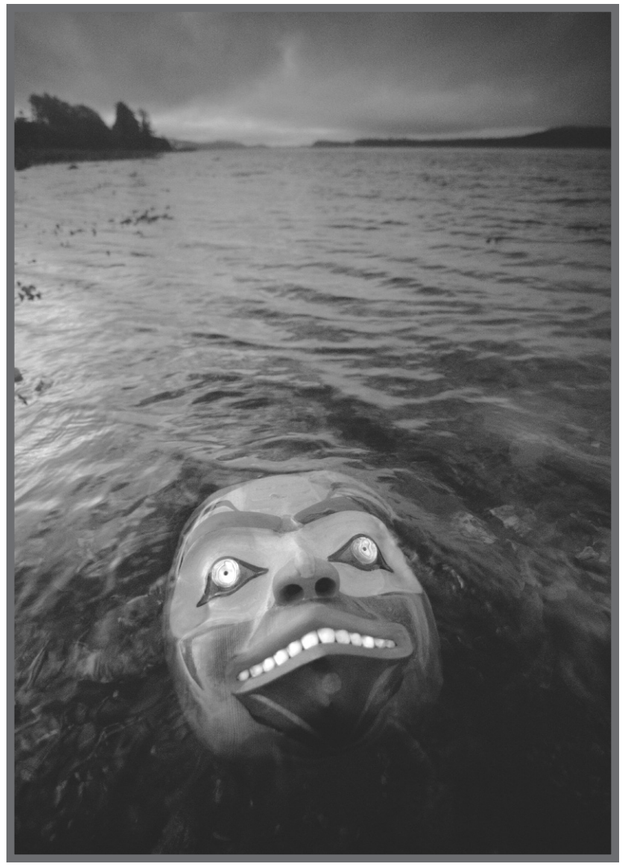

FRANS LANTING/MINDEN PICTURES

This is a "portrait mask" traditionally used by Haida people for a variety of ceremonies including the End of Mourning Ceremony, in which case it is made to resemble the deceased person. Increasingly, in the global economy, such art objects and sacred ceremonial objects are surreptiously removed and transported via underground black markets, or else traded to foreign collectors and museums. Often they are copied and put into mass production for tourist markets, which represent them as authentic. Such theft and trade can be deeply demoralizing to indigenous peoples for whom these objects play important ceremonial roles.

CHAPTER 13

Sacred Objects, Art and Nature in a Global Economy

Terri-Lynn Williams-Davidson
(Haida)
Environmental-Aborginal Guardianship through Law and Education (EAGLE)

FROM AN INDIGENOUS PERSPECTIVE, "cultural property" is not limited to tangible objects such as those used in ceremonies; or art objects, crafts, music, and the instruments of daily life. For us, discussions of cultural property, or of culture itself, cannot be separated from its integration with the natural world. For indigenous peoples the Earth and all of its life forms the fundamental context, the foundation and the ultimate source from which culture emerges. In this article, I will suggest that some of the problems which are accelerated by globalization, with respect to the theft and alienation of tangible things of our cultures cannot be solved without also addressing a larger problem of protection of Indian lands and rights. They are intrinsically connected.

I. CAPTURED HERITAGE

Colonization over the last century has resulted in most of the cultural objects of indigenous peoples of the world being removed from those who created and integrated them into our lives and rituals. This has been profoundly detrimental to the sustainability of indigenous cultural heritage, and of the cultures themselves.

The forms of removal have ranged from direct trade or sale, to unconscionable fraudulent negotiations, to outright theft and counterfeiting. But the net result has been their export from their places of origin to museums, institutions, private collectors and speculators of the world, many of whom operate in a multi-million dollar global "black market" for such objects. Most appalling, the prized targets for this illicit and immoral global trade activity are the most treasured cultural objects; those necessary for the continued conduct of ancient traditional ceremonies and knowledge.

In a traditional context, ceremonial and other cultural objects are handled via very strict rules and protocols for their use or display. These protocols are, of course, seriously violated by the handling, collection, shipping, display, sale or other activities that accompany their being lifted by unauthorized outsiders from their culturally embodied context. Indigenous peoples understand that we have a Sacred Trust with the Creator to protect cultural heritage and all its expressions and sources, and to uphold all traditional protocols; breaches of these protocols directly undermine this Sacred Trust, and the ancient ceremonies that keep it alive.

It would be difficult to overstate the importance of the maintenance of ceremonies among indigenous peoples; they regulate and re-affirm the

relationships between people—individuals, clans, communities and nations—as well as between people and the Earth, including the Earth's life forms. Ceremonies play an integral role in weaving the cultural fabric of indigenous peoples, particularly with respect to the education of the youth, and the integration of the values and principles we need to live by. Without the maintenance of our ceremonies, the inevitable drift of our societies is toward unrootedness and assimilation into the broader society. This is how the theft and removal of ceremonial objects can cause tremendous injury to the continuity of traditional culture and teachings. It is also why their return has become an issue of grave seriousness for many indigenous societies.

