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Robert K. Paterson

Allard School of Law at the University of British Columbia, paterson@allard.ubc.ca

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TOTEMS AND TEAPOTS: THE ROYAL BRITISH COLUMBIA MUSEUM CORPORATION

ROBERT K. PATERSON[†]

I. INTRODUCTION

Recent years have seen increased turbulence surrounding the normally placid lives of museums.¹ Many institutions confront difficult financial challenges in the face of dwindling attendance and declining government grants.² While the acquisition and display of objects remain major priorities for most museums, many now also seek to redefine and examine their role in relation to their client communities and constituencies. These pressures and changes have sometimes been reflected in debates surrounding controversial exhibitions and have been accompanied by increasing numbers of claims for the return of objects by

[†] Faculty of Law, University of British Columbia and Member, External Advisory Board, UBC Museum of Anthropology.

¹ One of the best known instances of such controversy was the “Sensation” exhibition of contemporary British art at the Brooklyn Museum in 1999, which led to its condemnation by the then mayor of New York, Rudolph Guiliani, who attempted to close the exhibition. This, in turn, led to a successful court challenge by the museum on constitutional grounds. For background to these events, see Peter Levine, “Lessons from the Brooklyn Museum Controversy” (2001), online: <http://www.publicpolicy.umd.edu/IPPS/Summer00/brooklyn_museum_controversy.htm>. The International Council of Museums (ICOM) *Code of Ethics for Museums* defines a museum as “a non-profit making permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits, for purposes of study, education and enjoyment, the tangible and intangible evidence of people and their environment”: (January 2006) at Glossary, online: <<http://icom.museum/ethics.html>>.

² See Martin Knelman, “Flaherty Scrooge to Canada’s Museums” *The Toronto Star* (27 September 2006) E1.

indigenous peoples, victims of Holocaust-era confiscations, and others.³

II. THE *MUSEUM ACT*

On 25 March 2003, the British Columbia *Museum Act*⁴ became law. The principal result of the new law was to change the status of the Royal British Columbia Museum (“the Museum”), in Victoria, British Columbia, from that of a special operating agency of the provincial government to a provincial Crown Corporation.⁵ Section 4 of the Act sets out the purposes of the new corporation as being:

- (a) to secure, receive and preserve specimens, artifacts and archival and other materials that illustrate the natural or human history of British Columbia;
- (b) to hold and manage the archives of the government;
- (c) to increase and communicate knowledge of the natural and human history of British Columbia by research, exhibits, publications and other means;
- (d) to serve as an educational organization;
- (e) to develop exhibits that are of interest to the public;
- (f) to manage, conserve and provide access to the collection;
- (g) on the request of the government, to manage cultural and heritage facilities designated by the government;
- (h) to perform functions usually performed by a museum and archives.

³ See Robert K. Paterson, “Hitler and Picasso—Searching for ‘The Degenerate’” (1999) 33 U.B.C. L. Rev. 91.

⁴ S.B.C. 2003, c. 12 [the Act].

⁵ *Ibid.*, s. 2(1).

The Act describes the powers and provides for the governance of the new corporation.⁶ It also deals with routine matters concerning financial administration and conflicts of interest.⁷

The Royal British Columbia Museum was founded in 1886 and was originally part of the provincial legislature buildings. Its present site was constructed in 1967 as a Canadian centennial project. While the Museum's focus is on all aspects of the natural and human history of British Columbia, it is particularly known for its outstanding collection of artifacts originating from the First Nations of British Columbia. The collection of the Museum exceeds ten million objects and includes vast numbers of documents, records, photographs, audio and visual material, books and other publications. The Museum site contains a First Nations carving Studio and Big House, along with Thunderbird Park and its totem poles. These facilities are programmed and interpreted through a partnership between the Museum and the Native Friendship Centre in Victoria. The Museum has long been a symbol of the city of Victoria and is a major tourist attraction in the centre of the provincial capital.⁸

The problems facing the Museum highlight a major difference between similar institutions in Canada and the United States.⁹ In the United States, a long history of private donor support buttressed by generous tax incentives has been the foundation for many great institutions such as the J. Paul Getty Museum in Los Angeles. The Getty Museum is a private charitable trust with an endowment comprising assets of around US\$10 billion. There is no Canadian museum that even remotely approaches having this level of financial resources. With less tax incentives for donors than in the United States, most Canadian museums operate under

⁶ *Ibid.*, ss. 2-13.

