

Chapter 2

Facts, Method, and Basic Concepts

2.1 The Factual Background

2.1.1 *The One-Way Flow of Indigenous Cultural Property*

The cultural property repatriation claims of indigenous peoples are a reversing consequence of an almost exclusive one-way flow of indigenous cultural property into western civilisations. It is an open secret that western museums and public or private collections display and store the majority of indigenous cultural property. The collections comprise hundreds of thousands of objects, featuring past and present native, tribal, or ‘primitive’¹ cultures. The National Museum of the American Indian (NMAI) of the American Smithsonian Institution alone houses more than one million objects and artefacts and vast photographic, media, and paper archives relating to the archaeology, ethnology, and history of Native American peoples.² On the other side, innumerable indigenous communities are isolated from their cultural items.³

Before the nineteenth century, the habit of collecting indigenous cultural property tended to be sporadic, with rare or unusual specimens brought back to Europe by explorers, colonial officials, and traders. The items were acquired in a broader attempt to understand the peoples and cultures that the discoverers encountered in the ‘new world’. In the nineteenth century, scientists such as Charles Darwin or Theodor Waitz became interested in the indigenous peoples and used the collected objects and data for their anthropological research. Later, the collection and collation of human exotica became a booming sector, creating an increasing one-way

¹ ‘Primitive’ and other problematic terms in this book will be put in quotation marks so that the readers do not take them at face value.

² The National Museum of the American Indian Act of 1989 (NMAI Act), 20 U.S.C. § 80q(3).

³ Lyndel V. Prott and Patrick J. O’Keefe, *Law and the cultural heritage*, London and Edinburgh: Butterworths, 1989, at pp. 11–12.

flow of thousands of objects into Europe and the western world.⁴ Grand-scale explorations took place, striving for the development of scientific enquiry and the growth of western empires.⁵ The years from the 1870s to the 1920s were the ‘golden age’ of museum collecting, fuelled by officially approved assimilation and relocation policies vis-à-vis indigenous inhabitants and the conviction that indigenous cultures were declining and threatened with extinction.⁶ Trade and barter were booming. Archaeologists, anthropologists, and museums strove to save information on these cultures through the collection of objects, and thereby often played an ambiguous role vis-à-vis indigenous peoples, which Gii-dahl-guud-sliiaay describes as follows⁷:

Museums and other institutions have played an important role in the preservation of cultural objects and have potential for educating other cultures about Indigenous Peoples’ cultures. However, at least to some extent, in their rush to preserve what they perceived were the ‘dying races’ and their history, museums and other institutions have hastened the demise of these cultures through the removal of objects that were integral to our cultural survival.

What was collected at that time not only fills museums today but still fuels a continuous and strikingly increasing interest of the international art market in indigenous cultural objects. Monetary values of the objects have exploded. In 2005, for example, the auction of Native American, pre-Columbian, and tribal art held in San Francisco realised total sales prices of more than US\$2.8 million. For a Native American basket, a 1929 Paiute polychrome basket produced in the Yosemite-Mono Lake region, a bidder paid US\$336,250, three times the pre-sale estimate. A rare Tinglit shaman’s rattle, acquired in the 1870s by a captain of the Seventh Regiment of the United States Army, was sold for US\$149,250.⁸

⁴ Heath Pearson, ‘Homo economicus goes native, 1859–1945: The rise and fall of primitive economics’ (2000) *History of Political Economy*, 32 (4), pp. 933–989, at p. 936; United Nations (UN), Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Chairperson-Rapporteur Erica-Irene Daes, ‘Discrimination against indigenous peoples: Study on the protection of the cultural and intellectual property of indigenous peoples’, (UN Doc. E/CN.4/Sub.2/1993/28, 28 July 1993), at p. 14, para. 49 [hereinafter Daes, Study 1993]; and Robert K. Paterson, ‘Claiming possession of the material cultural property of indigenous peoples’ (2001) *Connecticut Journal of International Law*, 16, pp. 283–295, at p. 285.

