The Heritage Inquisition: A Comparative Analysis of Archaeological Heritage Legislation from Around the World

by

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Author's Declaration

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

Abstract

Around the world, archaeological sites and their excavation are governed by laws. These laws regulate things such as what must occur when land that may contain archaeological sites is going to be disturbed, as well as who is allowed to excavate sites, and what happens to the artifacts that are found. These laws have a real impact on archaeologists and other members of society, but they differ from jurisdiction to jurisdiction. By comparing current archaeological heritage legislation, regulation and policy in different jurisdictions around the world, this thesis identifies patterns both common and distinct within the heritage legislation. In this thesis, I draw from my own research to look at the diverse ways in which archaeology is regulated, practiced and perceived in different parts of the world. I draw from my own knowledge and experience of Ontario archaeology and include areas from around the world that share a similar past to that of Ontario, which results in the archaeology of colonial and Indigenous histories. The jurisdictions examined in this thesis are: Ontario and Nunavut in Canada; New Zealand, and Tasmania. In chapter one, I investigate and demonstrate how these archaeological heritage laws are important, and the real effect they have on people. Archaeological legislation protects archaeological sites and materials, and is sometimes perceived in a positive manner, and sometimes in a negative manner by affected people. In chapter two, I expand upon the effects of legislation on individuals by comparing the archaeological heritage legislation from the four chosen jurisdictions. I ask the question: which problems were solved by the legislation? Asking this question emphasizes the similarities and differences in the practice of archaeology from around the world and helps to show how different jurisdictions deal with specific archaeological situations. This analysis of the current archaeological heritage legislation of these jurisdictions offers insights into the role and influence heritage governance has on the lives of people around the world.

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> *"Any legislation that has at its core an objective to protect places of identified heritage value is likely to impinge on the rights of private owners" Vosseler 2006:67*

1.1 Introduction – Archaeological Laws Matter

Archaeology matters. Archaeologists make impressive claims about what archaeology can accomplish: "The archaeologist is the mediator between past and present, helping communities and individuals to come to terms with their own past and their heritage. It empowers them to take charge of their own futures by understanding how we live in fragile environments and in dynamic and changing societies" (Henson 2011:127). The insights derived from archaeological research "can help bolster the chances of a better future" (Sabloff 2008:16). Archaeological research can also connect modern people to the past, and can help create positive relationships with Indigenous people around the world. By connecting modern identities to those of the past, archaeology can help to invoke emotive responses in individuals, which create a sense of belonging and contribute to a common heritage as human beings (Henson 2011:120, 123). These insights and connections help to show the public the importance of archaeology.

Just as archaeology itself matters, so too do the laws that govern archaeological research. These laws ensure that essential archaeological research is conducted with the proper care needed to provide valuable insights into the past. Without these laws, as has been the case in the past, archaeology is reduced to haphazard salvage or blatant treasure hunting, leading to loss of information. In many places, archaeological investigation is required by law, and this requirement is often met with surprise by the general public, but seems practical when one

remembers that archaeology is everywhere: in backyards, farmers' fields and under cities. With development posing a constant threat to archaeological resources and the destructive practice of archaeology itself, laws were inevitable. With the importance of archaeology to the future, and the abundance of archaeology around the world, these laws are becoming more and more necessary to regulate archaeological research. These laws affect people in very different ways. Sometimes "the study of archaeology, however fascinating, seems a luxury we can ill afford in a world beset by economic uncertainties and widespread poverty and famine" (Sabloff 2008:16). Despite this belief, archaeology is important and can be used to provide insights into the critical issues that affect the world today. The following two examples illustrate how archaeology and its laws can affect the public.

1.2.1 Archaeological Laws -- Beneath the Pavement: The Ward

In 2017, a plan was drafted to construct a new courthouse on a parking lot in Toronto. The City of Toronto consulted Toronto's Archaeological Management Plan, which identifies areas of archaeological potential and requires archaeological assessments in these areas prior to development (City of Toronto 2004). This plan indicated that the property in question had the potential for heritage resources. Based on the *Ontario Heritage Act* (1990), any property suspected of having heritage value must be investigated by a licensed archaeologist (Ontario 1990:S.48). Accordingly, the company in charge of the courthouse project hired Timmins Martelle Heritage Consulting, a private Ontario archaeological consulting firm, to determine the next steps. Once they concluded that the parking lot had high heritage potential, an excavation began of the area formerly known as St. John's Ward. At the end of the excavation, between 300,000 to 500,000 artifacts were recovered (Martelle et al. 2018:19). Background historic research had determined the area had begun as a working-class neighbourhood in the 1830s but

the artifacts augmented this understanding, revealing a complex community that provided housing for waves of immigrants to the city. In the 1840s, Toronto became a centre of abolition activity in the fight to end American slavery, and thus the area became home to hundreds of African Americans fleeing slavery via the Underground Railroad; it also became a landing point for Irish migrants escaping the potato famine, and Italian labourers settled there seeking work. The area also accommodated Eastern European Jews running from brutal pogroms (Martelle et al. 2018:19-20; 143). By the late 19th Century, civic documents and popular media shaped by public opinion depicted the area as a slum. But the archaeological investigation revealed that this characterization does not do justice to the complex and diverse lives of the individuals who called the Ward home. The researchers learned that the area was "a microcosm of a microcosm – a tiny piece of Toronto that was both unremarkable and yet rich in the sort of social history that has often been overlooked in the narratives of our civic past" (Martelle et al. 2018:20). The excavation helped illustrate "the lives of known historical figures whose fortitude, resolve, perseverance, bravery, and entrepreneurialism offer salient models for us today" (Martelle et al. 2018:277). The law that required the artifacts and cultural features be excavated thus contributed to a richer, more nuanced understanding of the area's heritage, and to a Canadian identity. In order to disseminate this rich history to the public, the archaeologists involved released a book discussing the excavation and the amazing material recovered, and there are plans to create a permanent display of a few of the more outstanding artifacts at the new courthouse.

1.2.2 Archaeological Laws -- The Case of the Mysterious Skull

In 2017, while building a patio for her summer home in Goderich, Ontario, a homeowner and her contractors found a human skull within the soil. The contractors informed the police and coroner, as required by the *Funeral, Burial and Cremation Services Act* (Ontario 2002:S.95). Once the

police and the forensic anthropologist determined the skull was from the 1880s and of no forensic concern, the homeowner was then advised to contact a provincially licensed archaeologist, as finding the human remains from a historic context invoked the *Ontario Heritage Act* (1990). The homeowner did question what would happen if she just put the skull back into soil and covered it up, and was told by the ministry employee that she would face a fine of $50,000 and up to two years in jail. Cowed by the possibility of this fine, the homeowner decided it was worth it to continue the archaeological work. This required the homeowner to hire an archaeological firm in order to clear her property of cultural heritage value or interest. Through research and through excavation, it was determined that the skull likely came from the cemetery of an Anglican church which had once owned the stretch of land belonging to the homeowner and her neighbours. The property also had potential for Indigenous history due to its proximity to Lake Huron, since shorelines were often camping spots for transient past peoples. However, no other archaeologically significant objects were found during the excavation, so the site was cleared and the homeowner was given leave to complete her patio.

By the end of this archaeological investigation, the homeowner had been required to pay almost $70,000, including the cost for the reburial of the skull. The entire process took over one and a half years to finish and prevented her use of her yard during that time. Although this homeowner was able to afford all involved costs, the ordeal was stressful for her and her community. Her neighbours are now wary of doing any home improvements to their properties after this experience. This wariness could potentially lead neighbours to avoid reporting archaeological heritage hoping to stay away from expensive and invasive excavations.

1.3 Discussion

The two cases described above illustrate different ways in which archaeological legislation can affect the lives of the public. These types of examples are not restricted to Ontario and occur all around the world. Despite the cost of the excavation of the Ward (likely to have been in the millions), the laws required a complete excavation of the land as it was going to be fully destroyed in order to construct the new courthouse. The end result of the archaeological investigations was evidence of a complex and diverse history beneath the pavement. However, it is easy to have sympathy for an individual homeowner who was forced by the laws to spend thousands of dollars on top of the expense of building a patio on her property, especially since the archaeological investigations that were paid for did not produce any further information. Others may be wary about reporting archaeological material to avoid paying out of pocket. While some people understand the high cost of archaeological excavations, others may not. The homeowner from Goderich was quoted as saying the requirement of archaeological research was "bureaucratic nonsense" (Brown 2018), and was encouraged by the media who reported on the situation. These views often hinder the archaeological process and place the archaeological sites and materials at potential risk.