⁷ *Ibid.*, ss. 14-20.

⁸ For general information about the Museum, see Royal BC Museum, online: RBCM Main Site <<http://www.royalbcmuseum.bc.ca/MainSite/default.aspx>>.

⁹ For an outline of museum fundraising and marketing in the United States, see Robert C. Lind, Robert M. Jarvis & Marilyn E. Phelan, *Art and Museum Law: Cases and Materials* (Durham: Carolina Academic Press, 2002) at 505-33 and Richard Sandell, *Museum Management and Marketing (Leicester Readers in Museum Studies)* (London: Routledge, 2006).

some form of federal or provincial control and largely depend on government financial support for their operating expenses.¹⁰ In contrast to most Commonwealth countries, the circumstances of museums in the United Kingdom are somewhat unique because of the enormous scope and number of institutions in the country. However, government support is still crucial and there are concerns about maintaining existing levels of capital expenditure and audiences.¹¹

Concern about improving the financial management of the Museum appears to have been a major motivation for the passage of the Act. In moving the second reading of the Act, the Hon. George Abbott, then Minister of Community, Aboriginal and Women's Affairs in the Government of British Columbia, addressed the economic realities behind the proposed law as follows:

Successful museums throughout Canada and around the world rely on a combination of government funding and private sector donations. It is incumbent on us to provide the museum with the necessary mechanism to achieve maximum benefits of being both a major tourist attraction and a significant non-profit cultural and heritage resource. The Museum Act is that mechanism. It proposes changing the museum from a special operating agency to a government corporation, a change the museum has actively sought for ten years. This proposed change in governance means the museum will gain the ability to raise and carry over funds for reinvestment in exhibits and programs. It will be able to grow an endowment for long-term sustainability. It will be able to respond more quickly to the competitive tourist marketplace, to increase revenue and attendance, and finally—and I think not insignificantly—to attract major donors.¹²

¹⁰ On 26 September 2006, Canada's Conservative federal government announced a cut of \$4.6 million to the Museums Assistance Program of the Department of Canadian Heritage.

¹¹ Tony Travers, *Museums and Galleries in Britain: Economic, Social and Creative Impacts* (December 2006), online: National Museum Directors' Conference <http://www.nationalmuseums.org.uk/Travers_Report.html>.

¹² See *Debates of the Legislative Assembly of British Columbia (Hansard)*, vol. 13, No. 2 (24 March 2003) at 5566 (Hon. George Abbot).

Federal museum funding in Canada has recently been under threat. Faced with increasing operational budgets together with the perceived need for new programs to attract more visitors, museums have been actively searching for new sources of income. Apart from private donations and government grants, a popular source of additional income has been the so-called “blockbuster exhibition”.¹³ The Museum has resorted to this strategy with such events as its exhibition entitled “Leonardo da Vinci: Scientist, Inventor, Artist” in 1998 and 1999. The Museum has added a National Geographic IMAX Theatre by means of a public-private partnership and enhanced its food services and museum shop.¹⁴

The Act is seen by the provincial government as providing the Museum increasing freedom to operate in a commercial manner, while preserving its primary cultural mission. The present provincial Liberal party government has extensively and somewhat controversially sought to adopt the “public-private partnership” model for realizing what were previously exclusively public services such as transportation and health care.¹⁵ The incorporation of the Museum is seen not only as enhancing its ability to obtain funding separately from other branches of the provincial government, but also as increasing its involvement in partnerships with the private sector. Some criticize developments such as licensing agreements and corporate sponsorships on the part of museums, but for an increasing number of institutions they are seen as a necessary economic reality. The idea of incorporation of the Museum apparently originated with the Friends of the

¹³ The term “blockbuster exhibition” seems to have originated with the world tour of the treasures of Tutankhamun in 1977. The term is now loosely used for any museum exhibition of limited duration that can be seen as extraordinary in respect to its size or the rarity and value of the objects on display.

¹⁴ See online: National Geographic IMAX Theatre <<http://www.imaxvictoria.com/index2.cfm>>.

¹⁵ See Stephen P. Osborne, ed., *Public Private Partnerships: Theory and Practice in International Perspective* (London: Routledge, 2000) and Robert K. Paterson, *Public-Private Partnerships and Trade Agreements: Guidance for Municipalities* (Toronto: The Canadian Council for Public-Private Partnerships, 2003).

