THE CUSTODIAL AGREEMENT CONCEPT DEVELOPED IN THE TREATY WITH THE NISGA’A, A CANADIAN EXPERIENCE TO BALANCE THE RIGHTS OF FIRST NATIONS WITH MUSEUMS’ FIDUCIARY OBLIGATION¹: SUCCESS OR FAILURE?

For years, Museums in Canada have acquired ethnological artefacts from Aboriginal Peoples, First Nations as we call them in Canada. Return or repatriation has taken place, early on, in the eighties. The Canadian Museum of Civilization² was and is still engaged in bilateral discussions with a First Nation for the return, temporarily or permanently, of some cultural artefacts on an ad hoc basis.

A new phenomenon started in the mid-nineties when discussions between governments of Canada and First Nations related to First Nations autonomy and territorial claims, involved Museums for return of cultural artefacts.

In this paper, I will look at the relationship between:

¹ To do that research I was priviliged to have many conversations with Andrea Laforet, Director of the Ethnology and cultural studies, till 2009. She played a major role in her representation of the Museum during negotiations with the Nisga’a, and in the final drafting. We had a long registered conversation on the 9th September 2014. I did the same with Nadja Roby, actual Head of Repatriation at the Canadian Museum of History. I thank both of them to have given me generously their time.
-- A Canadian First Nation, the Nisga’a, based in British Columbia, on the West Coast of Canada and
-- A National Museum, the Canadian Museum of Civilization.
More specifically, I will deal with the transfer or the return of cultural artefacts acquired over the years and owned by the Canadian Museum of Civilization within the Nisga’a Treaty, and how and why that transfer of cultural artefacts concluded in the Treaty never took place.

I. May 2000: First modern treaty signed by Canada, the province of British Columbia and the First Nation Nisga’a, involving Museums
SELF DETERMINATION

The Nass River and surrounding lands have provided for the Nisga’a people since time immemorial.³

A new process emerged in the 1990’s, when negotiations between Canada, a province and a First Nation took place. The Nisga’a had been negotiating their land claim since the 1980s.

The Nisga'a Treaty sets out the land and resources that form part of the agreement between Canada, B.C., and the Nisga’a Nation. The Treaty sets out the Nisga’a's right to self-government. Together, the Treaty and related agreements provide the Nisga’a with: $196.1 million dollars (In 1999 dollars); 2,019 square kilometres of land; The Nisga'a Treaty is an example of the kind of negotiated settlements that the Supreme Court of Canada encouraged in its decision in the Delgamuukw \(^4\) case. The court accepted evidence that was not familiar to common law courts including oral histories and legends. Another significant part was evidence given by experts in genealogy, linguistics, archeology, anthropology and geography. The Parties have agreed that the Treaty is a full and final settlement of the Nisga'a land question.

The treaty negotiations brought the Museum to the table when dealing with the requests of that Nation for the return of all cultural artefacts owned by the Museum. The Museum had to manage the gap between what the Museum felt able to do while remaining faithful to the mandate and the fiduciary obligation on the one hand, and the request of the Nisga’a for the return of all objects of Nisga’a origin held in federal repositories, on the other hand. As Andrea Laforet, representing the Museum at the negotiation table, pointed out: \(^5\)

\(«(\ldots)\) What this places at issue is the CMCC’s mandate under the Museums Act to develop a collection whose primary purpose is to be a vehicle for the generation and preservation of knowledge. At the treaty table, the ideas of research and a broadly defined public trust come at least implicitly and often explicitly into conflict with the concept of the First Nation’s authority as a nation. Nonetheless, agreements concerning repatriation negotiated within treaties so far have followed a model that recognizes the First Nation’s ongoing connection with objects originating in their society and provides for repatriation and access within a

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framework that also acknowledges the institutions of the larger society and the participation of the First Nation within those institutions. »

Face-to-face negotiations began in February 1995 and the Agreement-in Principle was signed in February 1996; the Final Agreement was concluded in December 1998, and the Treaty was signed in 2000. For Andrea Laforet: «There was careful consideration and discussion of all issues, requiring hard work and creative thought on all sides, but that work and thought led to resolution in a reasonable amount of time».

The question of relations to objects and their different signification for First Nations Peoples and Museums have been studied in the Canadian literature. Here, the negotiations became a meeting place for Western and Nisga’a ideas about the relationship of objects to history, historiography and the organization of knowledge in society.

As Andrea Laforet wrote:

“The negotiation of the treaty has illuminated and emphasized culturally divergent ideas about the connection between objects and history at work in the Nisga’a society and in the museum. Its implementation may find both the Nisga’a and the museum engaging in new practices that, both intentionally and unintentionally, bridge the divergence.”