Another issue faced by both the City of Toronto and the Goderich homeowner alike relates to the right to develop property. This right shows the dilemma of legislation, which is "the community's right to protect heritage versus the need to uphold the freedom of the rights of the property owner to do what they want with their property" (Vosseler 2006:67). How do we prevent someone from destroying archaeological resources because they cannot pay the cost to investigate a site? To begin to understand and appreciate how legislation affects or influences the way in which we protect and manage our historic resources, we must recognise that such matters

are inevitably political in nature and "subject to the excesses and vagaries associated with political processes operating at the national, regional and local levels" (Vosseler 2006:67). Balanced against this, though, is the need to appreciate that heritage legislation, in whatever guise, is still "an expression of the community's wish for [heritage place] management, and, if properly written or used, is a useful tool" (Vosseler 2006:67).

The Ontario archaeological legislation that initiated archaeological investigations in both of these examples was enacted as a response to the loss of almost 8,000 archaeological sites in the 1950s and 1960s due to development (Williamson 2018a:252). From these losses came the *Ontario Heritage Act* (1990), a law dedicated to protecting the archaeological and built heritage of Ontario. Similar laws have been created for analogous reasons in other jurisdictions around the world. Archaeological legislation exists to protect archaeological heritage so that it will be available to inform the future.

While not all excavations will be as informative as the example of the Ward, each and every archaeological site can offer some degree of information towards a grander scheme of insight, helping archaeologists and other scientists to better understand the past. Even the very recent past, indeed even the present, can be better understood through archaeology. The Garbage Project by William Rathje is an example of utilizing archaeology to understand and create solutions to our current and future problems. The garbage project began in the 1970s and utilized archaeological perspectives to understand patterns of use and disposal of material culture (Sabloff 2008:18). This project contributed to our understanding of garbage disposal and recycling issues, which were far more complex than previously understood (Sabloff 2008:18). Another example of archaeology contributing to future studies is the study of the Maya. The Maya of the Southern Lowlands were able to sustain large populations in a tropical rainforest

environment for over a thousand years, but failed in their attempts to adapt to changing conditions such as drought, environmental degradation, warfare, violence, economic changes and health problems (Sabloff 2008:38). These failures resulted in a decimated population and led to the theory that there was a 'Maya collapse' and the complete destruction of the Mayan people. Though the Maya did not disappear completely, their current population levels have never reached the same height as those of the ancient Maya. However, this example and others like it can help archaeologists understand the perils of overpopulation with a lack of sustainable resources – we may be able to learn how to correct similar crises in the present by studying the failures of the past.

Finally, archaeology and the legislation that governs it have the potential to be especially important to Indigenous populations in post-colonial situations. Adapting archaeological legislation to the needs of Indigenous people is important in helping to mend strained relationships between settlers and Indigenous communities. Instead of ignoring the descendent communities and creating legislation with no consideration or consultation at all because of the old Western convention that the past has been "lost" (Nicholas & Hollowell 2007:63) and the material belonged to a people long gone, legislation should include input from descendent communities regarding their own heritage. Non-Indigenous archaeologist's "ways of thinking about and interpreting the world are often accepted as authority" (Piskor 2014:1). Including Indigenous populations in the legislative process from the very beginning might help to repair these power imbalances, which in turn could be helpful in mending the damaged and long-unequal relationships between archaeologists and Indigenous people. Much of the pushback to have Indigenous representation has occurred from within, with Indigenous peoples enacting changes to deal with "archaeology in their own terms rather than wait for new legislation or

accept the inadequate" legislation (DeVries 2014:32). Changes to legislation often occur after periods of unrest among Indigenous populations, and from a desire for Treaties to be ratified. In some parts of the world, these changes are recognized as an attempt to include Indigenous populations in heritage matters. It is ethically irresponsible of archaeologists to conduct archaeological investigations without taking into account the questions these entities might be interested in asking (Piskor 2014; Hodder 2002:174). Indigenous communities and descendant groups have been marginalized by archaeology in various ways and for various reasons, but that is changing as archaeologists around the world are slowly shifting the ways in which they conduct archaeological work in an attempt to make it more ethical and inclusive (Piskor 2014:6). Archaeologists need to ask questions that resonate with stakeholder communities (Hodder 2002:181) and Indigenous people, challenging the ethics of an archaeology that deals with their heritage but is irrelevant to their needs (Nicholas & Hollowell 2007:65).

1.4 Conclusions

All around the world the protection of archaeological resources falls under legislative frameworks established by governments, though many outside the field of heritage do not know about these laws (Pokotylo & Mason 2010:60). These laws not only help protect sites and materials and ensure that the archaeological objects/sites/samples are available for future studies, they can also help with strained relationships between settlers and Indigenous people. Without laws, it would be very easy to destroy archaeological sites, especially at a time when many are at risk by land development. Often, the general public wonders what the point is. Why create strict laws to protect materials of long dead past that seemingly have no importance to the future? Archaeology can provide more than just information on the past. By studying past peoples, such as the ancient Maya, or early immigration into the city, archaeologists can provide new insights

into critical issues affecting the modern world. Past peoples experienced many of the same problems we face today, and while they did not always recover from these experiences, the ways in which past peoples attempted to deal with their problems could be useful to decision-makers today. These issues that face archaeologists, stakeholders, and the general public need archaeological heritage legislation that reflects modern problems.

The rest of this thesis examines the laws governing archaeology in four jurisdictions: the province of Ontario and the territory of Nunavut, within Canada, the country of New Zealand, and the island state of Tasmania, within Australia. The proposed venue for publication for this thesis is the *Canadian Journal of Archaeology*. The intended audience of this research is lawmakers, the general public, and archaeologists actively engaged in archaeological research. The intention was to reach as many people as possible to demonstrate the ways in which archaeological legislation is important and how it affects us all, and how we can affect change so that it reflects and represents our modern society.

Chapter Two -- The Heritage Inquisition – A Comparative Analysis of Archaeological Heritage Legislation from Around the World

2.1 Introduction

Archaeological sites are protected by laws, which stipulate the procedures and practices that are required when land disturbance occurs anywhere, or when the deliberate excavation of a known archaeological site is undertaken. What is the intention of archaeological legislation and what archaeological problems can it solve? Are there differences in archaeological legislation around the world and, if so, what are the effects of those differences? This chapter explores these questions through an examination of legislation from four jurisdictions around the world, and looks at how these laws have an impact on both archaeologists and other members of society.

2.2 Research Methodology

The methods employed in this study are a comparison of relevant archaeological heritage legislation, and a literature review. In order to choose jurisdictions for this study, specific criteria were used. The first related to my background as an Ontario archaeologist: I chose to include Ontario because I wanted to see how its heritage legislation compares with that of other jurisdictions with a similar background of colonialism. Other criteria included jurisdictions with an archaeological record that included sites from both the Indigenous and colonial populations and legislation that is written in English and accessible online. Though there are many places that meet these criteria, I chose only three additional places to ensure a complete comparison could fit within the length constraints of this thesis. This sample included one other jurisdiction within Canada, and two jurisdictions within Oceania: the territory of Nunavut, the country of New Zealand, and the island state of Tasmania. Despite the many jurisdictions that fit within these

criteria, particularly anywhere in the United States, I already had two jurisdictions within North America, I wished to select jurisdictions that were different and far away from North America, which led me to choose Tasmania and New Zealand. Once the four jurisdictions were selected, a search for the archaeological legislation and associated documents for each was completed online. The most recent version of archaeological heritage legislation was reviewed, though previous versions were considered for background knowledge. Other documents that were associated with the heritage acts were also examined, such as legislation that deals with procedures for the discovery and care of human remains, as well as documents that explain the procedures and practices that archaeologists must follow within each designated jurisdiction.

