
Penal Protection of Cultural Property: The Canadian Approach

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The illicit taking and movement of cultural property is on the horizon of international criminal law. The total value of stolen or smuggled objets d'art involved in international trafficking, running over \$1 billion annually, is second only to narcotics. It is a story of big-time dealers, collectors, institutions, clandestini and tombaroli of every nationality.¹

The importance of cultural property for individuals, nations or the whole of humanity does not need to be proved. It gives each person his intellectual identity, irrespective of whether he is the creator or simply a user. Cultural property in its entirety constitutes a huge heritage which determines our awareness and inspires new bursts of creativity. Any reduction in this heritage, built up over the centuries and constantly added to, means a loss. The protection of cultural property is rightly considered to be everybody's duty.²

These quotes, while disparate in nature, echo an identical theme: the need to ensure the preservation and protection of cultural property, and the need for an effective means of achieving that end. This commentary is an examination of the Canadian experience.

On September 6, 1977, Canada enacted the Cultural Property Export and Import Act,³ (hereinafter referred to as the Act). The purpose of the Act is to preserve in Canada significant examples of Canadian heritage in movable cultural property,⁴ and to protect the legitimate interests of foreign states concerned with the preservation of their own heritage in movable cultural property.⁵ The aims of the Act are accomplished by a control list and system of export permits,⁶ and a mechanism for the recovery and return of any foreign cultural property to a reciprocating state that has been illegally imported into Canada.⁷ The scope of this commentary

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will summarize the Canadian legal framework for protecting both domestic and foreign cultural property; define and analyze the penal aspects of the law; and discuss the practice of this scheme.

Domestic Cultural Property

The Act envisages the protection of domestic cultural property by a control list⁸ and a system of export permits.⁹ The general principle of the system is the establishment by order of the Governor in Council of a Canadian Cultural Property Export Control List¹⁰ (hereinafter referred to as the Control List). The Control List is the basis upon which the whole system functions. Items which fall within the Control List are subject to control of the Act, and must remain within Canada unless issued an export permit under the Act.¹¹

The criteria for inclusion on the Control List are set out in Section 4 of the Act, which states:

(2) Subject to subsection (3), the Governor in Council may include in the Control List, regardless of their places of origin, any objects or classes of objects hereinafter described in this subsection, the export of which the Governor in Council deems it necessary to control in order to preserve the national heritage in Canada:

(a) objects of any value that are of archaeological, prehistorical, historical, artistic or scientific interest and that have been recovered from the soil of Canada, the territorial sea of Canada or the inland or other internal waters of Canada;

(b) objects that were made by, or objects referred to in paragraph (d) that relate to, the aboriginal peoples of Canada and that have a fair market value in Canada of more than five hundred dollars;

(c) objects of decorative art, hereinafter described in this paragraph, that were made in the territory that is now Canada and are more than one hundred years old:

(i) glassware, ceramics, textiles, woodenware and works in base metals that have a fair market value in Canada of more than five hundred dollars, and

(ii) furniture, sculptured works in wood, works in precious metals and other objects of decorative art that have a fair market value in Canada of more than two thousand dollars;

(d) books, records, documents, photographic positives and negatives, sound recordings and collections of any of those objects that have a fair market value in Canada of more than five hundred dollars;

(e) drawings, engravings, original prints and water-colours that have a fair market value in Canada of more than one thousand dollars; and

(f) any other objects that have a fair market value in Canada of more than three thousand dollars.

(3) No object shall be included in the Control List if that object is less than fifty years old or was made by a natural person who is still living.

(4) For the purposes of this Act, an object within a class of objects included in the Control List is deemed to be an object included in the Control List. 1974–75–76, c.50, s.3; 1980–81–82–83, c.167, s.34

Thus the Control List may be comprised of objects or classes of objects which are situated in Canada, 'regardless of their place of origin, or the nationality of their creator', which are deemed necessary to control in order to preserve the national heritage of Canada.¹² However no object shall be included in the Control List if the object is less than fifty years old,¹³ or was made by a natural person who is still living.¹⁴

An object that falls within the purview of the Control List can be exported from Canada only if the person¹⁵ receives an export permit or a general permit¹⁶ under the Act. If the object is to be sold or disposed of within Canada, the owner is free to do so; it is only when the owner of the object wishes to export it that the Control List will apply.

