20 Cultural Property and the Question of Underlying Title

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The perspective I wish to address concerns the ownership of cultural property. As an anthropologist interested in comparative legal issues, my goal is to present some ideas that might help to frame an answer to the issue of ownership in a manner that is consistent with contemporary anthropological principles and remains faithful to the ethics of Canadian culture. It is a framework that I have found helpful in thinking through issues surrounding my own work as a cultural anthropologist. I hope it will be useful to archaeologists as well.

The approach I am suggesting ultimately concludes that First Nations hold a better jurisdictional title than does either Canada or the Provinces. Hence, the discussion is bound to raise sensitive matters that might, at first blush, seem divisive and counter-productive. This is not my intent. Rather, I am hopeful that the consequence of this exploration will be to further the sense of cooperation and sharing that is beginning to infuse the relationship between First Nations and archaeologists with regard to archaeological research, cultural property, and the presentation of artifacts and their ownership. At the same time, given the kinds of issues I raise, I am sanguine that the approach may not yield any practical results, at least in the short run. In fact, such results may only arise when governments are prepared to conclude governance agreements with First Nations on matters related to fundamental jurisdictional relationships.

UNDERLYING TITLE

Within Canadian legal culture there are two matters that need to be addressed in answering the question "who owns a particular piece of cultural property."[1] The first focus is on who owns the actual artifact itself. In the Western legal framework from which I am working, this answer would focus on *ownership* in the *private property* sense. In this meaning, one could say that any artifact might have an individual owner. I do not intend to discuss *ownership* in this sense.

Ownership in the sense I intend to address here concerns the matter of *jursidiction*. It focuses on the identification of the party and the political institution (or institutions) that have the legitimate legislative authority to make laws within a territory and includes laws respecting cultural property. This meaning of the word *ownership* pertains to *sovereignty* and *dominion,* as well as to *legislative authority* and *jurisdiction*. It is ownership in a *collective* and *political* sense rather than in an *individual* and *economic* one. Another term for this aspect of *owning* found in Canadian jurisprudence is *underlying title*.

My focus in this paper is on the concept of *ownership* solely in relationship to the issue of *underlying title*. I do this not because I find other issues uninteresting or unimportant. Rather it is because I believe that a discussion of this matter will be of value in furthering the resolution of issues pertaining to the ownership and management of cultural property as well as history—issues that lie at the heart of archaeological and anthropological inquiry and concern.

Canadian Law of Underlying Title

It is a self-evident fact that Aboriginal peoples held legitimate underlying title, jurisdiction, and sovereignty prior to the arrival of the Europeans. It is also reasonable to conclude that, notwithstanding the existence of Canada as a state, unless there is clear evidence that they were extinguished, such sovereignty, jurisdiction, and underlying title must be presumed to continue to exist today. This is what I call *the Aboriginal fact.*

What, then, is Canada's position on underlying title in the face of the Aboriginal fact? While the scholarly literature on this topic provides a range of views, the official position is settled, at least for the present, within Canadian law. It is that, notwithstanding this fact, the state holds undisputed right to underlying title and sovereignty. It is a position that can be found through examination of many statements by legal councils for federal and provincial Crowns and by government officials acting in their official capacity. It is confirmed by reference to court judgments,

[1] See Bell (1992) for a discussion about ownership.

including ones that have been decided in the very recent past.

While the position of Canada has been stated, albeit obliquely, in many recent court decisions regarding Aboriginal rights and Treaty issues, there is at least one place where a clear and highly authoritative statement on this matter is made. This one expression will suffice to illustrate the point. The citation comes from a decision of the Supreme Court of Canada in 1990. Called *R. vs. Sparrow,* this decision has been hailed, on other grounds, as a major victory for Aboriginal people.

