

## THE 1970 UNESCO CONVENTION: THE CANADIAN EXPERIENCE

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### I. INTRODUCTION

In terms of the movement of cultural property across its borders Canada has the characteristics of a source state, a market state and a transit state. It is a source state especially in respect of recently excavated or discovered objects of Canada's first peoples. It is a market state, in terms of the museums and private collectors who purchase objects on world markets. Finally, it is a transit state because of its geographical borders with the United States – still the world's largest market for cultural property.

### II. THE CULTURAL PROPERTY EXPORT AND IMPORT ACT (1977)

It was not until September 6, 1977, however, that Canada had any controls on the removal of cultural property to outside its borders. When such legislation—which became the *Cultural Property Export and Import Act*<sup>1</sup> (“the Act”)—was first proposed in 1975, reference was made to controversial past removals from Canada of important objects—such as the diaries of Paul Kane and Champlain's astrolabe.<sup>2</sup> Prior to the new law, initiatives to retain such cultural properties inside Canada had been made on an *ad hoc* basis. This process was formalized in 1922 when an emergency purchase fund was established to buy properties that might go to purchasers outside Canada or that had come up for sale abroad. This fund enabled the return from what

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<sup>1</sup> R.S.C. 1985, c C-51 (“the Act”).

<sup>2</sup> See H.C. Deb. (Can.) Feb. 7, 1975, at 3024. The tale of the astrolabe had a happy ending in 1989 when the Canadian government purchased the astrolabe from the New York Historical Society. It is now part of the collection of the Canadian Museum of Civilization, in Gatineau, Quebec.

was then West Germany of the historically important Speyer collection of First Nations material.<sup>3</sup> The *Act* was proposed as building on this practice and establishing a more comprehensive system to limit the export of what were described as “national treasures”. At the same time there was a clear intention on the part of the government introducing the legislation to keep controls to a minimum. The then Secretary of State, the Hon. James Hugh Faulkner, said:

I should like to emphasize the necessity for limiting control to a minimum. After examining export control systems in force abroad, we concluded that all have some inherent defects which became greater as the number of objects it is sought to control increases. Whatever arrangements are decided upon must be administratively practical. Any attempt to be over-meticulous defeats itself. A workable system of export control must confine itself to limited, well-defined categories.<sup>4</sup>

The *Act* established broad categories of cultural property to which it applies that are roughly based on the same categories comprising the definition of the term “cultural property” in Article 1 of the 1970 UNESCO Convention and are amplified in detail by the *Canadian Cultural Property Export Control List*.<sup>5</sup>

The criteria set out in the *Act*, whose application determine whether a cultural property needs an export permit before it can leave Canada, are as follows:

- a) Whether [the] object is of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts and sciences, and
- b) Whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.<sup>6</sup>

These criteria mirror those applicable in the United Kingdom and are widely known as the “Waverley criteria” based on the chair of the 1952 report that recommended their implementation.<sup>7</sup> At the time the legislation was introduced the Waverley criteria were said to “inspire [the] Canadian

<sup>3</sup> The Speyers were a German family of artifact collectors and dealers. See William C. Sturtevant, “Documenting the Speyer Collection”, in Christian Feest (ed.) *Studies in American Indian Art: A Memorial Tribute to Norman Felder*, 2001, 162.

<sup>4</sup> *Supra*, n. 2 at 3026.

<sup>5</sup> C.R.C., c. 448.

<sup>6</sup> *Act*, s. 11.

<sup>7</sup> *Committee on the Export of Works of Art, Etc.*, 1952. See Wang, Vivian F., “Whose Responsibility? The Waverley System, Past and Present”, 15 *Int'l. J. of Cul. Prop.*, 2008, 227.

system of control".<sup>8</sup> Apart from being modeled on similar legislation in the United Kingdom, the *Act* also relied on French experience insofar as it provided for a decentralized system of administration.<sup>9</sup> The Waverley criteria have also been adopted by other countries besides Canada and the United Kingdom, such as Australia and New Zealand.

The question inevitably arises as to whether the Waverley criteria are suitable for countries other than the United Kingdom? One major difference between the United Kingdom and Canada, of course, is that Canada has never been an imperial power or acquired the masses of booty (much of it valuable artwork) that have historically arisen from such status. Given its youth, there may have been an implicit concern that with its relatively small corpus of cultural properties there was a special need in Canada for effective export controls. Much historical First Nations or Inuit cultural material has either been lost or been outside Canada since before Confederation.<sup>10</sup> On the other hand, Canada's relatively national immaturity might argue for it being harder to say what is or is not of cultural significance to Canada. Canadian society has undergone marked change in the over 35 years that the *Act* has been in effect. New immigrant populations and the growth of multiculturalism mean that what can be claimed to represent Canada's cultural heritage is in a state of constant flux.