The Procedure

An owner¹⁷ of an object on the Control List who wishes to export it must first submit an application for an export permit to a permit officer.¹⁸ The permit officer who receives an application for an export permit from a Canadian resident shall issue the permit forthwith if the person establishes to the satisfaction of the permit officer that the object was imported into Canada within thirty-five years immediately preceding the date of the application and was not exported from Canada under a permit issued under the Act prior to that importation,¹⁹ or was loaned to an institution or public authority in Canada by a person who was not a Canadian resident at the time of the loan,²⁰ or is to be removed from Canada for a purpose prescribed by regulation such as display or exhibition abroad for a period of time as may be prescribed by regulation.²¹

Where the permit officer does not issue an export permit as already mentioned, and where he is not aware of any notice of refusal sent in respect of the object during the two years immediately preceding the date of the application,²² then he must determine whether the object is included in the Control List.²³ If the permit officer determines that the object is not included in the Control List then he shall issue a permit for the object.²⁴ However where the permit officer determines that an object is or *might be* included in the Control List, then he shall refer the application to an expert examiner for consideration.²⁵ The duties of the permit officer are

purely administrative. They do not pass any artistic judgment on the object.

When an application for an export permit is referred to an expert examiner,²⁶ then he shall determine whether the object is included in the Control List.²⁷ The expert examiners are usually custodial institutions such as museums, art galleries, provincial archives or university libraries. Instructions regarding the duties and responsibilities of the expert examiners are issued to ensure the Act is applied uniformly across the country.²⁸ Where the expert examiner determines that an object is not included in the Control List, then he shall advise the permit officer to issue an export permit for the object.²⁹ However, where the expert examiner determines that an object is included in the Control List, then he shall further determine 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;³⁰ *and* whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.³¹

If the expert examiner determines that an object is not of outstanding significance or does not meet the degree of national importance, then he shall advise the permit officer to issue an export permit for the object.³² However where the expert examiner determines that an object is of outstanding significance *and* meets the degree of national importance, then he shall advise the permit officer not to issue an export permit for the object.³³ The permit officer will then send a written notice of refusal to the applicant, with the reasons given by the expert examiner for the refusal.³⁴

An applicant who receives a notice of refusal may request a review of his application for an export permit by the Review Board.³⁵ The request for a review must be in writing and must be made within thirty days after the date on which the notice of refusal was sent.³⁶

The Review Board in considering a request for a review of the application applies the same criteria as the expert examiner in order to determine whether the object has outstanding significance and national importance.³⁷ The Review Board, unlike an expert examiner, may receive any information presented to it orally or in writing that it considers to be relevant to any matter before it.³⁸

If the Review Board determines an object fails to meet one or more of the required criteria, then it will direct a permit officer to issue an export permit.³⁹ However, where the Review Board determines an object meets all the required criteria, *and* the Review Board is of the opinion that a fair offer to purchase the object might be made by an institution or public authority in Canada within six months of its determination, then the Review Board may establish a delay period of two to six months during which time no export permit will be issued for the object.⁴⁰ In any other case, i.e., an offer is unlikely, or a delay period has passed, the Review Board will direct a permit officer to issue an export permit.⁴¹ The Act does not

provide an appeal procedure from a determination of the Review Board, and all its decisions are final and binding upon the applicant.

Where the Review Board establishes a delay period, written notice of the delay period and its decision shall be sent to the applicant and the Minister.⁴² The Minister upon receiving the notice of the delay period shall advise such institutions and public authorities in Canada as he sees fit of the object and the delay period.⁴³ If an offer to purchase is made within that period but is not accepted, either the applicant or the institution or public authority making the offer can request the Review Board to determine a fair cash offer to purchase.⁴⁴ The request must be by notice in writing⁴⁵ and must be made not less than thirty days before the end of the delay period.⁴⁶

Where the Review Board establishes a delay period and does not receive a request to determine a fair cash offer to purchase, it shall after the delay period, and upon request of the applicant, direct a permit officer to issue an export permit.⁴⁷ However, where the Review Board receives a request it shall determine the amount of a fair cash offer to purchase,⁴⁸ and then both parties are advised of its decision.⁴⁹ There is no requirement that the Review Board furnish details of their considerations or their method in determining the fair cash offer to purchase.