In the *Sparrow* case, the Supreme Court agreed that Aboriginal fishing was an inherent right which existed even though it was not specifically mentioned in the *Constitution Act* of 1982. Prior to the passage of that Act, this right could have been diminished or extinguished by Canada, but only through specific legislation made by the Canadian Parliament. The Supreme Court concluded that such legislation had not been passed. Therefore the right continued to exist at the time of the passage of the *Constitution Act* of 1982. The Court further determined that this Aboriginal right to fish had become a constitutional right with the passage of the 1982 Act. It then asserted, given the constitutional status of this existing right, Parliament could only affect the exercise of that right after it had met a very strict test. Although not mentioned specifically, it would seem to follow that this Aboriginal right to fish, as well as other Aboriginal rights that are found to still exist, could only be extinguished, if they could be extinguished at all, through Constitutional amendment.

In the course of its judgment, the Court stated the following with respect to the question of underlying title:

> It is worth recalling that while British policy toward the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, *there was from the outset never any doubt that sovereignty, legislative power, and indeed the underlying title, to such lands vested in the Crown* (*Sparrow* 1990: 404, emphasis mine).

In short, the court has stated that legitimate possession of underlying title by Canada in the face of the Aboriginal fact is unproblematic. Canada, or particularly the Crown (now in right of Canada), holds it. Their solution regarding fishing rights—and indeed all existing Aboriginal rights (which might include ownership of and jurisdiction over artifacts)—derives from this premise.

This view provides the basic framework for the development of government policy with respect to First Nations whether or not they have a treaty relationship with the Crown. It also finds expression in statements by the Crown in court pleadings. For example, in the *Delgamuukw* case in which the Gitksan and Wet'suwet'en First Nations asked for a declaration that their jurisdiction over their own lands still existed, notwithstanding the existence of the Province of British Columbia, the Attorney General of Canada stated: "Ownership and jurisdiction constitute a claim to sovereignty. If the plaintiffs ever had sovereignty, it was extinguished completely by the assertion of sovereignty by Great Britain" (Canada 1989).

In a series of papers (Asch 1992a, 1992b, Asch and Bell 1994, Asch and Macklem 1991), I have questioned, as an anthropologist, the cultural basis for the presumption by Canada that a unilateral assertion of underlying title was ontologically true in the face of the Aboriginal fact. The answer, as I have found in my examination of many court precedents and statements of government officials over the past century and more is that there is a premise that Canada was a *terra nullius,* or empty landscape, devoid of people, at the time of the arrival of Europeans.[2] This claim is sustained in the presence of human beings based on a schema deriving from 19th century cultural evolutionary principles. These principles are clearly articulated in a decision of the Privy Council in England of 1919, which at that time acted as the highest appeals court for the British Empire. Entitled *re Southern Rhodesia*, it is still the leading case upon which Canadian prece-

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2 For archaeological commentary on the question of colonialism and the assumption of *terra nullius*, see Rupertone 1989: 33-35.

dents respecting court assessments of ownership and jurisdiction of First Nations are based. This decision states:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor 'richer than all his tribe.' On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit (*re Southern Rhodesia*, 1919: 233-234).

The utilization of the premise enables the courts assert that some are societies "so low on the scale of evolution" that their culture does not include "sovereignty" and "jurisdiction" over their own people and territory. This allows courts to presume, in the absence of evidence to the contrary, that Canada was a *terra nullius* notwithstanding the fact that Aboriginal people lived here at the time Europeans first arrived. It also enables the courts to reject an application by a First Nation that they possessed underlying title and jurisdiction on the grounds that the evidence does not convince the judge that their societies were sufficiently high on the scale of evolution to assert such a claim. And this is precisely what occurred in the case of the Gitksan-Wet'suwet'en. The judge stated, for example: "I do not accept the ancestors 'on the ground' behaved as they did because of 'institutions.' Rather I find they more likely acted as they did because of survival instincts which varied from village to village" (*re Southern Rhodesia*, 1919: 213).

He also stated that they really did not have law, but flexible customs which were generally not followed. The judge therefore had no trouble concluding that the Gitksan-Wet'suwet'en had a very low form of social organization in the pre-contact period. With respect to underlying title, he said that he could assume only that some minimal sense of ownership and jurisdiction, which was limited to village sites, may have existed in the "legal and jurisdictional vacuum" that was present in the area "prior to British sovereignty." He did not accept the premise that it survived the arrival of British sovereignty.

