

Indigenous human rights and knowledge in archives, museums and libraries: Some International Perspectives with specific reference to New Zealand and Canada".

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**ABSTRACT:** This article highlights the extent to which international law has changed rapidly in recent years in relation to the rights of Indigenous peoples generally, and in particular how this impacts upon the legal status of traditional knowledge and culture. It reviews the recognition of the unique legal status of Māori in Aotearoa and Aboriginal peoples in Canada in relation to self-determination and how their changing place within these nations are affecting the operations of museums, libraries and archives as case studies, illustrating some of the key legal and practical challenges that now impinge upon the work of archivists and related professionals in many countries.

**KEY WORDS:** Indigenous Records, Indigenous Human Rights, International Indigenous Law, Indigenous Culture, Māori, Aboriginal.

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## INTRODUCTION

The United Nations estimates that there are over 370 million Indigenous peoples in 70 countries around the world. Far too many of them are marginalized by settler governments, impoverished and discriminated against by the societies that now assert dominion over their traditional lands. Most are sublimated as tribal peoples within modern states that inherited previous colonial boundaries that bore no connection to the limits of traditional territories, often leaving them divided by state borders and as small minorities with limited political influence in national governments. Fundamental ethical issues exist concerning State and international obligations to alleviate their poverty, restore to them control over their territory and provide reparations for the injuries they have suffered to date (for example the *Declaration on the Rights of Indigenous Peoples* (DRIP) which clearly expresses the principle that States must give reparations for injuries caused to Indigenous populations). The purpose of this article, however, is neither to excavate the depths of the violations of their rights over the decades of colonization in any one

country or internationally; nor is it to canvass the range of domestic and international law arguments that would compel a change in circumstances (Lenzerini 2008). Instead my aim is to illuminate some international and comparative dimensions of ensuring respect for Indigenous cultural rights.

One of the common elements amongst Indigenous peoples globally is their deep spiritual and cultural links to traditional lands and waters. They often possess religious obligations to preserve and protect the environment in which they live, and that duty can be understood as a legal imperative under their traditional laws. While there are naturally many cultural, linguistic and lifestyle differences among Indigenous nations, a relatively common perspective is a worldview in which human beings are merely one element of nature - with no greater or lesser importance in the cosmos than plants, animals, rocks, sea creatures or waters - as all are alive, have a role to play and possess spiritual value. This view of the world means that distinctions between animate and inanimate objects are of far lesser significance than they are in many other societies. The living nature of inanimate things, and the spiritual element imbued within many such objects, has profound implications for the work of archivists, librarians, art curators, museumologists, and others who spend their days devoted to the vital tasks of preserving and/or displaying 'objects' of varying natures.

In this article I hope to highlight the extent to which international law has been changing rapidly in recent years in relation to the rights of Indigenous peoples generally, and in particular how this impacts upon the legal status of traditional knowledge and culture. I will then briefly review the recognition of the unique legal status of Māori in Aotearoa and Aboriginal peoples in Canada in relation to self-determination and how their changing place within these nations are affecting the operations of museums, libraries and archives as case studies, so to speak, to illustrate some of the key legal and practical challenges that now impinge upon the work of archivists and related professionals in many countries. Given space limitations, my goal is merely to introduce the reader to a range of ideas and material that may trigger a desire to pursue how their work has, or should, change to respond to the rapid evolution that has occurred in the place of Indigenous peoples globally.

## INTERNATIONAL INDIGENOUS RIGHTS LAW

One can suggest that Indigenous peoples have been a major trigger for the development of what can be regarded as international law through their sheer existence. The spread of some peoples (particularly Europeans, infamously from the 15<sup>th</sup> Century onwards, although they are not alone in this behaviour) seeking to expand beyond their own lands by conquering or colonizing other peoples compelled attention toward the legality of such actions. It meant that principles needed to be crafted that dealt with the rights of the ‘discoverer’ as well as that of the ‘discovered’. There was also benefit to be had by the discoverers if they could minimize military and economic conflict among those seeking to claim new lands. These different goals lead to protracted debates among scholars, lawyers and governments with occasional disagreements and jealousies resulting in warfare among the colonial powers. Indigenous peoples were not included within these deliberations in the 16<sup>th</sup> through much of the 20<sup>th</sup> centuries. They were the recipients of the outcomes, however, as colonizing nation states developed rules that favoured their claims of ownership through conquest, settlement of so-called vacant lands, (or *terra nullius*, even though long occupied by other peoples with their own sovereign regimes) and the doctrine of discovery (McNeil 1989).

Having sorted out the rules of legitimating colonial domination relatively early on after Christopher Columbus “sailed the ocean blue in 1492”, international law largely turned its attention away from Indigenous peoples (Morse 2006 pp. 1-168; Rodríguez-Piñero 2005). Even the decolonization era after World War II saw the disappearance of most of the remaining overseas colonies of the European powers but with no attention paid to Indigenous peoples distinctly, even within new countries being liberated. Formal international recognition of Indigenous people as a distinct category, rather than as members of minorities generally or as victims of racial discrimination, had begun in the context of Indigenous workers in the 1920s through Conventions of the International Labour Organization (ILO) and then as peoples through ILO Convention 107 in 1957 and ILO Convention 169 in 1989. The 1960s and 1970s witnessed the emergence of what has more recently been labeled ‘civil society’ by average citizens calling for the end of state sanctioned violence and injustice. The populace in many cities took to the streets and were demanding the truth through the full disclosure of the extent of injustice and the

identity of those murdered or ‘disappeared’; calling for reparations to be provided to the victims of state repression; and declaring the desperate need for comprehensive, accurate and publicly accessible records concerning human rights abuses to be created through the campaigns for the ‘Nunca Mas’ of Argentina and the ‘Never Again’ of Holocaust survivors.

Indigenous peoples in many nations benefited from these campaigns as their issues gained some traction and their organizations acquired greater profile in the mass media with national governments. Their invisibility started to disappear in the 1970s and changed drastically in the 1980s through developments in the International Labour Organization (ILO), the United Nations (UN), and the Organization of American States (OAS). Thus, the position of Indigenous peoples around the world have begun to be formally recognized in a more positive light as having a distinct status internationally as well as having unique individual and collective human rights. This change has been evidenced most dramatically by the adoption of the Declaration on the Rights of Indigenous Peoples (DRIP) by the UN four years ago (2007).

### ***The United Nations Declaration on the Rights of Indigenous Peoples***

After 25 years of long and tortuous formal debate and discussion the Declaration on the Rights of Indigenous Peoples was finally adopted overwhelmingly by the UN General Assembly on September 13, 2007 (United Nations, General Assembly 2007). This Declaration was developed after the contributions from the Working Group on Indigenous Populations starting in 1982, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (subsequently renamed the Sub-Commission on the Promotion and Protection of Human Rights), the efforts of another Work Group on the Draft Declaration for a dozen years, the endorsement by the Human Rights Council (formerly the Commission on Human Rights) in June of 2006, and the active engagement by over 100 Indigenous organizations (United Nations Permanent Forum on Indigenous Issues 2006b). It was a profound and momentous achievement to reach the stage where distinctive and collective rights of Indigenous peoples have been recognized by **the** global body representing humanity. The UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples at the time, Dr. Rodolfo Stavenhagen, stated:

The Declaration reaffirms that indigenous peoples, both individually and collectively, enjoy all rights already recognized at the international level, and that the special circumstances of their existence as discriminated peoples and long dispossessed of their ancestral resources, demand particular attention by States and by the international community (United Nations 2007).