Where the Review Board has determined a fair cash offer to purchase and no offer to purchase is made during that period then it shall direct a permit officer to issue an export permit.⁵⁰ However, if an offer to purchase is made during that period which is equal to or greater than the amount of the fair cash offer to purchase, then no export permit will be issued.⁵¹ The applicant may refuse the offer but then he must either retain the work, or seek to deal it inside Canada, or reapply after two years for an export permit.⁵²

Under the scheme an export permit cannot be withheld absolutely, and is subject to a *bona fide* domestic offer to purchase at a fair cash purchase price. Nonetheless this procedure has been the subject of criticism; both by nature of its interference with property rights, and the effect the delay period has on discouraging foreign buyers.⁵³

In addition to the export permits the Act provides for the issuance of two Ministerial permits: the general permit and the open general permit.⁵⁴ The general permit, really a bulk licence, is issued to reputable dealers to alleviate undue hardship or interference with business.⁵⁵ The open general permit applies to all persons.⁵⁶ In effect it creates an exception to the Control List. The Minister issues an open general permit if, for instance, a particular class of object subject to control is in abundant supply.⁵⁷ The Minister may at any time amend, suspend, cancel or reinstate either of these permits.⁵⁸

Offences and Punishment

The offences and punishment are set out in Sections 40–45 of the Act. The Act provides that in respect of domestic cultural property

it is an offence to: export or attempt to export from Canada any object included in the Control List except under the authority of and in accordance with a permit;⁵⁹ or to transfer the permit to or allow it to be used by another person;⁶⁰ or to wilfully furnish any false or misleading information or knowingly make any misrepresentation in applying for or obtaining any permit.⁶¹ Every person who contravenes any of these provisions is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment to a term of twelve months or both;⁶² or on conviction on indictment to a fine not exceeding twenty-five thousand dollars or to imprisonment to a term not exceeding five years or to both.⁶³ Where a corporation commits an offence under this Act any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is liable to the punishment as provided for the offence, whether or not the corporation has been prosecuted or convicted.⁶⁴ A conviction under the Act, for any offence, does not act as a bar to prevent the applicant from applying for a permit for that or other objects.

Proceedings under the Act may be instituted, tried or determined at the place in Canada where the offence was committed, or at the place in Canada in which the person charged resides or has his office or place of business at the time of the institution of proceedings.⁶⁵ A prosecution of a summary offence must be instituted at any time within but not later than three years after the time when the subject matter of the complaint arose.⁶⁶

Foreign Cultural Property

As previously stated, the Act is not limited to the control of domestic cultural property. In recognition of the growing world concern over the illicit traffic in cultural property,⁶⁷ and in response to the UNESCO Convention, the Act has established a procedure to protect the cultural property of foreign states. This objective is accomplished by two means: a control of the import into Canada of foreign cultural property which has been illegally exported from a reciprocating State,⁶⁸ and by establishing a procedure for a reciprocating State to obtain the recovery and return of illegally exported foreign cultural property.⁶⁹

For the sake of clarity it should be stressed that while the two means are closely associated with each other, they are nonetheless separate and distinct. It is by virtue of the control, designating the property as having been illegally imported into Canada, that the mechanism is triggered for permitting the government of a reciprocating State to request the recovery and return of the foreign cultural property.

Control of Illegally Exported Foreign Cultural Property

The Act provides for the control of the import into Canada of any 'foreign cultural property'⁷⁰ that has been illegally exported from

the 'reciprocating State'.⁷¹ The control is governed by Section 37(2) and is supplemented by a mechanism for prosecuting violators.⁷²

Section 37(2) of the Act states:

(2) From and after the coming into force of a cultural property agreement in Canada and a reciprocating State, it is illegal to import into Canada any foreign cultural property that has been illegally exported from that reciprocating State.

Thus once a 'cultural property agreement'⁷³ has come into force between Canada and a foreign State, it then becomes illegal to import into Canada any foreign cultural property that has been illegally exported from that reciprocating State.⁷⁴ This point requires three observations: (1) the Act makes no reference to foreign cultural property that has been illegally exported from a reciprocating State *before* the coming into force of a cultural property agreement; (2) there is no provision in the Act that makes it unlawful to have in one's possession any foreign cultural property knowing that the foreign cultural property has been illegally exported from a reciprocating State; (3) The Act fails to define the term 'illegally exported'. The significance of these omissions was demonstrated in the first prosecution under the Act. In *R v Heller, Zango and Kassam*⁷⁵ the three accused were prosecuted for illegally importing foreign cultural property into Canada that had been illegally exported from a reciprocating State.⁷⁶ The Crown elected to proceed by way of indictment and all three accused elected a preliminary inquiry before the Provincial Court Judge. The factual situation surrounding the importation of the object was not in issue and was set out in the judgment as follows:

On 1st December 1981 the two accused Heller and Zango, U.S. citizens, arrived at the Calgary International Airport on a direct Air Canada flight from New York City, U.S.A. They had with them the object in question. Heller reported that fact to officials from the customs and excise branch of the Canadian government stationed at the airport. He advised them of its estimated worth, that being several hundred thousand dollars. The Canadian officials allowed entry of the object into Canada.

