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How Two Sunken Ships Caused a War: The Legal and Cultural Battle Between Great Britain, Canada, and the Inuit over the Franklin Expedition Shipwrecks

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Cover Page Footnote

J.D. Candidate, 2019, Loyola Law School, Los Angeles; B.A. in the Program of Liberal Studies, University of Notre Dame, 2012. This article is a student note completed in Spring 2018. I would like to thank Professor Jeffery Atik and James Trotter for their advice with this note. I would also like to thank the hardworking editors and staff of the International and Comparative Law Review.

How Two Sunken Ships Caused a War: The Legal and Cultural Battle Between Great Britain, Canada, and the Inuit over the Franklin Expedition Shipwrecks

BY CHRISTINA LABARGE*

I. INTRODUCTION

The 2014 and 2016 discoveries of the Franklin Expedition shipwrecks HMS *Erebus* and HMS *Terror* in the Canadian Arctic solved a mystery that had gripped the public imagination for almost two centuries.¹ Both the HMS *Erebus* and the HMS *Terror* contain important clues as to why the disastrous 1845 search for the Northwest Passage ended in the deaths of all 129 men on board.² The discoveries also ignited a legal battle for ownership of the wrecks between Britain, the Canadian federal government, and the Inuit of Nunavut (the Canadian territory where the ships were discovered).³ Ownership has been contested because the artifacts have significant cultural heritage value to all three cultures and they generate substantial tourism revenue.⁴

Although Britain has indicated it will assign ownership over the wrecks to Canada pursuant to a 1997 Memorandum of Understanding (MOU) between the two countries, today, four years after the discovery of HMS *Erebus*, negotiations continue over which artifacts Britain will keep and how it will compensate Canada for recovering them.⁵ After much dispute, the Canadian government and the Inuit have also agreed to

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1. See *infra* Part II. B., Part IV. A., Part V. A.
2. See *infra* Part II. B.
3. See *infra* Part III, Part IV. B.
4. See *infra* Part VI.
5. See *infra* Part V. C.

co-ownership of the artifacts once Britain assigns ownership to Canada in accordance with the MOU.⁶

The debate over the Franklin artifacts has been not only about legal rights but also the right to define the legacy of the Franklin expedition to British, Canadian, and Inuit culture.⁷ The expedition simultaneously implicates the British age of exploration, Canadian sovereignty over the Arctic and the Northwest Passage, and the impact of Western civilization on traditional Inuit culture.⁸ Section II traces the history of the Franklin expedition. Section III provides an overview of the overlapping legal claims to the Franklin artifacts. Section IV describes the discovery of the HMS *Erebus* and the ensuing legal conflict. Section V lays out the subsequent discovery of the HMS *Terror* and the continuing legal conflict over both wrecks. Section VI discusses how global and national cultural heritage claims have influenced the legal battle for ownership over the Franklin artifacts. Section VII addresses the international conventions that provide benchmarks for proper shipwreck conservation to examine the various major issues which archaeologists will have to address when dealing with the Franklin wrecks and artifacts.

II. THE HISTORY OF THE FRANKLIN EXPEDITION

A. *The Expedition and Its Disappearance*

When Sir John Franklin departed from England in 1845 on his fatal expedition to the Canadian Arctic, he was a veteran British naval officer with a distinguished history of service in the Napoleonic Wars, the War of 1812, and three previous Arctic exploration missions.⁹ He also previously served as governor of the British colony in what is now Tasmania.¹⁰ After a scandal in Tasmania tarnished his reputation, Franklin and his wife believed that successful leadership of the 1845 expedition would rehabilitate his reputation and allow him to retire a hero.¹¹ The Royal Navy leaders, who thought Franklin was too old for the job, eventually overcame their qualms and appointed him commander of the expedition.¹² In May 1845, Franklin and his crew departed from London with much fanfare on the HMS *Erebus* and HMS *Terror*, with

6. See *infra* Part IV. B.

7. See *discussion infra* Part VI. A.

8. See *discussion infra* Part VI. B, VI. C, VI.D.

9. See PAUL WATSON, ICE GHOSTS: THE EPIC HUNT FOR THE LOST FRANKLIN EXPEDITION 3-5 (2017).

10. See *id.* at 4-5.

11. See *id.* at 3-4, 6-8.

12. See *id.* at 6-7.

the goal of finding the Northwest Passage.¹³ Franklin's conversation with a whaler two months later near the Canadian Arctic archipelago proved to be the last contact the expedition had with the outside world.¹⁴

B. The Search Expeditions for the Franklin Expedition

After several years of ominous silence from the Arctic, it was clear to those in England that the expedition had run into serious problems, if not disaster.¹⁵ The failure of the expedition to reemerge stimulated many search parties whose efforts gripped the public imagination. As one Franklin historian wrote, it was "the most extensive, expensive, perverse, ill-starred, and abundantly written-about manhunt in history."¹⁶ From 1847 to 1859, nearly forty search expeditions hunted for any clue as to the crew's fate.¹⁷ In 1854, explorer John Rae returned to England with horrifying news: the starving Franklin survivors, all of whom were now dead, had turned to cannibalism in their last days.¹⁸ The Inuit told Rae they had seen a group of starving white men in 1850 and had later discovered the bodies of about thirty white men.¹⁹ Rae located the site and confirmed that, given the state of the mutilated bodies, the survivors had "been driven to the last dread alternative."²⁰ He brought back various relics from the site, including Sir John Franklin's Star of the Hanoverian Order of Knighthood and other objects inscribed with the names or initials of Franklin crew members.²¹

Rae's report outraged both Lady Franklin and the British public, and a "shock of horror ... swept across the civilized world."²² "Britain immediately went up in arms" and responded with total condemnation towards the Inuit.²³ Rae must have been telling "the wild tales of a herd

13. *See id.* at 32-33.

14. *See id.* at 43.

15. *See* KEN MCGOOGAN, *DEAD RECKONING: THE UNTOLD STORY OF THE NORTHWEST PASSAGE* (2017).

16. *See* WATSON, *supra* note 9, at xxx (quoting W. Gillies Ross, *The Admiralty and the Franklin Search*, 40 *POLAR RECORD* 289 (2004), quoting Alfred Friendly); *see also* Kathryn Schulz, *Literature's Arctic Obsession*, *NEW YORKER* (Apr. 24, 2017), <https://www.newyorker.com/magazine/2017/04/24/literatures-arctic-obsession>.

17. *See* WATSON, *supra* note 9, at xxx.

18. *See* WATSON, *supra* note 9, at 156-57; *See* SCOTT COOKMAN, *ICE BLINK: THE TRAGIC FATE OF SIR JOHN FRANKLIN'S LOST POLAR EXPEDITION 176-78* (2000).

19. *See* OWEN BEATTIE & JOHN GEIGER, *FROZEN IN TIME: THE FATE OF THE FRANKLIN EXPEDITION* xvi (2017); *see also* WATSON, *supra* note 9, at 153.

20. *See* WATSON, *supra* note 9, at 154.

21. *See id.* at 154-55.

22. *See* MCGOOGAN, *supra* note 15, at 278-79.

23. *See* Schulz, *supra* note 16.

of savages.”²⁴ Charles Dickens wrote a “long tirade against the lying, savage ‘Esquimaux’ in his own magazine,”²⁵ even accusing the Inuit themselves of killing the Franklin survivors.²⁶ This characterization of the Inuit continued to recent times: as late as 1997, in his book *Sir John Franklin’s Arctic Expedition*, R.J. Cyriax discounts stories that the Inuit murdered the survivors for their possessions because “it must have been obvious even to them that the course of events would shortly make murder unnecessary.”²⁷

As the furor over Rae’s gruesome discovery died down, the British public turned its attention from the Franklin search to the Crimean War.²⁸ Lady Jane Franklin refused to give up hope, and, in 1857, she purchased the *Fox* and hired Captain Francis McClintock to perform one more search for her husband.²⁹ McClintock’s expedition, itself trapped in the ice for an entire winter, made several key discoveries.³⁰ McClintock’s lieutenant found notes in a cairn (a structure made of loose stones) in which survivors “briefly detailed Franklin’s death, their ships’ long imprisonment in sea ice, and the decision to abandon them.”³¹ They even discovered a ship’s boat with two skeletons in it and a number of other items from the ship.³² They also bartered with the Inuit for items clearly from the Franklin expedition, which the Inuit said they had gathered from a shipwreck nearby.³³ Thanks to the note, Lady Franklin at last knew her husband died on June 11, 1847—long before the real suffering of the majority of the crew began.³⁴ McClintock tried to comfort her by telling her that Franklin had “died with reason to hope his mission would succeed.”³⁵

In the late 1870s, an expedition sponsored by the American Geographical Society set out to look for any remaining Franklin documents or records.³⁶ In stark contrast to the Franklin crew, they travelled over 3000 miles by dog sled, in -50°F weather, without any

24. See WATSON, *supra* note 9, at 157.

25. See RUSSELL A. POTTER, *FINDING FRANKLIN: THE UNTOLD STORY OF A 165-YEAR SEARCH* 9-10 (2016).

26. See WATSON, *supra* note 9, at 157.

27. See R.J. CYRIAX, *SIR JOHN FRANKLIN’S LAST ARCTIC EXPEDITION 180-81* (1997).

28. See Owen Beattie & James H. Marsh, *Franklin Search*, *THE CANADIAN ENCYCLOPEDIA*, <https://www.thecanadianencyclopedia.ca/en/article/franklin-search/> (last updated Mar. 8, 2018).

29. See WATSON, *supra* note 9, at 162-163; see also Beattie & Marsh, *supra* note 28.

30. See WATSON, *supra* note 9, at 165.

31. See *id.* at 167.

32. See *id.* at 167-68.

33. See *id.* at 166.

34. See *id.* at 170.

35. See *id.*

36. See *id.*

fatalities, injuries, or ill health, because they had adopted Inuit clothing, diet, and means of shelter.³⁷ While they did unfortunately discover that any surviving documents had been destroyed because the Inuit had left them to the mercy of the elements or given them to their children as playthings,³⁸ they also found a number of skeletons and confirmed many of the Inuit oral accounts about the locations of the ships and their encounters with the Franklin crew members.³⁹

Searches for the Franklin expedition continued throughout the 20th century with each expedition slowly piecing together more clues.⁴⁰ In the 1980s, forensic anthropologist Owen Beattie exhumed three Franklin sailors buried on Beechey Island.⁴¹ His discovery of high levels of lead in the bodies gave rise to the theory that lead poisoning had caused the sailors to make erratic decisions which greatly reduced their chances of survival.⁴² In 1997, after 150 years of searching, Great Britain and Canada came to an agreement about how they would proceed if the Franklin Expedition ships were ever discovered.⁴³

III. CONFLICTING LEGAL CLAIMS TO OWNERSHIP AND CONTROL OF THE FRANKLIN SHIPWRECKS BEFORE DISCOVERY: HIERARCHY OF LAW APPLICABLE TO THE FRANKLIN SHIPWRECKS

A. International Law: the 1982 United Nations Convention on the Law of the Sea

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is the relevant international law regime for determining ownership over the shipwrecks.⁴⁴ Under UNCLOS, the sovereignty of a coastal and/or archipelagic state like Canada extends beyond “its land territory and internal waters and ... archipelagic waters, to an adjacent

37. See HEINRICH KLUTSCHAK, *OVERLAND TO STARVATION COVE: WITH THE INUIT IN SEARCH OF FRANKLIN*, at vii, xxv, xxx, 219 (William Barr, ed., trans., Univ. of Toronto Press 1987) (1881).