Once all relevant heritage legislation from each jurisdiction was identified, the two methods employed in this study were to identify key themes in the legislation, and to "reverse engineer" the documents to determine their possible intention with respect to archaeology. For an example of reverse engineering Part 1, Section 6 of *Heritage New Zealand Pouhere Taonga Act* (2014) reads:

> ***Archaeological site*** *means, subject to 42(3),*
> *a) any place in New Zealand, including any building or structure (or part of a building or structure), that –*
> *i. was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900;*

Section 1 of the *Nunavut Archaeological and Palaeontological Sites Regulations* (2001), the regulations derived from the *Nunavut Act* (1993), reads:

> *An archaeological artifact means any tangible evidence of human activity that is more than 50 years old and in respect of which an unbroken chain of possession or regular pattern of usage cannot be demonstrated, and includes a Denesuline archaeological specimen referred to in section 40.4.9 of the Nunavut Land Claims Agreement.*

Although the wording is very different, the intent of both sections is to legally define how old something must be to be considered archaeological.

The list below identifies key themes identified through the analysis of the legislation:

- What year was the legislation introduced?
- What ancillary documents supplement the legislation?
- What qualifications are needed to conduct archaeology?
- What are the procedures for conducting archaeological investigations?
- What procedures are followed once excavation is complete?
- What policies deal with human remains?
- What are the procedures in place that deal with archaeological sites and materials in emergency situations (natural disasters, etc.)?

This second list shows examples of questions addressed by the legislation, as identified by the "reverse engineering".

- How are the laws enforced?
- When does something become archaeological?
- What happens to the archaeological materials?
- Who owns the archaeological material?
- How are Indigenous communities involved in the legislative process?

Once the information was organized by way of these questions, a comparative analysis of the four jurisdictions was completed to determine what was similar and what was different with the legislation. Finally, a literature review was also completed in order to understand the legal

history of the legislation from each jurisdiction, and the role archaeology plays in the lives of its people.

2.3 The Jurisdictions

2.3.1 Ontario

Ontario is a province within the country of Canada. Within Ontario, the earliest well-documented groups were the Paleo-Indians around 11,500 years before present (B.P). (Ellis & Deller 1990:37). Over the subsequent thousands of years these early groups of nomadic hunters and gatherers gave way to larger populations, and eventually the emergence of sedentary village life (Munson & Jamieson 2013). The voyages of Jacques Cartier in the 1530s demonstrate the first European visits with Indigenous people in Ontario (Hill 2017:86). Early large-scale colonization of North America began with the fur trade, with French and British colonists competing for land. Eventually by the 18th and 19th Centuries, Europeans had settled into Ontario (Munson & Jamieson 2013). Treaties were signed between the Crown and Indigenous people that were allegedly meant to govern fair land and resource sharing, but with the settlement of Europeans, disease and war followed, leaving Indigenous populations weak and unable to fight back (Hill 2017:87). Indigenous children were forced from their homes into residential schools to assimilate to European ways, and Indigenous communities were forced onto reserves, which led to Indigenous populations dwindling while European populations increased.

History of heritage legislation

Provincial archaeological heritage legislation has existed since the 1950s in Ontario. Prior to that, federal and provincial legislation was already in place to protect Indigenous burials and sacred sites, but there was nothing set in writing that addressed non-burial archaeological sites.

In 1953, the *Archaeological and Historic Sites Protection Act* was introduced (Dent 2012:30). The *Ontario Heritage Act* (1990) was then introduced in 1975, and since then has gone through several revisions, the most recent revision occurring in 2005. Several key elements of this document, including ideas about "archaeological significance", still remain in use today (Dent 2012:30).

2.3.2 Nunavut

Nunavut is a Territory within the country of Canada. In 1999, the *Nunavut Act* (1993) created the new territory by altering the boundaries of the Northwest Territories. Nunavut became the third territory within Canada and the majority of the population is Inuit. Human populations did not explore the Arctic lands and sea until approximately 4,000 years ago (Arnold & Stenton 2002:36). The earliest populations gave way to Dorset cultures some 2,500 years ago, followed by another migration, known as the Thule. The Thule are the ancestors of the modern Inuit, the Indigenous population residing in Nunavut. By the late 1500s encounters became more frequent between the ancestors of Inuit and Europeans. The search for the Northwest Passage led to an increase in explorers to the region. These encounters did not immediately affect the lives of the Inuit, but slowly led to change as continuing activities involving naval ships, whalers, traders, missionaries, police and public servants resulted in a relationship with non-Inuit people (Simon 2011:880). This relationship resulted in Inuit losing control over their ability to make decisions regarding their lands and waters. Children were removed from households and placed in residential schools in an attempt to assimilate them to European culture, while the introduction of unknown diseases led to the removal and relocation of many Inuit people far away from home in order to provide treatment, and many never returned (Stevenson 2008:21).

History of legislation

The *Nunavut Land Claims Agreement* (1993) was signed between the Inuit of the Nunavut Settlement Area and their representatives, the Tungavik Federation of Nunavut, and the Canadian government, and in 1999 Nunavut officially became a territory. The *Nunavut Act* replaced the *Northwest Territories Act* and was informed by the land claims in other provinces and territories and included the needs and the rights of the Inuit population. It also gave the Government of Nunavut legal responsibility for the territory's archaeological resources, which at the time numbered around 6,000 documented sites (Arnold & Stenton 2002:36). In 2001, the *Nunavut Archaeological and Palaeontological Sites Regulations*, which regulate archaeological research in Nunavut, came into force and replaced the archaeological policies of the Northwest Territories.

2.3.3 New Zealand

New Zealand is an island country within the Pacific Ocean and consists of two main landmasses known as the North Island and the South Island, as well as approximately 600 smaller islands. People did not settle until very recently on the island now known as New Zealand because it was extremely remote. The island was likely settled by Polynesians between 1250 and 1300 CE. These first populations developed a unique Māori culture. Due to the remoteness of New Zealand, very few Europeans settled on the island until the arrival of Captain James Cook of Britain in 1769 (Paterson 1999:110). Following the arrival of European and American traders, whalers and missionaries, New Zealand officially became part of the British Crown by signing the Treaty of Waitangi. Despite the treaty, the New Zealand government transferred large parcels of Māori land to state-owned corporations and other development (Paterson 1999:112). The

Māori protested the land loss, resulting in the government finally acknowledging the rights of the Treaty of Waitangi.

History of legislation

In 1954 the *Historic Places Act* was introduced and was the first legal document that was concerned with preserving, marking and recording places of historic interest in New Zealand. The Act was amended in 1980, and again in 1993 after protests against the Crown to acknowledge the Treaty of Waitangi. However, a call for the adoption of a more "integrated approach to the protection and management of historic heritage" resulted in the *Heritage New Zealand Pouhere Taonga Act* 2014 (Vosseler 2006:72), which helped to streamline procedures for archaeological work and improved alignment with other heritage legislation.

2.3.4 Tasmania

Tasmania is an island state south of Australia, separated by the rise of sea levels in the Bass Strait. The state encompasses the main island of Tasmania as well as the surrounding islands. Tasmania was first occupied by people more than 40,000 years ago (Tasmania 2019:1). In the late 1700s, early encounters with colonizers were violent, with British forces occupying Aboriginal land by force (Fenton 1884:36). Britain permanently settled the island and created a penal colony. Land was taken and Aborigines were murdered and abducted. During a six-year war called the Black War (Fenton 1884:37-38), prison camps for Aboriginal survivors were set up on the Furneaux Islands, which resulted in more death due to disease and war (Bowdler 2015:214). A reserve was established on Cape Barren Island in 1881, where Aborigines had no rights, and children were forcibly removed to be assimilated into European culture (Harman 2013:749). In 1973, the Tasmanian Aboriginal Centre (TAC) formed and after years of efforts,

successfully petitioned for land rights, the recognition of identity and the return of stolen human remains (Harman 2013:760).