Museum (its members) and had earlier support in principle from the former New Democratic Party government.

The Crown corporation model adopted by the Act was initiated in Canada for museums by the enactment of the federal *Museums Act*¹⁶ in 1990. That statute incorporated several national museums, including the National Gallery of Canada and the Canadian Museum of Civilization. Under the British Columbia Act, the Royal British Columbia Museum is established as a corporation and deemed an agent of the provincial government. At the same time, the Museum was amalgamated with what were previously separate operations: the British Columbia Archives, Helmecken House (the oldest house in British Columbia), and the Netherlands Carillon.

Most Crown corporations in Canada have a broad mandate that extends to include commercial activities. For example, the British Columbia Railway Company provides rail and other transportation-related services on the basis that they are competitive with similar services furnished by the private sector.¹⁷ Very few Canadian museums operate as either for-profit or non-profit private enterprises. The focus of most government-supported Canadian museums is on the preservation of their collections and the provision of services in the public interest. This distinction poses interesting questions about the extent to which the economic efficiency goals of museums in Canada can be reconciled with their public policy objectives, especially were the two to come into conflict.

The Museum is managed by an eleven member board of directors, a majority of whom are appointed by the provincial government.¹⁸ Like directors of business corporations, the directors of Crown corporations are subject to fiduciary responsibilities, though these have rarely been subject to examination by Canadian courts.¹⁹ It could be suggested that the

¹⁶ S.C. 1990, c. 3.

¹⁷ *British Columbia Railway Act*, R.S.B.C. 1996, c. 36.

¹⁸ *Museum Act*, *supra* note 4, s. 6.

¹⁹ See Barry Slutsky & Philip Bryden, "The Governance of Commercial Crown Corporations: How Much Independence Can We Expect from Corporate

absence of cases indicates that the issue of the liability of directors of Crown corporations is exaggerated, but that is probably not a sound explanation given that only the Crown itself has standing to sue for an alleged breach of fiduciary duty by a director of a Crown corporation.²⁰ Even if a Canadian court were to be presented with such a case, it is unclear what principles it would apply to reconcile the dual responsibilities of directors of Crown corporations: to optimize the efficient allocation of the resources of the corporation and also pursue its public policy objectives.²¹ For example, a museum might not want to dispose of an object in its collection for the highest market price obtainable, but instead to sell it to another public institution or even a private buyer in the same province. In such a case it is unclear how courts would react, but they may be guided by the case law on charitable acts by business corporations, which suggests that insofar as charitable actions appear to be seen as consistent with the long term profitability of the corporation they will not be overturned.²²

There have been a number of decisions in the United States in cases involving allegations of both negligence and breaches of fiduciary duty on the part of museum directors.²³ This litigation has been facilitated by the role that state Attorneys-General play in enforcing the duties owed the public by the directors of charitable institutions established under state law. Thus, in one case, the trustees and a director of the Maryhill Museum of Art in Washington State were sued by the Attorney General of the state for mismanagement of the museum's assets. Among the alleged improprieties was allowing the improper removal of American Indian artifacts from the museum's collection and failure to properly supervise the museum's management. The case was

Directors?" in Janis Sarra, ed., *Corporate Governance in Global Capital Markets* (Vancouver: UBC Press, 2003) 225 at 240-43.

²⁰ See *Northeast Marine Services v. Atlantic Pilotage Authority* (1992), [1993] 1 F.C. 371, 57 F.T.R. 80 (T.D.).

²¹ See *Crown Corporations Act*, R.S.S. c. C-50.101, s. 46(1)(a), which states that every officer and director of a Saskatchewan Crown corporation shall "act honestly and in good faith with a view to the best interests of the Crown corporation ..."

²² See *Parke v. Daily News Ltd.*, [1962] 1 Ch. 927.