38. See *id.* at vii, xxv.

39. See *id.*

40. See generally, *id.* at 37, 207- 17; see also Beattie & Marsh, *supra* note 28.

41. Beattie & Marsh, *supra* note 28.

42. See BEATTIE & GEIGER, *supra* note 19, at 240-43.

43. See Memorandum of Understanding Between the Governments of Great Britain and Canada Pertaining to the Shipwrecks *HMS Erebus* and *HMS Terror*, Can.-Gr. Brit., Aug. 5–Aug. 8, 1997, reprinted in *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION* 263 (Roberta Garabello & Tullio Scovazzi eds., 2003). [hereinafter Can-Gr. Brit. MOU]

44. See United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 31363 (entered into force Nov. 16, 1994).

belt of sea, described as the territorial sea.”⁴⁵ Therefore, under UNCLOS, Canada has undisputed jurisdiction over any wrecks found within its internal waters and territorial sea. However, under traditional maritime law, a state retains “flag state jurisdiction” over vessels flying the flag of that state.⁴⁶ UNCLOS Articles 95 and 96 grant “complete immunity” to flagships that are either “warships on the high seas” or state-owned and operated ships “used only on government non-commercial service.”⁴⁷ HMS *Erebus* and HMS *Terror* would be considered British flagships under UNCLOS Article 29’s criteria: (1) they were Royal Navy ships; (2) they bore external marks, such as the British flag, distinguishing their nationality; (3) they were under the command of Sir John Franklin, a government-commissioned officer; (4) their names appeared in the service lists; and (5) they were manned by a Royal Navy crew.⁴⁸ Complete immunity for flagships extends to the “territorial sea of another state, provided that the rules of innocent passage are respected.”⁴⁹ Therefore, as *Erebus* and *Terror* respected the rules of innocent passage by not acting in a manner “prejudicial to the peace, good order, or security of the coastal State,” Britain retained flag state jurisdiction and sovereign immunity over the ships during their voyage to the Canadian Arctic.⁵⁰

Scholars disagree as to whether flag state jurisdiction and sovereign immunity extend to *wrecks* of flag ships that sink outside of the flag state territory.⁵¹ While some scholars opine that immunity is not retained after a ship sinks, others assert that sunken warships remain state property.⁵² While the law is unsettled as to the flag state’s right to be advised or consulted as to its flagship in another coastal state’s territorial waters, coastal states often do initiate contact with those flag states, whether because of “the belief that there is a legal obligation to contact the flag state . . . for reasons of diplomatic courtesy, or because of uncertainty over the international legal position.”⁵³ Flag states rely on the state property argument when asserting their immunity claims over sunken flag ships,

45. See *id.* Part II, § 1, art. 2(1).

46. See SARAH DROMGOOLE, UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW 18-19 (2013).

47. See United Nations Convention on the Law of the Sea, *supra* note 44, pt. VII, § 1, arts. 95, 96.

48. See *id.* at Part II, § 3, subsec. C, art. 29.

49. See DROMGOOLE, *supra* note 46, at 136.

50. See United Nations Convention on the Law of the Sea, *supra* note 44, at Part II, § 3(A) – (C).

51. See DROMGOOLE, *supra* note 46, at 19, 137.

52. See *id.* at 137-38.

53. See *id.* at 140.

which Britain clearly did in the MOU describing them as “two wrecked ships of Her Majesty’s Royal Navy within Canada.”⁵⁴

B. The Canada-Britain Memorandum of Understanding of 1997

In 1997, Canada and Britain signed the “Memorandum of Understanding Between the Governments of Great Britain and Canada Pertaining to the Shipwrecks *HMS Erebus* and *HMS Terror*” (MOU) to create a preliminary solution for Britain and Canada’s competing claims to the artifacts.⁵⁵ The MOU asserted that Britain would retain legal ownership and sovereign immunity over the wrecks and their contents, but assigned custody and control over the investigation, excavation, and recovery of the wrecks to Canada.⁵⁶ Britain also stated its intention to formally assign ownership of the wrecks and their contents to Canada once either one was positively located and identified.⁵⁷ However, Britain retained ownership rights over “any gold recovered from the wrecks,” and, more significantly, “any recovered artifacts identified by Britain as being of outstanding significance to the Royal Navy.”⁵⁸ Current negotiations over the artifacts are proceeding slowly largely because Britain wants to retain some of the most significant artifacts from the wrecks pursuant to the MOU, as will be discussed *infra*.⁵⁹

C. Canadian Federal Law

The Canadian federal government has jurisdiction over wrecks within Canada under the Canada Shipping Act, which designates the Parks Canada Agency (Parks Canada) as the administrative body overseeing “the protection and preservation of wreck[s] ... that ha[ve] heritage value.”⁶⁰ The Parks Canada Agency Act gives Parks Canada authority over “the implementation of the policies of the Government of Canada that relate to ... national historic sites.”⁶¹ Internally, Parks Canada has created the Guidelines for the Management of Archaeological Resources, which establish federal authority and legal procedures over any archaeological sites and excavations on “federal lands and lands

54. See Can-Gr. Brit. MOU; see also DROMGOOLE, *supra* note 46, at 138.

55. See Can-Gr. Brit. MOU, *supra* note 43.

56. See *id.*

57. See *id.*

58. See *id.*

59. See Dean Beeby, *Talks with Britain drag on over Franklin wreck artifacts*, CBC NEWS, (Dec. 22, 2017, 5:00 AM) [hereinafter, Beeby, *Britain Drag On*] <http://www.cbc.ca/news/politics/franklin-expedition-talks-nunavut-1.4456799>; *infra* part V. c.

60. See Canada Shipping Act, S.C. 2001, c. 26 (Can.) (as amended Dec. 12, 2017).

61. See Parks Canada Agency Act, S.C.1998, c 31 (Can.).

underwater.”⁶² In 1992, to ensure that the wrecks would be under Parks Canada jurisdiction, the Minister of Canadian Heritage declared that once the wrecks were located, their locations would become National Historic Sites.⁶³

When Britain and Canada signed the MOU in 1997, the legal standing of the undiscovered shipwrecks was relatively clear. Britain retained legal ownership over the wrecks, while Parks Canada had the legal authority to conduct archeological excavations under Canadian federal law and the MOU.⁶⁴ Neither party anticipated that a third entity would eventually claim joint ownership over the wrecks: the recently formed Canadian territory of Nunavut.

1. The Territorial Law of Nunavut

a. The Formation of Nunavut

Nunavut is a Canadian territory, officially formed in 1999 out of the Northwest Territory, which includes the traditional lands of the Inuit, the indigenous people of Arctic Canada.⁶⁵ The territory is a vast area of more than 700,000 square miles (2 million square kilometres), with fewer than 40,000 residents, of whom 85% are Inuit.⁶⁶ The Inuit embarked on the political campaign to create Nunavut in response to what they viewed as centuries of paternalistic mistreatment by the Canadian government.⁶⁷ Most recently, in the early 1950s, the Canadian government—without consulting the Inuit—established permanent settlements in the Canadian Arctic and went to great lengths to end the traditional Inuit nomadic, subsistence-based lifestyle.⁶⁸ Inuit were not consulted on the new government policies.⁶⁹ Inuit children were forcibly removed from their homes and placed in residential schools where they received a Western

62. See *Wrecks of HMS Erebus and HMS Terror National Historic Site of Canada*, PARKS CANADA AGENCY, http://www.pc.gc.ca/apps/dfhd/page_nhs_eng.aspx?id=334 (last visited Sept. 9, 2018).

63. See *id.*

64. See Can-Gr. Brit. MOU, *supra* note 43.

65. See Kenneth John Rae, *Nunavut*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Nunavut> (last visited Sept. 9, 2018).

66. See Peter Kikkert, *Nunavut*, CANADIAN ENCYCLOPEDIA <https://www.thecanadianencyclopedia.ca/en/article/nunavut/> (last updated June 15, 2018).

67. See Rae, *supra* note 65; See also Ken Coates, *The 'Gentle' Occupation: The Settlement of Canada and the Dispossession of the First Nations*, in *INDIGENOUS PEOPLE'S RIGHTS IN AUSTRALIA, CANADA & NEW ZEALAND* (1999).

68. See Kikkert, *supra* note 66, see also WATSON, *supra* note 9, at 4, 5.

69. See Kikkert, *supra* note 66, at 15.

education, often suffering physical and sexual abuse while they were there.⁷⁰

In the 1960s and 1970s, the Inuit discussed creating a new territory through a land claim which they could govern themselves.⁷¹ It took two more decades for the Inuit to create a feasible plan that was ratified by the Canadian government and public.⁷² In 1993 the Nunavut Land Claims Agreement Act and the Nunavut Act were both passed into law.⁷³ The territory officially came into being on April 1, 1999.⁷⁴ The creation of Nunavut was a victory for the Inuit, who “overcame many obstacles to peacefully establish a government that they controlled within the Canadian state, thereby gaining control of their land, their resources, and their future.”⁷⁵ The Inuit dispute with Parks Canada over control of the Franklin artifacts is the first time some of the rights being claimed by the Inuit in the Nunavut Land Claims Agreement are being tested.

b. Nunavut Jurisdiction Over Archeological Discoveries

Article 33 of the 1993 Nunavut Land Claims Agreement Act (Land Claims Agreement) gives the Nunavut government jurisdiction over archaeological sites and artifacts in its territory.⁷⁶ Article 33 expresses the need for Inuit control over Nunavut’s archaeological record because of its “spiritual, cultural, religious, and educational importance to Inuit” and created the Inuit Heritage Trust for that purpose.⁷⁷ Article 33 also granted the federal government and the Inuit Heritage Trust joint ownership of all archeological specimens in Nunavut not within areas administered by the Canadian Parks Service.⁷⁸ These provisions, along with a provision giving the Inuit Heritage Trust authority to create a permit system for Nunavut archaeological sites, have played key roles in the power struggle between Parks Canada and Nunavut over the Franklin artifacts.⁷⁹

Nunavut’s internal authority is reinforced by Parks Canada’s Guidelines for the Management of Archaeological Resources (Guidelines), which states that land claims agreements “are legally

70. See WATSON, *supra* note 9, at 204-205.

71. See Kikkert, *supra* note 66, at 15.

72. See *id.* at 16.

73. See *id.*

74. See *id.* at 17.

75. See *id.* at 1.

76. See Nunavut Land Claims Agreement Act, S.C.1993, c 29 (Can.).

77. See *id.* at 226.

78. See *id.* at 229.

79. See *id.* at 227.

binding and override [Parks Canada] policies and directives.”⁸⁰ The Guidelines also mandate, “Parks Canada must [further] adhere to sections and clauses in land claim agreements pertaining to archaeology and heritage on lands and lands underwater under its administration.”⁸¹ As will be discussed *infra*, Parks Canada’s jurisdictional deference to Nunavut made it imperative for Parks Canada to quickly declare HMS *Erebus* a National Historic Site to bring it within their jurisdiction.

IV. THE HMS *EREBUS*

A. *The Discovery of the HMS Erebus*

In 2008, Stephen Harper took office as Prime Minister of Canada and announced that the Canadian government would revive the search for the Franklin ships.⁸² Over the next seven years, it funded six search expeditions in partnership with public, private, and non-profit groups.⁸³ Harper was motivated by both a genuine interest in the lost expedition and his political agenda to assert Canadian sovereignty over the Canadian Arctic and Northwest Passage, which is discussed *infra*.⁸⁴ Harper believed his team would succeed where others had failed because they were consulting Inuit historian Louie Kamookak on Inuit oral history about the Franklin expedition.⁸⁵

Kamookak was central to the discovery of the Franklin ships and, shortly before his untimely death in March 2018, was appointed to the Order of Canada for his “relentless dedication to collecting and showcasing the stories of the Inuit of Nunavut.”⁸⁶ Kamookak was an Inuk

80. See PARKS CANADA, *Legal Obligations, Policy Directives, and Administrative Duties for the practice of archaeology on federal lands, federal lands underwater, and on lands administered by Parks Canada*, in PARKS CANADA GUIDELINES FOR THE MANAGEMENT OF ARCHAEOLOGICAL RESOURCES 9 (2005), parkscanadahistory.com/publications/archaeological-resources-e-2005.pdf.

81. See *id.*

82. See *Canada launches new Arctic search for Franklin’s lost ships*, CBC NEWS, (Aug. 15, 2008), <http://www.cbc.ca/news/canada/north/canada-launches-new-arctic-search-for-franklin-s-lost-ships-1.702857>.