It is not only the recovery of the objects themselves that is so important. Also at stake is the entire scale of a cultural revitalization that is already underway among indigenous peoples throughout the world; one that is also experienced in the growing movements to recover language, arts, and lands. In many ways, the revitalization of the past half-century has been particularly fueled by the devoted activities of indigenous artists, who are working to renew and sustain the culture on a daily basis.

Art has always permeated all aspects of indigenous life, and has been inseparable from daily life; so inseparable that there are many indigenous languages that do not have a separate word for art. The making of traditional art objects has increased dramatically over the past few decades, bringing new generations of indigenous artists even closer to traditional teachings and principles. This process has become very important in the revitalization movement among numerous cultures, notably among the peoples of the Northwest Coast of Canada. It has also had significant economic benefits. Indigenous artists have been able to create a viable thriving alternative economic activity that helps to counter proposals for industrial-style development that are steadily served-up by the larger society around us. An expanding market for indigenous art has also begun to employ indigenous peoples in a way that permits us to continue to create, while learning values integral to the culture.

However, just as the market has grown for these art objects, there has developed a downside: the market has also globalized, and has led to a new global industry of imitation indigenous art. It has spawned a new class of non-indigenous entrepreneurs engaging the services of artisans in Third World countries, who reproduce art objects at a high speed, on nearly an assembly-line basis, and at a fraction of the cost of the original indigenous art. Frequently, one-of-a-kind objects are mass produced without the consent or knowledge of the original artist, as for example, the reproductions of Northwest Coast Indian masks and other objects—reproduced in Third World countries like Indonesia—available for sale on e-bay at well below the cost of the original. Other familiar cases are the widespread imitations and reproductions of Native American weavings and jewelry, particularly Navajo and Pueblo art and jewelry, as well as the Japanese attempts to mass-produce sweaters of the Cowichan Peoples in Canada, among other cases.

One useful innovative idea has been to develop a certification program that labels the "bonafide" indigenous art objects, so consumers know they are supporting local artists rather than some assembly line operation from abroad. This is already proving helpful, but is not a complete answer.

Global reproduction of indigenous art can be extremely frustrating for local artists, who have held onto this opportunity for self-sufficiency. However, few indigenous artists can afford to obtain legal counsel to fight these reproductions, and their entry into local markets. Even when legal counsel is retained, domestic copyright law prohibits the original artists from restraining mass production.

Matters are made still worse by the major bureaucracies of globalization, such as the WTO and NAFTA, which make it difficult for any country to give preference to local producers of art (or anything else) over objects produced abroad and exported into domestic markets. Import controls or tariffs violate the rules of "free trade." So indigenous producers have little ability to protect the markets they have worked so hard to develop, especially against low priced Third World "knock-offs." The net result of this situation is that Native artistic production becomes less viable, and indigenous communities are increasingly pressured to accept proposals for industrial development, with the resulting long-term destruction of forests and other natural resources. *(See also Chapter 6 by Victor Menotti on the rules of free trade.)*

Conversion to industrial-style development is, of course, an even further assault on traditional cultures which have evolved for millennia in an integrated manner with the natural world and the biodiversity in their locales. The relationship is symbiotic: as culture changes, the earth is impacted; as the earth is impacted, local cultures are impacted, and a destructive spiral is accelerated.

The story becomes especially dramatic when you consider effects upon so-called "cultural-keystone" species that are particularly important to individual cultures. For example, the buffalo of the central plains is a "keystone species" for cultures of those regions, with ceremonies, objects and art and rituals focused directly upon them. Among the Haida people of the Pacific Northwest of Canada, a "cultural keystone species" is the western red cedar. Cedar, and especially old-growth cedar, provides for much of the material, social, cultural and spiritual needs of the Haida. It provides raw materials for canoes, houses, hunting and cooking instruments, the tools for everyday life; even for clothing and food. It also provides the monumental totem poles and mortuary poles (for burials), and the materials for ceremonial and art objects—masks, rattles, and other regalia. As well, many medicines and other species with a high cultural profile are sustained by, and their fate is tied to that of, old growth forests.

As the shift to globalization has opened global corporate access to these revered western cedar forests, the Haida relationship with them has been injured. Haida access has been sharply restricted, and cultural and ecological devastation has resulted. The rapidly diminishing areas of monumental red cedar and old growth forests in the Pacific Northwest have reached the point where full regeneration is now questionable, and that is a serous setback for the regeneration of Haida culture as well. So, the recovery of control over the title and development of Haida lands, based on Aboriginal Rights, is as much a cultural necessity as an ecological and political one.