Under international law, the DRIP is not legally binding on States despite its adoption, as it can only be considered “soft law,” therefore having little direct legal effect (though they do retain normative significance) (Birnie and Boyle 2002 pp. 24-27). On the other hand, declarations like the DRIP are not intended to be binding as covenants and conventions are (where once ratified, States are obliged to fulfill certain obligations), and are even distinguishable from resolutions, although possessing far greater normative weight as reflecting principles of the UN Charter. On the other hand, declarations can become a baseline for universal affirmation of rights to which Member States are expected to adhere; invariably they are shown to be a source of moral and authoritative force. The long-standing Universal Declaration of Human Rights (UNDHR) of 1948 is one example where a mere declaration has been transformed over time into a bedrock international human rights instrument. Eleanor Roosevelt, who was then a member of the former UN’s Commission on Human Rights, described the weight and status of the UNDHR most eloquently:

It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of basic principles of law or legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations. [...] *This declaration may well become the international Magna Carta of all men everywhere.* [emphasis added] (Roosevelt 1948).

The *Declaration on the Rights of Indigenous Peoples* reflects the views of the vast majority of nation states regarding what constitutes globally accepted principles as prevailing standards, and not just future aspirational or hortatory goals. It is one significant step forward in the right direction to assert express rights for Indigenous peoples, albeit it presently remains without formal legal force and effect (International Law Association 2010). Notably, arguments do exist

that while the DRIP as a whole is not binding, many of its provisions reflect current customary international law and in that latter capacity are binding on all states, whether a particular state may have endorsed it or not. The Declaration confirms the relevance of individual human rights and non-discrimination provisions from other instruments as applying to Indigenous peoples within the context of newly enumerated collective rights principles.

There is also no adjudicatory body that plays a role akin to the UN Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR); or even a monitoring agency similar to the Committees of Experts that supervise state reporting and adherence to the International Convention on the Elimination of All Forms of Racial Discrimination (which also can receive individual complaints) and the Convention on the Elimination of All Forms of Discrimination against Women. The UN Permanent Forum on Indigenous Issues (UNPFII) is a body that can examine progress and developments in the area of indigenous rights annually, however, it cannot demand periodic State reports and formally challenge State performance in this area. The UNPFII has, however, decided on its own initiative that it can issue General Comments in the same manner as the Committees of Experts do with some regularity. There is no formal mechanism for UN sanctioned oversight of state behavior, although Articles 41 and 42 of the DRIP itself call on the United Nations and its agencies to promote compliance with its overall terms.

State oversight is thus quite limited indeed and is largely dependent upon pressure from Indigenous peoples organizations and civil society generally, and a vigilant media shining a spotlight on any gross human rights violations. Should the principles enunciated in the DRIP be considered customary international law though, and achieve a status similar to that obtained by the UNDHR, they would then become officially binding on States. It must be recognized though that nowhere in the world are Indigenous peoples as such recognised as member states of the international community. As a result, they do not have voting rights at the UN or the ability to sue another state for breach of international law before the International Court of Justice (ICJ). Lack of standing before the ICJ leaves Indigenous peoples unable to sue a state for breach of customary international law or explicit treaty commitments in any event. Nonetheless, the DRIP is expected to impact dramatically upon the lives of the 370 million Indigenous peoples

worldwide by virtue of most States deciding to honour the obligation to recognize the principles and rights declared in its articles and to work toward implementing these new global standards (United Nations Permanent Forum on Indigenous Issues 2006a).

Articles 3 and 4 confirm that Indigenous peoples possess the right to self-determination (DRIP Articles 3, 4). Whether Indigenous peoples are eligible to be included in the phrase “all peoples” recognized by the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR Article 1(1)) as possessing this right has been in dispute for decades. This right *qua* communities or nations presupposes regulatory or governance authority that would include the right to manage and have control over local resources, such as water. The right to life, physical and mental integrity, as well as liberty and security of the person is provided for under Article 7(1) (DRIP) along with a prohibition on the “destruction of their culture” and “their cultural values” in Article 8 (DRIP Article 8(1) and 8(2)(a)). These provisions do link closely to the aforesaid spiritual injury and mental health harm caused when access to traditional territories and sacred objects are disrupted. Paragraph 7 of the Preamble constitutes a clear acceptance of the necessary holistic understanding of the position of Indigenous peoples, when it states:

*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources (DRIP Preamble, at para 7),

Paragraph 7 then finds further buttressing within the body of the Declaration through Article 5. Furthermore, Article 25 stipulates the following:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard (DRIP Article 25).

The DRIP also allows for Indigenous peoples to assert their right to development that is consistent with their spiritual, cultural and historically unique needs and aspirations for the present and future (See in particular DRIP Articles 3, 11, 23, 26(2), 31, 32). It is further

noteworthy that Article 26 confirms the indigenous right to control traditionally owned or occupied lands, which is paramount in ensuring Indigenous survival as authority over the territory is inextricably linked to a close, spiritual relationship with the land.

International recognition of the indigenous right to maintain and revive traditions and ceremonies is especially relevant to the work of archivists, librarians and museum curators. The Declaration speaks both to the Indigenous rights in this regard as well as state obligations in Article 11, which reads:

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
  
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

This goal of this Article acquires further strength through Article 12, which states:

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned (DRIP Article 12).



A further provision, Article 13, concentrates upon protecting intangible indigenous heritage by affirming the right to retain and transmit “their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons” (DRIP Article 13). International law has recognized the right to culture and its vital character in influencing individual and collective identity in many treaties (United Nations Education, Scientific and Cultural Organisation 2003; United Nations Education, Scientific and Cultural Organisation 2005; International Labor Organisation Convention No. 169 Article 2; International Covenant on Economic, Social and Cultural Rights Article 15; International Convention on the Elimination of All Forms of Racial Discrimination Article 5(e)(vi)). If a conflict does arise, however, between the collective right to control culture and individual intellectual property rights regarding the products or knowledge from such cultures, then a difficult terrain is entered in which neither the law nor the balancing act among competing rights is certain. Article 31 arguably helps to tip the balance in favour of the collective right, at least when the conflict relates to matters that can be regarded on a case-by-case basis as essential to the survival of cultural heritage. This Article declares:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights (DRIP Article 31; Daes 1993).

Another important aspect of the DRIP is its frequent reiteration of the vital principle that actions can only be taken by the state and its agencies if they have previously acquired the “free, prior and informed consent” (FPIC) of the Indigenous peoples who will be effected by this action. This principle of FPIC is strewn through the Declaration, but its relevance to the scope of this paper is particularly evident by its inclusion in Article 11(2). The obligation on states to take “effective measures” to protect rights or provide methods of redress is also common and again is relevant to the public service working in safeguarding Indigenous objects and traditional knowledge.

Notwithstanding these universally declared rights upheld and endorsed by the UN itself and 144 of its Member States (there were 11 abstentions), four nations voted against the Declaration at the General Assembly (Australia, Canada, New Zealand and the USA) for varying but largely similar reasons and remained hostile to it for several years. Canada was the most explicit and detailed in its rejection and continued to retain legal rationales on government websites by statements such as “the Declaration is a flawed instrument that lacks clear, practical guidance for States,” and that “[t]he text is not balanced, and suggests that Indigenous rights prevail over the rights of others, without sufficiently taking into account the rights of other individuals and groups, and the general welfare of society as a whole” (Indian and Northern Affairs Canada 2008). Each of the four nations, however, did place some caveats or limits on the import of their ultimate approval of the Declaration, as did a number of other countries when casting their affirmative votes at the UNGA on 13 September 2007, thereby leaving questions open as to the degree to which each of these countries has fully embraced its terms.