83. See *Franklin Expedition Search Continues for 6th Summer*, CBC NEWS (June 23, 2014, 5:00 AM), <http://www.cbc.ca/news/technology/franklin-expedition-search-continues-for-6th-summer-1.2682563>.

84. See Adriana Cracuin, *The Disaster of Franklin: Victorian Exploration in the Twenty-First Century Arctic*, in ARCTIC MODERNITIES: THE ENVIRONMENTAL, THE EXOTIC, AND THE EVERYDAY 191 (2017) [hereinafter Cracuin, *The Disaster of Franklin*]; Kat Long, *Canada’s Prime Minister Is Obsessed With a Missing Explorer*, SLATE (May 19, 2014, 6:00 AM), http://www.slate.com/articles/health_and_science/science/2014/05/canada_search_for_franklin_expedition_nationalism_and_control_of_northwest.html; *Infra Part VI e.*

85. See *Canada launches new Arctic search for Franklin’s lost ships*, *supra* note 82.

86. See Sara Frizzell, *Louie Kamookak Among Several Northerners Honoured with Order of Canada Appointments*, CBC NEWS (Dec. 29, 2017, 3:33 PM), <http://www.cbc.ca/news/canada/>

who was raised in the traditional manner before he was forcibly removed from his family and made to attend a residential school, where he first heard about Sir John Franklin.⁸⁷ After he returned home, he became increasingly fixated on finding Franklin's burial place and interviewed the elders of his tribe about stories that had been passed down to them through the generations.⁸⁸ Over the years he pieced together an impressive collection of Inuit oral history, adding to the "long record of Inuit histories" regarding the Franklin expedition, and was considered the Inuit expert on the topic.⁸⁹

Jim Basillie, the Canadian billionaire co-founder of RIM (the firm which invented the Blackberry), was another key player in the discovery of the Franklin ships.⁹⁰ In 2010, after three years of unsuccessful Parks Canada searches for the shipwrecks, Basillie was intrigued by a news broadcast about the expeditions.⁹¹ On a trip to the area near where the Franklin ships had been abandoned, Basillie saw a Russian icebreaker searching for the shipwrecks.⁹² Frustrated that other countries seemed more engaged in finding the wrecks than Canada, Basillie committed \$10 million of his personal fortune to finding at least one Franklin wreck.⁹³ He founded the Arctic Research Foundation in 2011 with Tim McDonald, another wealthy Canadian businessman.⁹⁴ The Foundation brought much needed funding to the search, which continued for the next two summers without success.⁹⁵

The tipping point came in the summer of 2014 when, by chance, Kamookak met Ryan Harris, a Parks Canada archaeologist-diver.⁹⁶ When Harris told Kamookak that his team was planning to search for the Franklin ships "off the northwest coast of King William Island," "Kamookak suggested they search an area farther south."⁹⁷ When the expedition was prevented by sea ice from reaching its original search area, the team turned its attention to the southern area Kamookak had

north/intuit-order-of-candada-1.4467503; Louie Kamookak, *Intuit Historian and Educator, has Died*, CBC NEWS (Mar. 18, 2018), <http://www.cbc.ca/news/canada/north/louie-kamookak-intuit-historian-dies-1.4588260>.

87. See WATSON, *supra* note 9, at 187, 207-11.

88. See *id.* at 211-12.

89. See *id.* at 225; Cracuin, *The Disaster of Franklin*, *supra* note 84, at 191, 202.

90. See WATSON, *supra* note 9, at 298-99.

91. See *id.*

92. See *id.*

93. See *id.* at 299.

94. *Id.* at 300.

95. See *id.* The Arctic Research Foundation partly funded the expedition that found *Erebus* in 2014, and also bought an Arctic research vessel, which discovered the *Terror* in 2016.

96. See MCGOOGAN, *supra* note 15, at 390.

97. See *id.*

mentioned.⁹⁸ On August 13, 2014, several archaeologists visited a small island off the west coast of the Adelaide Peninsula as part of their systematic search while survey boats continued their sonar scan of the sea floor.⁹⁹ They found a piece of iron with telltale Royal Navy arrow markings, as well as two pieces of wood from a ship's deck.¹⁰⁰

The team searched for several more weeks, moving ever closer to the small island where the artifacts were found, and, on September 2, 2014, they viewed the underwater sonar robot's live sonar feed to see a ship standing upright on its keel in thirty-six feet of water, with the top of its deck just nine feet from the surface.¹⁰¹ Over the next weeks, marine archaeologists confirmed that the ship was Sir John Franklin's flagship, the HMS *Erebus*.¹⁰² They brought up numerous artifacts, including the ship's bell, to much fanfare from the Canadian government; Harper declared that the find solved "one of Canada's greatest mysteries" and was "truly a historic moment for Canada."¹⁰³

B. The Initial Conflict between Parks Canada and the Nunavut Government

After the discovery of *Erebus*, Parks Canada and the Nunavut government quickly realized they had very different ideas about who would retrieve and manage the artifacts.¹⁰⁴ In spring 2015, Parks Canada applied to the Nunavut government for a permit authorizing its divers to retrieve artifacts from *Erebus* as part of its first official archaeological expedition to the site.¹⁰⁵ However, relying on Article 33 of the Land Claims Agreement, the Nunavut government instead issued a permit that allowed the divers to visit the site but not to retrieve artifacts.¹⁰⁶ When Parks Canada stated that the limitation was unacceptable, the Nunavut government informed the agency that they could be charged under the

98. *See id.*

99. *See* WATSON, *supra* note 9, at 313-14.

100. *See id.* at 315.

101. *See id.* at 317-18

102. *See Franklin Ship Discovery: Stephen Harper's Full Statement*, CBC NEWS (Sept. 9, 2014, 10:45 AM), <http://www.cbc.ca/news/politics/franklin-ship-discovery-stephen-harpers-full-statement-1.2760566>.

103. *See* WATSON, *supra* note 9, at 322; *See Franklin Ship Discovery: Stephen Harper's Full Statement*, *supra* note 102; *see also Lost Franklin Expedition Ship Found in the Arctic*, CBC NEWS (Sept. 9, 2014), <http://www.cbc.ca/news/politics/lost-franklin-expedition-ship-found-in-the-arctice-1.2760311>.

104. *See* Dean Beeby, *Parks Canada Juggles Competing Claims to Franklin Shipwrecks*, CBC NEWS (Mar. 8, 2016, 5:00 AM), <http://www.cbc.ca/beta/news/politics/parks-canada-franklin-wrecks-artifacts-1.347>

105. *Id.*

106. *See id.*

Nunavut Act if they did not comply, and Parks Canada reluctantly backed down.¹⁰⁷ Nunavut's victory was short-lived: on April 8, 2015, the Canadian government officially added the *Erebus* wreck site to the *Wrecks of HMS Erebus and HMS Terror National Historic Site of Canada* which the Canadian government had created in 1992 before the wrecks were located.¹⁰⁸ Once the *Erebus* site was an official National Historic Site, it was firmly under Parks Canada jurisdiction because Nunavut's permit regulations and archaeological policies applied only to lands within Nunavut not administered by Parks Canada.¹⁰⁹

However, Parks Canada's authority over the wreck site was not absolute; as mentioned *supra*, Parks Canada's Guidelines require the agency to "adhere to sections and clauses in land claim agreements pertaining to archaeology and heritage on lands and lands underwater under its administration."¹¹⁰ Additionally, Article 33 requires that any archaeological specimen found within an area of Nunavut administered by the Canadian Parks Service must be jointly managed in accordance with the provisions of Article 33.¹¹¹ Also, because the site is located on Nunavut territory, Parks Canada had to negotiate an Inuit Impact and Benefit Agreement (IIBA) with the Inuit Heritage Trust.¹¹²

Parks Canada appears to have ignored all these requirements until it was convenient to address them. Parks Canada took over the *Erebus* site, and because of the "urgent" need to protect the site, the agency was given a five-year window within which to negotiate the IIBA with the Inuit Heritage Trust.¹¹³ In the summer of 2015, Parks Canada underwater archaeologists returned to *Erebus* and recovered artifacts with the help of Royal Canadian Navy divers.¹¹⁴ Their many finds included small brass tunic buttons, a cannon, and ceramic plates that are part of the first major Franklin museum exhibition, *Death in the Ice*, which began at England's

107. *See id.*

108. Order Amending the National Historic Sites of Canada Order, SOR/2015-88 at 1.

109. *See* Nunavut Land Claims Agreement Act, S.C. 1993 at 229.

110. *See* PARKS CANADA, *supra* note 80 at 11.

111. *See* Nunavut Land Claims Agreement Act, S.C. 1993 at 229.

112. *See id.* at Art. 33.4 at 226; Order Amending the National Historic Sites of Canada Order, SOR/2015-88 at 3.

113. *Id.* at 6.

114. *See* Janet Davison, *HMS Erebus Dive 'Just Scratching the Surface' of Franklin Expedition Mystery*, CBC NEWS (May 27, 2015, 11:00 AM), <http://www.cbc.ca/news/canada/hms-erebus-dive-just-scratching-the-surface-of-franklin-expedition-mystery-1.3086476>.

National Maritime Museum, and moved in March 2018 to the Canadian Museum of History in Gatineau, Quebec.¹¹⁵

Parks Canada's handling of the *Erebus* situation appears to have created bad blood between the two groups that continues to this day despite Parks Canada's later conciliatory efforts towards inclusion, discussed *infra*. One issue the two entities needed to resolve was that the then-undiscovered HMS *Terror* almost certainly lay outside of the *Erebus* National Historic Site boundaries.¹¹⁶ When found, the *Terror* would be under Nunavut jurisdiction and Parks Canada would have to apply for Nunavut's permission to recover artifacts from the *Terror*.¹¹⁷ Nunavut clearly was not going to hand over ownership of the Franklin artifacts to Parks Canada without a fight; when IIBA talks began in 2015, the Inuit Heritage Trust stated that "ownership and control of Franklin artifacts is a priority because the Inuit want the objects to be displayed in local communities to enhance tourism."¹¹⁸

After their initial conflict, Parks Canada agreed in June 2015 that it would seek permission in the future from Nunavut's director of heritage before divers removed any *Terror* artifacts found on the seabed.¹¹⁹ The agency took further conciliatory actions over the next year by planning for Parks Canada and Nunavut to jointly manage the national historic site, as well as planning a Franklin visitor and field research center in the tiny Nunavut town of Gjoa Haven, near the *Erebus* site.¹²⁰ In March 2016, Parks Canada announced \$16.9 million in funding for investigating *Erebus*, continuing to search for *Terror*, contributing to economic development in Nunavut, and "creat[ing] employment opportunities in local Inuit communities."¹²¹ The Franklin Interim Advisory Committee, comprising Parks Canada, the Kitikmeot Inuit Association, the Government of Nunavut, the Inuit Heritage Trust, Nunavut Tourism, and local community representatives, was also created to advise Parks Canada

115. Davison, *supra* note 114; *Death in the Ice: The Shocking Story of Franklin's Final Expedition*, ROYAL MUSEUMS GREENWICH (May 3, 2017) <https://www.rmg.co.uk/work-services/news-press/press-release/death-ice-shocking-story-franklins-final-expedition>.

116. Beeby, *supra* note 104.

117. *See id.* at 4.

118. *See id.* at 6.

119. *See id.* at 4.

120. *See* Press Release, Parks Canada Agency, Parks Canada Announces Funding for The Wrecks of HMS *Erebus* and HMS *Terror* National Historic Site (March 17, 2016), <https://www.canada.ca/en/parks-canada/news/2016/03/parks-canada-announces-funding-for-the-wrecks-of-hms-erebus-and-hms-terror-national-historic-site.html>.