⁵ For details on the grand-scale collecting expeditions in the United States conducted by Harriman, Hemenway, Jessup, Hayden and Powell (following Lewis and Clark), see Richard Waldbauer and Sherry Hutt, ‘“Cultural property” begins: The centennial of the antiquities act’, in Sherry Hutt (ed.), *Yearbook of cultural property law 2006*, Walnut Creek: Left Coast Press, 2006, pp. 147–174, at pp. 151–153. On the collecting practices of the British Empire, see Ana F. Vrdoljak, *International law, museums and the return of cultural objects*, Cambridge: Cambridge University Press, 2006, at p. 43.

⁶ Vrdoljak, *International law, museums and the return of cultural objects*, supra note 5, at p. 120.

⁷ Gii-dahl-guud-sliiaay (Terry-Lynn Williams), ‘Cultural perpetuation: Repatriation of First Nations cultural heritage’ (1995) *U.B.C. Law Review*, Special edition, pp. 183–201, at p. 183.

⁸ The results of this auction by Bonhams & Butterfields were published on the Website of Antiques and the Arts, available at <http://www.antiquesandthearts.com>.

The art market is stimulating dealers and pothunters to penetrate the remotest areas of the world in order to find the remaining ‘exotic’ indigenous cultures and their cultural property. The more unique, beautiful, or ‘sacred’ an object is, the higher is the market price of the object.⁹ The market mechanisms thereby accelerate a modern wave of destruction of indigenous and non-indigenous archaeological sites and put many objects into circulation that are deprived of their original context. That is where indigenous peoples’ interests meet the ones of scientists and national governments again.¹⁰

2.1.2 Indigenous Cultural Property Takings

A central trigger point of indigenous peoples’ cultural property repatriation claims is the question of whether the original alienation of such property was legal.

For centuries, a conquering party could legally acquire good title to objects of the enemy by looting and colonising new territories.¹¹ In the wrestling of state imperialism, theories of natural law and cultural Darwinism justified countries’ bringing of land and resources under their purview and into their possession.¹² Cultural depletion of indigenous peoples thus, in principle, did not qualify as illegal. It was, on the contrary, a common and internationally accepted understanding to hold the appropriation of indigenous peoples’ resources to be legal.

Today, however, values have changed. A different perception and assessment of colonial history and the legality of colonial activities require a reconsideration of the alienation of indigenous cultural property from their original owners. A new opinion prevails that holds that ‘most of those takings would be improper under contemporary legal and ethical standards’.¹³ In the United States, in particular, a study on Native American cultural property mandated by the American Indian

⁹ See, for example, Susan Lobo, ‘The fabric of life: Repatriating the sacred Coroma textiles’, *Cultural Survival Quarterly* (4 March 2010), available online at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/bolivia/fabric-life-repatriating-sacred-coroma-textiles>.

¹⁰ Antonia M. De Meo, ‘More effective protection for Native American cultural property through regulation of export’ (1994) *American Indian Law Review*, 19, pp. 1–72, at p. 8.

¹¹ Hannes Hartung, ‘Kunstraub in Krieg und Verfolgung: Die Restitution der Beute- und Raubkunst im Kollisions- und Völkerrecht’, *Universität Zürich*, Dissertation (2004), at pp. 9–23; and Kurt Siehr, ‘Restitution of looted art in private international law’, in Marc-André Renold and Pierre Gabus (eds), *Claims for the restitution of looted art = La revendication des oeuvres d’art spoliées*, Zurich: Schulthess, 2004, pp. 71–94, at pp. 81–83.

¹² See *infra* Sect. 2.3.1; and Vrdoljak, *International law, museums and the return of cultural objects*, *supra* note 5, at p. 46.

¹³ David Rudenstine, ‘Symposium: IV. Cultural property: The hard question of repatriation: The rightness and utility of voluntary repatriation’ (2001) *Cardozo Art & Entertainment Law Journal*, 19, pp. 69–104, at p. 70. See also Bowen Blair, ‘Indian rights: Native Americans versus American museums – A battle for artifacts’ (1979) *American Indian Law Review*, 7, pp. 125–145, at pp. 132–133.