²³ See Lind, Jarvis & Phelan, *supra* note 9 at 647-73.

dismissed once both sides agreed that the museum would pursue remedies against the person assumed responsible for the alleged mismanagement at the museum.²⁴ While Canadian courts might look to this and other cases for guidance in applying Canadian law, they are, of course, not bound by American decisions which may be seen as imposing higher standards than exist in Canada, where museums are usually not established as trusts and their directors should not therefore be held to as high a standard of conduct as that expected of trustees. Additionally, as autonomous institutions there are factors such as donor support, the preservation of professional reputations, and avoiding the high cost of litigation that all weigh against the initiation of legal proceedings against museum directors.²⁵

III. MUSEUM CODES OF ETHICS

With little by way of laws that specifically regulate their activities, museums in Canada and elsewhere look to codes of ethics and other voluntary guidelines prepared by non-governmental museum organizations to which they belong. In Canada the leading example of these guidelines comes from the Canadian Museums Association (“CMA”), which was founded in 1947 and currently has about 2000 members.²⁶ Globally, the leading museum organization is the International Council of Museums (“ICOM”), which was established in 1946 and has close links to the United Nations Educational, Scientific and Cultural Organization (“UNESCO”).²⁷ All of these organizations facilitate the discussion of mutual problems and facilitate the development of shared professional standards.

²⁴ *State of Washington ex rel. Gordon v. Leppaluoto*, Nos. 77-11777 and 77-11781 (Wash. Super. Ct. Klickitat County, settled 12 April 1978).

²⁵ See Lind, Jarvis & Phelan, *supra* note 9 at 647.

²⁶ See Canadian Museums Association, *CMA History* (2006), online: History—Canadian Museums Association <http://museums.ca/en/about_cma/history>.

²⁷ See ICOM, *ICOM Mission* (12 January 2007), online: ICOM Mission <<http://icom.museum/mission.html>>.

ICOM adopted its first code of ethics in 1970.²⁸ This code coincided with the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*²⁹ and symbolizes the strong influence that the international law-making role of UNESCO has had on ICOM. In 2004, the most recent version of ICOM's *Code of Ethics for Museums* was published.³⁰ This Code seeks to establish minimum standards, principles, and guidelines for museum practice. The ICOM Secretariat and ICOM national committees can provide assistance in cases not specifically addressed by the Code. Because the Code is addressed to museums world-wide, it tends to represent compromise positions on many issues and uses language that many may see as too broad or imprecise to be of use in difficult calls. Another factor that has a strong influence on ICOM codes is the organization's close relationship with UNESCO. Since UNESCO's rule-making role is primarily in the field of international cultural heritage law and policy, it may be that this does not facilitate the development of ICOM guidelines that realistically address problems of a more particularly national or local nature.

The CMA, along with the Canadian Art Museum Directors Organization have published *Guidelines: Roles and Responsibilities of Museum Boards of Trustees*,³¹ which they suggest be used as a checklist for developing or improving internal museum policies and procedures with respect to board roles and responsibilities. Like similar guidelines, the intention is not to insulate trustees and directors from legal liability, but instead form a basis of support for higher professional standards and an improved administrative environment at Canadian institutions. The *CMA Guidelines* address such specific issues as the hiring and monitoring of performance of directors, policy development, and

²⁸ See ICOM, *1946-1998 ICOM Chronology*, online: Official Documents <<http://icom.museum/chronology.html>>.

²⁹ (1971) 10 I.L.M. 289. The UNESCO Convention has been enacted into Canadian law by s. 37 of the *Cultural Property Export and Import Act*, R.S.C. 1985, c. C-51.

³⁰ See ICOM, *Code of Ethics for Museums*, *supra* note 1.

³¹ See *Guidelines: Rules and Responsibilities of Museum Boards of Trustees* (Toronto: Canadian Museums Association, 2005) [*CMA Guidelines*].

board recruitment orientation, development, evaluation, and conduct. They also deal with avoidance of conflict of interest and board-director and board-staff relations. Boards of Canadian museums are urged to adopt their own codes of ethics or the *CMA Ethical Guidelines of 1999*.³² The latter set of guidelines deals with collections' policies (including acquisitions, loans and disposals), culturally sensitive objects and human remains, employment relations, and many other specific areas of museum activity. Probably because they represent the efforts of a single national museum organization, there is a greater level of specificity in the *CMA Ethical Guidelines* in comparison to the *ICOM Code of Ethics*.