121. *See id.*

on the management of the National Historic Site until the IIBA is finalized.¹²²

The Inuit had a very different perspective on the actions Parks Canada took and still felt they were not being treated as equal stakeholders in the *Erebus* site and artifacts. For example, when Parks Canada released details about the proposed Franklin research center in Gjoa Haven, an Inuit Heritage Trust representative said, “We were surprised to hear the news, and we were not directly consulted about our involvement on this one.”¹²³ Gjoa Haven already has a museum devoted to Inuit traditional knowledge, the Nattilik Heritage Centre, and the Inuit Heritage Trust perhaps would have recommended expanding that center instead of building a new facility if they had been consulted.¹²⁴

Additionally, in April 2016, Cathy Towtongie, a Nunavut representative, wrote a letter to Parks Canada minister Catherine McKenna expressing concern over the possibility that Inuit representatives would be excluded from the artifact negotiations, as any agreements would “directly impact Inuit treaty rights.”¹²⁵ In May 2016, without responding to Towtongie’s letter, Parks Canada did negotiate about Franklin artifacts with the National Museum of the Royal Navy in Portsmouth, England.¹²⁶ They did not include Inuit representatives and decided to consult with the Inuit only after they had reached an agreement with Great Britain.¹²⁷ While a Parks Canada representative stated at the time, “Parks Canada is committed to exploring options for co-ownership of the artifacts with our Inuit partners,” Parks Canada seems to have intended for the Inuit to have “co-ownership” only on terms dictated by Parks Canada.¹²⁸

122. *See id.*

123. *See* Sima Sahar Zerehi, *Franklin Centre Announcement Catches Inuit Heritage Trust Off-Guard*, CBC NEWS (Sept. 14, 2015, 1:10 PM), <http://www.cbc.ca/news/canada/north/franklin-centre-announcement-catches-inuit-heritage-trust-off-guard-1.3226928>.

124. *See* Cracuin, *The Disaster of Franklin*, *supra* note 84 at 191, 204; Sarah Rogers, *Gjoa Haven’s Nattilik Heritage Centre Opens its Doors*, NUNATSIAQ NEWS (Oct. 17, 2013, 8:30 AM), http://nunatsiaq.com/stories/article/65674nattilik_heritage_centre_opens_its_doors/; Zerehi, *supra* note 123.

125. *See* Ashifa Kassam, *Inuit Argue for Say as Canada and Britain Decide Fate of HMS Terror Wreck*, THE GUARDIAN (Sept. 16, 2016), <https://www.theguardian.com/world/2016/sep/16/inuit-canada-britain-shipwreck-hms-terror-nunavut>.

126. *See* Dean Beeby, *Inuit Press Claim for Co-ownership of Franklin Artifacts*, CBC NEWS (July 14, 2016, 5:00 AM), <http://www.cbc.ca/news/politics/franklin-hms-erebus-inuit-parks-canada-hms-terror-1.3689503>.

127. *See* Adriana Cracuin, *Of shipwrecks and sovereignty*, OTTAWA CITIZEN (July 14, 2017) [hereinafter Cracuin, *Shipwrecks and Sovereignty*], <http://ottawacitizen.com/news/local-news/of-shipwrecks-and-sovereignty>.

128. *See* Beeby, *supra* note 126.

The two entities made progress towards Inuit inclusion when, in August 2016, Towtongie sent another letter to Parks Canada, which responded, “We will seek concurrence with the National Museum of the Royal Navy to include the Inuit Heritage Trust in all future discussions related to the transfer of the artifacts.”¹²⁹ Towtongie described the response as “a first good step,” but added, “We want to sit with the government of Canada when they’re negotiating with Britain.”¹³⁰ Later in August 2016, when Parks Canada announced their 2016 Franklin search expedition, they emphasized their continued collaboration with the Inuit, a claim that is questionable under the circumstances.¹³¹ It was in this tension-filled atmosphere that, in September 2016, the HMS *Terror* was found.

V. THE HMS *TERROR*

A. *The Discovery of the HMS Terror*

In September 2016, the next official search expedition set off to look for the *Terror*, with only nine days allotted for the search.¹³² An Inuk named Sammy Kogvik was part of the crew of the Arctic Research Foundation ship *Martin Bergmann*.¹³³ Kogvik claimed that six or seven years prior, he was crossing the sea ice in Terror Bay on a snowmobile when he saw a pole of wood sticking out of the ice.¹³⁴ He and his companion realized that it was a mast and they took photographs.¹³⁵ The next day, his father-in-law followed the same trail and also saw the mast.¹³⁶ When they returned to Gjoa Haven, however, Kogvik’s camera was gone; it had fallen out of his pocket.¹³⁷ Without evidence of his find, Kogvik resolved to say nothing because he didn’t “trust” Parks Canada.¹³⁸ In 2016, however, he mentioned the story to Adrian Schimnowski, the *Bergmann*’s captain, who got permission to detour the ship to Terror

129. See Kassam, *supra* note 125.

130. See *id.*

131. See Press Release, Parks Canada Agency, The Search for HMS Terror Continues (Aug. 23, 2016), <https://www.canada.ca/en/parks-canada/news/2016/08/the-search-for-hms-terror-continues.html>.

132. See WATSON, *supra* note 9, at 324.

133. See *id.* at 325.

134. See *id.* at 326-27.

135. See *id.* at 327.

136. See *id.*

137. See *id.*

138. See Cracuin, *The Disaster of Franklin*, *supra* note 84, at 191; WATSON, *supra* note 9, at 327.

Bay.¹³⁹ After a day of fruitless searching, the crew agreed to give up and move on to another bay, but as they motored out, a large object appeared on the sonar display.¹⁴⁰ It was a ship with three masts, sitting in just under eighty feet of water.¹⁴¹ The ship was in such pristine condition that Schimnowski remarked, “[i]f you could lift this boat out of the water, and pump the water out, it would probably float.”¹⁴² On September 3, 2016, the HMS *Terror* had been discovered at last.¹⁴³

The find corroborated Inuit tales of mass death at Terror Bay and their encounters with starving white men nearby.¹⁴⁴ Parks Canada’s news releases highlighted “the importance of Inuit knowledge” to the “extraordinary find,” although always in the problematic context of the “validation” of the truth of Inuit knowledge, discussed *infra*.¹⁴⁵ In contrast to Harper’s exuberant press release stating the national importance of the discovery of *Erebus*, current Prime Minister Justin Trudeau celebrated the discovery of *Terror* via a short video and a tweet: “The second ship lost in the Franklin Expedition has been found! #HMSTerror lying off King William Island.”¹⁴⁶ However, despite all the celebrations, the issues between Parks Canada and the Nunavut government regarding control of *Erebus* and *Terror* were still far from being resolved.

B. Control Over the Terror Wreck Site

The continued tension between Parks Canada and Nunavut is highlighted by two events that took place on September 26, 2016. First, Parks Canada officially confirmed that the discovered wreck was the *Terror* and stated, “[w]orking together to advance joint ownership of these historic artifacts is an opportunity to strengthen our Government’s

139. See WATSON, *supra* note 9, at 327-28.

140. *Id.* at 329.

141. See *id.*

142. *Id.* at 331.

143. See Press Release, Parks Can. Agency, Parks Canada Media Statement – Validation of Discovery of HMS *Terror* (Sept. 26, 2016), <https://www.canada.ca/en/parks-canada/news/2016/09/parks-canada-media-statement-validation-discovery-terror.html>; Paul Watson, *Ship Found in Arctic 168 Years After Doomed Northwest Passage Attempt*, THE GUARDIAN (Sept. 12, 2016) [hereinafter Watson, *Ship Found*], <https://www.theguardian.com/world/2016/sep/12/hms-terror-wreck-found-arctic-nearly-170-years-northwest-passage-attempt>.

144. See WATSON, *supra* note 9, at 332.

145. See Cracuin, *The Disaster of Franklin*, *supra* note 84, at 191, 202; Press Release, Parks Can. Agency, Last Piece of the Franklin Expedition Potentially Discovered in the Canadian Arctic (Sept. 14, 2016), <https://www.canada.ca/en/parks-canada/news/2016/09/last-piece-franklin-expedition-potentially-discovered-canadian-arctic.html>; *Infra* part VI. D.

146. See Scott Wishart, *Second Ship Located from Doomed Franklin Expedition*, BEACON HERALD (Sept. 15, 2016), <http://www.stratfordbeaconherald.com/2016/09/15/second-ship-located-from-doomed-franklin-expedition-through-northwest-passage>.

relationship with Inuit in Nunavut.¹⁴⁷ Second, Nunavut premier Peter Taptuna wrote a letter on the same day to Prime Minister Trudeau accusing Parks Canada of taking the *Erebus* artifacts without permission.¹⁴⁸ The letter was made public nearly a year later, just before the first exhibition of *Erebus* artifacts opened at the National Maritime Museum in Greenwich, England, in July 2017.¹⁴⁹ Many news outlets picked up the letter and drew public attention to the tension between Parks Canada and the Inuit Heritage Trust, increasing the pressure on Parks Canada to be more inclusive of the Inuit.¹⁵⁰

One positive outcome of increased inclusiveness and collaboration through the Franklin Interim Advisory Committee is the new Inuit Guardians program.¹⁵¹ In the summer of 2017, Parks Canada hired seventeen “Inuit guardians” from Gjoa Haven to watch over the National Historic Site and to make sure no unauthorized groups tried to visit the wrecks.¹⁵² Kamookak viewed this program as an important example of how the Inuit can be validly involved in management of the site, which is in their traditional hunting area.¹⁵³ Another positive outcome is the Umiyaqtutt (Shipwreck) Festival, which was first held in September 2017 in Gjoa Haven and focused on the Franklin expedition and the historically “important role Inuit knowledge and community involvement” played in the discovery of the wrecks.¹⁵⁴ Parks Canada also stated, in a new release

147. See Press Release, Parks Can. Agency, Government of Canada Confirms Wreck of HMS Terror and Deepens Collaboration with Inuit in Nunavut through Co-ownership of Franklin Artifacts (Sept. 26, 2016), <https://www.canada.ca/en/parks-canada/news/2016/09/government-canada-confirms-wreck-terror-deepens-collaboration-inuit-nunavut-through-ownership-franklin-artifacts.html>.

148. See generally, Jane Sponagle, *In Letter to PM, Nunavit Premier said Parks Canada Took Franklin Artifacts without Permission*, CBC NEWS (July 11, 2017, 3:00 AM), <http://www.cbc.ca/news/canada/north/nunavut-premier-letter-franklin-artifacts-1.4198611>.

149. See *id.*

150. Tom Spears, *Feds Took Franklin Artifacts Without Permission, Nunavut Claims*, OTTAWA CITIZEN, <http://ottawacitizen.com/news/local-news/feds-took-franklin-artifacts-without-permission-nunavut-claims> (last updated June 23, 2017); Sponagle, *supra* note 148; Vanessa Thorpe, *Museum Risks Wrath of Inuit with Display from Tragic Arctic Voyage*, THE GUARDIAN (July 2, 2017), <https://www.theguardian.com/world/2017/jul/01/franklin-arctic-voyage-tragic-inuit-wrath-museum>.

151. Press Release, Parks Can. Agency, Parks Canada and Franklin Interim Advisory Committee Announce Next Steps for the Franklin Wrecks (Sept. 26, 2016), https://www.canada.ca/en/parks-canada/news/2017/08/parks_canada_andfranklininterimadvisorycommitteeannouncenextstep.html.

152. Kate Kyle, *Inuit Guardians ‘Happy and Proud’ to Protect Franklin’s Ships*, CBC NEWS (Sept. 8, 2017, 3:00 AM), <http://www.cbc.ca/news/canada/north/inuit-guardians-happy-and-proud-to-protect-franklin-s-ships-1.4279482>.