Through that treaty process, the Museum has reached repatriation agreements of artefacts with the Nisga’a.

To arrive to such an agreement, two lists of artefacts were established: the first one of Sacred or Shamanic objects to be returned immediately to the Nisga’a and a second, of Cultural Objects to be returned on request.

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6 LAFORET, A. Registered conversation, 9th September 2014.
For these Cultural Objects, they concluded a **Custodial Arrangements Agreement** that provides for shared possession on a rotating basis of objects of Nisga’a origin remaining in the Museum’s collection. The rotation would have permitted a timetable that would allow both the Museum and the Nisga’a to develop adequate programmes, so that at any time some of the materials would be with the Nisga’a and some with the Museum.\(^{10}\)

This custodial agreement arrangement approach was agreed to in others treaties concluded later by First Nations, Governments and the Museum. The Nisga’a one served as a model.

In that agreement, for all the care and conservation, the Museum is responsible for the insurance, responsible for shipping it. If there were specific things that the Nisga’a would want to be stored in a particular way the Museum would try to accommodate the request, in terms of cultural practices. At least initially, the Museum would make sure it was photographed, condition reported. The Museum would pay for the crating, the conservation, the shipping and ensure that the Nisga’a receive it in good condition.\(^{11}\)

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\(^{10}\) Appendix L – 1 Nisga’a Artifacts To Be Transferred From The Canadian Museum Of Civilization To The Nisga’a Nation Appendix L – 2 Nisga’a Artifacts To Be Shared By The Canadian Museum Of Civilization And The Nisga’a Nation. That was explained by Andrea Laforet on the 9\(^{th}\) September 2014.

\(^{11}\) ROBY, N., Registered conversation, 9th September 2014.
II. SPRING 2011: The Nisga'a Museum *Hli Goothl Wilp-Adokshl Nisga'a*, museum of the Nisga'a people located in Laxgalts'ap

**EQUALITY**


«We Nisga’a are leaders. Our art and culture tie us to this place. We have stories of wonder, tragedy, and triumph to tell. Here, we will share them with the world. »

During more than 10 years, the Nisga’a did not ask for the return of any objects, though the Shamanic or Sacred ones could have been returned immediately on request by the Nisga’a and that the Canadian Museum of Civilization would have had to send those. The Nisga’a Final Agreement provided for return of the objects on the L-1 list within 5 years of the effective date of the treaty, the return to be triggered by a request made by the Nisga’a. In fact, after four years, the Nisga’a requested an extension and the CMC agreed.

In 2010, the Nisga’a requested, and the CMC returned the artefacts on the L-1 list, Sacred and Shamanic artefacts, that were to be placed in the Museum and shown to the

12 Photos taken from Nisga’a Museum web site: www.nisgaanation.ca/nisga'a-museum.
The Museum is a project of the Nisga'a Lisims Government and opened in the spring of 2011, 11 years after the Treaty.

As the President of the Nisga’a Lisim government said: «They were the cornerstone of the New world class Nisga’a museum.»

The Nisga’a name Hli Goothl Wilp-Adokshl Nisga’a means: "the heart of Nisga’a House crests," a name that celebrates the role of tribal crests in Nisga’a society.

As the web site points out:

“\textit{It is the intent of the Nisga’a Museum that in the near future, the history of each item in the Ancestors’ Collection will be revealed. Through exhibit information panels, audio guide, museum book, audio/visual presentation, and searchable database, these rich and interwoven tales will take visitors deep into traditional Nisga’a life and culture. This state-of-the-art facility will eventually include archival software systems, a library and teaching centre, ongoing cultural programming, and a gift shop showcasing Nisga’a art and artists. Special exhibits will open on an ongoing basis »}.

It is fair to say that the Nisga’a perceive their Museum as being a contact zone not only among themselves but for the entire world. Future will tell if it is a reality.

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13 Though they were not accessible to visitors when they were at the Canadian Museum of Civilization.
15 \textit{Ibid.}
III. Lessons learned for the future: First Nations self-determination and National Museums

The Canadian Museum is now involved in several negotiations at different levels.

The BC treaty negotiations process is voluntary and open to all First Nations in British Columbia. There are 65 First Nations participating in or have completed treaties through the BC treaty negotiations process. The 65 First Nations represent 104 of the 203 Indian Act Bands in BC. The BC map illustrates exactly that interwoven of First Nations territories and, ipso facto, of cultural artefacts.