### III. CANADIAN CULTURAL PROPERTY CONTROLS AND INTERNATIONAL TRADE LAW

Restrictions on the movement of all products are prohibited by Article XI of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) (now part of the *Agreement Establishing the World Trade Organization* (WTO)).<sup>11</sup> Almost all countries are members of the WTO which, unlike UNESCO, has an effective and frequently-used dispute settlement procedure accessible to member states.<sup>12</sup> GATT 1994, Article XX(f), however, established an exception from

<sup>8</sup> *Supra*, n. 2 at 3025.

<sup>9</sup> See Clark, Ian Christie, "the Cultural Property Export and Import Act of Canada: Legislation to Encourage National Co-operation", 15 *N.Y.U.J. Int'l. L. & Pol.* 771, 772 and *supra*, n. 2, 1982-83, at 3025.

<sup>10</sup> The Dominion of Canada was formed in 1867 when three British colonies became four Canadian provinces. Subsequently, other colonies and territories became part of Canada.

<sup>11</sup> *General Agreement on Tariffs and Trade*, LT/UR/A-1A/1/GATT/1 (signed 15 April 1994).

<sup>12</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*, LT/UR/A-2/DS/U/1 (signed 15 April 1994).

Article XI for “[measures] imposed for the protection of national treasures of artistic, historic or archaeological value”. This provision has never been the subject of analysis by a GATT or WTO panel or appellate body so its precise scope remains somewhat unclear.<sup>13</sup> The language of the exception in Article XX(f) predates the Waverley Report in the United Kingdom and its origin is obscure. The meaning of the exception involves two main questions. First, what level of artistic, historic or archeological significance is needed to satisfy the exception. Second, does the exception extend in scope to except both cultural property export controls and import controls on the importation of cultural objects illegally exported from another state? If the Article XX(f) exception were ever the subject of WTO panel dispute resolution the focus would likely be on criteria already developed in relation to the other exceptions listed in Article XX. The relevance of the various UNESCO Conventions in connection with this exercise remains unclear, but it is likely that they would be examined by a WTO panel in an attempt to assess the current state of international law regarding cultural heritage in general. Thus, the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expression* could be referred to endorse the view that cultural property export controls, such as Canada has, are legitimate under international law.<sup>14</sup>

#### IV. THE IMPLEMENTATION OF UNESCO 1970 INTO CANADIAN LAW

At the same time as Canada established its first restrictions on the export of cultural property it also enacted provisions regulating the importation into Canada of cultural property that had been illegally exported from a country that is party to the UNESCO Convention. Canada ratified the UNESCO Convention in 1978, so amendments “implementing” it into Canadian law actually preceded this event. It should be noted, however, that the amendments do not specifically refer to the UNESCO Convention. The *Act* simply refers to “cultural property agreements” but these would clearly include the 1970 UNESCO Convention.<sup>15</sup>

<sup>13</sup> See Voon, Tania, *Cultural Products and the World Trade Organization* (2007) at 100 to 105. In his early work on the Havana Charter (*A Charter for World Trade*, New York, 1949) Clair Wilcox describes paragraph (f) (originally Article 45(1)(a)(vii) of the Charter) as a “technical and routine exception to general rules, similar to those contained in all commercial treaties and trade agreements” (at 180).

<sup>14</sup> October 20, 2005, UNESCO Doc. CLT-2005/CONVENTIONDIVERSITE-CULT-REV.

<sup>15</sup> See *infra*, n. 31.

It should be noted here that conventional international laws do not become part of Canadian law unless implemented by separate legislation. This is the situation in most Commonwealth countries that are part of a dualist tradition.<sup>16</sup> In Canada there is the further complication that if the subject matter of a convention is within provincial rather than federal jurisdiction the convention must be implemented by provincial legislation.<sup>17</sup> Since the UNESCO Convention deals with international trade, it is clearly within the jurisdiction of the federal Parliament of Canada to implement.<sup>18</sup> As I will discuss below, this may not be the case if Canada were to become party to the 1995 UNIDROIT Convention and wished to implement it into domestic law.

The provisions of the UNESCO Convention have not been implemented into Canadian law except as provided for in sections 37, 38, 43 and 44 of the *Act*. Section 37 sets up a system of implementation of the UNESCO Convention which is akin to that in place in Australia and New Zealand. To the extent that the UNESCO Convention deals with aspects of illicit trade in cultural property besides the reciprocal recognition of the cultural property export controls of state parties, it has not been implemented into Canadian Law.<sup>19</sup>

In 1998 Canada ratified the 1954 UNESCO *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (the *Hague Convention*).<sup>20</sup> The *Act* was amended in 2005 to make it an offence to export cultural property (as defined in Article 1 (a) of the *Hague Convention*) from an occupied territory of a state party to the second Protocol.<sup>21</sup> Similar provision to section 37 of the *Act* is also made in such cases for the Attorney-General of Canada to initiate civil action to recover such property and also for the payment of compensation.