153. See *id.*

154. Press Release, Parks Can. Agency, The Government of Canada Recognizes the National Historic Importance of the Wrecks of HMS *Erebus* and HMS *Terror* (Sept. 2, 2017),

that it was working with the Inuit Heritage Trust on an “Interim Memorandum of Understanding to ensure that all decisions regarding the artifacts will be made jointly while negotiations with the Government of the United Kingdom continue.”¹⁵⁵

C. Official Assignment of Ownership Over the Wrecks

Just a short while later, on October 23, 2017, Britain formally stated its intention to assign ownership of the wrecks to Parks Canada.¹⁵⁶ While Britain did not mention Nunavut, perhaps viewing the issue as an internal Canadian one, Parks Canada stated in its news release that it continued to be committed to co-ownership of the Franklin artifacts with the Inuit.¹⁵⁷ This commitment was demonstrated when, on December 8, 2017, the *Terror* was added to the Wrecks of HMS Erebus and HMS Terror National Historic Site.¹⁵⁸ The language of the Order Amending the National Historic Sites of Canada illustrates this shift: it states that the Franklin expedition is important to Canadians because it “paint[s] a clearer picture of Canada’s rich history of Arctic exploration” and is important to the Inuit because the story of the expedition is “as much a part of Inuit history . . . [as] Canadian and British history.”¹⁵⁹

However, as of December 2017, Britain had not officially assigned ownership to Canada.¹⁶⁰ Britain reserved the right in the MOU to keep artifacts of “‘outstanding significance’ to the Royal Navy” and now wants to exercise that right to keep a “small representative sample” of artifacts.¹⁶¹ Canada, on the other hand, wants a “full transfer of the wrecks and artifacts” from Britain, and to arrange “long-term loan options for the U.K. to display important artifacts in museums in the U.K.”¹⁶² Costs present an additional complication: Britain will have to reimburse Canada for the recovery and conservation of any artifacts which it keeps.¹⁶³

https://www.canada.ca/en/parks-canada/news/2017/09/the_government_ofcanadarecognizesthe_nationalhistoricimportanceof.html.

155. *Franklin 2017*, PARKS CAN. AGENCY, https://www.canada.ca/en/parks-canada/news/2017/08/franklin_2017_.html (last updated Aug. 11, 2017).

156. *Defence Secretary Announces Exceptional Gift to Canada*, GOV.UK (Oct. 23, 2017), <https://www.gov.uk/government/news/defence-secretary-announces-exceptional-gift-to-canada>.

157. Press Release, Parks Can. Agency, Government of the United Kingdom Signals Intent of Historic Gift to Canada (Oct. 23, 2017), https://www.canada.ca/en/parks-canada/news/2017/10/government_of_theunitedkingdomsignalsintentofhistoricgifttocanad.html. See *Defence Secretary Announces Exceptional Gift to Canada*, *supra* note 152.

158. Order Amending the National Historic Sites of Canada Order, SOR/2017-273 at 6 (Can.).

159. *Id.*

160. Beeby, *Britain Drag On*, *supra* note 59.

161. Can-Gr. Brit. MOU, *supra* note 43, at 4(b); Beeby, *Britain Drag On*, *supra* note 59.

162. Beeby, *Britain Drag On*, *supra* note 59.

163. See *id.*

Without factoring in those costs, Canadian taxpayers have already spent over a million dollars on the *Death in the Ice* exhibition which went to England before its current location in Canada, including “shipping the artifacts to Britain, insuring them, and providing a team to set them up.”¹⁶⁴ It is unclear how long it will take to resolve these issues in order for a final transfer of ownership to take place.¹⁶⁵

In whatever way the specific details are resolved, it is clear that the shipwrecks and many of the Franklin artifacts will remain in Canada and will be jointly managed by Parks Canada and the Nunavut government. The next section will discuss the cultural significance of the artifacts to British, Canadian, and Inuit cultures to explain why this legal battle took place and why the artifacts are so meaningful for each entity involved. It is worth noting that despite the current positive outcome of joint management between Parks Canada and Nunavut, Parks Canada missed an important opportunity to treat Nunavut as an equal partner and stakeholder from the beginning. The federal agency treated the Inuit with the same paternalistic condescension as the generations before it, ignoring the legal rights which the Inuit had gained via the land claims agreement in its handling of the *Erebus* situation in 2014 and creating an atmosphere of distrust which has permeated the negotiations ever since. Even while proclaiming its cooperation with the Inuit two years later in 2016, Parks Canada has left them out of negotiations with Britain until public attention in 2017 forced it to be more inclusive. The Nunavut government has done an excellent job of using media attention to pressure Parks Canada to collaborate with them; ultimately, however, it is a shame they had to do so in order to force the federal government to acknowledge their legal territorial rights.

VI. THE FRANKLIN SHIPWRECKS AS UNDERWATER CULTURAL HERITAGE OBJECTS

A. Definition of Cultural Heritage

The concept of “cultural heritage” explains why Great Britain, Canada, and the Inuit have gone to great lengths and expense to recover and control the Franklin artifacts. This section will examine cultural heritage from a global and nationalist perspective, and will then discuss Great Britain, Canada, and the Inuit’s cultural heritage claims to the

164. Dean Beeby, *Talks with British on Ownership of Franklin Artifacts Still Unresolved*, CBC NEWS (May 5, 2017, 5:00 AM) [hereinafter Beeby, *Talks with British*], <http://www.cbc.ca/news/politics/hms-erebus-terror-franklin-expedition-wrecks-parks-canada-inuit-1.4099544>.

165. See *id.*; See Beeby, *Britain Drag On*, *supra* note 59.

Franklin artifacts. At its core, cultural heritage includes “almost anything man made or given value by man.”¹⁶⁶ More specifically, cultural heritage has “economic, cultural, political, or social” aspects.¹⁶⁷ Cultural heritage can be tangible (archaeological sites, artwork, etc.) or intangible (oral traditions, music, dances, etc.).¹⁶⁸ Legally, historic shipwrecks are “underwater cultural heritage” (“UCH”), and are formally protected by both UNCLOS and the UNESCO Convention on the Protection of Underwater Cultural Heritage (“CPUCH”).¹⁶⁹ CPUCH defines UCH as “all traces of human existence having cultural, historical, or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years.”¹⁷⁰ Ultimately, cultural heritage is significant because of the values assigned to it by society.¹⁷¹ The following discussion emphasizes three main cultural heritage values which the Franklin artifacts possess: 1) expressive (storytelling) value, 2) the value of preserving archaeological and historical evidence, and 3) economic value.¹⁷²

First, the Franklin artifacts have an expressive value for modern society.¹⁷³ Cultural heritage objects each have their own “unique sum of inherent values” based on their physical characteristics, aesthetic appeal, and other values which the objects represent, such as religious or moral values, emotional connections, and “feelings of nostalgia for people, events, and cultures.”¹⁷⁴ As physical links to the past, the objects “reflect the common heritage of humankind.”¹⁷⁵ In this regard, the Franklin artifacts fascinate us as tangible remnants of the British sailors who lived and died in the Canadian Arctic. Not only do they evoke our pity for the sufferings undergone by the crew members, but they also carry different

166. See CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE (2010) (“Attempts to describe what ‘cultural heritage’ is tend to use general terms understood intuitively as reflecting a culture which is inherited from the past.”). See also ALESSANDRO CHECHI, THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES (2014) 17-22 (“The terminology used reflects different ideological approaches, whereas the criteria relate to qualified historical, scientific or artistic values or interests; to the age, or to the fact that cultural objects belong to certain periods or styles or environments.”).

167. See FORREST, *supra* note 166, at 2.

168. See *id.* at 2-3.

169. Convention on the Protection of the Underwater Cultural Heritage, Nov. 3, 2001, 41 I.L.M. 40. [hereinafter CPUCH]. See also FORREST, *supra* note 166, at 27.

170. CPUCH, *supra* note 169.

171. See FORREST, *supra* note 166, at 2-3.

172. See *id.* at 4-5.

173. See *id.*

174. See *id.*

175. See *id.* at 5.

cultural meanings when viewed from the lenses of British, Canadian, Inuit, or global culture.

Second, like all archaeological objects, the Franklin artifacts “embody and preserve information” about the past.¹⁷⁶ Historic shipwrecks are “time capsules” because they uniquely represent the world at the time they sank more than archaeological sites on land ever can.¹⁷⁷ Scholars can add to the historical record by examining what the Franklin sailors ate, drank, wore, and read from 1845 to the time they left the ships. That information, in turn, may shed some light on the enduring mystery of why the Franklin sailors made the fatal decision to abandon their ships.

Third, the Franklin artifacts have economic value, which is comprised of intrinsic value, attributed value, and value as a “tourist resource.”¹⁷⁸ While scholars wrestle with the implications of the “commodification” of cultural heritage, it has become an “important industry” and tourist revenue from cultural heritage sites “provide direct economic benefits” to the States in which they are located.¹⁷⁹ Here, the Franklin artifacts are not made of valuable materials, so they do not have a high intrinsic value. However, they have a high attributed value because of the story-telling (expressive) value attached to them and because of their ability to draw large numbers of tourists. Although the artifacts do not have a permanent home yet, in the four years since the discovery of the *Erebus* they have already drawn thousands of tourists, from several minor exhibitions to the first major exhibition, *Death in the Ice*, which has already taken place at the National Maritime Museum in Greenwich, England, and is now at the Canadian Museum of History.¹⁸⁰

Cultural heritage can play important roles both globally and nationally. Globally, the “common heritage of humankind” is an emerging concept that describes the “general interest of the international community in the conservation and enjoyment of cultural heritage.”¹⁸¹ While a specific culture may have a stronger claim than others, its claim is not exclusive.¹⁸² As one scholar writes, “[t]he history and development of our species is one history, and the culture of the world is greater than

176. *See id.*

177. *See id.* at 340.

178. *See id.* at 5.

179. *See id.* at 7.

180. *Death in the Ice: the Mystery of the Franklin Expedition*; CANADIAN MUSEUM HIST., <http://www.historymuseum.ca/event/the-franklin-expedition> (last visit Sept. 8 2019); *Death in the Ice: The Shocking Story of Franklin's Final Expedition*, *supra* note 111.

181. CHECHI, *supra* note 166 at 19.

182. FORREST, *supra* note 166, at 13.

the sum of individual cultures.”¹⁸³ The Franklin expedition impacted many cultures; thus, the general claim of humankind to witness and interact with the Franklin artifacts exists concurrently with specific cultural claims.

Nationally or in a group setting, cultural heritage can play an important role as a “symbol of national identity . . . cultural pride . . . community spirit and common history.”¹⁸⁴ A specific group’s cultural heritage is “the sum of practices, knowledge, and representations that a community or group recognize as part of their history and identity.”¹⁸⁵ If a group claim exists, then “members of that group, individually and collectively, must be entitled to access, perform and enjoy such cultural heritage as a matter of right.”¹⁸⁶ There are three distinct cultural heritage claims to the Franklin artifacts held by Great Britain, Canada, and the Inuit. As will be argued below, the assertion of these overlapping cultural heritage claims to the Franklin artifacts has been a driving force behind the struggle for their control and ownership.

B. British Cultural Heritage Claims to the Franklin Expedition

Because HMS *Erebus* and HMS *Terror* were British flag ships, Great Britain has clear legal ownership over the wrecks and their contents.¹⁸⁷ Great Britain also has the primary cultural heritage claim over the Franklin expedition and artifacts viewed through the three cultural heritage values.¹⁸⁸

The Franklin artifacts have evident expressive value for British culture, as “[s]ince at least the Elizabethan era, English identity ha[s] been bound up with English seamanship and imperial expansion.”¹⁸⁹ The British obsession with discovering the Northwest Passage began as early as the eighteenth century, when Parliament passed an act in 1745 which offered a reward of twenty thousand pounds for discovering a “North-West Passage through Hudson Strait” (over four million pounds in today’s currency).¹⁹⁰ The Franklin artifacts are tangible relics of Victorian England, which had an “obsession with polar exploration among the

183. *See id.* at 11.

184. *See id.* at 10.

185. CHECHI, *supra* note 166, at 20-21, (citing F. FRANCONI, CULTURE, HERITAGE, AND HUMAN RIGHTS: AN INTRODUCTION, TO CULTURAL HUMAN RIGHTS (2008)).

186. *See id.*

187. *See supra*, part III. a. i.

188. *See supra*, part VI. a.