There are other key international Instruments that go to the body of law known as Indigenous Human Rights. Together with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) make up the commonly labelled “International Bill of Rights.” One of the many focal points of the ICCPR is to protect against discriminatory State practices. Indigenous peoples are not mentioned in the ICCPR and are only included implicitly in Article 27, which guarantees “persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and

practise their own religion, or to use their own language.” There is not space in this paper to outline the impact of Article 27 and the key elements of international human rights law as it relates to Indigenous peoples, and this is set out extensively elsewhere (ICCPR 1976 Article 27; Morse 2006). The scope of Article 27 and the balance of the ICCPR is clearly far narrower than the DRIP, but it does have added teeth through its complaint mechanism that in appropriate cases may trigger more effective state action to meet Indigenous concerns.

International law is of course not the only, or even the main, vehicle that can lead countries to seek partnerships with Indigenous peoples residing within their borders. The next section will examine the experiences in Canada and New Zealand that are directly relevant to the topic at hand. Most of these positive initiatives predate the passage of the DRIP, so they have been primarily influenced by both domestic law and political dynamics, however, the emerging international norms through ILO 169 of 1989 and the prolonged discussion on the DRIP have no doubt had some modicum of influence as a further factor in fostering change.

## **NATIONAL REPOSITORIES OF OUR COMMON HISTORY, KNOWLEDGE & CULTURE**

The European tradition has been for the nation state to establish official national libraries, museums and archives in order to preserve historical records and artifacts for future generations and governmental needs. Over time this function has also evolved to collect objects from other jurisdictions, and particularly those from what could be regarded as different or ‘exotic’ as curiosities, and to place many of these local and foreign artifacts on display for their educational value. European colonizers were often avid collectors for the mother country as well as for personal and local public collections. The latter have evolved over time into regional and national museums and libraries that have been supplemented by the proper storage of government records. We have been witnessing a profound transformation in information technology in recent years that has generated dramatically new ways to record, store, preserve and exhibit artifacts.

Similarly, the expectations of people to have ready access to state collections is challenging the priority that many curators had given, or were ordered to provide, to the preservation of records and artifacts as the main, if not sole, priority. Compounding the challenges faced by those employed in these institutions is the growing sensitivity toward how objects and information about those items are conveyed. Not surprisingly, governments have felt compelled to overhaul and modernize the legislative regimes that provide a foundation to these state bodies. Statutory and policy reforms have been required to enable the necessary adaptation to reflect these societal changes and the global world in which we live today.

The major concern of this paper is to connect these changes occurring more generally with the concrete concerns of Indigenous peoples to implement their inherent right of self-determination as peoples and to press the state to live up to its responsibility as guardians and trustees of indigenous traditional knowledge when this wisdom and cultural values are held within state libraries, museums and archives. Developments in policy and legislation especially over the past two decades have influenced how state institutions are dealing with indigenous traditional knowledge. Some national and regional libraries, museums and archives have incorporated indigenous values and principles directly in their governance structures and procedures. Others have created protocols to guide their relationships, codes of ethics to regulate the responsibilities of professional workers within these institutions, or created consultative bodies to share their advice and criticism about the operations of the government bodies. The very foundational philosophy of many of these government ‘owned’ protectors of the legacy of the past for the illumination of the future have been redesigned by the desire, if not necessity, to engage with Indigenous peoples and their different perceptions.

These philosophical and programmatic changes have been radically transforming the way traditional indigenous knowledge is held and managed by at least some state libraries, museums and archives in both Aotearoa/New Zealand and Canada. These two countries have each encountered a number of similar issues concerning how they handle historic objects and traditional knowledge in general. While there are some commonalities in the shifts that have occurred, there have also been many differences in how the challenges have been addressed by

state libraries, museums and archives. Both countries have adopted, through policy and legislation, varying degrees of co-management models with Indigenous peoples. The inherent rights of Indigenous peoples regarding their traditional knowledge have resulted in differing responsibilities. This section will look at domestic legislation and policies applied by these three types of institutions concerning Indigenous treasures and traditional knowledge in each jurisdiction.

## **NEW ZEALAND**

Aotearoa, as New Zealand is called in te reo Māori (the Māori language), was formed through the direct negotiation of the Treaty of Waitangi in 1840 (Treaty) by representatives of the British Crown and a number of Māori iwi (tribes) through their chiefs. The Treaty documents, in both English and te reo Māori, were subsequently carried around much of the country for the endorsement of further chiefs resulting in over 500 chiefs signing the te reo Māori version. The Treaty replaced the Declaration of Independence of 1835 that had been issued by a union of some Māori iwi and embraced by Great Britain. The Treaty created a new bicultural nation at its core that was intended to reflect British responsibility to deal with foreign nations and immigrants, to respect Māori self-determination and to provide an environment in which equal rights of British citizenship would benefit all. The Treaty was to reflect the unique relationship between Māori and the Crown as clear partners in the redesigned governance of this territory. The drive to honour its spirit, as well as its precise terms, has meandered through a generally tortuous path over the intervening 171 years.

The principles of the Treaty of Waitangi, or certain of its constituent parts, have been incorporated in contemporary times into national statutes and governmental policy. Legislative enactment and policy reform have developed to reflect the bicultural and bilingual nature of Aotearoa/New Zealand based on the principles of consultation, co-operation and participation (Williams 2001 p. 101). Fundamental differences of perspective regarding what the Treaty actually said have plagued much of New Zealand's history. Relatively quickly, the colonists forgot the commitment to partnerships and the precise meaning of the text in te reo. Instead, the English version was relied upon as if it was the only one, and even its clear wording was too

often ignored. The emergence of heightened political activism among Māori in the 1970s, along with a revival of attention to the actual words used in both versions, led to a greater focus on what the Treaty really meant when negotiated and in contemporary terms. The import of the linguistic differences between the two versions was a matter that ultimately could only be resolved through litigation. The decision of the Court of Appeal in *New Zealand Māori Council v Attorney-General* ([1987] 1 NZLR 641) settled this issue by declaring that the “focus is on the spirit rather than the letter of the Treaty, and on the adherence to the principles rather than the terms of the Treaty” (*New Zealand Māori Council v Attorney-General* ([1987] 1 NZLR 641 p. 62). The Court made clear that an overarching principle of the relationship was to function as partners. Adhering to this judicial direction has not been easy or smooth, however, there have been some noted successes in which specific legislation declares it is based on the principles of the Treaty. One of the best examples is the landmark legislation that was a global leader in taking a holistic and environmentally sensitive approach to all aspects of land use planning and natural resource development. The Resource Management Act 1991 states that any persons or bodies exercising functions under the Act “shall take into account the principles of the Treaty of Waitangi”. (Resource Management Act 1991, s. 8; Williams 2001 p. 106). These developments have opened the door for broader public discussion and debate about the continuing place of traditional Māori law, and scope for its ongoing evolution, in the 21<sup>st</sup> Century (New Zealand Law Commission Study Paper No. 9, Maori Custom and Values in New Zealand Law 2001).