Under the *Act* a foreign state that is a party to the UNESCO Convention can request the Minister of Canadian Heritage to assist in the recovery and

<sup>16</sup> Hans Kelsen, *Principles of International Law* (1966) at 551 to 552.

<sup>17</sup> See *A-G Can. v. A-G Ont.* (Labour Conventions) [1937] A.C. 326.

<sup>18</sup> Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3 (reprinted in R.S.C. 1985, App. II, No. 5, s. 91 (Trade and Commerce Power).

<sup>19</sup> On July 17, 1997, Canada and the United States signed the *Agreement Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological and Ethnographic Material*, 22 U.S.T. 494. Though the United States is a party to the UNESCO Convention it only recognises foreign cultural property export controls when such an agreement is in place. Despite Canadian requests to renew it, the agreement expired in 2002. See Nafziger, J. *et al.*, *Cultural Law: International, Comparative and Indigenous*, 2011, at 379-388.

<sup>20</sup> 249 U.N.T.S. 240, First Hague Protocol; 249 U.N.T.S. 358. Second Hague Protocol; 75 U.N.T.S. 287, 38 I.L.M. 769, 1999. In 2005 Canada signed both protocols to the Hague Convention.

<sup>21</sup> *Act*, s. 36.1.

return of cultural property that has been “illegally exported” from the reciprocating state.<sup>22</sup> If the property is located in Canada, the Attorney General of Canada may then bring an action for the recovery of such property on behalf of the requesting foreign state.<sup>23</sup> The court that orders the property’s return may also order that monetary compensation be paid to a *bona fide* purchaser for value or someone who otherwise has valid title to the object and was unaware of its illegal export.<sup>24</sup> It is clear that under Canadian law it is not necessary that the source state claim title to the property in question. This means that the *Act* to the extent of the remedy it provides, has reversed the long-standing common law principle that foreign cultural property export controls are unrecognizable and unenforceable as being public laws of a “penal or confiscatory” nature.<sup>25</sup>

No foreign party has standing under the *Act* to institute the recovery proceedings just described. It is possible that the Attorney-General of Canada might decline a foreign request to institute recovery proceedings if the Canadian government thought the request was unreasonable or contrary to Canadian public policy. No such proceedings have been reported so the dynamics of the process remain unclear.

Despite the lack of any reported case dealing with requests under section 37 of the *Act* to institute civil proceedings for the recovery of illegally exported cultural property, there are several examples where Canadian authorities have intercepted foreign cultural property being smuggled into this country and succeeded in returning it to its country of origin.<sup>26</sup> A recent example involved over 21,000 coins, jewellery and other items that had been illegally exported from Bulgaria to Canada over a number of years, beginning in 2007. After their interception by the Canada Border Services Agency the items were abandoned by their importer which led to an order by the Court of Quebec under provisions of the Canadian *Criminal Code* that they be returned to Bulgaria.<sup>27</sup>

<sup>22</sup> *Act*, ss. 37(2) and (3).

<sup>23</sup> *Ibidem*, s. 37(3).

<sup>24</sup> *Ibidem*, s. 37(6).

<sup>25</sup> See *Attorney-General of New Zealand vs. Ortiz et al* [1982] 3 W.L.R. 571 (C.A.). This issue has never arisen in Canada but it is generally assumed that the *Ortiz* principle (that foreign public laws will not be recognized and enforced – including cultural property export controls) applies in Canada. See Paterson, Robert K., “The Legal Dynamics of Cultural Property Export Controls: *Ortiz* Revisited”, 1995, *UBC L. Rev.* (Special Issue) 24.

<sup>26</sup> See Walden, David, “Canada’s Cultural Property Export and Import Act: The Experience of Protecting Cultural Property”, 1995 *UBC L. Rev.* (Special Issue), 203, at 208-210.

<sup>27</sup> The objects were seized by Canada Border Services Agency. After an investigation by the Royal Canadian Mounted Police and the abandonment of the objects by their importer,

The case represents the largest known seizure of illegally imported cultural property in Canadian history.

For a complete list of Canadian returns of cultural property pursuant to the UNESCO Convention, since 1997, see the attached *Appendix*.