II. THE ARGUMENTS OVER ABORIGINAL TITLE

Arguably the most important cultural issue for indigenous peoples is the legal and political one: the urgency of campaigns to permanently confirm full legal title and ownership of traditional lands, and all the resources thereon, as these lands are the wellsprings of indigenous life and vision; of art and religion. Right now, in many countries of the world, the matter is one of great debate, as the interests of narrow global investment and development corporations conflict profoundly with those of peoples on their own traditional lands.

Among countries descended from British colonial rule—Canada, United States, Australia, New Zealand—land tenure systems are largely derived from British common law. This holds that colonial governments obtained "Crown title" to all lands and resources, but that such title is subject to the Aboriginal Title of the original inhabitants. So, the principle would seem to favor indigenous interests, especially where treaties have been concluded to confirm the situation. Unfortunately, however, this fundamental principle has not been respected. In Canada, for example, there remain very large areas of British

Columbia, the Northwest Territories, and Quebec, where treaties have not been concluded, and the matter of Aboriginal Title versus Crown title has not yet been reconciled. So, the issues keep churning throughout the court system: Who owns the lands? Who has the rights to control and/or prevent development? Whose laws apply? What happens in the interim, before treaties are concluded or before Aboriginal Title litigation is completed – how do you preserve the subject matter of the disputes?

In Haida Gwaii (the Queen Charlotte Islands), British Columbia, where the Haida have lived for millennia, there are only a handful of treaties, leaving the vast majority of lands and resources still "encumbered" by Aboriginal Title. Negotiations between the original peoples and the federal and state governments have been ongoing for more than a century, and are unsettled.

Complicating matters further is the fact that there is an effective dispute between the Canadian government and the province of British Columbia about Aboriginal Rights. As is also discussed elsewhere in this book, Canada's constitution officially recognizes, affirms and protects the rights of Aboriginal, Inuit (Eskimo) and Metis peoples. *(See also Chapter 23 by Arthur Manuel.)* In addition, the constitution requires that Canada uphold a trust responsibility, or "fiduciary" relationship encompassing all aboriginal lands that have not been surrendered through treaty or otherwise. Canadian courts have stated numerous times that the government is obligated to act in the best interests of Aboriginal and Treaty Rights holders. Most recently, Canada's highest court, the Supreme Court of Canada, held that the Crown cannot "run roughshod" over the interests of the Haida, but must protect the Haida's interests—in particular monumental cedar and Haida Title—pending the reconciliation of Crown sovereignty with Haida sovereignty.

On the other hand, the government of British Columbia has argued that in the absence of treaties or litigation confirming specific titles to specific places, the law remains unclear as to whether the province must wait for the Aboriginal Title to be "disencumbered" from Crown title. Effectively, the BC government is suggesting it is okay, in the meantime, to conclude exploitation deals with timber and other resource companies, to go ahead and develop the land, even without the explicit permission of the indigenous communities.

So, we have perfect conditions for raging conflict and for legal actions among all parties – the aboriginal communities, the Provincial government, the national government, and the corporations. The situation has become so frustrating for the Haida who see Haida Gwaii's forests being eliminated on a daily basis, and who have pursued litigation for over a decade, that the Haida have recently begun to take direct action against logging companies like Weyerhaeuser Company Ltd. In an interesting development, local non-indigenous communities intervened in favour of the Haida Nation at the Supreme Court of Canada and have joined hands with the Haida in a joint effort to care for local communities and to curtail the globalization of Haida Gwaii's limited remaining forests. For example, during April, 2005, the Haida put fishing boats in harbors, while the islands' local people created peaceful checkpoints, to blockade Weyerhaeuser barges and operations that were attempting to export Haida logs to Asian markets. This has expressed a new, powerful solidarity that, as we go to press, is still ongoing.

III. THE GLOBALIZATION DIMENSION

Finally, it is necessary to include in the mix of factors affecting Haida land rights and culture, the extremely negative role of international trade agreements, such as NAFTA and the WTO. Each of these have specific rules to prevent any member country of the agreement, such as Canada, or any Province of Canada (or any other country or state) from making its own laws that might conflict with NAFTA or WTO rules. This prohibition specifically includes internal laws, or internal agreements, or agreements with so-called

"sub-governments" such as indigenous nations, if any of these have the effect of inhibiting the intentions of the trade rules. Recognition of Aboriginal sovereignty, and Aboriginal Rights would certainly constitute a challenge to these global rules. And in any such case, according to the WTO's own rules, the WTO agreement trumps all local and domestic or sub-government arrangements or laws, thus effectively diminishing local and even national (Canadian) sovereignty and rights. The following are two such trade agreement stipulations, and some strategies for overcoming them.