State libraries, museums and archives have sought over the past few decades to implement the principles of the Treaty through their policies. The role of these institutions has had to change in order to adhere to their enabling legislation and to take into consideration a key focus of the New Zealand Government: “To Strengthen National Identity and Uphold the Principles of the Treaty of Waitangi” (Museums Aotearoa 2005). It has been particularly appropriate for the National Archives to do so as it is the holder of the English and te reo Māori originals of the Treaty. This overall governmental objective is premised on “our identity in the world as people who support and defend freedom and fairness, who enjoy arts, music movement and sport, and who value our cultural heritage; and resolve at all times to endeavor to uphold the principles of the Treaty of Waitangi” (Museums Aotearoa 2005).

The change among state institutions is reflective of the growing influence of Māori in all social, political and economic sectors of society. Māori represent over 15% of the population; held an estimated \$16.5 billion of collectively owned assets in 2005; 23 Māori individuals are Members of the current Parliament; and Māori are leaders in all parts of the country. Furthermore, the changing patterns of accessibility to information through technological innovation have meant these institutions have needed to adjust the manner in which information is preserved, collected and exhibited. Consequently, practices and procedures have developed that aim to foster positive working relationships with Māori promoting the principles of consultation, co-operation and partnership.

The official policies of state libraries, museums and archives have evolved in recent years within a framework that seeks to express Māori values, culture and concepts through mātauranga Māori including respect for the pursuit of tikanga Māori (proper protocol and tradition). Mātauranga Māori has been interpreted as:

...a dynamic and evolving system of knowledge (te kauwau runga and te kauwae raro) used by tangata whenua (people of this land by right of discovery) to interpret and explain the world in which they live. It is framed by the whakapapa (genealogy) of all things and whanaungatanga (kinship connections) between them. Examples of mātauranga Māori include:

- the oral histories of whanau (families), hapu (extended families), and iwi (tribes)
- karakia (prayers and incantations)
- waiata (songs) (Johnstone 2006 p. 3).

State libraries, museums and archives have been trying to integrate mātauranga Māori through facilitating “valuable partnerships, dynamic and innovative exhibitions, and programs and storylines relating to taonga [treasures or prized possessions] and local histories” (Johnstone 2006 p. 4). The inclusion of paying attention to mātauranga Māori is explicit recognition by these state institutions that Māori are the tangata whenua as the original peoples of

Aotearoa/New Zealand. Mātauranga Māori has helped to inform the application of proper procedures utilised by these institutions to regulate protocol, codes of ethics, the management of taonga and the employment of staff.

### **The Major Museums in New Zealand**

The role of museums has shifted from a physical home for important objects, only a small proportion of which might ever be on public display, into institutions that must function in the face of the advancement of technology. The creation of mini-museums, travelling collections, community facilities and virtual museums generates new opportunities to rethink the role of museums in the 21<sup>st</sup> century. The presence of digital technologies, social media, co-creators of new material and other startling changes almost overnight could be seen to clash with growing recognition of the significance of traditional knowledge. On the other hand, that latter recognition is arguably even more essential than ever for Indigenous peoples, as well as the broader society as a whole, before such knowledge diminishes. Museums have been directed to adapt to these changes and have chosen to do so in order to remain integral public institutions in contemporary society. The Museums of Aotearoa have adopted the following definition:

...a museum is an institution which is primarily engaged in collecting, caring for, developing or interpreting the natural or cultural heritage of Aotearoa/New Zealand. For the avoidance of doubt the term includes marae and exhibition galleries or centers, which are maintained on an ongoing basis for other institutions (Museums Aotearoa 2005 p. 4).

This description reflects the evolution of museums in New Zealand from a function based on preserving and collecting objects in large, impressive edifices that were ‘distinctly western cultural inventions and preoccupations’ (Kreps 2003 p. 1) designed for a non-Indigenous audience. Contemporary museums have been attempting to transform themselves so as to incorporate a place in society as educator, promoter of respect and appreciation of different cultures, entertainer and central figure in preserving – or establishing - a national identity.



In Aotearoa/New Zealand museums perform a crucial role in assisting the ability of generations of New Zealanders to ‘learn about their identity as individuals by enabling them to seek out and relate to family connections, and to establish their place as part of local and regional communities’ (Museums Aotearoa 2005 p. 5). Of particular significance to this paper, museums are vital in aiding our understanding of the Treaty of Waitangi and the development of Aotearoa/New Zealand as a bicultural nation in what is increasingly becoming recognised as a multicultural society (Museums Aotearoa 2005 p. 5).

A number of museums throughout the country have been developing policies that are intended to reflect the bicultural heritage with the incorporation of mātauranga Māori. Further, some museums have acknowledged the vital role that Māori possess in establishing a correct interpretation and management of taonga. Consequently, leading museums have promoted the principle of partnership as their guiding philosophy so as to ensure that there is full consultation and co-operation with the specific iwi that possess katiakitanga (guardianship) authority regarding any taonga presented in exhibits, as well as concerning the preservation of the objects in the permanent collection (Museums Aotearoa 2003 p. 3).

The development of the relationship and partnership with Māori is based on the understanding that “museums are the ‘guardians’ or ‘kaitiaki’ of the collections and knowledge they hold on behalf of communities” (Museums Aotearoa 2005 p. 5). Modern museums now see themselves as the guardians or trustees of taonga and, as such, are in a moral if not legal sense obligated to negotiate proper agreements that are consistent with this trustee role (Museums Aotearoa 2003 p. 4). This approach equally applies in relation to past or present acquisition of taonga or treasures, whether of historical, cultural or contemporary value, as they must be “obtained with the views of the appropriate tangata whenua in order to avoid competition and conflicts of interest” (Museums Aotearoa 2003 p. 4). Museums must be cognizant of this changed situation when accepting donations from institutional benefactors or from individuals as well as through their purchasing policies.

## **Auckland Museum**

The Auckland Museum has been in continuous operation since its establishment in 1852, housing the largest collection of Māori material in the country. The Auckland War Memorial Museum Act 1996 provides a statutory base for the governance and the practices of the Museum. The governance policies focus on four areas: (1) the proper management of the collection; (2) corporate services; (3) gathering knowledge; and (4) the sharing of knowledge (Talakai 2007 p. 48). These policies in recent years have been modified to encompass Māori cultural values and precepts.

The Auckland War Memorial Museum Act 1996 reassigned the governance of the former Institution to the Auckland Museum Trust Board (Auckland War Memorial Museum Act 1996). The Trust Board's most important responsibility is the "trusteeship and guardianship of the Museum, and its extensive collections of treasures and scientific materials" (Auckland War Memorial Museum Act 1996). Additionally, the Act established a Māori Committee, called the Taumata-a-Iwi or Taumata, consisting of representatives of the iwi (the tangata whenua) from around the Auckland region, who are mandated to advise the Trust Board on the management of taonga in the possession of the Museum (Auckland War Memorial Museum Act 1996, s. 16 (8)).