## V. CRIMINAL PROCEEDINGS FOR ILLEGALLY IMPORTING CULTURAL PROPERTY INTO CANADA

Along with establishing a mechanism for the recovery by source states of cultural property which has been illegally removed from their territories, the *Act* also makes it an offence to import or attempt to import into Canada any cultural property that has been illegally exported from a country that is a party to the UNESCO Convention.<sup>28</sup> The penalty for such an offence is a fine not exceeding \$25,000 or up to five years imprisonment, or both.<sup>29</sup> As mentioned above, there are no reported decisions involving recovery proceedings by a source state under the *Act*, but there have been reported cases involving criminal proceedings against those responsible for illegal importation

The earliest reported Canadian case involving cultural property import controls involved a situation where Canada played the role of a market state. In *R v. Heller* the accused was charged with unlawfully importing a terra-cotta Nok figure originating in what is now Nigeria.<sup>30</sup> The issue in the case was whether the object had been “illegally exported” from Nigeria within the meaning of the *Act*. Nigeria was party to the UNESCO Convention when Canada became a party in June 1978 and the Alberta judge in *Heller* concluded that there was a ‘cultural property agreement’ between both countries relating to the prevention of illicit international traffic in cul-

the Court of Quebec ruled, under section 490(5) and (9) of the *Criminal Code* (R.S.C. 1985, c. C-46) that the objects be returned to Bulgaria: *Ordonnance de Remise de choses Saisies* (490(9)) du Code Criminel), Cour du Quebec (Chambre criminel le et penale) No: 500-26-051 799-082 (February 28, 2011). See “Government of Canada Returns its Largest Ever Seizure of Cultural Property to the Republic of Bulgaria”, at [www.news.gc.ca/web/article-eng.do?mid=60549](http://www.news.gc.ca/web/article-eng.do?mid=60549).

<sup>28</sup> *Act, supra*, n. 1, s. 43.

<sup>29</sup> *Ibidem*, s. 45.

<sup>30</sup> 1983, 27 A.L.R. (2d) 346, Prov. Ct., 1984, 30 A.L.R. (2d) 130, Q.B. See also S. Katz, “Penal Protection of Cultural Property: The Canadian Approach”, 1993, 1 *Int’l. J. Cultural Property*, 11. Nigeria had requested a civil action to recover the figure in the name of the Attorney-General of Canada (as is provided for in the *Act*, see *Act*, s. 37(3)) but this proceeding was discontinued once failure of the criminal proceedings seemed imminent.

tural property.<sup>31</sup> The object was clearly subject to the *Act* when imported into Canada, but counsel for the accused argued that there was no evidence as to precisely when the object had been illegally exported from Nigeria. It had apparently been tested for authenticity in France in 1977 so must have been exported from Nigeria prior to that year. The judge reasoned that the *Act* should be interpreted in a manner consistent with the UNESCO Convention and relied on Article 7(a) of the Convention to conclude that the *Act* should only apply to property ‘illegally exported after entry into force’ of the Convention in the states concerned. Since there was no evidence that the object had been exported from Nigeria after June 1978, he ordered the acquittal of the accused.

The issue of the timing of the illegal export and the wording of the UNESCO Convention is a vexed one. It has been argued that Article 7(a) should have been irrelevant to the timing problem in *Heller*. Professors Patrick O’Keefe and Lyndel Prott contend that the Canadian law should be seen as based on Article 3 of the UNESCO Convention, which provides: “the import, export of transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.” They argue that since Article 3 places no time limit on the export of goods from the source country, it is permissible for states to leave the timing issue open.<sup>32</sup> In doing so they also point to the language of Article 7 as being limited to the illegal export of objects stolen from museums or similar institutions and their subsequent purchase by such institutions in importing countries. The *Act* only requires that the foreign cultural property have been “illegally exported” from the source country, and does not suggest that such illegal export be linked to when either it or Canada became party to the UNESCO Convention.<sup>33</sup>

The most complex and attenuated Canadian case involving import controls was *R. v. Yorke*.<sup>34</sup> In *Yorke* Canada played the role of a transit state – the

<sup>31</sup> Section 37 of the *Act* defines “cultural property agreement” as meaning, in relation to a foreign state: “...an agreement between Canada and the foreign state or an international agreement to which Canada and the foreign state are both parties, relating to the prevention of illicit international traffic in cultural property”. Canada is not party to any bilateral cultural property agreements but the reference to multilateral agreements would include the UNESCO Convention.

<sup>32</sup> O’Keefe and Prott, *Law and the Cultural Heritage: Volume 3 Movement* (1989), p. 779.

<sup>33</sup> An appeal in *Heller* was upheld on procedural grounds but the appellate court appeared to agree with the lower court’s interpretation of the *Act*. See *R. v. Heller* (1984) 30 A.L.R. (2d) 130 (Q.B.).