17 British Columbia Treaty Commission, http://www.bctreaty.net/files/updates.php. First Nations in the BC treaty negotiations process are self determining, and there are several First Nations that govern or represent multiple Indian Act Bands, communities, or hereditary houses, clans or families, or combinations of these.
Many aboriginal groups are now in the Treaty Negotiation Process. For some of these First Nations there are significant overlaps in territorial boundaries, which can imply overlaps in affiliation with cultural objects in the CMC collection; new structures or approaches of repatriation of cultural artefacts will have to be developed.

The Canadian Museum, sooner or later, will discuss repatriation with every Aboriginal group in Canada, as it was pointed out to me.

It is complex to assess the reasons why, any of the Cultural Artefacts of List L-2 governed by the Custodial Agreements Arrangement, were never demanded, as of today, by Nisga’a to be repatriated. It appears that negotiators at the table, both Nisga’a and CMC, expected that the Custodial Agreement would be implemented very soon after the ratification of the Treaty. That did not happen. The Canadian Museum does not know why the Nisga’a have not yet acted on the Custodial Arrangements Agreement.

It would be too simple to say that the Custodial Arrangements Agreement did not meet expectations. What could be said is that the artefacts of list L-2 remain in safe conditions at the Canadian Museum; and the Custodial Arrangements Agreement is still in force, though not executed. The L-1 objects, Shamanic or Sacred artefacts were returned and are now in the Nisga’a Museum.

The post-treaty period is, for any new country or entity, a very challenging and demanding time; issues at stake are immense and obligations often competing. That was surely the case for the Nisga’a Lisims Government. They decided to choose the road of building and installing a Museum and then asked for the Repatriation of L-1. That took time and energy. Today, as could be read on their website, Nisga’a are proud of their Museum, Hli Goothl Wilp-Adokshl Nisga’a.

Being on the side of the Museum, would it not have been preferable for a Museum to use the financed long term approach? The question is opened. What is sure is that the Museum has to find an alternative to the Custodial Arrangement Agreement in places where there are competing claims to the same cultural material. In some cases, that idea
of loans, funded through the federal implementation package, might possibly be that alternative.

On a broader scale, the repatriation of Shamanic or Sacred artefacts imply that the First Nations has ownership right and can decide for their preservation, as they decide to do. When objects are within a national collection their preservation is a national responsibility, held specifically by the national museum, its staff and governing body. Accountability for the preservation of the objects is then within a national context.

In CONCLUSION, let me say that the road to self governance is paved with tragedies as the Canadian First Nations history shows; even last June, the Canadian Truth and Reconciliation Commission on Residential schools spoke of «cultural genocide». The Nisga’a journey illustrates perfectly well that long tragic road. The Nisga'a quest for a treaty began over 100 years ago with the formation of the first Land Committee in 1890; Nisga’a went through very difficult times since then, were for many years outlawed by the federal government, had to fight in court also many years.

This model of repatriation and shared custody is a good model of what museums can develop with First Nations. It goes beyond the guidelines of the Canadian Task Force Report of 1992 and stands the test of time in that it meet the objectives of the United Nations Declaration on the Rights of Indigenous Peoples.¹⁸

Te Papa Museum is as a model and a pioneer in the development of relations of Biculturalism and Equality. I suggest that the process followed in the dialogue between First Nations and the Government in the Treaty Negotiation, first with the Nisga’a and now with others, in on that road to Equality. More that access to, I think it could be qualified as a dialogue of partners who can decide on an equal footing of substantive issues, who can dictate the agenda. The process is the essence of Equality.

The history of the Nisga’a shows that they are masters of their destiny, that they are fully conscious of their Equality and that they exercise it.

I applaud the resilience of First Nations. I pay immense tribute to the Nisga’a.

I will go as far as saying that it is a great success of 20th and 21st centuries.

Michèle Rivet, September 2015
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**Biography**

**Michèle Rivet** obtained her Master’s Degree in Museology in 2015. Her studies took an in-depth look at questions related to First Nations and Museums; she also wrote on topics where her expertise in Human Rights is applied to the museology domain.

**Michèle Rivet** has had a long career in Human Rights, as a lawyer, as a judge namely as first President of the Quebec Human Rights Tribunal, from 1990-2010. She is a visiting professor at Université de Sherbrooke (Québec).

**Michèle Rivet** holds a Master’s degree in Law from Paris. In 2005, she received an Honorary Doctorate from Ottawa University, signal testimony to her contribution to the development of Human Rights. In 2011, the Quebec Court gave her the Gold Medal and, in 2015, the Quebec Bar awarded her its Annual Merit and gave her the title *Advocatus Emeritus*.

**Michèle Rivet** is Vice-President of the International Commission of Jurists, based in Geneva. She has written and published extensively on Human Rights.