Provincial legislation, it concluded, could not 'effectively destroy or interfere with aboriginal culture or heritage by authorizing the destruction of aboriginal heritage objects'.²⁴ However, the Supreme Court of Canada disagreed, deciding that the provisions did not affect the 'essential and distinctive values of Indianness'.²⁵

As a result, legislative provisions in British Columbia allow the Crown to authorize permits to developers even if they damage Aboriginal burial grounds. The only obligation under the British Columbia Act seems to require the Crown to consult with Aboriginal peoples before it infringes on their rights by issuing a permit that would alter or damage a heritage site.²⁶

¹⁹ *Heritage Conservation Act*, R.S.B.C. 1996, c. 187, s. 13(b).

²⁰ *Nanoose Indian Band v. British Columbia et al*, BCSC Victoria 28 June 1995 docket number 943420, Hutchison, J. unreported <http://www.canlii.org/bc/cas/bcsc/1995/1995bcsc10958.html>.

²¹ *Kitkatla Band v British Columbia (Small Business, Tourism and Culture)*, [2000] B.C.C.A. 42 (B.C.C.A.).

²² *Ibid.* at para. 118.

²³ *Ibid.* at para. 125.

²⁴ *Ibid.* at para. 150.

²⁵ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31 (S.C.C.).

²⁶ *Lax Kw'alaams Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2002

In Ontario, both the *Cemeteries Act* and the *Funeral, Burial and Cremation Services Act* require that once an 'unapproved Aboriginal cemetery' is discovered, negotiations must take place resulting in a site disposition agreement.²⁷ Section 68 of the *Ontario Cemeteries Act* prohibits the disturbance of a 'burial site or artifacts associated with the human remains' except on the instruction of the coroner or under one of these agreements.²⁸

As a result, private landowners do not always admit to finding Aboriginal burial sites for fear it will prevent them from developing their land. In August 4, 1998, a Sauble Beach cottager from Amherstburg, Ontario was charged with disturbing a burial ground and failing to notify authorities about remains he found. Robert Booth had uncovered the remains of an 'ancient' Anishnabe woman while doing construction work on his property. He apparently left the bones strewn on his front yard until someone tipped off the police.²⁹ The charges against Booth were the first ones laid under the 1992 Act but they were dismissed without notice to the local First Nations.

That summer, another Aboriginal burial site was uncovered in Ontario when a local road at Dunk Point washed out. Under the *Ontario Cemeteries Act*, an 'unapproved Aboriginal peoples' cemetery' is land 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'.

Section 72 obliges the registrar, on declaring a burial site to be an 'unapproved Aboriginal peoples' cemetery', to serve notice on the people affected, including the First Nations, so that negotiations can take place. However, if the registrar concludes that rather than an unapproved Aboriginal peoples' cemetery it is an 'irregular burial site' (i.e. one that was not set aside specifically for interring human remains), he does not have to give notice. In this case, the provincial Registrar of Cemeteries ruled the site was an 'irregular aboriginal burial site' and merited no special protection. The remains were removed and re-buried without notice to the Chippewas of Nawash or Saugeen.³⁰

No legislation in Ontario deals with other kinds of cultural items located during excavations or development, including archaeological digs. In 1999, the University of Western Ontario and the City of London, Ontario removed 3,000 Aboriginal artifacts from an archeological dig in London without notifying local First Nations. Peter Timmins, the archeologist in charge, insisted that he was not required by law to do so as the *Cemeteries Act* only requires that archeologists notify First Nations when human remains or burial grounds are found, but is silent on the matter of artifacts.³¹

In 2000, residents of Edmonton, Alberta learned that a city-owned power plant had been built over a mixed graveyard in which at least 130 Blackfoot, Cree and Metis, French, Scottish and English had been buried between 1823 and 1879. Most of the graves had been paved over as a road. That year, power plant officials announced they planned an expansion that would have disturbed the graves even further. With the support of local community groups, members of the Blood First Nation helped lead

BCSC 1075, Maczko, J. at para. 30.

²⁷ Supra note 6.