<sup>34</sup> For a discussion of the case see Robert K. Paterson, “Bolivian Textiles in Canada”, (1993) 2 *Int’l. J. of Cultural Property* 77.



source state being Bolivia and the market state perhaps, along with Canada, likely being the United States. In January 1990 Roger Yorke was charged under the *Act* with unlawfully importing into Canada cultural property that had been illegally exported from Bolivia. The charge was precipitated by a communication from United States Customs to the then Canadian Departments of Communications and National Revenue that Yorke's name had been connected with that of an individual under Grand Jury investigation in the United States for similar importations into that country. Investigation by Canadian authorities led to a search of Yorke's residence in Truro, Nova Scotia in July 1988. In April 1989, Bolivia made an official request for the return of certain Bolivian textiles seized during the search of Yorke's residence.<sup>35</sup>

Yorke first moved to quash his committal for trial on the ground that he had been improperly deprived of his constitutional rights to cross-examine various Crown witnesses at his preliminary committal inquiry. Boundreau, J. of the Nova Scotia Supreme Court (Trial Division) agreed with Yorke, but the Crown successfully appealed that ruling to the Appeal Division of the Nova Scotia Supreme Court, which ruled in September 1991 that the committal order against Yorke be restored.<sup>36</sup> Among other factors, the Appeal Division was sympathetic with the logistical problems facing the prosecutors on account of the large number of artifacts (428 out of some 6,000 seized) that were the subject of the proceedings.

Yorke's trial took place before Mr. Justice Anderson of the Supreme Court of Nova Scotia, in Halifax, Nova Scotia. Before hearing the evidence against Yorke, the Court ruled on four submissions made on behalf of the accused dealing with jurisdiction and with section 7 of the *Canadian Charter of Rights and Freedoms*.<sup>37</sup> As to jurisdiction, the accused argued that the charge against him, in effect, involved his prosecution for illegally exporting cultural property from Bolivia – an offence he contended was outside the territorial jurisdiction of the Nova Scotia Court. The Court found that, while it needed

<sup>35</sup> For a provocative discussion of the background to Bolivian concerns, see Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles," (1991) *Cultural Survival Quarterly* 40. On September 24, 1992 the U.S. Customs Service returned a quantity of seized Coroma textiles to Bolivia in a ceremony in Washington, D.C. The return was apparently made possible through the co-operation of the San Francisco art dealer (Steven Berger) who received an assurance from the U.S. Attorney from the Northern District of California that he would not be prosecuted: see *New York Times*, September 27, 1992 (p. 14Y).

<sup>36</sup> *R. v. Yorke* [1991] Nova Scotia Judgments No. 368 Acción S.C.C. No. 2573 (Nova Scotia Supreme Court – Appeal Division).

<sup>37</sup> Being Part 2 of Schedule B of the *Constitution Act*, R.S.C. 1985, appendix 11, No. 44.

to determine whether what occurred was illegal under Bolivian law, the prosecution also had to prove separately all the elements of what was an offence independently established under Canadian law. The court, therefore, concluded that it had jurisdiction in the matter before it.

Anderson, J. reviewed the evidence against Mr. Yorke. He described how Mr. Yorke had lived in South America for nine years and while there collected textiles of the indigenous inhabitants of Peru and Bolivia. Mr. Yorke had a store in La Paz, Bolivia, and used native buyers to acquire items for sale. While living in South America, Mr. Yorke formed a partnership with Steve Berger, an American citizen, to carry on the business of buying and selling Bolivian textiles. On dissolution of the partnership in 1984, Yorke had the responsibility of shipping textiles formerly held by the firm to both the United States and Canada. Anderson, J. was impressed with Mr. Yorke's extensive knowledge of the culture of Bolivia's indigenous peoples. On the other hand, he also found that this very sophistication made it more likely that Mr. Yorke would know about Bolivian laws pertaining to his business activities in that country.

The Court reviewed some of the evidence of the Crown (prosecution) witnesses. These included customs and police officers who had been involved in the seizure of property at Mr. Yorke's residence and related activities. One Crown witness was a Bolivian lawyer who had been able to describe and interpret the cultural property laws of Bolivia. Another witness was another store owner in Bolivia —Ms. Cristina Bubba-Zamora— a Bolivian social psychiatrist, who was also regarded as qualified to give opinion evidence as to Bolivian cultural property law. The accused apparently saw her evidence as lacking credibility, particularly since she had formerly been his business competitor in La Paz.

The reasons of the Court in respect of various defences raised by Mr. Yorke are very briefly stated. Anderson, J. reiterated his rejection of the constitutional arguments raised in relation to the *Act* based on section 7 of the *Canadian Charter of Rights and Freedoms*. Without giving reasons, the Court also rejected an argument that the Bolivian cultural property law did not conform to the UNESCO Convention and that the Crown had failed to prove the age and provenance of the textiles involved.