The Taumata, the Museum and Māori people work together to ensure "policies will reflect the aspirations of both Treaty partners by acknowledging that existing and proposed policies will be reviewed by the Taumata-a-Iwi and recommendations to the Auckland Museum Trust Board" (Auckland Museum Taumata-a-Iwi a). As such, the Taumata is authorized under the Auckland War Memorial Museum Act to offer advice and make recommendations on the following: custodial and guardianship policies, staffing policies, display policies and development policies (Auckland War Memorial Museum Act 1996, s. 16 (8) (a) - (d)). Through these roles the Taumata, functioning as kaitiaki for the Museum, are expected to:

- i) monitor the management – custody, care, display, accessibility and development – of their taonga within the museum
- ii) facilitate repatriation of all whakapakoko [mummies], uru moko [shrunken, tattooed heads] and koiwi [human skeletons] (Auckland Museum Taumata-a-Iwi a)

The Auckland Museum Trust Board carries a mandate as kaitiakitanga, to protect the taonga in its possession by:

- i) safeguarding mana whenua [power derived from the traditional territory] and the lore of Māori
- ii) safeguarding the tapu (spiritual restrictions) of the Museum's war shrines
- iii) providing appropriate management – custody, care, display accessibility and development – of all taonga
- iv) providing all staff and visitors with a culturally safe environment
- v) taking affirmative action in recruitment, training and educational (primary, secondary and tertiary) programs, which will lead Māori people into professional careers in New Zealand's culturally integrated museums.

It is through this governance framework that the Auckland Museum Trust Board and the Taumata-a-Iwi strive to respect and reflect the goal of biculturalism by attempting to ensure that both parties do in fact, and not just in name, adhere to the principles of the Treaty (Auckland Museum Taumata-a-Iwi a). Therefore, the fundamental principles of partnership, trusteeship and active protection of prized possessions are upheld in the management and utilization of taonga (Auckland Museum Taumata-a-Iwi b).

### **Te Papa Museum**

Te Papa Tongarewa Museum of New Zealand opened in 1998, incorporating the former National Art Gallery and the National Museum (Museum of New Zealand Te Papa Tongarewa Act 1992, s. 5 (2)). Te Papa, as it is most commonly called, is really the only national museum as such and it has five main collection areas: Arts, History, Pacific, Taonga Māori and the Natural Environment (Museum of New Zealand Te Papa Tongarewa). The official purpose of this national Museum is described by its founding statute as being to provide a:

...forum in which the nation may present, explore, and preserve both the heritage of its cultures and knowledge of the natural environment in order better –

- (a) to understand and treasure the past, and
- (b) to enrich the present; and
- (c) to meet the challenges of the future (Museum of New Zealand Te Papa Tongarewa Act 1992, s. 4).

The Museum of New Zealand Te Papa Tongarewa Board, in fulfilling its functions, must do the following:

- a) have regard to the ethnic and cultural diversity of the people of New Zealand, and the contributions they have made and continue to make to New Zealand's cultural life and the fabric of New Zealand society:
- b) endeavor to ensure that the Museum expresses and recognises the mana and significance of Māori, European, and other major traditions and cultural heritages, and that the Museum provides the means for every such culture to contribute effectively to the Museum as a state of New Zealand's identity:
- c) endeavor to ensure that the Museum is a source of pride for all New Zealanders (Museum of New Zealand Te Papa Tongarewa Act 1992, s. 8 (a) - (c); see also Museum of New Zealand Te Papa Tongarewa Annual Report 2009-10 p. 24).

These mandatory functions clearly direct and influence the way the bicultural policy of the Museum is articulated and how it is implemented on a daily basis. The Museum's bicultural policy states:

Biculturalism at Te Papa is the partnership between Tangata Whenua [the people of the land or Māori] and Tangata Tiriti [the people of the Treaty, i.e., the Crown or settlers] recognising the legislative, conceptual, and Treaty framework within which the Museum operates as well as reflecting international developments. This framework provides the mandate for the Museum to express and celebrate the natural and cultural

diversity of New Zealand. It acknowledges the unique position of Māori in Aotearoa New Zealand and the need to secure their participation in the governance, management, and operation of the Museum of New Zealand Te Papa Tongarewa (Museum of New Zealand Te Papa Tongarewa Annual Report 2009-10 p. 26).

Te Papa Museum is explicitly instructed to work together with both the tangata whenua and the tangata tiriti to formulate its governance policies in a way that gives a strong voice to both treaty partners. The understanding of mātauranga Māori has been that it is the traditional knowledge that must be incorporated in the way in which Te Papa displays the country to its own citizens and to the world. This requires that it must develop a mechanism through which an environment for iwi and Māori communities has been created so that they can be involved in the management of taonga in a meaningful way (Johnstone 2006 p. 4).

#### **State Libraries and Aotearoa/New Zealand**

The National Library of New Zealand, or Te Puna Mātauranga o Aotearoa, was established in 1965 bringing together the General Assembly Library, the Alexander Turnbull Library and the National Library Service. The primary purpose of the National Library as stated in the National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003, s. 7 is to:

- s. 7 ...enrich the cultural and economic life of New Zealand and its interchanges with other nations by, as appropriate, -
- a) collecting, preserving, and protecting documents, particularly those relating to New Zealand, and making them accessible for all the people of New Zealand, in a manner consistent with their status as documentary heritage and taonga; and
  - b) supplementing and furthering the work of other libraries in New Zealand; and
  - c) working collaboratively with other institutions having similar purposes, including those forming part of the international library community.

The National Library has the following responsibilities to help fulfill the aforementioned goals (National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003, s. 9 (1) (a) - (b)):

- s. 9(1)(a) to develop and maintain national collections of documents, including a comprehensive collection of documents relating to New Zealand and the people of New Zealand; and
- b) to make the collections and resources of the National Library accessible in a manner and subject to conditions that the Minister determines, in order to provide for the most advantageous use of those collections and resources.

The National Library has sought to foster positive relationships with Māori generally and iwi in particular through Te Kaupapa Mahi Tahī A Plan for Partnership 2005-2010 (National Library of New Zealand 2006c p. 10). In effect, “Te Kaupapa Mahi Tahī acknowledges iwi Māori as tangata whenua and incorporates enhanced outcomes for all Māori clients in all endeavours of the National Library, for this year and the years to come, so that Māori are connected with information important to all aspects of their lives” (National Library of New Zealand 2006c p. 6). Te Kaupapa Mahi Tahī has been a means to achieve the aims of the National Library while working with Māori to “nurture New Zealand’s documentary heritage, facilitate New Zealanders’ access to information, and to build our skills and confidence in using information” (National Library of New Zealand 2006c p. 6). It also is an attempt to reflect the changing nature of New Zealand, in which the central place of Māori is seen as far more important than before, and in which materials in te reo Māori (the Māori language) are in greater demand (National Library of New Zealand 2006c p. 8):

The unique status Māori have as tangata whenua, and the relevance the Treaty of Waitangi has to our young nation, together create an ever-increasing need for closer relationships with iwi and Māori. Māori are continuing to create born digital material in English and te reo Māori about things that are important to them. Demand for access to information written in te reo Māori, such as whakapapa, histories, writings and images, is increasing all the time. Simply, Māori seek mātauranga in a way that reflects their view of the world and want to create pathways to information that will shape their future.

The incorporation of mātauranga Māori concepts and values is acknowledgement by the National Library that Māori are the primary holders of this traditional knowledge and wisdom (National Libraries of New Zealand 2006c p. 7). Additionally the governance structure of the National Library has included a body called the Library and Information Advisory Commission Nga Kaiwhakamara i nga Kohihokinga Korero. This Advisory Commission was established under section 22 to provide advice to the Minister on Library and Information issues, including mātauranga Māori (National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003, s. 3 (e)). The goal is to ensure that the information would be disseminated in a manner that is intended to enhance the lives of Māori as well as the understanding of taonga by Māori and others.