Religious Freedom Act of 1978 confirmed the assertion that a significant amount of Native American cultural property was acquired through illegitimate means.¹⁴ The Study came to the conclusion that not only were indigenous human remains illegitimately collected but also '[m]ost sacred objects were stolen from their original owners. In other cases, religious property was converted and sold by Native people who did not have ownership or title to the sacred object'.¹⁵

The specification of such general statements is, for most cases of collected indigenous objects, complex or impossible. The provenances may not be available, or the traces back to the transaction that alienated an object from the original owners have been lost in an object's history. In the following cases, however, the relevant facts could be established and may, to some extent, illustrate the rationale behind the new opinions. A categorisation of these cases into terms of stolen, unlawfully excavated, or illegally exported or imported cultural property¹⁶ would be too narrow and inappropriately cling to a western property law perspective. That is why, in the following, this book will use the word 'takings'.¹⁷ Sometimes, the knowledge of an indigenous people's destiny alone might be sufficient to suspect how and under what repugnant circumstances objects were abandoned.

2.1.2.1 The Taking of Indigenous Human Remains

Human remains provide a first illustrative picture of cultural property takings from indigenous peoples. Hundreds of thousands of indigenous human remains have already been excavated, taken out of caves, removed from mountaintops or tree burials, picked up after military battles, or obtained from hospitals.¹⁸ In the United States, but not exclusively, such activities were officially tolerated, supported, or even ordered by the government until the twentieth century.¹⁹

¹⁴ 42 U.S.C. § 1996; and Jack F. Trope and Walter R. Echo-Hawk, 'The Native American Graves Protection and Repatriation Act: Background and legislative history' (1992) *Arizona State Law Journal*, 24, pp. 35–76, at p. 44.

¹⁵ Trope and Echo-Hawk, *supra* note 14, at p. 44, citing United States Secretary of the Interior Federal Agencies Task Force, American Indian Religious Freedom Act Report (August 1979).

¹⁶ Prott and O'Keefe, *Law and the cultural heritage*, *supra* note 3, at pp. 37–51.

¹⁷ For the use of the term 'wrongful taking', see *ibid.*, at pp. 838–839.

¹⁸ According to Norman Palmer and James Dowling, 18 of the institutions surveyed in Great Britain claimed to be in possession of 382 human remains holdings from Australia/Tasmania, 21 institutions claimed to be in possession of 187 holdings from New Zealand, and 125 claimed to be in possession of 1074 holdings from the Americas. United Kingdom, Department for Culture, Media and Sport, Cultural Property Unit, Norman Palmer and James Dowling, 'The report of the working group on human remains' (November 2003, updated February 2007), at p. 14, para. 35 [hereinafter Palmer and Dowling].

¹⁹ See, for example, Trope and Echo-Hawk, *supra* note 14, at pp. 38–43; and Steven J. Gunn, 'The Native American Graves Protection and Repatriation Act at twenty: Reaching the limits of our national consensus' (2010) *William Mitchell Law Review*, 36 (2), pp. 503–532, at pp. 508–511.

Human remains of indigenous peoples were curiosities that fuelled a lively international trade. Mokomokai (the Māori word for tattooed preserved Māori heads), for example, were very popular trading objects in the nineteenth century, which reached high prices on the market. To the Māori, tattooing is sacred and was a mark of rank and importance. However, trade in mokomokai made this tradition dangerous and uncertain. When captured Māori warriors and slain chiefs could not provide sufficient heads to meet the demand for mokomokai, slaves were tattooed and killed to supply the required goods. The Māori thus ultimately stopped the preserving of heads of friends and relatives out of respect.²⁰

Another reason for the high interest in indigenous human remains was their scientific value. The skeletons, skulls, and bones served the study of indigenous peoples, and proving their racial inferiority as ‘savages’.²¹ An activist member of the Native American Pawnee tribe once brought this practice into focus with the following statement: ‘If you desecrate a white grave, you go to jail. If you desecrate an Indian grave, you get a Ph.D.’²²