Mr. Yorke was fined \$10,000 and placed on two years' probation.<sup>38</sup> He then applied to and was granted leave by the Nova Scotia Court of Appeal to appeal his conviction. The judgment of the three-person Nova

<sup>38</sup> *R. v. Yorke*, 1996 Canlii 5380 (Nova Scotia Supreme Court, Anderson, J.).

Scotia Court of Appeal bench was delivered by Justice Chipman on January 7, 1998 and marked the end of a very lengthy judicial process.<sup>39</sup> Of the seven grounds in Yorke's notice of appeal, none succeeded and his appeal was dismissed. In relation to the status of the property under Bolivian law (for the purpose of an argument that the law was unconstitutionally vague), Chipman J. said:

The inquiry into the status of exported property may be fairly complex, because the importation of cultural property can be a complex activity. On the other hand, the requirement is only that the importer exercise reasonable care. To escape conviction, one need only raise a reasonable doubt as to one's negligence. The ordinary traveler—for who the appellant's counsel expressed concern—should, I think, have little to fear from Canadian law with respect to an article casually picked up in a foreign marketplace. Such traveler should not have much difficulty in raising a reasonable doubt about the reasonableness of his or her actions. In the majority of cases, there would be nothing about the purchase which would put a reasonable person upon an inquiry. Viewed in this light, the legislation offers fair protection to the buyer of foreign property.

On the other hand, a person whose business is the trading in and importation of cultural property and artwork clearly has a duty to make greater inquiries. Such a person has access to consular offices, Customs and police officials and other traders in the foreign lands. It is not unreasonable to expect of such persons that they make reasonable inquiries about the status of the property they propose to export from that foreign land.<sup>40</sup>

The court also dismissed the argument that the Bolivian decree of 1961 (5918) to protect the artistic and cultural wealth of the country, insufficiently designated the property it sought to protect for the purposes of the UNESCO Convention:

Generally, the appellant's submission that, to "specifically designate" cultural property something more was required of Bolivia than what was specified in the Decree is not tenable. It would not be possible for a nation to create an itemized list of every piece of property to be protected. The categories have been made clear in the Decree as described by Dr. Valdez-Andretta, and they apply to the items seized from the appellant. Likewise, the suggestion that the term "weavings" is somehow overly broad and fails to distinguish those

<sup>39</sup> *Yorke v. The Queen*, 166 N.S.R. (2d) 130; 498 A.P.R. 130 (1998). A subsequent application by Yorke for leave to appeal to the Supreme Court of Canada was denied.

<sup>40</sup> 498 A.P.R. 130, at 143.

“weavings” which are of cultural significance from those which are not, is not persuasive. The term “weavings” is one of common usage and the Decree distinguishes them from property of other types of manufacture. Ms. Bubba-Zamora testified about the weaving tradition in Bolivia. Textiles that are cultural property reveal valuable information regarding ethnic groups and their religious practices.

I accept the respondent’s submission that the trial judge did not err in concluding that the testimony of Dr. Valdez-Andretta and Ms. Bubba-Zamora demonstrated that the articles seized from the respondent fell clearly within the meaning of the Decree.<sup>41</sup>

Further, the court concluded that since Canada restricted the unlawful export of certain cultural property from its territory it was essential that reciprocal arrangements be in place to punish those who import cultural property into Canada that has been similarly illegally exported from other countries. In 2002 Canada returned the Bolivian textiles that had been seized from Mr. Yorke’s residence some twelve years earlier (see *Appendix*).

## VI. THE QUEBEC CULTURAL HERITAGE ACT (2012)

This discussion of Canadian law relating to the movement of cultural property would not be complete without reference to a new Quebec statute—the *Cultural Heritage Act* of 2012—which introduced significant changes to the law of cultural heritage in that province.<sup>42</sup>

The issue of the status of Quebec in international affairs has a long and controversial history in Canada. Many in Quebec argue that Quebec should have the power to sign treaties on its own behalf but Canadian governments have consistently rejected such claims. Specifically, in regard to UNESCO, in May 2006 an agreement was signed between Quebec and Canada establishing a permanent representative of Quebec to the Canadian mission to UNESCO.<sup>43</sup> While not an independent member of the organization, Quebec now has a formal presence in the organization as part of the Canadian Permanent Delegation.

<sup>41</sup> *Ibidem*, at 150.

<sup>42</sup> RSQ, c P-9.002.

<sup>43</sup> See *Agreement between the Government of Canada and the Government of Quebec Concerning the United Nations Educational, Scientific and Cultural Organization (UNESCO)* at <http://pm.gc.ca/gc.ca/eng/medias.asp?id=1153>. For background to the unique role of culture in Quebec Society, see Handler, Richard, *Nationalism and the Politics of Culture in Quebec* (Univ. of Wisconsin Press, 1988).