²⁸ Under s. 71, as soon as the origin of a burial site is determined, the registrar shall declare it to be either (a) an unapproved aboriginal peoples cemetery, (b) an unapproved cemetery [i.e. one in which the remains are not those of Aboriginal peoples], or (c) an irregular burial ground. *Ontario Regulation 133/92 (Burial Sites)* sets out how an investigation of a burial site is to be conducted.

²⁹ 'Sauble Beach Man Cleared of Digging up Remains', <http://www.bmts.com/~dibaudjimoh/page53.html>.

³⁰ Doug Pritchard, 'Desecrated Burial Grounds', *CPTnet News*, 10 September 1998.

³¹ Randy Richmond, 'Removal of Artifacts Angers Natives', *The London Free Press*, 4 November 1999.

opposition to the power plant expansion. The city now plans to close the road, and has agreed that bodies that were exhumed during previous construction will be re-buried. However, the city indicates that there are at least three other unregistered graveyards within city limits, including one beneath land designated for a school. It is estimated that there are some 230 similar burial grounds throughout the province, none of which are protected under the Alberta *Cemeteries Act*.³²

Litigation

Litigation has proved to be particularly unhelpful in circumstances where burial grounds have been threatened by impending development. In 1990 the Lubicon Lake Band of northern Alberta complained to the United Nations Human Rights Committee that oil and gas company development on their lands prevented them from accessing their traditional burial grounds, among other things.³³ The Lubicon filed for an injunction in February 1982 to stop oil and gas development on their traditional lands. But the provincial Court of Queen's Bench did not deliver a decision for almost two years, while the development continued. On November 17, 1983, the Lubicon application was dismissed on the basis that the band would suffer no 'irreparable harm' if development continued. In other words, that they could be compensated financially for any harm, among other things.

A subsequent appeal to the Court of Appeal was unsuccessful and on March 14, 1985 an application for leave to appeal to the Supreme Court of Canada was refused. An appeal to the United Nations is the only legal recourse available to the Lubicon now that all domestic avenues have been exhausted.

In June, 2003, the Red River Half Breed People of Manitoba went to court to stop the construction of a hotel on burial grounds at The Forks in downtown Winnipeg. The court again found that the Red River Half Breed People had not proved that irreparable harm would be caused if an injunction was not issued. Since the construction was underway, the Red River Half Breed People did not continue their litigation.

Blockades and Occupations

The frustration felt by Aboriginal peoples in response to the on-going development and desecration of their burial grounds, despite attempts to resolve such issues, has led to blockades and land occupations. One of these took place at Oka, Quebec in the summer of 1990.

On July 11, 1990, Quebec provincial police attempted to dismantle a roadblock set up in mid-March by a group of Mohawks from Kanasatake, an Iroquois community near Montreal. The Mohawks had taken this action to prevent the nearby town of Oka from expanding a golf course onto its traditional burial grounds. One police officer was killed, and the subsequent stand-off lasted 78 days and involved over 4,000 Quebec provincial police and members of the Canadian Armed Forces.

Under the terms of an 1857 surrender, burial grounds of approximately one acre had been specifically reserved and set aside for the Chippewas of Nawash in Owen Sound, Ontario. Although the Canadian government had promised to protect the burial grounds, the gravesites were looted and at least one body was removed to a museum. The lands were later wrongly patented by the Crown and sold to private parties. In 1988, two houses were built on top of the burial grounds.

³² Bob Weber, 'Memorial to Ancient Graves in Downtown Edmonton', *Edmonton CNEWS Canada*, 11 April 2004.

³³ U.N. Human Rights Committee, *Lubicon Lake Band v. Canada*, Communication No. 167/1984, 26 March 1990.

In 1992, the Chippewas of Nawash First Nation found archival records confirming the location of the Owen Sound burial grounds. When attempts to resolve the issue through negotiations with the municipality were unsuccessful, the Chippewas occupied the two lots for eight days. As a result, the federal government acknowledged the burial ground's reserve status and purchased the houses from their occupants. When the houses were moved, human remains were found in one of the basements.