Generally, only little hints on catalogue cards of collections indicate the ‘provenance’ of indigenous peoples’ human remains. However, if the stories on how the remains ended up in trade or collections are recovered, they are often highly problematic. The remains of the allegedly last ‘full-blood’ Aborigine from Tasmania in Australia, for example, called Truganini, ended up in the British museum. Born around 1812 on Bruny Island, this woman was the daughter of the island’s chief. Her mother had been killed by whalers before she was 18. Her first fiancé died while trying to save her from abduction, and her two sisters had been sold as slaves. Caroline Davies continues the story as follows²³:

As conflict continued between settlers and the Aborigines in 1830, Truganini and her husband Chief Woureddy were moved to Flinders Island, with about 100 others. Thinking this would save her people, she persuaded many to follow, but they succumbed to influenza and other diseases. Eventually, those remaining were moved to a settlement at Oyster Cove, where, in 1873, she was the sole survivor of her people. She died in 1876, aged around 73, in Hobart. Denying her dying wish that her ashes be scattered in the channel that separates Tasmania from mainland, she was buried, only for her skeleton to be exhumed by the Royal Society of Tasmania, and later placed on display.

²⁰ Christian Palmer and Mervyn L. Tano, *Mokomokai: Commercialization and desecralization*, Denver, USA: International Institute for Indigenous Resource Management, 2004 (electronic version).

²¹ The term ‘savage tribes’ is a citation from T.J. Laurence’s textbook on public international law that went through many editions. Quoted by Thomas Flanagan, *First Nations? Second thoughts*, Montreal Ithaca NY: McGill-Queen’s University Press, 2000, at p. 56.

²² Walter Echo-Hawk, ‘Putting spirits to rest. Sacred tribal artefacts and remains finally coming home 5 years after law was passed’, *Seattle Post Intelligence* (11 March 1996), at p. C1.

²³ Caroline Davies, ‘Aborigines demand that British Museum returns Truganini bust’, *theguardian* (16 September 2009), available online at <http://www.guardian.co.uk/world/2009/sep/16/tasmania-aborigines-ancestors-repatriation?INTCMP=SRCH>.

For an affected indigenous tribe, community, or family, it is thus often not only the excavation but also the trading, researching, and collecting of indigenous human remains that may result in a wrongful taking.

2.1.2.2 The Taking of Indigenous Cultural Property

Next to human remains, all kinds of objects created by indigenous peoples entered trade or otherwise ended up in collections. Most important of these are indigenous peoples' funerary objects, sacred and ceremonial items, and objects of cultural patrimony.²⁴

Put in context, many of these objects are proof of a history of diminution and cultural uprooting, which many indigenous peoples share.²⁵ Destroying their culture was one way to break resistance movements against colonising powers.²⁶ Assimilation measures of new governments supported and accelerated the cultural demise. In certain cases, one may even speak of 'cultural genocide'.²⁷ Important influences on social traditions of indigenous peoples and their cultural lives were also epidemic diseases, alcoholism, Christianisation, and the economisation of indigenous peoples' territories, resources, and knowledge. Indigenous peoples themselves believed predictions of the complete demise of their tribal existence.

In consequence, indigenous peoples' separate cultural identities became weakened. Their leaders became unable, or lacked sufficient interest, to go on performing their leader's and feast obligations and to ultimately prevent the removal of their cultural property. Ceremonial gear, sacred objects, and cultural patrimony became useless and unprotected.²⁸

²⁴ On this legal categorisation of indigenous peoples' cultural property, see *infra* Sect. 2.3.2.3.

²⁵ Anja Titze, 'Die Vereinten Nationen und indigene Völker' (2007) *Vereinte Nationen*, 5, pp. 190–197, at p. 190.

²⁶ Destroying of cultural property is an applied war strategy in order to weaken the enemy. 'Shadow armies' list the works of culture and art of the attacked party that are to be removed or destroyed, long before war breaks out. See Wilfried Fiedler, 'Zwischen Kriegsbeute und internationaler Verantwortung – Kulturgüter im Internationalen Recht der Gegenwart: Plädoyer für eine zeitgemässe Praxis des Internationalen Rechts', in Gerte Reichelt (ed), *Neues Recht zum Schutz von Kulturgut. Internationaler Kulturgüterschutz. EG-Richtlinie, UNIDROIT-Konvention und Folgerecht*, Vienna: Manzsche Verlags- und Universitätsbuchhandlung, 1997, pp. 147–160, at p. 153.