189. Schulz, *supra* note 16.

190. *See* CYRIAX, *supra* note 27, at 3.

general public.”¹⁹¹ In the years leading up to Franklin’s expedition, “[t]he many unsuccessful attempts which had already been made by British explorers . . . the important scientific discoveries which were expected to result, and the desirability of exploring every part of the Dominions, had rendered the discovery of the passage a matter of national concern.”¹⁹² In addition to discovering the passage, the Royal Society (Britain’s premier scientific organization) was eager to participate in an “international cooperative program” that worked to complete “the magnetic survey of the globe” to locate magnetic North—part of Franklin’s mission was to take magnetic observations from the Arctic.¹⁹³ Polar exploration was a good political move as well; after the end of the Napoleonic wars, the victorious British navy had found itself with “a shortage of available naval battles” and “a shortage of new places to plant its flag.”¹⁹⁴ As a result, the search for the Northwest Passage “gave England a new way to assert its naval prowess and its national identity.”¹⁹⁵

In addition to their expressive value of this period of British history, the artifacts have archaeological and historic value for British culture. Archaeologists can study the artifacts for clues that might reveal what doomed the expedition’s crew (theories include lead poisoning, scurvy, and malnutrition).¹⁹⁶ By revealing what Victorian explorers ate, wore, read, etc., the artifacts will add to the British historical record. The artifacts also have an economic value by bringing tourists to see museum exhibitions, as discussed *supra*.¹⁹⁷

For these reasons, Britain insists on its right to retain significant Franklin artifacts pursuant to the MOU, which complicates negotiations with Canada.¹⁹⁸ As Britain’s intention to transfer ownership of the wrecks and their contents to Canada acknowledges the symbolic importance which Canada has placed upon the Franklin expedition (as well as the logistical and financial common sense of keeping the wrecks in Canada), Britain’s insistence on keeping significant artifacts forces a reciprocal acknowledgment that the Franklin expedition was a British expedition of

191. Schulz, *supra* note 16; See BEATTIE & GEIGER, *supra* note 19, at 18.

192. CYRIAX, *supra* note 27, at 160-61.

193. See MCGOOGAN, *supra* note 15, at 390.

194. Schulz, *supra* note 16.

195. *Id.*

196. See BEATTIE & GEIGER, *supra* note 19, at 65, 86, 240, 254; See CYRIAX, *supra* note 27, at 136.

197. See *Death in the Ice: The Shocking Story of Franklin’s Final Expedition*, *supra* note 115.

198. See *supra*, part V. c.

British sailors, intent on opening yet another corner of the globe to the British empire.¹⁹⁹

C. Canadian Cultural Heritage Claims to the Franklin Expedition

Over the course of the 170 years since its disappearance, the Franklin expedition has come to play an important role in both Canada's national identity and its claim over the Northwest Passage. In 1845, when Franklin set out for the Canadian Arctic to find the Northwest Passage, Canada was still a British colony with no independent interest in the expedition.²⁰⁰ Canada became an independent nation twenty-two years later, in 1867.²⁰¹ The numerous searches for the Franklin expedition helped open up the Canadian Arctic as the searchers mapped "all the Arctic waterways, revealing several possible North West Passages."²⁰²

As Canada places similar archeological, historic, and economic value on the Franklin artifacts as Great Britain, this discussion will focus primarily on the differing expressive values which the artifacts hold for Canadian culture. In her lecture on Franklin's role in Canadian literature, Canadian novelist Margaret Atwood states, "the Franklin disaster did not take root in the Canadian imagination immediately; possibly because, at the time, the whole thing . . . was thought of as too British."²⁰³ However, by the 1920s, the Franklin story was considered central to the "Canadian literary imagination," and was told and retold in poems, radio dramas, and novels over the rest of the twentieth century.²⁰⁴ By now, writes Atwood, Franklin himself has been "adopted by Canadians as one of their own."²⁰⁵ Today, the Franklin Expedition has taken on dimensions of national importance: it has been described hyperbolically as both "the

199. See *Defence Secretary Announces Exceptional Gift to Canada*, *supra* note 156.

200. Norman L. Nicholson, *British North America*, CANADIAN ENCYCLOPEDIA, <https://www.thecanadianencyclopedia.ca/en/article/british-north-america/> (last updated Jan. 28, 2014).

201. *Confederation, 1867*, THE CANADIAN ENCYCLOPEDIA, <https://www.thecanadianencyclopedia.ca/en/exhibit/confederation-1867/> (last visited Sept. 8, 2018).

202. See ANN SAVOURS, *THE SEARCH FOR THE NORTHWEST PASSAGE* (1999); The Canadian Press, *U.K. to Transfer Ownership of Franklin Shipwrecks to Canada*, THE STAR (Oct. 23, 2017), <https://www.thestar.com/news/canada/2017/10/23/uk-to-transfer-ownership-of-franklin-shipwrecks-to-canada.html>; See also BEATTIE & GEIGER, *supra* note 19, xv at 67; Schulz, *supra* note 16.

203. Margaret Atwood, *Concerning Franklin and his Gallant Crew*, in STRANGE THINGS: THE MALEVOLENT NORTH IN CANADIAN LITERATURE 7, 19 (2004) [hereinafter Atwood, *Concerning Franklin*].

204. Atwood, *Concerning Franklin*, *supra* note 203, at 7, 17.

205. BEATTIE & GEIGER, *supra* note 19, at 1,7.

single most eventful mythological moment” in Canada’s history and as one of Canada’s “most compelling Arctic myths.”²⁰⁶

Former Prime Minister Harper has been one of the strongest advocates for adopting the Franklin Expedition into the Canadian national mythos. Harper’s “Northern Strategy” was a “comprehensive Arctic policy” which included military, security, energy extraction, science, and maritime regulations.²⁰⁷ The Northern Strategy was heavily focused on Canada “firmly exercising” its “long-standing, well-established” sovereignty in the Arctic, in part to establish the Northwest Passage as “internal historic waters” under UNCLOS.²⁰⁸ If the Northwest Passage is historically Canadian, Canada can control which foreign ships use the passage; if the Northwest Passage is an international strait, as the United States and some other countries have asserted, then ships from the international community can move freely through the passage without Canada’s permission.²⁰⁹ This issue is especially pertinent as the Arctic warms, sea ice melts, and more ships are able to navigate the passage.²¹⁰

Harper overtly used the Franklin Expedition to promote his Northern Strategy by tying the expedition to Canada’s origin story and Canadian Arctic sovereignty.²¹¹ When he announced the discovery of *Erebus*, Harper proclaimed, “Franklin’s ships are an important part of Canadian history given that his expeditions . . . laid the foundations of Canada’s Arctic sovereignty.”²¹² This “integrat[ion of] the Canadian North into the nation’s psyche” retroactively creates a sense of Canadian ownership over the Arctic.²¹³ Problematically, the Canadian-centric

206. Adam Gopnik, *The Franklin Ship Myth, Verified*, NEW YORKER (Sept. 24, 2014), <https://www.newyorker.com/culture/cultural-comment/canada-franklin-ship-myth-verified>; The Canadian Press, *supra* note 202.

207. See CANADA’S NORTHERN STRATEGY, <http://www.northernstrategy.gc.ca/index-eng.asp> (last visited Mar. 4, 2018); See also Cracuin, *The Disaster of Franklin*, *supra* note 84, at 191, 192.

208. CANADA’S NORTHERN STRATEGY, *supra* note 207.

209. Cracuin, *The Disaster of Franklin*, *supra* note 84, at 191, 193-94; See also Editorial, *Arctic Discovery Boosts Canadian Sovereignty*, THE STAR, (Sept. 13, 2016), <https://www.thestar.com/opinion/editorials/2016/09/13/arctic-discovery-boosts-canadian-sovereignty-editorial.html>. (The hunt for and discovery of the wrecks fortifies Canada’s claims to The Passage.)

210. See Cracuin, *The Disaster of Franklin*, *supra* note 84, at 191, 193-94.

211. See Margo McDiarmid, *Stephen Harper and the Obsession with Franklin*, CBC NEWS (Sept. 3, 2014, 5:00 PM), <http://www.cbc.ca/news/politics/stephen-harper-and-the-obsession-with-franklin-1.2754180>; M.D., *Frozen Promises*, THE ECONOMIST (May, 14 2013) [hereinafter M.D., *Frozen Promises*], <https://www.economist.com/blogs/americasview/2013/05/canada-and-arctic>; Long, *supra* note 84; Steve Rennie, *Franklin Expedition: Stephen Harper Visits Search for Franklin Expedition Wreck*, CBC NEWS (Aug. 26, 2014, 9:08 AM), <https://www.cbc.ca/news/politics/franklin-expedition-stephen-harper-visits-search-for-franklin-expedition-wreck-1.2746999>.

212. *Franklin Ship Discovery: Stephen Harper’s Full Statement*, *supra* note 102.

213. McDiarmid, *supra* note 211.

interpretation of the Franklin Expedition reinvigorates the old Victorian perspective of the Arctic as an “empty, unpeopled wasteland” whose history began “not with the arrival of the Dorset and Inuit thousands of years ago . . . but with the recent arrival of the . . . British navy.”²¹⁴ This exclusionary perspective is evident in the initial cavalier treatment of the Inuit claim to the Franklin artifacts by Parks Canada.

D. Inuit Cultural Heritage Claims to the Franklin Expedition

The Inuit of Nunavut have the final cultural heritage claim to the Franklin Artifacts.²¹⁵ It is rare for an indigenous group to claim Western artifacts as part of their culture: the usual narrative centers around Western societies appropriating indigenous or ancient artifacts.²¹⁶ However, the Franklin artifacts have a strong expressive value for the Inuit because the expedition’s presence in the region actually impacted the lives of the local Inuit.²¹⁷ Sir Franklin was not the first European explorer to voyage to the Canadian Arctic in search of the Northwest Passage.²¹⁸ As early as the sixteenth century, the British explorer Martin Frobisher came to the region looking for a northern trade route to the Pacific.²¹⁹ Shipwrecks from subsequent explorations caused the Inuit “to change their travel and trading patterns to take advantage of the scarce wood and metal resources the sites offered.”²²⁰ According to Inuit oral history, when the Netsilingmiut Inuit made their ritual trip to King William Island in 1846, they witnessed Franklin crew members attempting to escape the island to reach civilization far away on the mainland.²²¹ One elderly Inuit lady described the men as “thin, starved, and ill; they were black around the eyes and mouth and were not wearing any fur clothing.”²²² They gave the starving men seals they had hunted, and attempted to lead them across the ice bridge connecting the island to

214. Cracuin, *The Disaster of Franklin*, *supra* note 84, at 191, 198-99.

215. Hilary Beaumont, *Canada, Britain, and the Inuit Are Fighting Over Sunken Treasure in the Arctic*, VICE NEWS (Mar. 15, 2016, 11:33 AM), <https://news.vice.com/article/canada-britain-and-the-inuit-are-fighting-over-sunken-treasure-in-the-arctic>.

216. See James A.R. Nafziger & Ann M. Nicgorski, *Preliminary Materials to CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE* xvii, xviii-xix (James A.R. Nafziger & Ann M. Nicgorski, eds. 2009).

217. Peter Brannen, *The Last Great Arctic Shipwreck*, THE ATLANTIC, (Sept. 20, 2016), <https://www.theatlantic.com/science/archive/2016/09/northwest-passage/500753/>.

218. See *id.*

219. See SAVOURS, *supra* note 202, at 4.

220. Bob Weber, *The historical tug of war over how the Franklin story is told*, THE STAR (Sept. 15, 2017), <https://www.thestar.com/news/canada/2017/09/15/the-historical-tug-of-war-over-how-the-franklin-story-is-told.html>.

