

In Search of our Heritage

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Why should society care when cultural property is damaged, destroyed, pillaged, looted or stolen? We should care because it holds the key in both form and spirit to our human past and hence our future. Recent developments in the field of protection and preservation of cultural property demonstrate that this is among the fastest-growing areas of law today. We have seen Austria return five Klimts looted by the Nazis to rightful heirs. We have seen looted Iraqi cultural heritage returned to its country of origin. Munch's *The Scream* has been recovered, however not without damage. Society has begun to realize that cultural property (or heritage, which is more accurate) has more than a commercial value. It is not a commodity, but rather has an historical, scientific, emotional and educational value and its loss results in incalculable damage. At this very moment archaeological sights are being looted in countries victimized by extreme poverty or war. This synopsis will explore practical solutions and recent case law.

Keywords: Cultural Property, Restitution, Heritage

1. INTRODUCTION

The following synopsis will discuss legal, ethical and practical issues concerning the sharing and mobility of art and antiquities from Canadian and North American points of view in terms of international art law.

Why should a society care when cultural property is damaged, destroyed, pillaged, counterfeited, stolen or unavailable to the people whose identity it defines?

We should care because this material holds the key in both form and spirit to our human past and hence our future. Most of what we know from history (i.e. technological, scientific, social, religious, and cultural development of humanity) is obtained from archeological excavation and scientific investigation conducted in situ – i.e. on objects in the context of their found location. When material is exhibited without context or provenance, we learn little about the purpose of the material, its significance to society, human origins, or development. Provenance should include the collector from whom it was acquired, its status as an archeological artifact, and the time and place from which it was excavated. That way we can know the purpose and meaning of the material. Context is as important as the object itself. Without provenance, we must assume the object is either looted or fake.

Recent developments in the field of protection and preservation of cultural property demonstrate that this area of law is among the fastest-growing today. A practitioner's field of practice in this area includes advising and assisting clients on such varied issues as recovery of stolen art and cultural property; import and export of antiquities; artist, gallery, museum and foundation rights; sale and loan

of collections; issues of authenticity; due diligence for collectors; and collectors' and artists' estates. We have seen Austria return to rightful heirs five Klimts looted by the Nazis. We have seen looted Iraqi cultural heritage returned to its country of origin. Munch's *The Scream* has been recovered, unfortunately in a damaged condition.

Society has begun to realize that cultural property, or, more accurately, 'cultural heritage', has more than commercial value. It is not a commodity but rather an item of historical, scientific, emotional and educational value; and its loss results in incalculable damage. At this very moment, archaeological sites are being looted, mostly in countries victimized by extreme poverty or war.

Attempts at resolving these issues require extensive understanding of the nuances of the art world. From a practical perspective the author has devised workable guidelines designed to curb illicit trade in art and antiquities.

2. BEST PRACTICE GUIDELINES

Best Practice Guidelines for law enforcement, art galleries, museums and collectors when dealing in art and antiquities theft cases: helping to curb the illicit trafficking in cultural property

When cultural property, art and / or antiquities have been stolen or are missing, these are steps that may be taken:

- a. File a police report with as much specific detail and description as possible
- b. Register the theft with the Art Loss Register [1]
- c. Register the theft with Interpol [2]

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- d. Report the theft to Customs
- e. Use the Canadian Criminal Code [3] wherever possible (The US counterpart is the NSPA, the National Stolen Property Act [4])
- f. Check locally for the authenticity of the painting, sculpture, work of art or antiquity
- g. Contact the art object's country of origin to determine whether the stolen material belongs to the cultural patrimony of another nation
- h. Publicize the theft in every way possible, as with other thefts and losses. Undertake a PR campaign. Distribute photographs of the stolen item wherever possible. Do not be embarrassed; speak to the press (TV and newspaper). Secrecy only benefits the offender.