²⁷ On the term 'cultural genocide', see Tullio Scovazzi, 'La notion de patrimoine culturel de l'humanité dans les instruments internationaux', in James A. R. Nafziger and Tullio Scovazzi (eds), *Le patrimoine culturel de l'humanité = The cultural heritage of mankind*, Leiden and Boston: M. Nijhoff Publishers, 2008, pp. 145–247, at pp. 134–137; and Hartung, *supra* note 11, at pp. 203–205.

²⁸ Richard Overstall, et al., 'The law is opened: The constitutional role of tangible and intangible property in Gitanyow', in Catherine E. Bell and Val Napoleon (eds), *First Nations cultural heritage and law: Case studies, voices, and perspectives*, Vancouver BC: U.B.C. Press, 2008, at p. 99.

Two cases from within the United States and two international repatriation cases involving Canadian and Bolivian indigenous peoples will establish in more detail the context of indigenous peoples' cultural property alienation. They show that indigenous peoples, even if living on different territories and sharing no common history or culture, often feel very similar about their cultural property losses or takings.

The Ghost Dance Shirts of the Lakota

At the end of the nineteenth century, the Native American dances in the United States were considered 'old heathenish dances' and a great hindrance to the official policy of Indian Christianisation and civilisation.²⁹ In consequence, the Commissioner of Indian Affairs distributed a set of rules for Indian Courts that officially deemed participation in the sun dance, the scalp dance, and the war dance a criminal offence.³⁰ Indian agents enforced the rules and banned Indian dances. Measures ranged from threats of punishment to the withholding of government rations (on which the Indians depended after their confinement to reservations), destruction of dance houses, imprisonment, or threats of military intervention.³¹

Also the ghost dance became prohibited at deaths by the Code of Indian Offenses.³² The ghost dance was a religious, anti-violent dance movement that rose with the Native Americans all over the United States as an ultimate resistance to the decline of Indian tribal independence.³³ It ended with a famous military intervention enforcing the dance prohibition against the Lakota ghost dancers in 1890 at Wounded Knee. After governmental troops arrested and shot the important traditional Lakota leader, Sitting Bull, they massacred around 300 Indians who were believed to practise the ghost dance.³⁴

²⁹ Henry Teller, Secretary of the Interior expressed this view in a letter to the Commissioner of Indian Affairs in December 1882. Allison M. Dussias, 'Ghost dance and holy ghost: The echoes of nineteenth-century Christianization policy in twentieth-century Native American free exercise cases' (1997) *Stanford Law Review*, 49, pp. 773–852, at p. 788.

³⁰ United States, Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs*, 1883, at pp. XIV–XV.

³¹ Dussias, supra note 29, at p. 788.

³² Carole Goldberg, 'Law and legislation: Overview: U.S. law and legal issues', in Duane Champagne (ed.), *The native North American almanac: A reference work on native North Americans in the United States and Canada*, Detroit Mich.: Gale Research, 1994, pp. 449–461, at p. 452 [hereinafter Goldberg, 'Law and legislation: Overview'].

³³ For an anthropological view on the ghost dance and the Wounded Knee Massacre, see James Mooney, *The ghost-dance religion and the Sioux outbreak of 1890*, Lincoln: University of Nebraska Press, 1991; and Dussias, supra note 29, at p. 795.

³⁴ On the killing of Sitting Bull, see United States, Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs*, 1891, at pp. 333–338. See also Dee Brown, *Bury my heart at wounded knee: An Indian history of the American West*, New York: Sterling Publishing Co., Inc., 2009.

The ban on dances was later reversed. However, the objects used in the dances are, in most cases, no longer in the custody of the dancers or their successors or clans. The ghost dancers wore shirts that they usually painted with stars, moons, and suns, in the belief that they became bulletproof while dancing. Today, several such shirts are kept and displayed in museums. How legitimate was the collecting of such shirts in view of the historical facts?