History of legislation

The first piece of legislation that set out to protect both Aboriginal and historic heritage was incorporated into the *National Parks and Wildlife Act* 1970 (McGowan 1990:61). In order to move away from heritage being viewed as less important than natural conservation, and due to mounting pressure from the 1970s movement toward Aboriginal rights, Tasmania developed the *Aboriginal Heritage Act* 1975, which defined what Aboriginal heritage is and how that heritage must be managed (McGowan 1990:61). In 2017, amendments were made in the interim while a complete review of the Act will be completed over the next three years.

2.4 Comparative Analysis

Table 1 below offers a summary of the legislative documents in the four jurisdictions.

Table 1: Summary of the Heritage Legislation and Ancillary Documents

Jurisdiction	**Heritage Legislation**	**Regulations/Ancillary Documents**	**Year**
Ontario	Ontario Heritage Act	Standards and Guidelines for Consulting Archaeologists	1975, recently amended in 2005, with ancillary documents completed in 2011
Nunavut	Historical Resources Act, Nunavut Act	Nunavut Archaeological and Palaeontological Sites Regulations, Applicants and Holders of Nunavut Territory Archaeology and Palaeontology Permits	1988 and 1993 respectively, regulations came out in 2001, ancillary document in 2003
New Zealand	Heritage New Zealand Pouhere Taonga Act	Archaeological Guidelines Series	1954, reviewed and amended in 2014, ancillary document amended to reflect legislative changes in 2014
Tasmania	Aboriginal Heritage Act	Aboriginal Heritage Standards and Procedures	1975, currently undergoing review with interim changes in effect as of 2017, ancillary document amended to reflect legislative changes in 2017

The following section compares the archaeological legislation from these four jurisdictions, organized by the questions identified above.

2.4.1 What year was the legislation introduced?

In Ontario, the *Ontario Heritage Act* was developed in 1975, with amendments to the archaeological sections last occurring in 2005. The *Nunavut Act* was passed in 1993. New Zealand is currently governed by the *Heritage New Zealand Pouhere Taonga Act* 2014, which repealed the 1993 legislation the *Historic Places Act*. Tasmania's heritage legislation was developed in 1975 but is currently undergoing a review, with some interim amendments having already been passed in 2017.

The year archaeological heritage legislation becomes law is important because it reflects the values and views archaeologists and governments of that time. Archaeology is a colonial field, with a past rooted in Western thought (Watkins 2002:432). Much of the early legislation is a reflection of this colonial thought process (McGowan 1990:61-62). Despite this recognition, legislation has been slow to change, and often only occurs after pushback from outside forces. In Ontario, archaeological regulations for consultant archaeologists were introduced in 2011 after years of pushing from archaeologists around the province for clearly articulated goals which move it in the direction of good beyond the financial benefits (Racher 2006:10). These goals included regulations that protect cultural heritage. In New Zealand and Tasmania, legislative changes occurred from periods of unrest within the Indigenous populations. Amendments can be beneficial, but sometimes a complete overhaul of the legislation may be necessary to fix deep-rooted issues. Tasmania determined its heritage legislation, which reflected the thinking and attitudes of predominantly white bureaucracy, was no longer appropriate for the modern world and began a review of the most recent version, with the hopes of producing a document that

reflects the current climate (Tasmania 2019). Legislation should be contemporaneous, and amending or introducing legislation more frequently to reflect modern times would be beneficial for archaeological practice.

2.4.2 Ancillary documents supplementing the legislation

All four jurisdictions have documents that supplement the actual legislation by outlining the procedures for conducting archaeological research. Ontario has the *Standards and Guidelines for Consultant Archaeologists* (Ontario 2011), while Nunavut has the *Guidelines for Applicants and Holders of Nunavut Territory Archaeology and Palaeontology Permits* (Nunavut 2003). New Zealand released a series of *Archaeological Guidelines*, which outline all aspects of fieldwork from the initial stages until the final report (New Zealand 2019a, 2019b, 2019c, 2018, 2017, 2014b, 2014c & 2007). Tasmania has the *Aboriginal Heritage Standards and Procedures* (Tasmania 2018) which was amended in 2017 to reflect the interim changes that have recently been made to the *Aboriginal Heritage Act.*

All these documents begin with a 'how to' guide on background research and investigation, excavation, and what is expected within a report. These documents help streamline the archaeological process and help to guide archaeologists to properly excavate archaeological sites to the standards outlined by legislation. It is impossible to fully understand each jurisdiction's legislation without also consulting these ancillary documents.

2.4.3 How are laws enforced?

The procedures for enforcement are very similar across all four jurisdictions. In all but Nunavut, the Minister responsible for heritage designates an investigator to ensure that all archaeological research is completed as per the laws outlined in each heritage act. If the inspector determines a

person or corporation is contravening the act by modifying or destroying an archaeological site or specimen, that person or corporation can be fined and/or punished by their respective authorities (Ontario 1990: S.51; New Zealand 2014:S.85, Tasmania 1975: Part 5) In Nunavut, a peace officer can seize any object, specimen or document suspected of being removed, shipped, in possession or otherwise dealt in contravention of the regulations and report to the justice of peace, who will in turn can determine if the object, specimen or document should be forfeited (Nunavut 1993:S.52.1, 52.2). The Nunavut Department of Justice in consultation with the Royal Canadian Mounted Police (RCMP) and the office of the crown prosecutor will decide whether any charges will lead to a conviction that would result in fines and/or imprisonment. In Ontario and New Zealand, there are two separate fine structures: one that deals with punishment for an individual, and another higher fine structure for a corporation that has failed to follow the laws. Uniquely among these four jurisdictions, Tasmania specifies fines not only for those who are in violation of the Aboriginal Heritage Act, but also for those in possession of relics, destroying/damaging/defacing or interfering with a relic, making a copy of a relic, removing a relic, selling or exposing for sale a relic, or taking a relic out of State. Tasmania also sets the fines based upon the consumer price index, which shows the variation in prices paid by consumers for retail goods due to the effects of inflation. This is an interesting point, as none of the other jurisdictions specify this regarding their penalty structures, and therefore, what might have been a daunting penalty decades ago is no longer the case. Table 2 details the penalties for contravening statues on archaeological heritage acts.

The importance of the protection of archaeological material is recognized by all four jurisdictions (Pokotylo & Mason 2010:61). The threat of heavy fines and jail time should persuade archaeologists, individuals, and corporations to obey the law and prevent them from

destroying or modifying an archaeological site. Without any repercussions for the destruction of archaeological material, there would be no incentive for developers to excavate a site and the site would be lost to development. These laws also protect against the unlawful sale of artifacts, which in turn helps prevent looting of archaeological sites.

Table 2: Summary of Offences and Penalties

Jurisdiction	Section	Penalty
Ontario	Ontario Heritage Act 69.1, 69.2, 69.5.1	-Individual maximum of $50,000[1] or imprisonment for up to one year or both; corporations face a maximum fine of $250,000 -penalties may also include restoration or repair costs
Nunavut	Nunavut Act 1993 51.1, 51.2	-No penalty stated in the legislation; maximum fine of $5,000 or six months in prison, or both, as a summary offense under the Nunavut Act[2]
New Zealand	Heritage New Zealand Pouhere Taonga Act 2014 85.1, 85.2	-Destruction; maximum fine for natural person[3] is $150,000[4], and for a non-natural person is $300,000 -Modification; maximum fine for natural person is $60,000, and non-natural person is $120,000
Tasmania	Aboriginal Heritage Act 1975 9, 10, 11, 12	-For archaeological sites, individual or small business entity maximum of 5,000 penalty units[5]; corporation (other than small business entity) maximum of 10,000 penalty units -For relics, individual or small business entity maximum of 1,000 penalty units; corporation (other than small business entity) maximum of 2,000 penalty units

[1]Canadian dollars, [2] Pokotylo & Mason 2010:59, [3] A natural person is an individual, whereas a non-natural person is a corporation, [4] New Zealand dollars, [5]value of a penalty unit is adjusted for each financial year based on consumer price index (CPI) movements in the previous year due to the effects of inflation

One downside to the structure of these penalties is that they may seem like a slap on the wrist for some. Many individuals may have issues paying a large fine, and though many corporations would have no issue in conducting archaeological investigations, there may be some corporations who would hide or destroy archaeological resources rather than conduct an investigation to save money and time, as archaeological excavations can be expensive and time-consuming. While many people and corporations respect archaeological legislation, there are those who do not, and these penalties, which are supposed to be a deterrent against destroying sites, may not be daunting enough to prevent the destruction.