221. See WATSON, *supra* note 9, at 53, 184.

222. KLUTSCHAK, *supra* note 37, at 73-74.

the mainland before it melted in the spring.²²³ Slowed down by a heavy sledge and weak from malnutrition, the Franklin sailors never made it.²²⁴ Several years later, Inuit boarded one of the abandoned ships and “carried off countless useful items before she also went down.”²²⁵ Tools made out of Franklin relics became prized family heirlooms – for example, a metal sword was broken into shards for use as snow knives²²⁶ and “Kamookak’s own great-great-grandfather had a Franklin dinner knife that he turned into an ice chisel.”²²⁷

The years in which the Franklin Expedition crew were trapped were also a time of great suffering for the local Inuit.²²⁸ The winters that Franklin and his men weathered in the ice “were so severe that they became part of Inuit legend.”²²⁹ The Inuit fled south and blamed “the white men [] for unleashing malevolent spirits upon the island.”²³⁰ Out of this harsh and difficult time came what the Inuit believed was a curse attached to King William Island that was related to the deaths of Franklin and his crew.²³¹

There is a general consensus that if Franklin and his men had respected Inuit knowledge of how to survive in the harsh Arctic climate, most of them would likely have survived.²³² One of Franklin’s predecessors, Sir John Ross, survived a similar situation in which he and his men were trapped in the ice by copying the Inuit diet and constructing igloos.²³³ Thirty years later, the American Geographical Society travelled over three thousand miles by dog sled, in -50°F weather, without any injuries because they had adopted Inuit clothing, diet, and means of shelter, as did famed Arctic explorer Roald Amundsen, who later became the first to navigate the North West Passage and the first to reach the South Pole.²³⁴ Unfortunately, Franklin and his men refused to emulate native habits, relying instead on tinned food (which possibly induced lead poisoning and scurvy) rather than seal and salmon, and on woolen mittens

223. See WATSON, *supra* note 9, at 333.

224. *See id.*

225. *Id.* at 273.

226. *See* Kyle, *supra* note 152.

227. Weber, *supra* note 220.

228. *See* WATSON, *supra* note 9, at xxix.

229. *Id.* at xxix, 199.

230. *Id.* at xxix.

231. *See id.* at 191, 214.

232. Brannen, *supra* note 217.

233. BEATTIE AND GEIGER, *supra* note 19, at 29-30.

234. Brannen, *supra* note 218.

and coats rather than naturally insulating seal or caribou fur.²³⁵ As a result, “Franklin’s entire crew died of starvation and exposure in an area where, for generations, the Inuit had raised their children and tended their elderly.”²³⁶

Inuit knowledge also provided crucial pieces of information which led to the discoveries of both *Erebus* and *Terror*.²³⁷ *Erebus* was discovered after Kamookak recommended a search area farther south than the team had planned, based on Inuit oral history about where the ship had sunk, and Sammy Kogvik directed searchers to the *Terror* in Terror Bay after he told them of seeing a ship’s mast sticking out of the water of the bay a few years before.²³⁸

The Inuit have had to strongly assert the historical significance of the Franklin artifacts to their culture and their legal rights under Nunavut law to jointly manage the artifacts, especially as this is the first time that some of those rights relating to archaeological specimens are being tested.²³⁹ The laws of Nunavut have given the Inuit the legal platform with which to push back against the highly publicized narrative of Inuit inclusion, which Parks Canada proclaimed somewhat disingenuously before 2016.²⁴⁰ Even today, the official narrative centers too much on the “validation” of the truth of Inuit knowledge. Franklin scholar Adriana Cracu points out,

Beyond the use value of Inuit knowledge of the ships’ locations, where else have the Canadian searches shown room for or interest in Inuit perspectives on, and potential critiques of, the value of the searches themselves? For too long Canadian and British authorities have framed the issue solely in terms of the truth of Inuit knowledge, rather than in terms of how Inuit occupancy of the Arctic should entrust them as partners in decision-making.²⁴¹

This “selective acknowledgement” of Inuit knowledge plays into the larger issue of Harper’s Northern Strategy perspective of the Arctic as an “empty, unpeopled wasteland” rather than a region which indigenous

235. See WATSON, *supra* note 9, at xxvi-xxix. See also BEATTIE AND GEIGER, *supra* note 19, at 145

236. Schulz, *supra* note 16.

237. See *supra* Part IV, Section A; see *supra* Part V, Section A.

238. See *id.*

239. See Beaumont, *supra* note 215.

240. See *id.* at 211.

241. Cracu, *The Disaster of Franklin*, *supra* note 84, at 191, 203.

peoples have inhabited for thousands of years.²⁴² By using the media to publicize their side of the story and their experience of exclusion, the Inuit of Nunavut have been able to “re-indigenize those ships, those spaces, those histories, and fold them into a larger Indigenous history,” as Cracuin suggests.²⁴³

Parks Canada has recently announced its own initiative to collect Inuit oral history on the Franklin Expedition to “fill gaps in contemporary research on the history of the wreck sites.”²⁴⁴ Although Kamookak and other historians have already collected Inuit oral history about the Franklin Expedition, Parks Canada has the technological resources to record valuable interviews with Inuit elders and conduct worthwhile archival research.²⁴⁵ Parks Canada still seems to be out of step in its perspective on Inuit involvement, stating somewhat patronizingly, “[m]aybe it’s time to put more of the focus on the Inuit [rather than on European explorers]” and “[i]t’s important that the Inuit stay involved – for their own sake as well as Canada’s.”²⁴⁶ Despite this tone, Kamookak thought the project was a good idea, as preserving Inuit oral history through modern technology will allow it to be passed down to future generations in a more concrete form.²⁴⁷

The proximity of the wrecks to the Inuit community in Gjoa Haven is a tangible link between modern Inuit and their ancestors who interacted with Franklin and his men. For the Gjoa Haven residents, the shipwrecks have become a “community treasure,” not only because of their historical significance, but because of their high economic potential to draw tourists to the sparsely populated, underdeveloped region.²⁴⁸ Cruise ships are already planning excursions to the region to visit sites related to the Franklin Expedition, discussed *infra*.²⁴⁹ For an isolated and historically

242. See *id.* at 191, 202.

243. Weber, *supra* note 220.

244. The Canadian Press, *Nunavut project to collect Inuit elder testimony on Franklin shipwreck sites*, CBC NEWS (Feb. 13, 2018, 8:50 AM), <http://www.cbc.ca/news/canada/north/nunavut-parks-canada-inuit-elder-1.4533014>.

245. See *id.*

246. *Id.*

247. See *id.*

248. Alex Brockman, *Britain’s gift of Franklin Expedition ships to Canada prompts excitement in Gjoa Haven*, CBC NEWS (Oct. 24, 2017, 3:37 PM), <http://www.cbc.ca/news/canada/north/gjoa-haven-franklin-wrecks-ownership-1.4369985>; See Kikkert, *supra* note 66; Paul Watson, *Franklin wreck could help float fortunes of Arctic community*, THE STAR (Mar. 23, 2015, 12:39 PM) [hereinafter Watson, *Franklin wreck fortunes*], <https://www.thestar.com/news/canada/2015/03/23/kokiwoogs-that-walk-and-other-worries-in-arctic-village-near-franklin-wreck.html>.

249. *Cruise ship passengers to visit HMS Erebus wreck this summer*, CBC NEWS (Jan. 24, 2015, 11:18 AM), <http://www.cbc.ca/news/canada/north/cruise-ship-hms-erebus-parks-canada->

impoverished region, increased tourism is life-changing, in ways both good and bad.²⁵⁰ Gjoa Haven faces high rates of unemployment and a housing crisis, and is ill-equipped at the moment to handle increased levels of tourists.²⁵¹ Cruise ships could also pollute the sensitive hunting and fishing grounds upon which the community depends for survival.²⁵² However, the money from tourists is creating jobs and opportunities in a community where they are desperately needed.²⁵³ Gjoa Haven is working to expand the Netsilik Heritage Center to house Franklin artifacts, funded by Parks Canada and the Arctic Research Foundation.²⁵⁴ The hamlet's leaders are working to carefully balance these competing priorities in order to preserve their community's identity while welcoming in the wider world.²⁵⁵ Hopefully, Franklin's legacy in the area will be a positive one for Gjoa Haven residents.

That the Franklin artifacts have significant cultural heritage value to Great Britain, Canada, and the Inuit is indisputable. Great Britain's primary claim over the artifacts as relics of the Royal Navy and the age of British exploration and empire has been reinforced by the exercise of its right to retain significant artifacts, although which artifacts it will keep remains to be seen. Within Canada, there has been clear tension between the Franklin expedition as a symbol of Canadian sovereignty and the Franklin expedition as experienced by the Inuit whose ancestors lived and interacted with the expedition and the region in which it was lost. This tension explains the struggle for ownership which has taken place between the two levels of Canadian government since the discovery of *Erebus* in 2014. Fortunately, however problematic the process of reaching a compromise of joint ownership and management between Parks Canada and Nunavut, this positive outcome has created a unique opportunity for the heritage of all three cultures to be acknowledged and respected as future exhibitions are curated, artifacts are discovered, and more answers to the riddle of the Franklin exhibition are uncovered.

1.3949814; *Into the Northwest Passage 2017*, ADVENTURE CAN., <http://www.adventurecanada.com/trip/Into-northwest-passage-2017> (last visited Sept. 8, 2018); *Infra* Part VII. § C Subsec. 1.

250. See Watson, *Franklin wreck fortunes*, *supra* note 248.

251. See *id.*

252. See *id.*

253. See *id.*

254. See *id.* at 241; see also Brockman, *supra* note 248; *As Franklin's Lure Brings People North, Gjoa Haven Seeks its Share of Tourism Dollars*, CBC NEWS (Sept. 17, 2017, 8:41 AM), <http://www.cbc.ca/news/canada/north/franklin-expedition-tourism-1.4293653>.

255. See Watson, *Franklin wreck fortunes*, *supra* note 248.

VII. ARCHAEOLOGICAL CONSERVATION OF THE ARTIFACTS

Once ownership over the Franklin Artifacts is resolved, Parks Canada archaeologists must navigate many archaeological protocols for the conservation and recovery of the shipwrecks and artifacts. This discussion will focus on the international conventions which provide benchmarks for proper shipwreck conservation that govern the various major issues which archaeologists will have to address when dealing with the Franklin wrecks and artifacts. Three international conventions dealing with the conservation of underwater cultural heritage (UCH) are applicable: UNCLOS, the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (CPUCH), and the 1999 *Charter for the Protection and Management of Underwater Cultural Heritage* promulgated by the International Council on Monuments and Sites (ICOMOS Charter).²⁵⁶

A. 1982 United Nations Convention on the Law of the Sea (UNCLOS)

The 1982 UN Convention on the Law of the Sea (UNCLOS) has been generally recognized as providing inadequate protection for UCH but needs to be discussed as it is the main source of international maritime law.²⁵⁷ Within UNCLOS, Articles 149 and 303 provide for treatment of archaeological and historical objects.²⁵⁸ Article 149 indicates,

All objects of an archaeological or historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.²⁵⁹

Problematically, Article 149 does not clarify which objects qualify as “archaeological” or “historical,” or which preferential rights are to be

256. See United Nations Convention on the Law of the Sea, *supra* note 44, at Art. 149, 303; CPUCH, *supra* note 169, at Annex, Rule 1; Int'l Council on Monuments and Sites [ICOMOS], *Charter on the Protection and Management of Underwater Cultural Heritage* (1996) [here ICOMOS Charter].

257. See United Nations Convention on the Law of the Sea, *supra* note 44, at Art. 149, 303; DROMGOOLE, *supra* note 46, at 23-24; see also FORREST, *supra* note 166, at 321-329; see also Laura Gongaware, Comment, *To Exhibit or Not to Exhibit?: Establishing a Middle Ground for Commercially Exploited Underwater Cultural Heritage under the 2001 UNESCO Convention*, 37 Tul. Mar. L.J. 203 (2012); see also Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, (2009).