The Smithsonian Institution reacted with the return of several ghost dance shirts to the Lakota. After an intense process, the Kelvingrove Museum in Glasgow also handed over one shirt with a possible Wounded Knee provenance.³⁵ The shirt was thereby one of more than a dozen objects kept at the Glasgow Museums that are said to be taken from peoples massacred at Wounded Knee. Among them are a warrior's necklace, a pair of boy's moccasins, and a baby's cradle. The Lakota have requested the repatriation of four of these objects from the Glasgow Museums, but the Glasgow Council has so far turned down the request.³⁶

The Wampum Belts of the Iroquois

An integral cultural part of the Iroquois culture is wampum belts. The Iroquois people consist of several Native American tribes such as the Mohawk, Oneida, Onondaga, Cayuga, Seneca, Tuscarora. They today primarily live in New York, Quebec, and Ontario.³⁷ Wampum belts are created from purple and white clam and conch shell beads. The belts traditionally fulfilled important social, cultural, political, and spiritual functions.³⁸ Symbols woven into the belts constitute recorded Iroquois history, religion, and law combined.³⁹ Iroquois traditionally used the belts as 'mnemonic devices to record important events, as message devices, an aid to the correct recitation of a ritual or ceremony and as symbols of treaties and

³⁵ See infra section 'Governmental Bodies Developing Procedural Solutions'.

³⁶ United Kingdom, House of Commons, Select Committee on Culture, Media and Sport, 'Cultural property: Return and illicit trade', *Seventh Report, Minutes of Evidence, Memorandum submitted by Glasgow City Council*, (Vol. II, HC 371-II, 18 July 2000), at ch. 3–5.

³⁷ On the Iroquois peoples, see Haudenosaunee (Mohawk, Oneida, Onondaga, Cayuga, Seneca, Tuscarora: Kahnawake Branch of the Mohawk Nation, Six Nation Iroquois Confederacy), 'History & Culture', available at <http://www.kahnawakelonghouse.com/index.php?mid=2>.

³⁸ William N. Fenton, 'The New York State wampum collection: The case for the integrity of cultural treasures' (1971) *Proceedings of the American Philosophical Society*, 115, pp. 437–461, at p. 440 [hereinafter Fenton, 'The New York State wampum collection']; and Richard W. Hill, 'Repatriation and the Indian way of mind', in Sheila Watson (ed.), *Museums and their communities*, London: Routledge, 2008, pp. 292–323, at p. 317.

³⁹ Blair, supra note 13, at p. 126.

agreements'.⁴⁰ It was the medium through which the Iroquois retained and transmitted information from generation to generation.⁴¹

Within the Iroquois Confederacy, the Onondaga tribe was the official holder of the office of 'wampum keeper'. A traditional Onondaga chief was attributed with such title and responsibility.⁴² In 1899, however, a New York State Indian Law determined the University of the State of New York to hold the new office of wampum keeper.⁴³ In the same year, the Onondaga transferred their last five wampum belts against a payment of US\$500 into the custody of the University.⁴⁴ The Onondaga later disputed the validity of the New York State law and claimed that the wampum belts were only on loan.⁴⁵ Again, the concrete historical facts enlighten how critical the circumstances were under which the Onondaga 'elected' the University and transferred the belts.

At the end of the nineteenth century, traditional Onondaga chiefs had to fight for the recovery of the wampum belts. They were illegitimately sold to private collectors by the then acting wampum keeper, Onondaga Chief Thomas Webster. The Onondagas removed Webster from his office for betraying a trust, but the collectors refused to return the belts based on their bills of sale.⁴⁶ In 1893, the World's Columbian Exhibition in Chicago displayed the belts transferred to the collectors as being reminiscent of a glorious past of the Iroquois. This added fuel to the belief that the Iroquois were a 'vanishing race' with little hope of surviving the next century.⁴⁷ To strengthen their position as a still existing nation and Confederacy, the Onondaga sought the assistance of anthropologists in their claim against the wampum belt collectors. The anthropologists convinced the Onondaga that they needed the help of the New York State University.⁴⁸ In the negotiations with the University, the Onondaga—to whom the written law and the English language were foreign—entrusted Harriet Maxwell Converse with the role of their 'attorney'.⁴⁹ However, Converse had an obvious conflict of interests. On the one hand, she was a defender of Indian rights and a friend of the Indians, who was adopted by the

⁴⁰ Fred A. Morris, 'Law and identity: Negotiating meaning in the Native American Graves Protection and Repatriation Act' (1997) *International Journal of Cultural Property*, 6, pp. 199–230, at p. 206, citing Robert F. Spencer, et al., *The Native Americans: Ethnology and backgrounds of the North American Indians*, 2nd edn, New York: Harper & Row, 1977, at p. 396.