The Access Policy of the National Library specifically states that it “is a guardian of New Zealand’s documentary heritage, of taonga or treasures, which have been collected through purchase, donation or deposit” (National Library of New Zealand 2006a p. 6). In recognition of this unique cultural heritage that underlies the taonga (treasures) in its collection, the National Library has declared (National Library of New Zealand 2006c p. 12):

We acknowledge the mauri of taonga. We respect that mātauranga Māori resides with iwi and Māori. We actively seek input and take notice of iwi and Māori communities’ needs. We hold face-to-face relationships in the highest regard. We respect the mana of all people and we work in teams. We strive for excellence and innovation in the shared care of taonga. We respect and acknowledge each other’s differences and contributions. We understand and apply the principles of the Treaty of Waitangi in our work.

**Comment [BM1]:** This is one of the only quotes that is single-spaced

The Preservation Policy must be read in line with the Access Policy in developing policies and programs. The National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003 provides that items from the collections of the Turnbull Library must be made “available on a temporary basis for public exhibition in New Zealand or elsewhere on terms and conditions that the Chief Librarian thinks fit” (National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003, ss. 15 and 18 (d)). However access to these items must never compromise the permanent preservation of the object (National Library of New Zealand 2006b). Further

“[t]he observation of the appropriate tikanga is essential for the preservation of collections” (National Library of New Zealand 2006b). The Guardians of the Alexander Turnbull Library are appointed under section 16 of the Act, after consultation with the Minister of Māori Affairs, to ensure that the goals are met, including the status of the collection as taonga.

### **Archives and Aotearoa/New Zealand**

Archives New Zealand (Te Rua Mahara o te Kāwanatanga) is established to serve as the official guardian of New Zealand’s public archives (Public Records Act 2005, s. 3; Archives New Zealand Te Pae Whakawairua b). The enabling statute for the Archives New Zealand is the Public Records Act 2005, which sets the framework for contemporary recordkeeping across government. It is the mandate of Archives New Zealand to work cooperatively with all government agencies to administer the Act.

The recognition of the importance of the Treaty responsibilities that are held by the Crown are expressly emphasized in the Public Records Act 2005. It specifically states in section 7 (Public Records Act 2005, s. 7):

#### **Treaty of Waitangi (Te Tiriti o Waitangi)**

In order to recognise and respect the Crown’s responsibility to take appropriate account of the Treaty of Waitangi (Te Tiriti o Waitangi),—

- (a) section 11 (which relates to the functions and duties of the Chief Archivist) requires the Chief Archivist to Archivist’s functions, processes are in place for consulting with Māori; and
- (b) section 14 (which relates to the establishment of the Archives Council) requires at least 2 members of the Archives Council to have a knowledge of tikanga Māori; and
- (c) section 15 (which relates to the functions of the Archives Council) specifically recognises that the Archives Council may provide advice concerning recordkeeping and archive matters in which tikanga Māori is relevant; and



(d) section 26 (which relates to the approval of repositories) recognises that an iwi-based or hapu-based repository may be approved as a repository where public archives may be deposited for safekeeping.

Archives New Zealand also possesses a Māori consultative group, Te Pae Whakawairua, consisting currently of 8 members to provide independent advice to the Chief Archivist and Chief Executive on how best to meet Māori goals, communicate effectively with Māori and ensure all services meet the needs of Māori now and in the future (Archives New Zealand Te Pae Whakawairua a).

“Responsiveness to Māori” is described as a key strategic principle adopted by Archives New Zealand, as declared in its Statement of Intent 2010-13. Thus, Archives New Zealand is attempting to work collaboratively with Māori to recognize their perspectives concerning the “value to iwi, hapu, whanau and researchers of Māori history” regarding the records they hold (Archives New Zealand 2010). The successor to the former National Archives is striving to work with iwi, other agencies, the National Library and Te Papa to focus on “innovative and sustainable options to address the long-term aspirations of Māori” (Archives New Zealand 2010). Archives New Zealand is, therefore, trying to provide “opportunities for iwi and hapu members to actively contribute to the design and implementation of project work to meet their archival needs and aspirations” (Archives New Zealand 2010). Implementing these objectives would naturally go a long way toward respecting indigenous knowledge in the Archives’ operations and reflecting appropriate adherence to Māori rights to self-determination. It must be noted that building positive relationships with Māori based on active consultation and cooperation is not yet respecting the DRIP directions of obtaining free, prior and informed consent, nor does it even achieve true co-management. It does, however, set the stage for far more effective management and information sharing with New Zealand society as a whole.

## **CANADA**

Canada underwent fundamental political and constitutional change through major amendments to its Constitution that took effect on April 17, 1982. An entrenched bill of rights was added in the

form of the Charter of Rights and Freedoms, provincial governments received added jurisdiction, a made-in-Canada amending formula was included, and Part II of the Constitution Act, 1982 (Constitution Act 1982 being Schedule B to the Canada Act 1982 (UK) 1982, c. 11, hereinafter Constitution Act, 1982) instituted a new chapter in the relationship between the first peoples of the land and the rest of Canadian society. The key provision is section 35(1), which states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.

This subsection is supported by those that define “aboriginal peoples” so as to include “Indian, Inuit and Métis peoples”; confirm that rights within land claims settlements will also be regarded as treaty rights; guaranteeing s 35(1) rights will apply equally to both sexes; and that indigenous rights will not be abrogated by Charter Rights. These radical changes have created an opportunity for Aboriginal peoples vigorously to assert their inherent rights in both political and legal arenas. A transformation in the relationship between Aboriginal and non-Aboriginal Canadians has occurred that has had a vast ripple effect. Courts have declared aboriginal and treaty rights to override some federal and provincial laws (*R v Sparrow* [1990] 1 S.C.R. 1075). The “honour of the Crown” in its dealings with Aboriginal peoples has been declared by the Supreme Court of Canada to be a paramount principle (*Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 73) and that both federal and provincial Crowns may owe fiduciary obligations (*Guerin v The Queen* [1984] 2 SCR. 335). The judiciary has rewritten its views on the admissibility and importance of oral history and traditional knowledge (*Delgamuukw v British Columbia* [1997] 3 SCR 1010). Politicians of all parties have called on government officials to act very differently than they did before in their dealings with First Nations, Inuit and Métis communities.

Changes of such a profound and highly public nature have naturally compelled state libraries, museums and archives to alter their philosophies, management structures, perceptions of their holdings and the very nature of their relations with Aboriginal peoples. These institutions have been integral to the formation of a national Canadian identity drawing from its history, its present and projections of a possible future. The way libraries, archives and museums handle the de facto invasion of Indigenous lands, the overthrow of traditional sovereign nations and the legacy of

colonization influences how Canadians envision these matters. How these essential public repositories of national treasures respect Aboriginal cultural values and political beliefs in the preservation, collection, accessibility, interpretation and dissemination of information to the public has obtained newfound momentum. This sector has become a highly charged one as so many matters previously taken for granted are now very politicized.

### **Canada and its Museums**

The existence of museums predates Confederation by two years as the first opened in 1865. Not surprisingly, early museums completely reflected British and French beliefs about the role of such institutions being to reflect Western values as well as settler attitudes that Aboriginal Peoples were part of the past as they were doomed to disappear through disease or assimilation. Those parts of museum collections containing Aboriginal elements presented artefacts as being from a former era, or dioramas of an exotic past, with no hint that First Nations, Inuit and Métis peoples continued to live throughout the country. The Assembly of First Nations and the Canadian Museum Association organised a landmark conference in 1988 to discuss how competing perspectives could be redressed (Jarosova 2002). One outgrowth of this meeting was the development of a joint Task Force on Museums and First Peoples. Its 1992 Report made numerous recommendations principally regarding “repatriation of human remains and artefacts, access of aboriginal people to museum collections, and interpretation of aboriginal cultures and history” (Grant and Blundell 1992 p. 52). Adoption of the Task Force’s recommendations has meant many museums have significantly modified their approach to include Aboriginal Peoples, both collectively and through some staff positions, in the redevelopment of museum practices and policies. The Task Force also advocated for a “co-operative model guided by equal partnership, [as] the recommended basis of a guiding framework whereby each party adheres to ‘moral, ethical and professional responsibilities’” (Gibbons 1997 p. 313).