There exists a little-known power within the Canadian Cultural Property Export and Import Act (CPEIA) [5] that allows for foreign nations to reconstitute cultural property that has been illegally exported. The CPEIA, which came into force in 1977, is the enabling legislation to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property [6], (hereinafter referred to as the 1970 UNESCO Convention) to which Canada became the 35th signatory. There are three conditions that must be met in order to make a claim for restitution:

- a. The object must have originated from a country that is a signatory to the 1970 UNESCO Convention
- b. The object was exported illegally from that country
- c. The material was exported after 1977 when Canada became a signatory the 1970 UNESCO Convention

When these three conditions are met, an application by a foreign nation may be made for restitution from Canada to that state.

3. BRIEF OVERVIEW OF DEVELOPMENTS:

With respect to the field of Restitution and Recovery of Cultural Property

The following developments have affected how those acquiring art and antiquities conduct their business. Highlights from the last few years include:

Europe

The past year has been marked by the efforts of Italy and Greece making claim to their antiquities housed in museums in the United States.

Examples of this include the now-famous case of the Euphronios krater, which has on it a drawing (rivaling the quality of da Vinci) depicting the death of the warrior Sarpedon. The Metropolitan Museum in New York acquired it in 1972 for \$1million US and it will be returned to Italy according to a recent agreement [7].

Italian authorities, after a ten-year investigation, un-

covered an immense number of artifacts in warehouses in Switzerland and around the world that resulted in the conviction of the dealer Giacomo Medici and the continued trials of Robert Hecht and the former Getty antiquities curator, Dr. Marion True.

The year 2006 saw the successful recovery of Edward Munch's *The Scream* and *The Madonna* following a two-year investigation.

North America

The FBI Art Crime team was created in November 2004 to help combat international trade in illicit cultural property – estimated at somewhere around \$6billion US a year. The USA is the largest consumer nation of art, which is one of the largest unregulated economies. As well, since the invasion of Iraq, there has been looting there on an unprecedented scale. As part of the FBI's effort to recover stolen art and raise awareness, they have published a list of the Ten Most Wanted works of stolen art [8].

On the subject of Iraq, on the Top Ten Most Wanted list of stolen works of art was the Statue of the Sumerian King Entemena of Lagash (present-day Al-Habiba), approximately three feet high, 300 pounds and sculpted out of black dolomite stone around 2430 BC. It was excavated near the Temple Ur in southern Iraq. There is an inscription on the statue that identifies the ruler and the lands donated for the support of the temple. By way of background, in March / April 2003, cultural institutions and archaeological sites in Iraq suffered tremendous loss of cultural heritage and significant historical material. Today looting of archaeological sites continues with speed and efficiency never before been witnessed in history. Rapid and permanent destruction to archaeological sites precludes future study, robbing us of potential irreplaceable historical information about the origins of human civilization.

Some artifacts stolen from the Iraq National Museum have been recovered; however between 7,000 and 10,000 items are still missing [9].

On July 26, 2006, through the efforts of US Immigration and Customs, the Diorite Statue of Entemena was recovered and returned to Iraq by the United States Government.

In the area of indigenous cultural heritage, the year 2006 also witnessed the restitution by a Swedish Museum of a Totem Pole to the Canadian West Coast First Nations Haisla tribe from which it had been taken in the 1920s [10]. The museum accepted a replica in its place and returned the original to the Haisla Nation Tribe. (Last year the same museum restituted the remains of 15 aboriginals to Australia that had been taken for scientific research a hundred years ago.)

In terms of Canada, it would be supportive to this field to have a third-party review or commission to assist with issues, as is the case in several other countries in the Western world. In the UK there exists a Spoliation Advisory Panel to help resolve claims made for cultural objects lost during the Nazi era between 1933 and 1945 [11]. The panel pro-

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vides advice to claimants, those who hold objects and government. Canada could also look to the example of the UK concerning their Working Committee of Human Remains under the auspices of the Department of Culture, Media and Sports [12]. These are just a few examples of the good work that other nations are doing and from whose experience we can benefit.