Under the provisions of Quebec's new *Cultural Heritage Act* a right of preemption — similar to that which exists in France — is established.<sup>44</sup> The new law also recognizes the principle of inalienability for state-owned cultural heritage properties.<sup>45</sup> The law establishes a system of classification of cultural heritage property. This process occurs in accordance with a decision of the Quebec Minister of Culture and Communications, acting on the advice of the newly-established Conseil du patrimoine culturel du Québec. Classified heritage objects cannot be sold or gifted to any government other than Quebec or to any person who is not a Canadian citizen or permanent resident.<sup>46</sup> Quebec's new law also restricts the removal of cultural property from its territory. The *Cultural Heritage Act* provides that "[no] classified heritage property may be transported out of Quebec without [Ministerial] authorization".<sup>47</sup> It appears that such permission will likely only be refused in the case of important private collections or individual objects that have an established connection to Quebec history and culture. It could be argued that this provision and others like it are unconstitutional as infringing federal jurisdiction over interprovincial and international trade. This argument might arise as a defense to an attempt to enforce the law in the case of the removal of a cultural heritage object out of the province in alleged violation of the statute.

## VII. CANADA AND THE 1995 UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS (THE UNIDROIT CONVENTION).

Canada, like the United States, has not signed the UNIDROIT Convention. There are several reasons to suggest that Canada should not ratify and enact the UNIDROIT Convention. The *Act* already goes beyond the UNESCO and UNIDROIT Conventions by setting up a procedure for the return of any foreign cultural property illegally exported from a UNESCO Convention signatory state. If Canada ratified the UNIDROIT Convention and implemented its provisions into federal law, there would actually be more limited provision for the return of such property than is currently the case.<sup>48</sup>

<sup>44</sup> *Supra*, n. 42, ss. 54 to 57.

<sup>45</sup> *Ibidem*, s. 53.

<sup>46</sup> *Ibidem*, s. 52.

<sup>47</sup> *Ibidem*, s. 47. A similar provision exists in Manitoba. See *The Heritage Resources Act* C.S.M. c. H39.1, s. 52 (removal of heritage objects from the province).

<sup>48</sup> See Article 5(3) of the UNIDROIT Convention.

Much of what UNIDROIT provides for is within provincial rather than federal jurisdiction. It is possible for provincial laws to enact an international agreement to which Canada is party, but in this case such laws would need to create a new category of property under provincial law (foreign cultural property), which would be an unusual development. A further complication is that Canada has provinces with both civil and common law systems. Canadian common law currently provides an unqualified right (excepting limitation periods) on the part of the owner to recover stolen property. Chapter II of the UNIDROIT Convention would modify this right (though Canada could decline to implement these provisions pursuant to Article 9(1) of the Convention).

There is debate about the meaning of many provisions of the UNIDROIT Convention. For instance: Is a request for the return of a cultural object pursuant to Article 5(3) of the Convention subject to the introductory language of Article 1(b), which requires the source state's law to be one enacted "for the purpose of protecting its cultural heritage"?

Private international law (or conflict of laws) poses problems in many international art law cases. One of the best known cases involved an innocent English theft victim who was unable to recover his property in an English court because that court applied Italian law and concluded that an honest foreign purchaser had obtained good title.<sup>49</sup> The UNIDROIT Convention does not deal with the application of conflict of laws rules. If Canada were to consider enacting the UNIDROIT Convention, it would need to consider how the provisions of the Convention would relate to such rules. For example, would the *Winkworth* case be decided differently in Canada if Article 3 (stolen objects) of the Convention were part of Canadian law?

Of particular concern to Canada is how claims for the possession of Aboriginal objects are addressed. One of the grounds set out in Article 5, upon which a request for the return of an illegally exported cultural object might be based, is the significant impairment to its traditional or ritual use by a tribal or indigenous community. This applies even if the indigenous person who created the object is still alive (Article 7(2)). While enforcement of Canadian export controls in market countries is currently an unpredictable exercise, the provisions of Articles 5 and 7 would only oblige market states to recognize a more limited range of indigenous cultural property export controls than currently exists under Canadian law. For stolen Aboriginal objects, international claims would be subject to limitation periods

<sup>49</sup> *Winkworth v. Christie's* [1980] 1 All England Reports, 1121.

and rights to compensation that are more stringent than may already be the case under various foreign laws.

However, the main challenge facing Canada regarding the UNIDROIT Convention is that it mostly concerns matters within provincial jurisdiction. As a matter of policy, the federal government consults with the provinces before signing such treaties. A recent example is the *United Nations Convention on Contracts for the International Sale of Goods* which has been implemented in every province.<sup>50</sup> Article 14 of the UNIDROIT Convention does allow for a declaration of limited application in the case of signatories with more than one territorial unit. Another problem with provincial implementation would be whether it would be seen as a replacement for the implementation by Canada of the UNESCO Convention in the form of section 37 of the *1977 Act*? When section 37 became law, the UNIDROIT Convention did not yet exist and one can only speculate as to whether, if Canada decided to become party to the UNIDROIT Convention, it would see it as appropriate to leave section 37 in place. One argument in favour of doing so is the superior ability of the federal government to negotiate returns of cultural property with foreign governments.