During the Ipperwash inquiry, expert witness Darlene Johnston, a member of the Chippewas of Nawash, their former land claims researcher and a law professor at the University of Toronto, testified that '[p]eople took the gravestones out of the area and used them as bases for a baseball diamond. My community is still trying to negotiate a transfer of these lands back to reserve status so that they can be protected'.

These events in Owen Sound were soon followed by the occupation of Ipperwash Park in Ontario by members of the Stoney Point community. In 1942, under the *War Measures Act*, the Department of National Defence had relocated the members of the Stoney Point Reserve #43 to nearby Kettle Point Reserve. The Order-in-Council expropriating the lands stated that once the war was over, if the lands were no longer required by the Department of National Defence, negotiations would be entered into with the Department of Indian Affairs to transfer the lands back to the band at a reasonable price. However, the Department of National Defence continued to use the land as a summer cadet training camp until 1992.

In May, 1993, a small group of the original Stoney Point residents and their families occupied the Stoney Point Reserve #43 demanding the return of the lands. On September 4, 1995, when the federal government refused to acknowledge them as a separate band for the purpose of negotiations, Stoney Point residents also occupied the Ipperwash Provincial Park, which they claimed contained ancestral burial grounds.

On September 6, tactical unit members of the Ontario Provincial Police entered the park during the night to remove the protesters. Dudley George, a Stoney Point member, was shot and killed. After these events, Ron Irwin, the Minister of Indian Affairs, released Indian Affairs documents which confirmed that the park contained Aboriginal burial grounds. A judicial inquiry into events at Ipperwash began in 2004.³⁴

C. The Impact of Development

Along with disturbances caused by road-building and construction, there are other impacts of development. For example, on June 20, 2002, the Chief of the Lyackson First Nation of British Columbia expressed concern about a park that the provincial government planned to create at Wake's Cove on Valdes Island. The Wake's Cove property has been the source of a bitter land dispute since 1876 when it was taken from the Lyackson First Nation and given to retiring British Navy Officer Baldwin Wake as a military land grant. As the land has been privately owned since then, the Lyackson First Nation has been unable to survey it to identify sacred sites or burial grounds. However, the Lyackson First Nation's cemetery at Shingle Point on Valdes Island, one of the earliest Coast Salish-

³⁴ At this inquiry, Darlene Johnston explained how early Jesuit priests and explorers had frequently commented on the value placed by Anishnabe peoples on their burial sites but how their reverence for burials was not shared by English settlers. She pointed out that as early as 1797, colonial officials had been forced to take steps to prevent grave-robbing.

Christian cemeteries in the Gulf Islands, has been repeatedly desecrated by vandals who have damaged graves and removed and scattered human remains.³⁵ The Lyackson chief has expressed concern that the additional traffic caused by a new park will cause further vandalism and damage to burial sites.

Along with burial grounds, other kinds of heritage sites with historical and sacred significance are at risk due to dredging and flooding. The fish weirs at the Atherley Narrows, near Orillia, Ontario are sacred to a number of First Nations. Built about 4,500 years ago, they were used to 'herd' fish to an area where they could be netted or speared. The Ojibway met to socialize and conduct healing ceremonies at the fish fence at what is now Rama or *Mnijaning* (meaning 'fish fence') of Ontario. However, at the time the Royal Commission on Aboriginal Peoples was conducting its hearings, the commissioners observed that the fish fence was in danger of destruction because of dredging carried out years before.