258. See United Nations Convention on the Law of the Sea, *supra* note 44, at Art. 149, 303.

259. See *id.* at art. 149.

given to which States or how conflicting rights claims are to be resolved.²⁶⁰

Article 303 more specifically covers “[a]rcheological and historical objects found at sea,” but simply establishes a general State duty to “protect or preserve underwater cultural heritage in various maritime zones beyond coastal State jurisdiction.”²⁶¹ Further provisions of Article 303 left in place existing maritime law regimes without resolving existing conflicts of law.²⁶² UNCLOS therefore created a system of archaeological conservation in which “each state party has been left with the task of establishing its own legal regime for the protection of underwater cultural heritage and how to cooperate on its protection with other nations.”²⁶³ Thus, UNCLOS was primarily focused on the right of the nation-state to deal with UCH in whichever manner it felt was appropriate based on its own law. The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (CPUCH) is generally viewed as the international community’s answer to UNCLOS’s ambiguity towards historic shipwrecks and marine archaeological sites.²⁶⁴

B. 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage

Unlike UNCLOS, CPUCH sets forth archaeological benchmarks for all UCH projects based on the global concept of cultural heritage as the common heritage of humankind.²⁶⁵ CPUCH expressly focuses on the “protecti[on] and preserv[ation] of the underwater cultural heritage” that is “an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage.”²⁶⁶ However, CPUCH has been unsuccessful as an international convention, with only fifty-eight countries subscribing to it as of the time of this writing, because it sets forth its archaeological principles as mandatory rather than as permissive best practices.²⁶⁷ Canada has “yet to make a decision regarding ratification” of CPUCH.²⁶⁸ However, Parks Canada does follow the substantially similar principles set forth by the 1996 ICOMOS Charter on

260. See DROMGOOLE, *supra* note 46, at 31-32.

261. See FORREST, *supra* note 166, at 329.

262. See *id.* at 328; see also DROMGOOLE, *supra* note 46, at 35.

263. See Gongaware, *supra* note 257, at 205.

264. See *id.* at 205; see also, Vadi, *supra* note 257, at 863.

265. See CPUCH, *supra* note 169; DROMGOOLE, *supra* note 46, at 60, 126-7; *supra* VI. a.

266. See CPUCH, *supra* note 169, at Preamble.

267. See *id.*; DROMGOOLE, *supra* note 46, at 238; Vadi, *supra* note 257, at 866.

268. See PARKS CANADA, *supra* note 80, at Appendix 6.

the Protection and Management of Underwater Cultural Heritage, upon which CPUCH was largely based.²⁶⁹ Because the principles are presented in a permissive manner and the Charter is not internationally binding, it has been accepted by a far wider audience (as of today, ICOMOS has over 10,000 individual members, 320 institutional members, 110 national committees, and 28 international scientific committees).²⁷⁰ The two most important archaeological principles are discussed below with reference to differences between the ICOMOS Charter and CPUCH when necessary.

C. 1996 ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage

1. In Situ Preservation

Both the ICOMOS Charter and CPUCH find *in situ* preservation of UCH fundamentally important.²⁷¹ Shipwreck sites are distinct from terrestrial archaeological sites because “at the time of sinking, the wreck captures a point in time in history.”²⁷² If marine archaeologists can examine historic shipwreck artifacts *in situ*, they can make unique contributions to the historical record. However, CPUCH states “[t]he protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option” (emphasis added),²⁷³ while the ICOMOS Charter uses the more permissive “*should* be considered as a first option” (emphasis added).²⁷⁴ *In situ* preservation is encouraged in the belief that “archaeological deposits *may* be ‘safest’ left in the natural environment in which they are found.”²⁷⁵ UCH artifacts are waterlogged and require expensive conservation procedures to prevent them from rapidly deteriorating once they are brought to the surface.²⁷⁶ Because archaeological resources are limited, the *in situ* preservation preference

269. See ICOMOS Charter, *supra* note 256; DROMGOOLE, *supra* note 46, at 57.

270. See ICOMOS Charter, *supra* note 256.

271. See *id.*; See CPUCH, *supra* note 169.

272. See FORREST, *supra* note 166, at 340.

273. See CPUCH, *supra* note 169, at Annex.

274. See ICOMOS Charter, *supra* note 256.

275. See DROMGOOLE, *supra* note 46, at 315.

276. See *id.* at 319, FN 44 (2013); see also WATSON, *supra* note 9, at 270-272. For example, in the late 1970s, when an amateur archaeologist discovered a Franklin search ship, the *HMS Breadalbane*, he wanted a souvenir. Ignoring the pleas of the trained archaeologist accompanying him, he yanked off the ship’s wheel. The wheel was fractured and transferred to Parks Canada archaeologists, who had to keep it from disintegrating without the ability to use special conservation procedures for waterlogged artifacts. 30 years later, the wheel is still too fragile to be displayed and has cost over \$100,000 in conservation attempts.

ensures that any archaeological project to recover UCH has been thoroughly planned, arranged, and funded.²⁷⁷

However, UCH sites and artifacts are not safe from disturbance simply because they are located on the seabed; *in situ* preservation can leave a site exposed to “risk of illicit excavation” or storm damage.²⁷⁸ Therefore, recovering the artifacts is often the only definitive way to ensure that they do not disappear.²⁷⁹ For these reasons, *in situ* preservation of the *Erebus* and *Terror* artifacts would be quite problematic.²⁸⁰ For example, although the frigid water has kept both ships and their artifacts in a remarkable state of preservation, the summer after *Erebus* was discovered, underwater archaeologists identified artifacts of interest and then were forced to wait for five days while a severe storm hit the wreck site.²⁸¹ When they returned, there was zero visibility and “almost every artifact that had been documented had moved ... some artifacts that were just lying on the deck had disappeared.”²⁸² With each year that passes, the odds increase that another destructive storm will hit the wreck sites and scatter artifacts.

The wrecks and artifacts are also in danger from tourist expeditions to the wreck sites, which disturb the water and contribute to their deterioration.²⁸³ In January 2017, Parks Canada discussed teaming up with a tour company, Adventure Canada, which had created an “Out of the Northwest Passage” themed cruise whose itinerary included potentially snorkeling over the wreck of the *Erebus*.²⁸⁴ Perhaps because of the conservation issues raised, the tour company no longer includes a trip to the *Erebus* wreck. Instead, tourists will visit Beechey Island where three Franklin expedition sailors were buried, to “pay respects.”²⁸⁵ While this decision reflects an increasing awareness of the damage tourism expeditions can do to the wrecks, it is no guarantee that other cruise ship lines and tourism companies will not try to visit the wrecks themselves.

277. See DROMGOOLE, *supra* note 46, at 318.

278. See *id.* at 315-316; FORREST, *supra* note 166, at 341-42.

279. See *id.*

280. See WATSON, *supra* note 9, at 321; see also Beeby, Parks Canada, *supra* note 100.

281. See Maev Kennedy, *Artefacts from Franklin's Fateful Arctic Voyage to Go on Show in London*, THE GUARDIAN (July 6, 2017, 11:29 AM), <https://www.theguardian.com/culture/2017/jul/06/sir-john-franklin-arctic-voyage-greenwich-exhibition>; see also WATSON, *supra* note 9, at 323.

282. See *id.*

283. See Bob McDonald, *Discovery of Franklin Expedition Ships Pits Science Against Tourism*, CBC NEWS (Sept. 16, 2016, 5:23 PM), <http://www.cbc.ca/news/technology/terror-erebus-arctic-tourism-1.3765559>.

284. See *Cruise Ship Passengers to Visit HMS Erebus Wreck this Summer*, *supra* note 249.

285. See *Into the Northwest Passage 2017*, *supra* note 249.

However, the hope is that the Inuit Guardians stationed at the site will report any unauthorized ships and tourist expeditions during the times of year when the weather would permit access to the sites.²⁸⁶ Regardless of these precautionary measures, preserving the Franklin artifacts will be best accomplished by recovering the artifacts and conserving them on land, not *in situ*.

2. Prohibition Against Commercial Exploitation

The ICOMOS Charter and CPUCH both agree that commercial exploitation of UCH is “fundamentally incompatible with the protection and proper management of underwater cultural heritage” because “material recovered from an archaeological site should be kept together as a collection so that it is available for public display and research purposes.”²⁸⁷ Many archaeologists feel that a strong prohibition against commercial exploitation is essential because commercial artifact recovery from shipwreck sites for commercial sale has often resulted in irreversible damage or destruction of the sites and other artifacts.²⁸⁸ However, CPUCH’s blanket prohibition on “the involvement of commercially motivated organisations” was viewed by many to be too restrictive, as archaeological projects to recover UCH are prohibitively expensive and often require partnerships with commercial operators almost of necessity.²⁸⁹ Therefore, the CPUCH drafters compromised by including two exceptions to the prohibition.²⁹⁰ First, Proviso (a) allows “the provision of professional archaeological services,” which allows for the common practice of hiring professional archaeologists to provide archaeological assessments and other services.²⁹¹ Second, Proviso (b) provides guidance as to how to dispose of cultural artifacts without violating CPUCH.²⁹²

Many commentators find CPUCH’s utopian prohibition against commercial exploitation to be one of the main reasons why many states have not yet joined.²⁹³ Few states have the financial resources to implement CPUCH’s mandated wholly noncommercial approach to

286. See Kyle, *supra* note 152.

287. See CPUCH, *supra* note 169, at Annex; DROMGOOLE, *supra* note 46, at 210.

288. See *id.* at 211. For additional arguments against commercial exploitation of UCH, see *id.* at 219.

289. See *id.* at 233.

290. See *id.* at 211.

291. See CPUCH, *supra* note 169, at Annex, Rule 2(a).

292. See DROMGOOLE, *supra* note 46, at 235.

293. See *id.* at 238; Vadi, *supra* note 257, at 866.

recovering UCH.²⁹⁴ In fact, the Canadian Franklin search expeditions were partially funded by Shell Canada, a partnership which would have been prohibited if Canada had joined CPUCH.²⁹⁵ Second, upholding a purely noncommercial standard for archaeological excavation means that archaeologists who have previously assisted commercial operations could be sanctioned or punished by the archaeological community.²⁹⁶ As a result, “it is very difficult for private companies to hire archaeologists who are both qualified and satisfy professional ethics and the standards of the 2001 UNESCO Convention.”²⁹⁷ Therefore, CPUCH has made it quite difficult for States to transition from old models of dealing with UCH to a model that complies with CPUCH’s standards. The permissive, non-legally binding ICOMOS Charter has put forth the same principle in an aspirational format, which has allowed it to be adopted widely.

The ambiguity of UNCLOS’s rules, and the fact that Canada has not acceded to the more stringent rules of CPUCH, means that the Franklin artifacts will be dealt with under international law primarily according to the conservation principles set forth in the ICOMOS Charter and Canada’s internal archaeological policies. Fortunately, Canada can follow the conservation best practices set forth in the ICOMOS charter while leaving intact the commercial relationships which are practically necessary to the endeavor but would be prohibited by CPUCH.

VIII. CONCLUSION

We are finally gaining answers to the enduring mystery of the Franklin expedition, yet many questions still remain. It is not clear which significant artifacts will be claimed by Britain, nor whether the final resting place of the Franklin artifacts in Canada will be in a major Canadian city or in a tiny Nunavut town. However, the artifacts that remain in Canada will be jointly managed by Parks Canada and Nunavut: a significant victory for the Inuit, which came only after Parks Canada mishandled the situation and the Inuit successfully asserted the rights for which they had campaigned for decades. The legal dispute over controlling the artifacts came as a result of overlapping cultural heritage claims based on the variety of symbolic and actual roles the expedition has played in British, Canadian, and Inuit culture. As ownership claims continue to be further defined, additional artifacts recovered, and future

294. *See id.* at 866. For further arguments about the positive side of allowing commercial exploitation of UCH, *see* DROMGOOLE, *supra* note 46, at 220.

295. *See* Cracuin, *The Disaster of Franklin*, *supra* note 84, at 191, 193-94.

296. *See* Gongaware, *supra* note 257, at 209-10.

297. *See id.* at 203, 210.

exhibitions planned, each culture will have the opportunity to refine its narrative about the expedition. Under the ICOMOS charter, it is likely that all of the artifacts will be removed from their *in situ* locations and conserved on land in Canada to be displayed for future generations.

When Franklin and his crew set off from England, they were filled with “good humour” and excitement for the voyage ahead of them.²⁹⁸ As the ice master Thomas Blanky wrote in his last letter home to his loved ones, “We are all in good spirits, one and all appearing to be of the same determination, that is, to persevere in making a passage to the northwest . . . do not allow any person to dishearten you on the length of our absence, but look forward with hope, that Providence will at length of time restore us safely to you.”²⁹⁹ Sadly for Blanky and his fellow crew members, Providence had a very different fate in store for them than the triumph of discovery; however, they have achieved a different kind of immortality in the modern world.

298. See WATSON, *supra* note 9, at 34.

299. See *id.* at 37.