Underlying Title and the Ownership of Artifacts and of History

The presumption that underlying title manifestly vests in Canada despite the Aboriginal fact is fundamental for the organization of current political and institutional arrangements of Canada. It is, for example, the basis for the principle that provincial legislatures, along with the Federal Parliament, have a monopoly on Crown title as well as ultimate legislative authority over all lands and people within the borders of Canada. Among other matters, it explains why Canada and the provinces have jurisdiction with respect to antiquities legislation, as well as authority regarding the disposition of cultural property even when it dated from a period prior to the existence of Canada or even the arrival of the first Europeans. In short, it is the *ownership*, in the underlying title sense, of the surrounding soil that determines the jurisdiction over cultural property found within it.

The fact that Canada (and the provinces) claim jurisdiction over cultural property that was created in a period prior to the inception of the state or even the presence of Europeans on this soil is also about jurisdiction over the past. Canada and the provinces assert they are the legitimate *owners* of a history that long pre-dates the existence of the state (or its colonial predecessors), based in the first instance on the ontological presumption of the legitimacy of underlying title in the face of the Aboriginal fact. The question is where to place Aboriginal people and their

history in this framework. Based on the work of a number of legal scholars in Canadian law (e.g., Slattery 1987), it may be assumed that First Nations citizens have been incorporated both individually and collectively into Canada (ultimately as citizens), either willingly or unwillingly. It follows, then, that their history, even from the period before contact, now becomes part of *Canadian* history and therefore lies within the ultimate jurisdiction of the political institutions of Canada (and the provinces) rather than with First Nations.[3]

UNDERLYING TITLE, CULTURAL PROPERTY, AND ANTHROPOLOGICAL THEORY

It comes as no revelation to any member of the profession that the 19th Century cultural evolutionary premise that rendered this land as a legal *terra nullius* cannot be supported either ethically or scientifically. The notion that some human cultures are so low on an evolutionary scale as to not have jurisdiction over their members and their lands is simply not supportable in the face of the evidence about the nature of all cultures of *Homo sapiens*. Equally, if we look at Canada's record at the United Nations, as well as surveys of popular opinion, it is also clear that Canadians would reject the legitimacy of a decision about the right to govern that was based on the presumption that one race of people or culture was inherently superior to another. In short, the basis upon which we decide the legitimacy of underlying title within Canada is one that runs counter to the ethical values of contemporary Canadian culture. The question is what to do about it.

Of course, the answer to this question is multifaceted and it is not my goal to elaborate on it here. My focus is how the issue of who owns an artifact—in the jurisdictional sense—might contribute to its resolution. Within that context, I think that an aspect of the answer which archaeologists might consider is how they might relate this question to contemporary anthropological theory. My reasoning is as follows. Nineteenth century cultural evolutionism provides the intellectual justification for the existing rationale regarding the legitimate disposition of underlying title in law. In this sense, it is 19th century evolutionism that lies behind how the law designates the ultimate authority over cultural property. As we now reject 19th century unilinear evolutionism in our own practice, it is useful to ask what contemporary theory might say about underlying title and hence about how to determine the legitimate ownership of cultural property.

In the first place it is clear that, were the Privy Council in the *re Southern Rhodesia* case to look at contemporary theory, they would have found no support for a proposition that it is valid to measure legitimacy regarding territorial control and social regulation on an evolutionary scale. There is, in fact, no people so low on the scale of evolution that they have no system, or that their system must give way to one that is presumed to be at a *higher* level. Instead, I would imagine that contemporary theory, even contemporary evolutionary theory, would suggest there are at least two principles upon which to base any comparative analysis. The first would be to assert that an analysis must be based on a presumption of cultural relativism (or its equivalent).[4] The second would be that we must eschew comparison based on ethnocentric reasoning when developing any framework for analysis.