⁴¹ Hill, *supra* note 38, at p. 317.

⁴² *Ibid.*, at pp. 320–321.

⁴³ Section 27 of the New York State Indian Law of 1899, cited by Fenton, 'The New York State wampum collection', *supra* note 38, at pp. 438–439.

⁴⁴ *Ibid.*, at pp. 450–453.

⁴⁵ *Ibid.*, at pp. 437–440.

⁴⁶ *Ibid.*, at p. 453; and Hill, *supra* note 38, at p. 321.

⁴⁷ Hill, *supra* note 38, at pp. 320–321.

⁴⁸ *Ibid.*, at p. 321. For more details on the connection between the election and transfer of the wampum belts and the willingness of the University to join the claim, see Fenton, 'The New York State wampum collection', *supra* note 38, at p. 452.

⁴⁹ Blair, *supra* note 13, at p. 132.

Seneca nation and made honorary chieftainess of the Six Iroquois Nations. On the other hand, she was an enthusiastic collector of Native American cultural property and enjoyed the blessing of the New York State University that aimed to found an Indian museum.⁵⁰

The Onondaga ultimately agreed to the election of the University as wampum keeper and the transfer of the belts, in order to get the University on their side in their suit against John Thatcher, one of the private collectors and former mayor of Albany. Nevertheless, the trial judge held that the University was never selected or 'raised up' to the position or office of 'wampum keeper', that the Iroquois Confederation had ceased to exist, that the wampum belts were curiosities and relics of time, and that the Onondaga seller did not hold the wampum in trust but had a right to sell it. The higher courts confirmed the holding, the return of the wampum belts was definitively denied, and the case lost.⁵¹

The University, nevertheless, kept the wampum belts and later handed them over to the New York State Museum. A 1909 New York State law fixed the Museum's possession by bestowing upon itself the position of wampum keeper and claiming rights over any wampum belts, past, present, or future.⁵² Sixty years later, public pressure led to an amendment of the Indian Law, which obliged the Museum to re-transfer the five wampum belts received from the Onondaga in 1898.⁵³

The Potlatch Objects of the Kwakwaka'wakw

An easy prey for cultural property collectors was also the potlatch objects from the First Nations living in the north-western regions of British Columbia. Potlatches are ceremonies celebrated at significant events of these First Nations, including marriages, naming of children, memorials to the dead, raising of totem poles, and transfers of rights and privileges. Next to feasting, speeches, storytelling, dancing, and singing, an important part of potlatch ceremonies is the giving of gifts consisting of cultural objects before witnesses. The ritual promoted values such as humility, generosity, responsibility, and respect.⁵⁴ The Canadian government prohibited the potlatch ceremony in 1884 by amending the federal Indian Act.⁵⁵

⁵⁰ Fenton, 'The New York State wampum collection', supra note 38, at p. 450.

⁵¹ *Onondaga Nation v Thatcher* (1901) 29 Misc 428, 61 NYS, 1027, 169 NY Rep 584. On the case, see Hill, supra note 38, at p. 321; and Blair, supra note 13, at p. 132.

⁵² Hill, supra note 38, at p. 321.

⁵³ Blair, supra note 13, at pp. 125–126 and 132.

⁵⁴ Catherine Bell, et al., 'Recovering from colonization: Perspectives of community members on protection and repatriation of Kwakwaka'wakw cultural heritage', in Catherine E. Bell and Val Napoleon (eds), *First Nations cultural heritage and law: Case studies, voices, and perspectives*, Law and society series, Vancouver BC: U.B.C. Press, 2008, pp. 33–91, at p. 46.

⁵⁵ An Act to Amend and Consolidate the Laws Respecting Indians, SC 1880, c. 28.



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