## VIII. CONCLUSION

Canada typically enacts most of the international conventions it signs in the form of (usually federal) legislation. Furthermore, Canadian courts—especially the Supreme Court of Canada—usually resort to the language of the international agreement concerned to resolve issues of interpretation regarding the domestic implementing legislation.<sup>51</sup> Both factors have been operative in the case of the UNESCO Convention. While interpretations of the UNESCO Convention in particular cases are unpredictable, Canada's broad implementation of the Convention provides a strong basis for its effectiveness in Canada.

Reported cases and informal sources suggest that the implementation of the UNESCO Convention in Canada has been reasonably successful. To a degree this may be supported by increasingly stringent border controls

<sup>50</sup> 1489 U.N.T.S. 3 (1980). For an example of provincial legislation see *International Sale of Goods Act*, S.O.c.1.10 (1990). See also Mazzacano, Peter J., "Canadian Jurisprudence and the Uniform Application of the UN Convention on Contracts for the International Sale of Goods", 2006, 18 *Pace Int'l. L.Rev.* 46.

<sup>51</sup> See, for example, the following decisions of the Supreme Court of Canada: *Baker v. Canada (Ministry of Citizenship and Immigration)*, 1999, 2 S.C.R. 817, *United States v. Burns*, 2001, 1 S.C.R. 283 and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002, 1 S.C.R.3.

and the sharing of information about the smuggling of cultural property between Canadian, United States and other governmental authorities.

## APPENDIX

Under the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Canada has returned the following cultural property since 1997:

### *Bolivia*

August 2002: Canada returns several hundred pre-Columbian textiles to the Plurinational State of Bolivia.

### *Bulgaria*

October 2010: Canada returns more than 300 ancient coins, jewellery and metal artifacts from Roman and Byzantine times to the Republic of Bulgaria.

June 2011: Canada returns 21,000 archaeological objects, including ancient coins, jewellery, bronze eagles, buckles, arrows and spearheads, and bone sewing needles. These objects cover more than 2600 years of the history of Bulgaria and represent a mix of Hellenistic, Roman, Macedonian, Byzantine, Bulgarian, and Ottoman cultural heritage.

### *China*

November 2010: Canada returns 35 fish, plant, insect and reptile fossils to the People's Republic of China. The fossils were between 125-150 million years old and originated from the Liaoning region of China.

### *Colombia*

November 1997: Canada returns a collection of pre-Columbian gold jewellery and two ceramic figures to the Republic of Colombia. The jewellery originates from northern Colombia and dates to 1000-1500 CE.

February 2006: Canada returns an ancient anthropomorphic figurine usually associated with tombs in the Rio Magdalena Region, and a pre-Columbian stone carving with a human face to the Republic of Colombia.

### *Egypt*

December 2004: Canada returns a clay funerary figurine to the Arab Republic of Egypt.

August 2010: Canada returns a sculpted head of a woman, carved in marble dating to the 1st or 2nd century BCE to the Arab Republic of Egypt.

### *Mali*

January 2009: Canada returns three bronze bracelets, archaeological in origin, to the Republic of Mali.



*Mexico*

November 1997: Canada returns 20 ceramic pots and figures to the Government of the United Mexican States. These pre-Columbian ceramics originate from Mexico's Pacific coast and date from 200 BCE to 250 CE.

*Nigeria*

January 2009: Canada returns a terracotta figure, similar to a Nok clay figure, to the Federal Republic of Nigeria. This figure is between 1,300 and 2,200 years old, and was returned to Nigeria with a seated terracotta figure and a wooden ceremonial statue.

*Peru*

November 1997: Canada returns pre-Columbian artifacts (painted ceramics, textiles and feathered articles) to the Republic of Peru.

April 2000: Canada returns pre-Columbian ceramic vessels to the Republic of Peru.

August 2002: Canada returns pre-Columbian textiles and other objects to the Republic of Peru.

May 2005: Canada returns a pre-Columbian copper figurine to the Republic of Peru.

*Syria*

May 1997: Canada returns 32 Byzantine mosaics dating to the 5th and 6th century CE to the Syrian Arab Republic.

April 1999: Canada returns a second group of Byzantine mosaics to the Syrian Arab Republic.

*Source:* Returns to Country of Origin, Department of Canadian Heritage. Online at <http://www.pch.gc.ca/eng/1346288431727/1346289196765>.