Were we to accept these two principles, it would not be possible to found the legitimacy of Canadian underlying title on the premises now used by the courts in the present day: it would be rejected as ethnocentric and biased, for it rests upon the legitimacy of a comparison based on the inherent superiority of our legal system and traditions. As a consequence, as good scientists, we cannot accept the appropriateness of laws that derive from that premise; and specifically the set of laws that assert that Canada (and/or the provinces) have ultimate jurisdiction over the cultural

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[3] Some legal scholars would suggest that First Nations have a measure of jurisdiction. However, I do not believe that any would disagree that, under the appropriate conditions, the *Sparrow* decision recognizes that the Federal government (and perhaps the provinces) would have the ability to override legislation made by First Nations' authorities.

[4] I do not mean to imply that the use of such a premise would lead to the avoidance of comparison or even questions regarding comparative morality. Rather, I mean that there would be a *presumption* of cultural relativism which nonetheless could be successfully challenged by the introduction of specific facts in specific cases.

property of First Nations or over their history. It follows, then, that were we to apply these principles from contemporary anthropological theory to our legal system, there would be significant implications for, among many other matters, archaeological research and the collection of artifacts.

TOWARDS RESOLUTION

Who, then, has legitimate jurisdiction over cultural property, especially that which clearly was produced by First Nations? If we follow the implications of contemporary anthropological theory with respect to underlying title, most likely the answer is not Canada or the provinces, notwithstanding what the courts have said. However, it does not follow that non-Aboriginal Canadians and especially professional archaeologists necessarily have no interest in this property or have no value in contributing to its interpretation. Archaeologists have technical and scientific knowledge that, in principle, is of immense value to any people who wish to ensure the continued life of its ancient material culture. Archaeologists also have settings, like archives, which enable the careful organization and accession of materials. Archaeologists, by and large, also have good will and a genuine scientific interest in the cultures of the peoples with whose cultural property they are involved. What archaeologists do not have and what legislation based on the existing law of underlying title alone cannot provide them with is comfort that their possession of cultural materials is ultimately immune from a challenge respecting their *jurisdictional* rights.

Archaeologists, anthropologists, and the profession as a whole are now well-aware of the issues respecting the values and jurisdiction of Aboriginal cultures. On the practical level, speaking as a cultural anthropologist, I believe that archaeologists responded to this realization in a very sensitive way in general, through such means as co-management regimes, some of which are discussed elsewhere in this volume. Equally, in jurisdictions such as the Northwest Territories where there is often a higher appreciation of Aboriginal concerns by legislators as well as the general public, archaeologists have helped to create new legislative requirements that extend a degree of sensitivity about Aboriginal cultures and values into the legislative regime. Within the profession itself, the report of the Task Force on Museums and First Peoples has provided a guide to the curation and use of artifacts that shows respect and concern for Aboriginal values. Finally, the *Statement of Principles for Ethical Conduct Pertaining to Aboriginal Heritage Research and Communicatio*n (Nicholson et al. 1996), which was discussed and adopted at the 1996 meeting of the Canadian Archaeological Association, acknowledges that the profession as a whole will act to ensure respect for the cultural needs and aspirations of the First Nations.

These initiatives are extremely important. They are practical. They will have an immediate impact on the way archaeology takes place. Measures such as these will serve to educate professionals in other disciplines, the general public, and even legislators of the need for respect and perhaps reform. As such, they are crucial and represent a positive advance in the whole process of developing better relations between First Nations and Canada. I applaud them.

I am suggesting that there is another aspect of the challenge, one which archaeologists as well as other anthropologists might now begin to consider. It concerns fundamental issues of jurisdiction over cultural materials. Who really owns this cultural property? Clearly, as I stated above, it is not Canada or the provinces. A better answer, drawing on contemporary anthropological theory, is *The First Nations*, for it is based on the premise of cultural relativism rather than ethnocentric comparison. Further, this answer enables us to disconnect Canadian concepts such as jurisdiction over cultural property and underlying title from colonial justifications.

At the same time, I certainly acknowledge that this answer gives rise to many practical concerns. Among other matters, these range from adjudication of disputes over ownership to concerns that cultural property of importance to both the individual culture and the larger community might be damaged. Nonetheless, these practical matters are resolvable in the longer run. To my mind, it is also very important at this time for archaeologists and others to consider the acknowledgment of a fundamental principle regarding jurisdiction over cultural property and to assist Canada and the provinces to recognize it legislatively. 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 that 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.

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