The *CMA Ethical Guidelines* say little about business activities of museums beyond some fairly general statements concerning the need for commercial activities to relate to the institution's institutional mandate. More detailed *Guidelines for Museums on Developing and Managing Business Support* were approved by the American Association of Museums in 2001.³³ These seek to maintain and develop the relationship between museums in the United States and outside businesses. While any conflict of interest between governing authorities of museums and outside businesses is clearly improper and possibly illegal as well, what is less clear is when businesses or outside interests merely benefit as a result of some sort of involvement with a museum. In the case of the "Sensation" exhibit at the Brooklyn Museum, Charles Saatchi (who owned many of the artworks in the exhibition and provided it with financial support) was criticized for the benefits that accrued to his collection as a result of the increased exposure the exhibit provided.³⁴ It seems unlikely, however, that merely because a benefit arose on the part of a lender such as Mr. Saatchi through the exhibition of his collection, the directors of the exhibiting museum would face any kind of legal accountability.

³² Canadian Museums Association, *CMA Ethical Guidelines* (1999), online: <<http://www.museums.ca/media/Pdf/ethicsguidelines.pdf>> [*CMA Ethical Guidelines*].

³³ See online: AAM Guidelines for Museums on Developing and Managing Business Support <http://www.aam-us.org/museumresources/ethics/bus_support.cfm>.

³⁴ Levine, *supra* note 1.

So long as an exhibition is arguably in the interests of a museum and it suffered no loss as a consequence of benefits accruing to an outsider, no liability for breach of fiduciary duty on the part of the trustees or directors would seem to arise.

IV. DEACCESSIONING: "SELLING THE FAMILY SILVER"

One of the most controversial aspects of museum governance in recent years has been the practice of deaccessioning where a museum sells or otherwise parts with possession of objects forming part of its collection.³⁵ Though such transfers are usually legal, they can sometimes engender heated controversy and debate. A striking recent example involves a painting ("The Gross Clinic") by the American artist Thomas Eakins, which belongs to Thomas Jefferson University in Philadelphia. The University announced in November 2006 that it had agreed to sell the painting for US\$68 million to the National Gallery of Art and the Crystal Bridges Museum of American Art, a museum founded by Wal-Mart heiress Alice L. Walton, due to open in 2009. The University gave local institutions until 26 December 2006 to match the offer. On 21 December 2006, the mayor of Philadelphia (who had said that the painting "belongs in Philadelphia as much as the Liberty Bell and our sports teams") announced that the funds had been raised and the painting would stay in Philadelphia.³⁶ While the significance of the painting in American art history cannot be denied, some questioned the expenditure of so much money when three-quarters of Eakins works were already in Philadelphia and there were other pressing causes needing financial support in the city.³⁷

Much of the controversy surrounding deaccessioning by museums seems to arise from the perception that they are public institutions impressed with the role of protecting and preserving their collections intact for future generations. The enormous market prices for certain works of art in recent years, however,

³⁵ See Jason R. Goldstein, "Deaccession: Not Such a Dirty Word" (1997) 15 *Cardozo Arts & Ent. L.J.* 213 at 247.

³⁶ Carol Vogel, "Prized Eakins Painting to Stay in Philadelphia" *The New York Times* (22 December 2006) E39.

³⁷ *Ibid.*

have both created new options for museums to raise funds and enhanced the view of some of the need to prevent future sales of objects based purely upon the amount of money that their sale could bring.

Deaccessioning can be justified for a variety of reasons. An institution may face rising costs for storage, conservation, and insurance. Museums may want to dispose of items that they see as unrelated to their core collection strengths. Since it is often unpredictable when very desirable objects will become available for purchase, sales of objects out of collections can be a way to quickly raise funds to purchase items the museum may feel it will never again have an opportunity to acquire. The recent sale of the Dundas collection of Canadian First Nations objects at auction in the United States is a good example of the problems facing Canadian museums in this respect. The collection comprised several dozen outstanding objects collected by the Reverend Robert J. Dundas at Metlakatla, British Columbia in 1863. The English owners of the collection (who were descendants of Dundas) had decided to sell the collection at auction, but it appears few Canadian museums (including the Royal British Columbia Museum) were able to raise sufficient funds quickly enough to make purchases of any of the major items in the collection, which realized a total of over US\$7 million. It was only through the purchase of many of the offerings by the Thomson family of Canada that the return of these important objects to Canada was secured.³⁸

In the few cases of deaccessioning to have reached courts in the United States, there has been an apparent reluctance on the part of judges to second-guess the judgment of museum trustees.³⁹

³⁸ See Miro Cernetigo, "Artifacts Saved, but BC the Real Loser" *The Vancouver Sun* (9 October 2006) A3 and *The Dundas Collection of Northwest Coast American Indian Art* (New York: Sotheby's, 2006).