Restructuring of federal museums also occurred during this era with the creation of the National Museums of Canada Corporation (NMCC) including four main corporations: the National Gallery of Canada, the Canadian Museum of Civilisation, the Canadian Museum of Nature and

the National Museum of Science and Technology. Several of these include other museums. The Museums Act (1990 Statutes of Canada, hereinafter Museums Act) , subsequently amended to include the Canadian Museum of Human Rights in 2008 and the Canadian Museum of Immigration created in 2010, established a clear overall mandate for NMCC and its constituent museums as:

It is hereby declared that the heritage of Canada and all its peoples is an important part of the world heritage and must be preserved for present and future generations and that each museum established by this Act

- (a) plays an essential role, individually and together with other museums and other institutions, in preserving and promoting the heritage of Canada and its peoples throughout Canada and abroad and in contributing to the collective memory and sense of identity of all Canadians; and
- (b) is a source of inspiration, research, learning and entertainment that belongs to all Canadians and provides, in both languages, a service that is essential to Canadian culture and available to all (Museums Act, c. 3 s. 3).

The Canadian Museums Association, which contains over 2000 members working in the museum sector, has identified the primary goal of all major museums to be the preservation and promotion of Canada's cultural heritage through two main responsibilities, namely stewardship and public service. These are described as follows (Canadian Museums Association 1999 p. 5):

The trust of stewardship requires museums to acquire, document, and preserve collections in accordance with institutional policies, to be accountable for them, and to pass them on to future generations of the public in good condition. ... The trust of public service requires museums to create and advance not only knowledge, but more importantly, *understanding*, by making the collections and accurate information about them, physically and intellectually available to all the communities served by the museum. To this end, museums seek to be public focal points for learning, discussion and development, and to ensure equality of opportunity for access (emphasis in original).

In fulfilling these responsibilities museums must respect the world view of other cultures, “including oral history and traditional knowledge concerning culturally significant objects and human osteological material” (Canadian Museums Association 1999 p. 5).

### **Canadian Museum of Civilisation Corporation**

The most relevant of the museums for this article is the Canadian Museum of Civilisation Corporation (CMCC), formerly the Museum of Man, and re-established under the federal Museums Act (c. 3 s. 7 (1)). Its purpose is set out at s. 8:

...to increase, throughout Canada and internationally, interest in, knowledge and critical understanding of and appreciation and respect for human cultural achievements and human behaviour by establishing, maintaining and developing for research and posterity a collection of objects of historical or cultural interest, with special but not exclusive reference to Canada, and by demonstrating those achievements and behaviour, the knowledge derived from them and the understanding they represent.

The CMCC is governed by a Board of Trustees, who are “accountable to Parliament, through the Minister of Canadian Heritage, for the stewardship of the Museum” (Museums Act, c. 3 s. 7 (1) p. 4). This Museum has an extensive collection of Indigenous art, cultural objects, totem poles, longhouses, photographs, clothing and extensive records donated or purchased from 1879 to the present. Although this collection has evolved over many decades from various federal sources, its management had been solely within the purview of federal employees and expert curators with no involvement by Indigenous people themselves.

The passage of the Native American Graves Protection and Repatriation Act (NAGPRA) by the Congress in November 16, 1990 was a seminal achievement in drastically altering the relationship between many federal entities and Indian Nations in the United States. NAGPRA requires all federal museums and other institutions that receive federal funding to return "cultural items" in their possession to those tribes originally connected to the items. The scope of this obligation is on human remains, funerary objects, sacred objects, and other objects of cultural patrimony in the possession of these institutions. NAGPRA also confirms tribal ownership of any objects found on federal, tribal and some state lands after the Act came into force. In addition, the Act provides funds to assist in repatriation and mandates the U.S. Secretary of the Interior to impose civil penalties on museums that do not comply and creates a crime for

trafficking in these cultural items. A further critical element is that NAGPRA compels all of the affected institutions to develop an inventory of relevant objects and seek their proper return.

Widespread publicity about NAGPRA, and the extensive support it obtained from Indian tribes in the US, sparked considerable attention in Canada. Many Canadian First Nations began to develop their own efforts to repatriate human remains and funerary objects of their ancestors that had found their way into US museum collections. The Canadian Task Force on Museums and First Peoples was heavily influenced by this experience and developed recommendations that affected many Canadian museums. The CMCC first crafted a Human Remains Policy in 1991 and subsequently added to it with a broader Repatriation Policy in 2001 (Canadian War Museum). The latter policy encompasses “human remains and associated burial objects, archaeological objects and related materials, ethnographic objects, and records associated with these held in the collections” (Canadian Museum of Civilisation Corporation p. 1). The CMCC considers:

1. requests from Aboriginal individuals;
2. requests from Aboriginal governments;
3. requests arising amidst comprehensive land claims negotiations with the federal government; and
4. requests made during self-government negotiations with the Government of Canada (Canadian Museum of Civilisation Corporation p. 1).

Successful negotiations via the repatriation policy has led the CMCC to return “human remains to First Nations in several regions of Canada, wampum to the Six Nations Confederacy, and medicine bundles and other objects important to Plains communities” (Canadian Museum of Civilisation Corporation p. 3). A Sacred Materials project was established to enable First Nations to review CMCC collections and discuss special care for certain objects or repatriation (Canadian Museum of Civilisation Corporation p. 1). The CCMC has appreciated the valuable input that Aboriginal people can make to a greater understanding of their own collections and their better presentation to the public through hiring Aboriginal curators and elders as permanent staff.

The use of land claims negotiations has provided a particularly creative way to achieve a more comprehensive and enduring relationship that is legally binding and constitutionally protected

under s. 35(3) of the Constitution Act, 1982. In addition to the repatriation agreements reached during negotiations with the Nisga'a Nation of British Columbia and the Labrador Inuit Association, the Nisga'a also made Custodial Arrangement Agreements with CMCC that "provides for shared possession on a rotating basis of objects of Nisga'a origin remaining in the CMCC collection" (Canadian Museum of Civilisation Corporation p. 1). Only these latter agreements have been achieved in a context in which the indigenous party has significant leverage. In marked contrast to NAGPRA, these policies, where they exist, extend no legal obligations upon Canadian museums to repatriate but merely to consider requests to do so unless included in land claims settlements.

### **Canadian Libraries and Archives**

The National Archives and the National Library were amalgamated under one umbrella organisation called the Library and Archives Canada (LAC) (Library and Archives of Canada Act 2004 Statutes of Canada, c. 11 s. 4). The Preamble to its enabling legislation declares "it is necessary that

- (a) the documentary heritage of Canada be preserved for the benefit of present and future generations;
- (b) Canada be served by an institution that is a source of enduring knowledge accessible to all, contributing to the cultural, social and economic advancement of Canada as a free and democratic society;
- (c) that institution facilitate in Canada cooperation among the communities involved in the acquisition, preservation and diffusion of knowledge; and
- (d) that institution serve as the continuing memory of the government of Canada and its institutions (Library and Archives of Canada Act S.C. 2004, c. 11 Preamble).

