

# INTELLECTUAL PROPERTY ISSUES IN CULTURAL HERITAGE (IPINCH)



September 2, 2014

An Open Letter to:

Honourable Steve Thomson, Minister of Forests, Lands and Natural Resource Operations  
and  
Ms. Justine Batten, Director, Archaeology Branch, Ministry of Tourism, Culture and the Arts

(copied to *Times Colonist* and *Globe and Mail*)

RE: Coast Salish burial site on Grace Islet

We write this letter as members of the *Intellectual Property Issues in Cultural Heritage* project, an international consortium of academic and community researchers, Indigenous organizations, and concerned individuals with expertise in law, ethics, archaeology, anthropology, museums and cultural tourism ([www.sfu.ca/ipinch](http://www.sfu.ca/ipinch)). Our work investigates the rights, values, and responsibilities concerning the protection and management of Indigenous cultural heritage in order to inform fair and ethical decision-making.

As researchers working on Indigenous cultural heritage at a variety of scales—from local to global—we think it is important to understand the larger context that shapes local conflicts. The dispute over development on Grace Islet and its impact on a Coast Salish burial site raises issues of local, provincial, national and international significance. Stepping back and taking this broader view can reveal alternatives to costly and divisive disputes between those wishing to develop private and public lands, and those who seek to protect ancestral sites and burial grounds essential to Aboriginal peoples' collective wellbeing. At the provincial and national level, the Grace Islet dispute illustrates disconnects between heritage laws and the protection of Aboriginal heritage sites in accord with the values and legal traditions of the affected communities and nations.

Of particular concern are inequities in identifying, evaluating, and protecting significant heritage sites. In Canada, Aboriginal peoples' burial sites are largely treated as archaeological sites and not afforded the same respect or protection as Euro-Canadian cemeteries. This is a significant point of inequity, as it implies culture- and race-based distinctions between Aboriginal and non-Aboriginal Canadians. Shouldn't all Canadians be able to expect that the burial grounds of their ancestors and loved ones remain protected, and that they have a say in any decisions made about their protection?

In British Columbia, First Nations burial grounds that pre-date 1846 are not considered cemeteries and thus are managed under heritage legislation. While 1846 is a milestone in Canadian sovereignty, it is an arbitrary and capricious legal imposition to use this date to distinguish between the remains of humans who receive full and respectful protection and those (of First Nations) who may be unearthened or otherwise disturbed because they are deemed to constitute all or part of an archaeological site. The *Heritage Conservation Act* does afford limited protection for pre-1846 remains, stating that “A person must not damage, desecrate or alter a burial place that has historical or archaeological value.” However, the key questions here are “Who assigns that value?” and “What constitutes adequate ‘protection’?”

Despite the fact that over 90% of heritage sites in British Columbia trace to First Nations, decisions about protection are made largely in keeping with European norms and concepts of property that seek to balance the protection of heritage with the economic benefits of land alteration and resource extraction. Our own work is revealing that collaborative, community-based approaches to decision-making provide a means of balancing values, interests, and perspectives. Conflict may be inevitable, but there are many alternatives to the current process used to comply with the *Heritage Conservation Act*, which too often results in the clear identification of winners and losers and which requires First Nations to fight for equality in how their ancestors and ancestral sites are treated.

The Grace Islet dispute points to fundamental differences in Euro-Canadian and First Nations value systems related to heritage protection. First Nations values and legal regimes are strongly influenced by Indigenous worldviews. For some, ancestral beings and forces, such as those present in burial sites, are real, present and existing in relationship with present-day descendant communities, who are responsible for their physical and spiritual respect. There may also be concerns about how the desecration could impact the spiritual and physical wellbeing of deceased ancestors, their First Nations descendants and others who come into contact with such powerful cultural sites. For example, many First Nations ask archaeologists to apply ochre to be visible to the spirits of past generations and to thus avoid harm.

Most provincial and federal laws require some level of consultation with affected First Nations before development decisions affecting heritage sites on private or provincial lands are made. However, many First Nations assert such consultations are inadequate given the increased pressures of development, and because they are designed to expedite decision-making rather than explore and accommodate diverse rights and interests. Concerns raised by First Nations may not be satisfactorily incorporated into the final site alteration or management plans. In the absence of significant public pressure on governments, or clear direction from Canadian courts, private property rights and resource extraction often trump First Nations interests. While protests and legal challenges may be effective in some cases, they exact a heavy toll on Indigenous communities.

The minimal level of protection offered by heritage legislation across Canada’s provinces runs contrary to emerging trends in Canadian Aboriginal rights law, which increasingly recognize pre-existing Aboriginal occupation and legal regimes and seek to reconcile these with the assertion of Crown sovereignty. The favouring of land and site alteration over the protection of Aboriginal rights

and interests is also inconsistent with the aspirations of international Indigenous rights and cultural heritage law, including the United Nations Declaration on the Rights of Indigenous Peoples, which Canada has endorsed. In seeking to resolve such cases, governments, Indigenous peoples and cultural heritage experts are called upon to work within both Indigenous and State laws. These are not always antithetical. For example, both archaeological evidence and local Coast Salish knowledge support the conclusion that Grace Islet was used as a burial site and that its protection warrants more complete and intensive investigation.

There are other important factors influencing the Grace Islet dispute, including the lack of funding and understaffing of the provincial Archaeology Branch, enforcement of permit violations, and the question of who should bear the costs of protecting important heritage sites located on private property. But the critical issues here are the absence of respect for First Nations laws, values and practices relating to burial sites and ancestral remains, and the need for descendant communities to have a say in how their ancestral sites are managed and protected.

Grace Islet offers an opportunity for British Columbia to reassess its approach to protecting and managing such sites in light of this deeper understanding. We advocate for inclusive, long-term and sustainable management policies and practices recognizing indigenous intellectual and material property, traditional cultural expressions, and ancestral remains. We must acknowledge the value of respecting Aboriginal rights, Indigenous laws and heritage sites for all British Columbians and Canadians.

We and other members of the IPinCH Collective are very willing to offer counsel on the matter, if we can be of any assistance.

Sincerely,

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