³⁹ See e.g. *Conway v. Emeny*, 139 Conn. 612, 96 A. 2d 221 (1953) and *Wilstach Estate*, 1 Pa.D. & C.2d 197 (Pa. Orph. Ct. 1954). This notion of the inappropriateness of judicial second-guessing has also been supported by one of the very rare museum cases in Canadian law. In *McMichael v. Ontario* (1997), 36 O.R. (3d) 163, 154 D.L.R. (4th) 50 (C.A.), the Ontario Court of Appeal examined the relationship between the agreement joining a museum founder/donor and the province of Ontario and subsequent provincial legislation concerning the

The issue of deaccessioning has instead primarily been addressed in non-binding codes of ethics. The *CMA Ethical Guidelines* contain detailed provisions on what it calls “disposals” and commence with an acknowledgment that while disposals can strengthen and refine the quality of a museum collection “there is a strong presumption against the disposal of accessioned collections to which the museum has acquired title ...”⁴⁰ A number of conditions that are seen as being desirable in the case of disposals are set out, including: the consent of the public or private sources for the original acquisition of an object, the desirability of disposed material remaining in public institutions, and the publicizing of the intention to dispose of material at least three months in advance. In particular, a museum must ensure that:

- it is legally free to act;
- it has clear title to the objects proposed for disposal and/or in the case of undocumented material, that it has made a serious, diligent and documented effort to locate owners;
- there are no restrictions associated with the material when it was acquired;
- the transaction is fully approved by the governing authority;
- objects for which a request for return, restitution or repatriation could reasonably be expected to arise in the future are not to be considered for disposal by other means.”⁴¹

The *CMA Ethical Guidelines* specify what has become a commonly accepted ethical and professional standard for museums: that funds generated by disposals not be used to provide for any other purposes besides the acquisition or direct care of

museum. The authority of the decision is somewhat limited in view of the *sui generis* nature of the agreement involved, but it appears to support the view that courts should defer to decisions of boards of museums as to when an accession (and by inference also a deaccession) of a work of art is appropriate; see A.J. McClean, “*McMichael v. Ontario—One Man’s Obsession*” (1998) 7 Int’l. J. Cult. Prop. 496.

⁴⁰ *CMA Ethical Guidelines*, *supra* note 32 at E.4.1 [emphasis in original].

⁴¹ *Ibid.*

museum collections. In this and other respects, the *CMA Ethical Guidelines* appear to follow closely the *ICOM Code of Ethics for Museums*.⁴²

V. RETURN OF FIRST NATIONS CULTURAL MATERIAL

Repatriation of cultural objects to First Nation claimants is another issue that has affected many Canadian museums over the last fifteen to twenty years.⁴³ In 1988, the Glenbow Museum in Calgary, Alberta held an exhibition entitled "The Spirit Sings", which included early First Nations masks from European collections and provoked protests by local Mohawks, along with the only known instance in Canada of litigation by First Nations to close down a museum exhibition on cultural grounds.⁴⁴ These court proceedings were unsuccessful, but they led to a national conference involving the Assembly of First Nations and the Canadian Museum Association. The conference resulted in a new partnership relationship between Canadian museums and Aboriginals. It produced a report entitled "Turning the Page: Forging New Partnerships between Museums and First Peoples".⁴⁵ The most detailed portions of the report were those dealing with the repatriation of Aboriginal cultural property from Canadian museums.⁴⁶ In the absence of comprehensive legislation, like the *Native American Graves Protection and Repatriation Act* in the United States,⁴⁷ these recommendations have, since their

⁴² See ICOM, *Code of Ethics for Museums*, *supra* note 1 at paras. 2.12 to 2.17.

⁴³ For a comprehensive discussion of the repatriation of cultural property from both a Canadian and international perspective, see Darcy N. Edgar & Robert K. Paterson, eds., *Material Culture in Flux: Law and Policy of Repatriation of Cultural Property* (1995) 29 U.B.C. L. Rev (Special Issue).

⁴⁴ See *Mohawk Bands v. Glenbow-Alberta Institute*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.).

⁴⁵ See *Task Force Report on Museums and First Peoples (Turning the Page: Forging New Partnerships between Museums and First Peoples)*, 2d ed. (Ottawa: 1992).