2.4.4 When does something become archaeological?

In Ontario, the *Ontario Heritage Act* is nonspecific with respect to the age an object or site must be to be considered archaeological, but the ancillary documents state sites that are pre-1900 are considered to have cultural heritage value or interest (Ontario 2011:S.2.2). In New Zealand, archaeological resources are defined in the legislation as any place including buildings and structures that has evidence of human activity that occurred before 1900 (New Zealand 2014:S.6.a.i). Nunavut determines objects and sites are archaeological if they are more than 50 years old where an unbroken chain of possession cannot be demonstrated (Canada 2001:S.1). Tasmania now has no cut-off date listed in the legislation or in the ancillary documents.

Tasmania used to have a cut-off date—1876— but in 2017, Tasmania amended the legislation and one of the changes was to remove this date. It was removed due to its association with the racist myth that in 1876 all Aboriginals were eradicated from Tasmania (Tasmania 2019:4). The government of Tasmania now recognizes Aboriginals as a living culture that produces heritage daily and will continue to do so in the future, making a cut-off date for archaeological material unnecessary (Tasmania 2019:4). Nunavut follows a similar philosophy as well by having a moving cut-off date of 50 years, which demonstrates that heritage is still being produced. Tasmania and Nunavut have excellent insight for including modern relics and sites as heritage. By having a fixed cut-off date, heritage legislation ignores the important information that could be excavated from after that date which would complement historical documents that oftentimes only tell one side of the story, or exaggerate others. For example, multiple historical documents detailed the Ward, the archaeological site that was found under a parking lot in Toronto, Ontario, as a slum, but upon excavation a complex social history was revealed, ending only when the final building was demolished in 1998 (Lorinc & Taylor 2018:19).

Despite the introduction of more widespread historical documentation post-1900, these documents rarely depict the everyday life of a people, or an individual. Heritage is being produced every day, by settlers and Indigenous people. In the past Indigenous people have been viewed as a people dead and gone, but archaeology can help illustrate that their existence continues to this day. Recognizing this fact is a first and crucial step to mending Indigenous-settler relationships.

2.4.5 What qualifications are needed to conduct archaeology?

The qualifications needed to conduct archaeological investigations are quite stringent in all four jurisdictions. Most require post-secondary degrees, and some require both a Bachelor's and a Master's degree. All require extensive experience in the field of study, and all but Nunavut require a membership to an archaeological society that has a code of ethics (Ontario 2017a, Canada 2001:S.8.2.a, S.9.2.a, New Zealand 2014a:S.45, Tasmania 2019:S.6). In Ontario, archaeologists are required to apply for a license to conduct archaeological fieldwork as well as possessing the above qualifications (Ontario 1990:S.48.1).

Archaeological research and fieldwork can be complex processes involving many different stakeholders and require a degree of precision. In the past, archaeology was the hobby of the wealthy, but has become first a partnership between academics and avocational archaeologists, and most recently, in some areas the dominion of professional consultant archaeologists. This rise of the consultant archaeologist as well as the increase in commercial archaeology has led to more strict qualifications for those wishing to practice archaeology. These qualifications ensure that those practicing archaeology have the experience and knowledge of their chosen area, and they ensure that only qualified individuals are permitted to conduct archaeological investigations.

It is also interesting to note that three of the jurisdictions require in their qualifications that the archaeologist be a member of an archaeological society with a code of ethics. In Tasmania and New Zealand, the code of ethics is meant to ensure archaeologists protect archaeological material and prevent them from participating in the sale of antiquities (New Zealand 2014a; Tasmania 1975). However, these ethics statements also recognize that archaeologists have responsibilities to Indigenous people such as ensuring the heritage is respected and properly cared for. For example, one section of the code of ethics for the Ontario Archaeological Society states:

> *2. as archaeologists, we recognize that we have special obligations to any Indigenous and Descendant community whose cultural legacy is the subject of our investigation. (Ontario 2017b)*

Thus, archaeologists are not only expected to be well informed and educated for their role, but they must also follow a code of ethics which acknowledges the potential concerns archaeologists can face throughout their careers.

2.4.6 Procedures for conducting archaeological investigation

The first step in all four jurisdictions is to apply for a permit to conduct archaeological fieldwork, either to excavate a known site or to survey for unknown sites. Each jurisdiction has a different process once the permit has been acquired. In Ontario, while both academic and cultural resource management (CRM) archaeologists are subject to the *Ontario Heritage Act* 1990 and require both a license and a permit to conduct field work, CRM archaeologists must also follow the steps outlined in the *Standards and Guidelines for Consultant Archaeologists* (2011). At each stage of the process, a new permit is required, which expires after one year. In Nunavut, there are two categories of permits: a Class 1 Permit which authorizes the documentation but not excavation of an archaeological or palaeontological site; and a Class 2 Permit which authorizes the documentation and excavation of a site. These permit applications must be sent to the Inuit

Heritage Trust for review, which can object to an application. The government of Nunavut can approve or reject a permit based on these objections or their own objections (Canada 2001:S.8.1). New Zealand requires an archaeologist to obtain one of three types of archaeological authorities (permits) from Heritage New Zealand Pouhere Taonga (HNZPT), which controls all archaeological investigation. The first authority deals with the potential for activity to modify or destroy an archaeological site, the second is for exploratory investigation to determine the presence or absence of an archaeological site, and the third authority is for scientific investigation of an archaeological site by a university for scientific or research purposes (New Zealand 2014a:S.44). Each of these permits expires in a period not exceeding 35 years from the application date, though if work commences, they expire within five years (New Zealand 2014a:S.4.a.b). Tasmania has even more complex procedures for conducting archaeological research, which begin with contacting Heritage Tasmania to determine the likelihood of finding archaeological resources. According to the *Aboriginal Heritage Standards and Procedures* (2018:S.3), a property search is completed to determine whether or not there is a risk for impacting Aboriginal relics. This is then followed by two different steps: one for when archaeological resources are expected, and one for when no resources are expected to be found. If it is determined the site has potential for archaeological activity, a permit must be obtained, which is followed by a three-stage process of investigation. There is also a special plan in place, called the Unanticipated Discovery Plan, which is part of the permit process. A plan is developed by the archaeologist and approved by the Minister that outlines what the developer and archaeologist do in the event archaeological materials are uncovered unexpectedly during the development process (Tasmania 2018:45).

2.4.7 What procedures are followed once excavation is complete?

The procedures once archaeological research is complete are very similar across all four jurisdictions, and require the excavating archaeologist to submit a full report detailing the field investigation. These reports have a similar basic structure, such as background study, the physiology of the region, and require recommendations for further work if need be. Ontario and Nunavut both require that the reports be completed by a specific date (Ontario 1990a:S.65.1; Canada 2001:S.7.3). New Zealand does not specify when the reports are due. In Tasmania, the archaeologist will submit the permit application with the proposed timeframe for the work to be completed. If the work is not completed within the specified time, a new permit must be granted before work can be completed. There is no due date for the report and no further work can be completed until the report is submitted and approved though most reports are reviewed within 10 working days to ensure development can continue (Tasmania 2018:S.13.8).

These reports are crucial in Ontario because in order to hold a license, archaeologists must have all their reports reviewed and approved by the Ministry of Heritage, Sport, Tourism and Culture Industries (MHSTCI) by the one-year anniversary of the permit. If they fail to do so, their license is suspended until the report is approved (Ontario 1990a:S.65). Nunavut has a similar policy to ensure all work is completed before another permit is issued (Canada 2001:S.14). However, in both Tasmania and New Zealand, there is no time frame stipulated, though in New Zealand there are quite a few overdue reports from the 1990s which do not affect the archaeologist obtaining new permits for new work unless they have more than ten outstanding reports (New Zealand 2007). The need to have all reports entered into the database and approved is very important to not only archaeologists and the government, but also to the public, stakeholders, and developers. Until these reports are submitted and approved, development should not be completed. These

reports are also the primary, and sometimes only, record of what was done, and therefore of interest to Indigenous people, students and fellow archaeologists, and should be available at the earliest convenience.