The construction of dams has also resulted in the flooding of Aboriginal burial grounds and sacred sites, often without any knowledge of Aboriginal communities that such development was planned. In the 1920s hydro projects within the Nelson River basin of Manitoba were completed on Lac Seul, including a diversion of the Ogoki River. This flooded the graveyards of the Lac Seul Indian Band. In 1958, with the development of the White Dog Falls Dam on the Winnipeg River and the Caribou Falls Dam on the English River, water fluctuations ruined burial grounds and sacred land sites, as well as hunting grounds and wild rice fields.³⁶ Between 1934 and 1935, authorized by the provincial and federal governments, hydro-electric development by the Ontario Power Generation Company flooded the Osnaburgh First Nation's traditional lands and burial sites, again without any advance consultation with them.³⁷

D. Jurisdictional Issues

Control over excavations on provincial lands falls within provincial and territorial jurisdiction, rather than federal jurisdiction, even though they affect Aboriginal burial grounds and sacred sites. As a result of such leading cases as *Sparrow*³⁸, federal officials understand they have a duty to consult with Aboriginal peoples before taking any action which might infringe on their constitutional rights. However, provincial officials working within areas of provincial jurisdiction do not always feel so obliged. In most instances they take the position that 'Indians, and Lands reserved for the Indians' fall within federal jurisdiction.

While in some areas, Aboriginal groups are consulted before provincial permits for excavation or development are issued, in general no consistent policies or laws are in place in Canada to ensure that

³⁵ In March, 2001, the Lyackson First Nation's researcher reported that 'This most recent incident is only one of a series of acts of vandalism inflicted upon the Lyackson's burial grounds on Valdes Island within the last five years. In the present case of vandalism, Grave Monument 1 had evidently been entered, scattering loose bricks and human remains outside of the tomb. ... Two elements of human remains were observed scattered immediately outside of Grave Monument 1, including a large, proximal end of a femur, and a smaller unidentifiable long bone fragment. The blue woolen blanket wrapping the human remains could still be seen inside the tomb, although obviously disturbed and having several brick fragments fallen on top. The inscription on the west face of the monument, however, appears undamaged'. Report, Eric McLay, dated 28 March 2001.

³⁶ Luke Hertlein, *Lake Winnipeg Regulation Churchill-Nelson River Diversion Project in the Crees of Northern Manitoba, Canada*, Contributing Paper # 12, World Association on Dams, (December, 1999) at 5.

³⁷ See comments in *Slate Falls Nation v. Canada (Attorney General)* unreported, docket no. 01-CV-213506CM dated 21 September 2004, Ont. S.C., Horkins, J.

³⁸ *R. v. Sparrow* [1990] 3 C.N.L.R. 161 (S.C.C.).

Aboriginal people are at least consulted before these central aspects of their heritage are placed at risk.

With the exception of the Nunavut territorial government, no provinces or territories in Canada require Aboriginal approval before activities are permitted to proceed which might affect their sacred sites and burial grounds.³⁹ This may change. However, the recent decision of the Supreme Court of Canada in *Haida Nation v. British Columbia*, in which the Court stated the obligation to consult with and to accommodate the concerns of Aboriginal peoples where their rights may be affected, extends to provincial governments as well as the federal government.⁴⁰

Conclusion

Human remains and sacred items removed from burial grounds have little protection under Canadian laws. If the museums or collectors who hold them do not return them voluntarily, there are no laws compelling them to do so. As well, Aboriginal burial grounds throughout Canada are at risk from development through construction, road-building, dredging and flooding. While many of the provincial laws protecting cemeteries mention Aboriginal burial sites and require consultation with Aboriginal peoples on the disposition of remains, in practice these laws have done little to prevent the desecration of Aboriginal burial grounds.

Litigation to prevent development has generally been unsuccessful. For some Aboriginal peoples, their inability to protect burial sites has resulted in blockades and occupations, even violence. As the Royal Commission has pointed out, Aboriginal groups often have little influence in deciding priorities for development or preservation. As the commission concluded, '[a]ll too often, Aboriginal peoples' desire or need for access to traditional sites for traditional activities has led to conflict with officials'.⁴¹ A new ruling by the Supreme Court of Canada calls on provincial governments as well as the federal government to consult with Aboriginal peoples and to accommodate their rights. The impact of this direction from the Supreme Court on Aboriginal burial grounds is still not known.

About the Scow Institute

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.

³⁹ Supra note 2. In Nunavut, excavation permits require Inuit approval.

⁴⁰ *Haida Nation v. British Columbia* [2004] S.C.C. 73.

⁴¹ Supra note 7.