⁴⁶ See Catherine E. Bell & Robert K. Paterson, "Aboriginal Rights to Cultural Property in Canada" (1999) 8 Int'l. J. Cult. Prop. 167 at 196-99.

⁴⁷ 25 U.S.C. §§ 3001-3013 (1988) [*NAGPRA*].

promulgation in 1991, been the primary basis for the resolution of repatriation issues between museums and First Nations in Canada. The situation in Canada regarding repatriation is, therefore, much more fluid and flexible than in the United States, where all museums that receive federal funds and have American Indian or Native Hawaiian human remains or artifacts in their collections are subject to the provisions of *NAGPRA* concerning the publication of inventories and an obligation to return certain categories of material.

The Museum has its own criteria for dealing with repatriation of First Nations artifacts and ancestral remains from its collection. These provide as follows:

- The Royal BC Museum has provided First Nations with information about ancestral remains from their traditional territories held by the Royal BC Museum, and upon request, returns all ancestral remains and directly associated burial materials to the originating First Nation after any overlapping interests have been resolved by the First Nations involved.
- The Royal BC Museum transfers artifacts to First Nations through negotiated treaties within the Treaty Process in British Columbia.
- For First Nations that are not in the Treaty Process and/or do not wish to include Royal BC Museum artifacts in their treaty negotiations, the Royal BC Museum negotiates the transfer of objects directly with those First Nations on a case-by-case basis.⁴⁸

The first modern treaty between Canada, British Columbia and a British Columbia First Nation was the Nisga'a Final Agreement

⁴⁸ Interview of Dr. Martha Black, Curator of Ethnology, Royal BC Museum Corporation (15 February 2007). See also Royal BC Museum, *Aboriginal Material Operating Policy* (18 February 2003), online: <http://www.royalbcmuseum.bc.ca/Content_Files/Files/AboriginalMaterialOperatingPolicy.pdf>.

of 4 August 1998.⁴⁹ This treaty is also the first of its kind to deal expressly with First Nations culture and heritage.⁵⁰ Pursuant to its terms, over 40 percent of the 430 Nisga'a cultural objects in the Museum's collection were agreed to be returned to the Nisga'a.⁵¹ No object made since 1951 (the date of the repeal of the anti-potlatch law), no donated objects, and no objects created specifically for the museum by Nisga'a artisans are covered by the agreement.⁵² Chapter 17 also makes the provisions of the dispute resolution chapter of the treaty applicable to any disagreement in respect of a determination as to whether an artifact is a Nisga'a artifact and other issues arising in connection with Chapter 17.

It is presumably the returns of First Nations material pursuant to treaty negotiations that led to the enactment of subsection 5(7) of the Act, which provides:

On the request of the government the corporation must transfer all of its legal interest in and possession of an artifact in the collection of an aboriginal people if

- (a) a treaty or other agreement with the government provides that the artifact is to be transferred to the aboriginal people, and
- (b) the terms and conditions, if any, specified by the government for the transfer of the artifact have been met.⁵³

This provision seems based on the corporation and the provincial government being separate entities, though, since the latter controls the former, it may be redundant for all practical purposes. As an agent of the Crown, the Museum is presumably subject to the Crown's fiduciary and other legal obligations towards First

⁴⁹ See *Nisga'a Final Agreement* (signed by B.C. and the Nisga'a Nation on 27 April 1999, and by Canada on 4 May 1999), online: <http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex12_e.pdf>. The treaty has been enacted by the British Columbia Legislature as the *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2 and by Parliament as the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7.

⁵⁰ *Nisga'a Final Agreement*, *ibid.*, c. 17.

⁵¹ *Ibid.*, arts. 21-34.

⁵² *Ibid.*

⁵³ *Supra* note 4.

Nations. These duties, together with the flexibility of the fiduciary duty generally, should insulate most carefully executed returns of material from the possibility of being subject to legal challenge.

VI. CONCLUSION

The Act is a significant milestone in the history of a museum containing one of the world's most important collections of First Nations artifacts. It signals a change, not only in the legal nature of the institution, but also in its readiness to operate with greater autonomy from the provincial government and to partner with private enterprise when it appears in the interests of the Museum to do so. Given the legal nature of the Museum as a Crown corporation, as distinct from an autonomous charitable institution, it would seem that it now has freedom to exploit business opportunities, so long as they can credibly be seen to be in the overall interests of the institution.