2.4.8 What happens to archaeological material?

The care of archaeological resources recovered during an excavation has a few similarities and differences between each of the four jurisdictions. In the legislation, both the Ontario and Nunavut governments hold all resources from the excavation in trust for the people (Nunavut 1993b:S.33, Ontario 1990a:S.66). In Ontario, the artifacts remain in the possession of the excavating archaeologist until they, at their expense, can transfer them to the care of a proper facility, though there is no timeframe specified for this transfer. In Nunavut, the artifacts are held at a designated repository (currently, the Canadian Museum of Nature) until Nunavut can establish its own storage and conservation facilities (Nunavut 2003:S.12). Archaeologists who have done research in Nunavut can possess artifacts for up to three months after the permit has expired. If collections are required for a longer period, a one-year, renewable collections loan can be requested (Nunavut 2003:S.12.2.1). Once the collections are no longer required, they are returned to the designated repository. Communities in Nunavut can also request that an archaeologist/palaeontologist return collections to the community, though a permit holder cannot make the decision on where a collection is stored (Nunavut 2003:S.8).

New Zealand has a more complicated policy regarding the safekeeping of the archaeological material. If the artifacts relate to the culture/history/society of, appear to be manufactured by, or were brought into New Zealand by Māori or used by Māori, and are more than 50 years old, they are managed by the Ministry for Culture and Heritage (MCH) until a determination on ownership is made by the Māori Land Court. Transfer and disposal of archaeological material has to be

documented, but options include transfer to an owner or custodian, destruction, destruction of samples for scientific testing, reburial on site, display on site, transfer to a museum or retention as a reference collection. Archaeologists are also required to consider the code of ethics of their international and national professional organizations which discourages activities that promote illegal trade and use of archaeological objects as items of commerce, and instead they should be encouraged to curate archaeological collections in public institutions to ensure they are readily available for scientific study, public interpretation and display (New Zealand 2019c).

Finally, in Tasmania, the preference is to leave artifacts in their original context, except in situations where salvage is necessary due to development/destruction of the site. Salvage removal is determined on a case by case basis by Aboriginal Heritage Tasmania. These cases include situations where there is support from the Aboriginal community/Aboriginal Heritage Council, when there are sufficient resources for the curation, display, and long-term storage of the material, and there is scientific merit in further analysis of artifact material that will advance knowledge of Aboriginal sites in Tasmania. If these situations exist, the archaeologist can remove the archaeological material from the site (Tasmania 2018:S.13.3).

Often, the use of museums and other facilities to display artifacts implies that preservation of the artifacts for future generations is the preferred end goal of archaeology (Cuk 1997:171). In a paper by Philip Walker (2000), he introduces the concept of the Preservation Ethic, which in the article relates specifically to human remains but can also be applied to non-burial material culture. This Ethic espouses the idea that Western bioarchaeologists see all human remains as potential information and they constitute a “material memory” of the people who preceded us, and therefore provided a direct means through which we may come to know our ancestors (Walker 2000:24). Walker also believes, as do many archaeologists, the preservation and

conservation of archaeological resources is an ethical imperative which discourages the unnecessary destruction of sites (Walker 2000:24) and ensures that all non-burial collections are preserved and intact so that future studies can occur. However, this view is not shared by all. In Tasmania the preference is to leave artifacts in their original context and to provide protection for the site in perpetuity. Some Indigenous people around the world believe artifacts are meant to decay, rather than be excavated. By leaving the artifacts *in situ*, it ensures the artifacts follow the cyclical pattern of all living things, which includes "decay and eventual nonexistence" (Cuk 1997:171). However, having these opposing worldviews about the protection of archaeological resources can be problematic for legislation because the Western viewpoints of the archaeologists take precedence over those of the descendent communities. The view that archaeological resources should be preserved at all costs is a very Western viewpoint, because these resources need to exist for scientific study by future generations. There is potential for middle ground though, as Nunavut and Tasmania have demonstrated it is possible to address the needs and worldviews of Indigenous populations versus the needs and worldviews of archaeologists by taking into consideration the needs and wants of the Indigenous community.

2.4.9 Who owns the archaeological material?

In Ontario, the archaeological material is owned by the Government of Ontario (Ontario 1990a:S.66.1), while in Nunavut, the material found within the Nunavut Settlement Area is owned jointly by the Inuit Heritage Trust and the Government of Nunavut (Nunavut 1993b:S.33.7.1). The other two jurisdictions have different ownership rules depending on the age and affiliation of the material. The Crown in New Zealand owns artifacts that relate to Māori culture/history/society and are more than 50 years old, while objects not of Māori interest, as well as other archaeological specimens, are owned by landowner, though they may be of interest

to other descendent groups (New Zealand 201, S.3.8). In Tasmania, the relic is owned by the Crown if found on Crown land, but otherwise it belongs to the property owner. The Crown can request the right to own an artifact from a property owner, though if they are of Aboriginal descent or have owned the relic for longer than 50 years, they can apply to keep the relic (Tasmania 1975:S.10).

The idea of ownership of archaeological material is a problematic one. In the case of three of the four jurisdictions, the government/Crown of the jurisdiction is the sole owner of the archaeological material. In Nunavut, both the government and the Inuit are responsible for the identification, protection, and conservation of archaeological sites and specimens, and the interpretation of the archaeological record (Nunavut 1993:S.33). The legislation of the other three jurisdictions indicates the archaeological material is being held in trust by the Crown (and sometimes the archaeologists until a transfer to a proper facility can occur), and they should be properly cared for so that the people of Ontario, New Zealand, and Tasmania will be able to access these artifacts at any time. This is just one of the problems associated with ownership of archaeological materials, since the Indigenous groups who wish to display or own objects of their ancestors are only capable of borrowing them from the Crown, even though it is their own heritage.

2.4.10 What policies deal with human remains?

All four jurisdictions have similar legislation or ancillary documents that deal with the recovery of human remains, whether through deliberate excavation or by accidental means. In all cases, if human remains are recovered unexpectedly, the coroner and police must be called to determine whether or not the remains are forensic or archaeological. Once the human remains have been determined to be archaeological, the human remains policies and legislation come into effect. All

but Tasmania allow for the scientific study of human remains, and in the case of Nunavut, these studies must balance the scientific and educational importance with respect for the dead and the spiritual and cultural interest/views of the Inuit (Nunavut 2003b:S.3). Both Ontario and New Zealand allow for the scientific analysis of human remains only through agreement with a mandated representative of the descendant group (Ontario 1990b:O.Reg 133/92: Burial Sites S. 7-8, New Zealand 2014b:12). Once scientific study is complete, samples are retained and the remains must be reburied close to their original context and that area can no longer be excavated (Ontario 1990b:O.Reg 133/92: Burial Sites S. 7-8; Ontario 2002:100, Nunavut 2003b: S.7; New Zealand 2014b:S.11). New Zealand includes procedures for reburial of Māori or non-Māori remains, as well as a section on cultural considerations (New Zealand 2014b:S12). In Tasmania the *Museums (Aboriginal Remains) Act 1984* ensures human remains recovered during archaeological excavations or through coastal erosion as well as any in local and global museums are entrusted to an elder of the Tasmanian Aboriginal Community (Tasmania 1984:S.4, S.6).