In the field of Holocaust-looted art, on January 2006, the *Republic of Austria v. Altmann* [13] was settled by an arbitration panel in Austria. Five paintings by Gustav Klimt that had been wrongfully seized by the Nazis in 1938 were returned to rightful heirs of Ferdinand and Adele Bloch-Bauer. After an eight-year legal battle, California-based attorney Randol Schoenberg, a grandson of the composer, acting on behalf of Ms. Altmann, succeeded in this restitution.

The stunning portrait of Adele Bloch-Bauer, painted by Klimt (over a two-and-a-half-year period during which time she became his mistress) sold at Christie's auction house for \$135million US in 2006 [14]. This price was the highest ever paid for a painting in history. It was purchased for the Neue Gallery in New York by Ronald Lauder and remains part of that gallery's collection.

In 2006, the Getty Museum issued Guidelines requiring that any antiquities it acquires must now be documented as out of the country of origin before 1970 or be accompanied by an export license [16].

Although the following case seems like a long shot, it is worth mentioning as a very interesting development in terms of the growing significance of cultural property in the legal system. Hamas, the Palestinian organization declared by Canada and many nations as a terrorist group, carried out bombings in Jerusalem in 1997. The American citizens who were victims sued for damages in the United States from Iran [16]. The grounds of this suit were the fact that Iran is a sponsor to Hamas. Iran was unable to pay the judgment in this case and the victims are suing a number of museums in the United States who have on loan from Iran ancient antiquities. The size of this claim is immense. Victims could claim \$423.5million US in damages, including punitive damages of \$300 million US.

South America

The FBI Art Crime Team announced that three individuals were arrested for illegal importation of pre-Columbian artifacts from Ecuador into the US in violation of the NSPA (the National Stolen Property Act [17]) and the US Customs Statute. The value of the artifacts seized was over \$2million US.

Asia

China has made application for a bilateral agreement (or memorandum of understanding) with the United States to help curb the illicit trafficking of cultural heritage from China to the US. The decision of the United States has again been delayed [18].

4. CONCLUSIONS

Training and educating in this field is of utmost importance. Those to be educated include enforcement officers and agencies, archaeologists as expert witness, high school students, arbitrators, judges, and lawyers. In addition, there is a need for transparency, particularly in the records concerning acquisitions and loans of cultural property, of publicly funded museums, galleries and universities as well as conflict of interest guidelines. It should be part of their school curriculum that children learn the significance of the cultural heritage that defines them. So often artifacts are stolen or traded simply because there is a lack of comprehension of these objects' significance. Just as responsibility for this current state of affairs does not rest with one party, so the solution rests with all of us: to educate children at school and adults through the media regarding the vital importance of our communal and respective cultural heritage.

Restitution issues should not necessarily be resolved through adversarial civil litigation, as in the *Shiele* case [19], where the paintings still sit in seizure. Rather we need to look to resolutions that are not as expensive in terms of time and money and that can deal with the increasing number of challenges facing the art world today, an international trade that operates very differently from other businesses. Canada might want to consider a spoliation of cultural property commission, along the lines of the UK example, in order to assist victims, governments and their agencies, universities, collectors and public and private institutions in resolving art disputes and facilitating recovery.

On the one hand it is important to share cultural heritage in order to engender mutual respect. On the other hand it is also important to have legal safeguards in place in order to protect what is, in many cases, priceless. A balance, both ethical and legal, must be achieved in terms of the mobility of art.

Like other social crises it is public awareness and education that will make the difference; create the will to change and the law will follow. We should take the lead of those who have tried so admirably to educate the public in other uphill battles such as the dangers of drunk driving, domestic violence, or environmental pollution, to make real change in our global community, a world where it is now easier than ever to trade illicitly in the trafficking of cultural property.

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