Investor-State Mechanisms of NAFTA

This is the draconian rule found in Chapter 11 of the NAFTA agreement, which holds that corporations may claim compensation for any lost profits from the "expropriation" of their development rights for a "planned but unrealized investment." This astounding provision of an international agreement basically argues that if a government or subgovernment (such as the Haida Nation), or any other local government, should act to prevent corporations from undertaking developments that were once deemed acceptable, then the corporations can sue for the profits they would have made, as if the project had really happened. Should we call this "virtual development?"

To try and counter the effect of this odd provision, the Haida Nation implemented a new legal strategy to give "formal notice" to any companies that entered Haida domain with designs to try and do business there, that the Haida have the right to expropriate their investment at some future time, and that the company should henceforth proceed at its own risk. In the case of Weyerhaeuser, Canadian courts have held that Weyerhaeuser had full notice of the Aboriginal Title and Rights of the Haida. Providing such notice arguably would nullify any future reliance of the corporation upon the NAFTA investor-state mechanism to receive compensation for work and activity it had not actually performed.

"National Treatment" clause of the WTO

Another example of a problematic global rule that thwarts local control is the "national treatment" clause of the WTO. This makes it illegal for any country, or any Province or city, to give preferred treatment to a local community, or local business, or investor, over a foreign investor. So, local laws, or treaty rights, or constitutional protections for Aboriginal Rights would certainly be found WTO-illegal under the "national treatment" clause. Again, the WTO asserts that in cases of any disagreement over whose rules apply, the WTO rules must apply in the apparently higher cause of unfettered resource development.

But the most crucial question may be whether a country like Canada, has any right to refuse to comply with such rules of international trade agreements, if they conflict with internal laws. The WTO says not, and that it has the power to enforce its rules by inflicting serious economic sanctions to an offending government that tries to protect its own laws. But the issue may not be so clear-cut as the WTO suggests.

For example, Article 46 of the Vienna Convention on the Law of Treaties admittedly does say that a State may not breach a treaty agreement such as the WTO just because it violates domestic internal laws. But the Vienna Convention also says that an individual country can refuse to honor an international agreement or treaty if it conflicts with "a pre-emptory norm of general internal law." Pre-emptory norm is further defined as a "norm accepted and recognized by the international community of states as a norm from which no derogation is permitted." A State is permitted to ignore international trade agreements if the trade agreement has the effect of invalidating an "internal law of fundamental importance," as would be "evident to any state conducting itself in the matter in accordance with normal practice and in good faith." In other words, if an internal law can be shown to be "fundamentally important," judging by normal standards of sovereign practice, then countries are permitted to keep the internal domestic law despite its WTO or

other treaty commitments. That would certainly seem to be the case for the law of Aboriginal Rights now contained in the Canadian constitution, and the trust and fiduciary responsibilities attached to it. In fact, Canadian courts have several times clarified that wherever treaties have not been concluded with indigenous nations internally, governments must negotiate in "good faith to reach workable accommodations with Aboriginal Peoples." Given the constitutional protections that apply to them, protection of aboriginal interests is surely of "fundamental importance" in Canada.

Therefore, it is our position that the Haida Nation now has a good opportunity to launch lawsuits against the Canadian government, with the claim that the government does not have the legal right to sign international trade agreements that provide unfettered access to corporations on lands where Aboriginal Title exists. Or, having signed such agreements, to remain as parties to them. If a trade agreement like the WTO infringes on Aboriginal Rights, which it certainly attempts to do, we believe it is illegal. We also believe that we have the legal right to prevent or regulate access to our forest or other resources, as we see fit, as well as to prevent the export of our traditional ceremonial objects, and the import of foreign art objects that are rip-offs of Haida artists.

CONCLUSION

In a world of globalized markets, centralized economic bureaucracies, and the prevailing attitudes of the modern world, all things—sacred or otherwise—are seen as potential resources for commercial development. Perseverance and creativity is needed at every turn. For indigenous peoples the issues are especially complex as one aspect of life and nature is not separate from the others; all dimensions of culture, art and nature are intertwined. To save sacred ceremonial objects and our culture also requires turning away giant logging and other companies protected by obscure trade decisions thousands of miles away in Geneva. But indigenous peoples have always been adept at embracing opportunities, and we are rapidly learning how to uphold our Sacred Trust and deal with the situations we face. Certification schemes are helping to protect the original artworks from the fake. New legal explorations on the international, domestic and provincial levels are gaining us ground and time. And we are seeking and gaining the strong support of public opinion. We are certainly at a critical turning point: while our forests, the natural world and also our culture is suffering from the commercial onslaught, we feel the powers shifting.