The Library and Archives of Canada Act is completely silent on the place of Aboriginal peoples as consumers of LAC's services, as suppliers and subjects of a sizeable portion of its collection, as co-managers of its materials and as owners of documents originating in their possession. On the other hand, the LAC has realized that its acquisitions policy has been weak regarding Aboriginal materials for its national library holdings while its archival function has fully ignored Aboriginal governments and organizations as producers of relevant documentation. In response to the realization of these gaps, the LAC launched a special consultation process over a several year period culminating in the Report and Recommendations of the Consultation on Aboriginal

Resources and Services in August of 2003 (Library and Archives Canada 2003). The LAC Management Board issued a document in March of 2005 intended to guide the overall development of its collection, which included the following commitments:

LAC recognizes the contributions of Aboriginal peoples to the documentary heritage of Canada, and realizes that, in building its collection of these materials, it must take into account the diversity of Aboriginal cultures, the relationship the Government of Canada has with Aboriginal peoples, and the unique needs and realities of Aboriginal communities. The development of a national strategy will be done in consultation and collaboration with Aboriginal communities and organizations, and will respect the ways in which indigenous knowledge and heritage is preserved or ought to be preserved and protected within or outside of Aboriginal communities. In order to develop its collection of Aboriginal materials, or to ensure their preservation by other means, LAC will:

- define or characterize "relationships," "consultations," and "partnerships" in the context of working with Aboriginal communities;
- develop an outreach strategy and a consultation framework;
- develop models guiding any "memorandum of understanding" or like document developed by LAC in collaboration with Aboriginal communities in order to support an approach or acquisition strategy;
- identify and develop relationships with outside institutions, including cultural centres;
- identify local, regional or territorial collections through research and through the development of a user needs study;
- conduct inventories of existing LAC collections to identify materials by or about Aboriginal peoples, and develop a global view of the existing collection;
- develop a baseline of information and further tracking mechanisms or tools to monitor collection development;
- review LAC programs, services and expertise that impact Aboriginal peoples or the documentary heritage of these communities; and
- prioritize collection development activities according to the results of the activities above (Library and Archives Canada 2005).

This appears to be a reasonably comprehensive response to the prior Report, which called for change to redress the lack of Aboriginal voice to “initiatives and policy development in institutions that have typically been Eurocentric” (Library and Archives Canada). It still falls far short of moving toward co-management or repatriation of parts of its collection into Aboriginal hands.

## **CONCLUSION**



The review of Canadian and New Zealand experience demonstrates that even recent efforts to move toward a more cooperative, partnership based approach has been difficult for museums, libraries and archives in settler states. The latter too often reflect general governmental thinking and the more western traditional ideology that the role of these institutions is to advance national goals and preserve objects ‘owned’ by the state.

Canadian agencies have adopted a more proactive approach in recent years while still retaining exclusive control and custody of the vast majority of Indigenous objects; but they are now willing to consult, involve Aboriginal peoples in the handling of artefacts and “consider” requests for repatriation of a limited array of objects as well as human remains. None of the Canadian legislation has yet to embrace a more direct and inclusive approach toward Aboriginal involvement, let alone control of the institutions or any part of their collections. The Nisga’a Nation Treaty of 1999 remains the most extensive re-ordering of past patterns. Chapter 17 of this Treaty recognizes the vital importance to the Nisga’a of retaining their “traditional and sacred connection” to their significant treasures regardless of where they are located (Nisga’a Final Agreement, 1999, chapter 17, articles 1 and 2). It confirms Nisga’a ownership of “any Nisga’a artefact discovered within Nisga’a Lands” while allocating ownership of certain specified ‘artifacts’ that have been in the possession of the CMCC as well as the Royal British Columbia Museum to the Nisga’a (Nisga’a Final Agreement, 1999, chapter 17, articles 1 and 2). Over 276 spiritually important objects have been returned by these two museums as of September 15, 2010 to be housed in a new Nisga’a Museum in their territory in northern British Columbia. The Treaty further commits both museums to negotiate custodial agreements over objects remaining in their possession until future transfer.

The experience in Aotearoa New Zealand has been more reflective of the partnership principle grounded in the Treaty of Waitangi. Te Papa Tongarewa Museum seems to have fully embraced the principles of kaitiakitanga (guardianship) regarding Māori objects by working collaboratively with iwi to design exhibitions with kaumātua (elders) in residence, to work with iwi through providing training and funding so that they can develop their own collections, and through supporting the Karanga Aotearoa Repatriation Programme to repatriate human remains from overseas. Te Papa has successfully repatriated 149 human remains from 8 nations since 2004,

with the most recent effort culminating in a vote by the French Parliament on May 5, 2010 to return 15 toi moko (mummified, tattooed heads) to their descendants. Te Papa has also returned other significant objects such as meeting houses that were improperly confiscated by the Crown in the past. The New Zealand legislation is also far more explicit in seeking to ensure Māori traditions and cultural heritage are a central component of the work of its national museums, library and archives.

On the other hand, even these two rather enlightened and progressive nations have yet to implement fully the principles of international law, and especially that of DRIP, in their policies in this arena. There is no comprehensive commitment to adopt the fundamental principle of ‘free prior and informed consent’ as the foundation for all dealings. One cannot point to a true co-management relationship being completely fashioned, although New Zealand is moving in that direction. The recent report of the Waitangi Tribunal (Ko Aotearoa Tēnei A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity 2011), which explores many of these issues along with a vast array of other aspects of intellectual property rights under the Treaty of Waitangi, will no doubt enhance the debate and increase the momentum in favour of more fundamental change toward the standards espoused by the UN Declaration. In the meantime, technology is transforming the way in which museums, libraries and archives must work. Online access to collections is exploding; reproduction of objects to enable multiple possessions is widespread; 3D digital virtual recreation and revision of both objects and complete environments can allow both major distortions to occur or enable broader, more thorough presentations to be created. These innovations present major new challenges and exciting opportunities. Does the perfect copy of a sacred object contain its original spiritual significance (for good or for ill)? Do guardianship obligations accompany the reproductions? Does the capacity to make replicas mean that state institutions can be content with holding copies while relinquishing original objects with their spirit intact back to the proper guardians?

No domestic or international legal instrument can fully compel changes in human behaviour, however, we have seen major shifts in international law in recent years, along with significant shifts in the laws of some states, as well as in relationships between Indigenous and non-Indigenous peoples. Changing visions and perceptions of these relationships has been occurring

rapidly in the context of state institutions like libraries, archives and museums, along with other repositories of cultural patrimony. These movements have frequently been generated by the good will of their staff accompanied by changes in public attitudes; yet these changes are still only just beginning. Embracing the aspirational language of the UN Declaration on the Rights of Indigenous Peoples in the way that archivists, librarians and museum curators pursue their daily work would be transformative of their institutions and of the societies in which they live. The Māori concept of kaitiakitanga is recommended as a particularly attractive principle to consider going forward as a way to meet the need for these essential institutions to protect that national heritage while simultaneously enhancing greater mutual respect and understanding among Indigenous and non-Indigenous peoples. It also enables compliance with the DRIP obligation to respect indigenous rights concerning “cultural heritage, traditional knowledge and traditional cultural expressions” in Article 31(1). Pursuing this philosophy would benefit us all.

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