The excavation of Indigenous human remains has been a contentious subject. As Indigenous people fought back against their colonial oppressors, they began to demand the repatriation and reburial of their ancestors (Scott 2013:2). Lawmakers and archaeologists recognized these calls to action and attempted to respond through legislation and regulations, such as the 1948 *United Nations Universal Declaration for Human Rights* as well as the 1989 *Vermillion Accord on Human Remains* which emphasized that human remains and the wishes of the community associated with those remains needed to be treated with respect (Curtis 2003:21; Scott 2013:12; World Archaeology Congress 1989). In 2007, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) demanded that States provide access and/or repatriation of ceremonial objects and human remains in their possession to Indigenous peoples concerned

(United Nations 2007: Article 12). In the United States in 1990, legislation entitled *the Native American Graves Protection and Repatriation Act* led to the repatriation of Indigenous human remains from decades of excavations and had a huge impact as more jurisdictions recognized that the idea of repatriation should be a legal obligation (Scott 2013:19). Despite these documents, there is no federal legislation regarding repatriation, and Ontario is the only jurisdiction in this study that does not provide legislative procedures for the repatriation of Indigenous human remains, though Nunavut only has policies through their guidelines and not procedures outlined in the land claims agreement or legislation (Nunavut 2003). While it mentions Indigenous burials, there is no discussion of repatriation or reburial, only that remains must be buried in the closest cemetery, or the site must be declared a cemetery (Ontario 2002:S.94-100). There is no law that requires identifiable or unidentifiable/unaffiliated Indigenous remains be repatriated to the care of an Indigenous community and UNDRIP has yet to be adopted into the current legislation of Ontario. The Truth and Reconciliation Commission of Canada: Calls for Action demanded UNDRIP be incorporated into the legislation for the protection of Indigenous rights, but even this document has yet to be fully adopted (TRC 2012:S.48). In most jurisdictions in the past, sacred sites and burials were often excavated without permission, resulting in human remains in museums and universities (Scott 2013:14). Recently, despite formal legislation, some Ontario universities and museums are repatriating and reburying Indigenous remains as part of the reconciliation process (Pfeiffer and Lesage 2014). While there is legislation in place to deal with unexpected and deliberate excavations of burials, outside influences from international declarations (UNDRIP) and national legislation (NAGPRA) have led to more and more jurisdictions recognizing the need for repatriation and

reburial, which can lead to important strides in the reconciliation process with the Indigenous population.

2.4.11 Procedures for emergency situations (natural disasters, etc)

Only two of the jurisdictions have a specified procedure for dealing with emergency situations. New Zealand and Tasmania have procedures in place that shorten the time it takes to get the appropriate permits to conduct archaeological excavations so the emergency work can be completed quickly, though Nunavut does allow the Government of Nunavut to expedite the permit process in cases of emergency (Nunavut 1993:S.33.5.3), though it does not specify exactly what type of emergency would warrant this expedited process. New Zealand also has the *Canterbury Earthquake Recovery Act* (New Zealand 2010), which deals with any archaeological or historic resources that were affected by the Canterbury earthquake in 2010 and pose a safety risk to the general public.

Creating procedures to deal with natural disasters and crises is important in the changing world. Each of the jurisdictions is likely faced with different disasters, such as forest fires and eroding coast lines. Each jurisdiction is faced with a relatively new crisis, that of climate change, and the effects will be as "profound as any in the past, and are predicted to lead to mass human migrations, conflict, and radical political and economic change across the globe over the next century" (Friesen 2018:28). Climate change has resulted in extreme weather, coastal erosion, and especially damaging, the loss of permafrost. Long frozen soils are now being exposed to microbial activities and other processes that destroy and disturb organic materials (Friesen 2018:30). The rise of sea levels will affect coastal regions and the thawing permafrost is particularly destructive. These are real concerns that need to be addressed sooner rather than

later, and implementing more documents such as the *Canterbury Earthquake Recovery Act* (2010) would only benefit the general public and the archaeological community.

2.4.12 How are Indigenous communities involved in the legislative process?

All four jurisdictions require involvement of Indigenous communities throughout the archaeological process, though unlike the other jurisdictions, Ontario's Indigenous communities are consulted only during the later stages of archaeological excavation (Ontario 2010, S.1.1) and not through legislative process.

Nunavut, New Zealand and Tasmania all have specific councils that must have a minimum representation of Indigenous people. In Nunavut, the Inuit Heritage Trust was created in 1993 to act on behalf and to protect the interests of the Inuit by ensuring that the Government of Nunavut implements the archaeological provisions of the 1993 Nunavut Land Claims. The Trust helps to align archaeological research with the needs of the Inuit and participates in developing government policy and legislation on archaeology in Nunavut (Nunavut 1993:S.33.4). The Inuit Heritage Trust, which was created through the Nunavut Land Claims Agreement, does not specify a ratio of Inuit to non-Inuit members, though the majority of the population consists of Inuit and most often consists of mostly Inuit members. Representatives of the community nearest the research area are also consulted by the Trust concerning an application for a Nunavut Archaeologist Permit. (Canada 2001:S.8).

New Zealand has a governing body called the Māori Heritage Council (MHC), which requires a minimum of half the members to be of Māori descent (New Zealand 2014:S.7.a). This council ensures the protection of Māori heritage, including tangible and intangible sites and other historic places and areas that are of Māori interest (New Zealand 2014:S.22). The council is also tasked

with aiding the Heritage New Zealand Pouhere Taonga (HNZPT), the governing body with New Zealand, in developing and reflecting the bicultural view, as well as recommend sites that may be of interest to Māori (New Zealand 2014:S.27.1.e). However, despite the inclusion of Indigenous voices and the MHC, it is the HNZPT that has the final say on whether or not a place is declared an archaeological site, and is the governing body that approves applications for an authority to undertake archaeological activity. The MHC can only make recommendations on all aspects of archaeological activity.

The Tasmanian Aboriginal Heritage Council (AHC) was introduced in 1975 and requires all members of the council to be of Aboriginal descent, as well as extensive knowledge and experience in Aboriginal heritage management (Tasmania 1975:S.4.2). The AHC makes recommendations to other government divisions regarding the objects, sites, or places alleged to be a relic under the *Aboriginal Heritage Act*. Though the AHC is still subject to approval from the Minister, it has the power to make recommendations for improvement of the Aboriginal Heritage Act. The AHC is also charged with ensuring that when appropriate, the Aboriginal people of Tasmania are consulted (Tasmania 1975:S.5).

In the past, much of the early heritage legislation was developed during a period of archaeological thought that placed heritage ethics and values almost exclusively within the belief and values systems of settlers/colonialists (Supernant 2018:144). While much of the legislation has attempted to rectify these issues, some jurisdictions still have problems accommodating other world views into current archaeological processes. On one side there are descendant communities who feel they have been excluded from the archaeological process which has also failed to address their interests and concerns. On the other side the majority of archaeologists are from a settler or Western background and they remain resistant to changes within the discipline

and "continue to defend their position of authority over the management and interpretation of the archaeological record" (DeVries 2014: ii). In some cases, jurisdictions have moved away from this exclusionary practice and have ensured that Indigenous involvement in archaeological heritage matters is law. For example, in the legislation of Nunavut, New Zealand and Tasmania, they specifically include their Indigenous populations in the process:

Inuit Participation:

> *33.3.1. The (Inuit Heritage) Trust shall be invited to participate in developing government policy and legislation on archaeology in the Nunavut Settlement Area (Nunavut 1993b:S.33.3.1)*

Functions of Māori Heritage Council:

> *27.1.a. to ensure that, in the protection of wāhi tūpuna, wāhi tapu, wāhi tapu areas, and other historic places and historic areas of interest to Māori, Heritage New Zealand Pouhere Taonga meets the needs of Māori in a culturally sensitive manner; (New Zealand 2014a:S.27.1)*

The Aboriginal Heritage Council:

> *3.2.a.b. shall advise, and make written recommendations to, the Minister in relation to any object, site or place alleged to be a relic under this Act; (Tasmania 1975:S.3.2).*

Not only are Indigenous councils involved in the legislative process, New Zealand has incorporated many of the traditional names and language into the legislation. The only jurisdiction that fails to include Indigenous involvement in legislation is Ontario. The Ontario Heritage Trust is a council that acts on behalf of the Minister, who is responsible for determining what is to be considered archaeological. The Trust has no obligation to include Indigenous participation, and simply states the Trust will consist of 12 board members assigned by the Lieutenant Governor in Council (Ontario 1990a:S.5.2). The ancillary document, *Standards and Guidelines for Consultant Archaeologists,* includes an "Aboriginal Engagement" component, which is meant to include Indigenous people in the archaeology that is relevant to their

community. By engaging Indigenous communities, a better and enriched understanding of the archaeological record can be discovered, and demonstrates "respect for Aboriginal heritage, recognizes Aboriginal people's connection to the land, and allows everyone to benefit from their knowledge" (Ontario 2011:7). However, despite this statement, there are only two required standards, and they are found at the Stage Three archaeological site-specific assessment. The first standard deals with engagement when determining cultural heritage value or interest:

> *3.4.2. Aboriginal communities must be engaged when assessing the cultural heritage value or interest of an Aboriginal archaeological site that is known to have or appears to have sacred or spiritual importance, or is associated with traditional land uses or geographic features of cultural heritage interest, or is the subject of Aboriginal oral histories. This will have been determined through background research in Stage 1, detailed documentary research on the land use and occupation history early in Stage 3, and/or analysis of artifacts and other information recovered through archaeological fieldwork. (Ontario 2011:57, S3.4.2)*

The second standard deals with engagement when drafting Stage 4 mitigation strategies for Aboriginal archaeological sites:

> *3.5.1. Aboriginal communities must be engaged when formulating Stage 4 mitigation strategies for the following types of Aboriginal archaeological sites:*
> - *(a) rare Aboriginal archaeological sites*
> - *(b) sites identified as sacred or known to contain human remains*
> - *(c) Woodland Aboriginal sites*
> - *(d) Aboriginal archaeological sites where topsoil stripping is being contemplated*
> - *(e) undisturbed Aboriginal sites*
> - *(f) sites previously identified as being of interest to an Aboriginal community (Ontario 2011:S.3.5.1)*

The other recommendations for Indigenous engagement are only under the "guidelines" section, which unlike standards, are deemed only suggestions, and are not required. If the budget does not allow for additional personnel, engagement does not always occur. The draft bulletin entitled "Engaging Aboriginal Communities in Archaeology" was also introduced at the same time as the 2011 policy. This bulletin acknowledges "stakeholder interest in archaeological and cultural

heritage, but shies away from addressing the province's "duty to consult" afforded to First Nations by the *Constitution Act*'s (1982) Section 35 treaty rights" (Dent 2012:78). However, this document, while recognizing the impacts Indigenous engagement would have, and offering suggestions on how to engage and mend relationships, it is also still just suggestions, and archaeologists are only required to comply with the two standards listed above. Academic archaeology in Ontario does not even have any requirement to engage with Indigenous communities, and none of these ancillary documents apply to academic digs. The need to include engagement in the heritage legislation would be a step in mending strained relationships and complying with treaties and global declarations is of high importance. Including engagement at the legislative level would ensure all archaeological field work, academic and consultant would collaborate with Indigenous communities. The other jurisdictions have recognized the need for engagement at a legislative level; Ontario needs to as well.

Legislation and archaeological practice continue to "reflect the agendas of the 'establishment' rather than those of Indian people" (Lassiter 2005:8). Many of Canada's Indigenous groups have been dissatisfied with existing heritage legislation and often narrow legal definitions of archaeological sites (Pokotylo & Mason 2010:62), while the Aboriginals of New Zealand and Tasmania created unrest in their respective lands to ensure their rights to heritage were recognized. One way to remedy this is to consult laws that were developed to protect the interests of Indigenous people around the world, such as the United Nations Declaration of the Rights of Indigenous People (UNDRIP). UNDRIP is clear that Indigenous people should manage their own heritage, among other rights (United Nations 2007: Article 12). UNDRIP was originally objected to by Australia, Canada, and New Zealand, but by 2016 was supported by these same nations (McGlaughlin et al. 2017). Despite this support, it has yet to be implemented

into the legislation of the four jurisdictions discussed in this study, though one jurisdiction (not in this study) within Canada has announced plans to implement UNDRIP into future legislation. There is no evidence these declarations are being included in the current legislation of the jurisdictions within this study, though in the future, it would be beneficial for other jurisdictions to recognize the need to include such laws in their own heritage legislations. In order to respect and acknowledge the needs of Indigenous people as written by UNDRIP, as well as respecting treaty rights, heritage legislation needs to be revised to "reflect equal partnership in management and control of archaeological heritage", and it needs to reflect modern ethics and Indigenous rights (Warrick 2017:102). However, while UNDRIP aims for the objective of securing "free, prior, and informed consent" (Williamson 2018:15) from Indigenous people when it comes to studying and excavating their heritage, there is still the ability of the legislation and governing bodies to override these objectives, especially in regard to commercial archaeology (Williamson 2018:15). This control over heritage matters has led to power issues. While legislation may have created superficial dialogue between governments and Indigenous people, settler governments still hold power when it comes to "the actual production and interpretation of archaeological knowledge, access to or use of data, and the capital derived from those processes" (Nicholas & Hollowell 2007:59). The very idea of sharing power is threatening to some as it means a radical revisioning of ethical responsibilities and research paradigms, and alteration of deep-seated notions about scholarly privilege, intellectual property, and control over the production of knowledge (Nicholas & Hollowell 2007:59). Even jurisdictions that have taken a more pro-active approach still maintain control over the archaeology. For example, in New Zealand, the Māori Council does not have full control over the archaeological resources, and still acquiesces

to the Heritage New Zealand Pouhere Taonga, which is the Crown entity and delegates much of the process to the Māori Council:

> *21. Delegations: Despite section 73 of the Crown Entities Act 2004, the Board must not delegate the power to –*
>
> > *(b) declare an archaeological site under section 43(1); (New Zealand 2014a:S.21.b)*

At the center of this debate is the question of whether institutional accommodation aimed toward reconciliation advances Indigenous interests, or whether it further maintains the conditions of domination that perpetuate the historical settler-colonial relationship (Kohn & Reddy 2017). Despite these difficulties, archaeologists still owe it to descendant groups to at least attempt to create a more equal power balance. Without active acknowledgement of the imbalance of power, any attempts to improve quality of engagement will fall short of success, no matter how noble intentions might be (DeVries 2014:106). If Indigenous representation and input occur during the production of archaeological heritage legislation, there is a better chance of creating a power balance. Being part of the early legislative process would allow for more perspectives on the ways in which archaeologists can approach archaeological investigations and excavations.

2.5 Conclusion

This comparison and analysis of the heritage legislation from Ontario, Nunavut, New Zealand and Tasmania, reveals many analogous characteristics. These similarities may be a result of the shared history of colonialism, of a shared approach to archaeology generally, and of a shared archaeological record that encompasses both Indigenous and settler populations.

However, despite similar themes and objectives in many of the sections of heritage legislation examined above, the legislation from each jurisdiction also deviate from one another in

meaningful ways, often dictated by the time period in which said laws were written. One of the noticeable changes over time in much of the legislation is the attempt at Indigenous involvement. Indigenous rights are currently at the forefront, and a restructuring of the legislation can help to include voices that previously had been largely ignored (Supernant 2018:144). Due to the colonial history of all the jurisdictions, the relationship between archaeologists and Indigenous people within them has not necessarily been a harmonious one. Pressure from outside forces such as the international declaration UNDRIP, as well as those on a national level, such as the *Truth and Reconciliation Commission* (2012) in Canada, and the *Native American Graves Protection and Repatriation Act* (1990) in the United States, is reflected in some of the jurisdictions' legislation, and the influence of internal forces, such as Indigenous people themselves, has led to significant changes. The removal of the pre-1876 date in Tasmania's legislation shows a conscious effort on the part of legislators to modernize the heritage legislation and to include Indigenous people in heritage matters. Some jurisdictions may not be ready for these changes though Nunavut has recognized the need to include and has included Indigenous people in the process. When more jurisdictions are ready, lawmakers should keep in mind the legislation from around the world, and learn from these jurisdictions' successes and failures. Legislation should be updated to deal with our rapidly changing world. There are issues that have arisen since many of these documents were first introduced, and these issues have not been corrected. While it might not be necessary for each jurisdiction to completely overhaul their legislation, amendments need to be made that reflect the changing world. For example, climate change is a grave and daunting concern for the world currently, and it is damaging to archaeological resources. The movement to include Indigenous people in their own heritage has received increased support and attention in recent years, but the legislation is still behind when it

comes to these issues. While it is not easy, or inexpensive, to change legislation to deal with these issues, they are necessary changes and should be the focus of legislators when it comes time for more amendments.

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