After they cleared formalities with the immigration officials at the airport, Heller and Zango were met outside the customs/immigration area by the third accused, Kassam, a Canadian citizen.

The three accused then proceeded from the airport to the Glenbow Museum in downtown Calgary with the object to meet with officials of the museum.

The ostensible purpose of the visit to the Glenbow Museum was (and in fact the visit of Heller and Zango to Canada) to have the object examined for authenticity, and to show it to

representatives of Mobil Oil Canada. Prior to this time the three accused were led to believe that Mobil might purchase the object from them and donate it to the museum.

Shortly after the arrival of the three accused at the museum, and during the 'examination', the meeting was interrupted by entry into the room at the Glenbow by members of the Royal Canadian Mounted Police.

The object was seized, and the three accused were charged as hereinbefore described.

The object

The object seized is a sculpture of some antiquity, created between 1,800 and 2,900 years ago. Its origin as attested to by Dr. Eyo, an internationally recognized authority on Ancient Africa, was in a time when there existed in that part of Africa which now comprises the country of Nigeria, a civilization known as the Nok culture. This culture of civilized society flourished during the period 900 B.C. and 200 A.D.

The world first formally became aware of the existence of this Nok culture in 1943, when, during mining activity in a part of Nigeria, items similar to the sculpture in this case were unearthed.

It is assumed that such sculptures were of some religious or political significance to members of the Nok culture. Dr. Eyo testified that there were only four other such sculptures known to exist, all smaller in size. He further testified that the sculpture was a Nigerian antiquity, within the meaning of current Nigerian legislation.

A Miss Eroku, a lawyer employed by the Nigerian government, and an expert in Nigerian law, reviewed the development of legislation dealing with the control of exportation of antique African sculptural works of art. The first such legislation was enacted in 1924.

The opinion of both Dr. Eyo and Miss Eroku was that the Nok sculpture in this case would be subject to the legislation in place, as amended, since 1924.

Dr. Eyo first became aware of the existence of Ex. 2 in 1980, during a visit to New York City. At that time the sculpture was offered for sale to the Nigerian government by the accused Zango. Dr. Eyo at that time advised Zango that the sculpture had been illegally removed from Nigeria, and that it should be returned. Zango (and the accused Heller, later) had further contact with Dr. Eyo in Lagos in attempts to secure proper export documents.

One can only assume that Dr. Eyo's statement made to Zango in New York in 1980 was the first indication that any of the accused had that the Nok sculpture *may* have been illegally removed from Nigeria.⁷⁷

At the completion of the preliminary inquiry the Crown moved for an order of committal for all three accused. In opposition to the motion counsel for the accused argued there was no evidence that the object had been illegally exported from Nigeria within the meaning of the Canadian legislation.

The Court held to succeed on the motion for committal the Crown must have adduced evidence on the following matters:

- (a) the object was 'foreign cultural property';
- (b) there existed between Canada and Nigeria on 1st December 1981 a 'cultural property agreement';
- (c) that Nigeria on 1st December 1981 was a 'reciprocating State';
- (d) the 'foreign cultural property' was imported into Canada after the coming into force of the 'cultural property agreement' between Canada and Nigeria;
- (e) The Nok sculpture was illegally exported from Nigeria.

The Court was satisfied there was sufficient evidence to support claims (a) to (d). On the issue of whether the Nok sculpture was illegally exported from Nigeria, within the meaning of the Act, the Court held:

I am satisfied, as I have said, that the Canadian Parliament intended, by its legislation to embody the principles and terms of the UNESCO convention dealing with the 'illicit international traffic in cultural property'.

I have examined the provisions of the international convention with respect to the meaning of the term.

Article 7(a) of the international convention to which Canada and Nigeria are parties specifically states that the convention only applies to cultural property '[w]hich has been illegally exported after entry into force of this convention in the states concerned', and further '[which has been] illegally removed from the state after the entry into force of this convention in both states'. Similar words are found in section 7(b).

I am satisfied that the meaning to be attached to the words 'illegally exported' must be restricted to that time frame following the entry by Canada as a party to the international convention.

With respect to the motion for committal, then, there must be some evidence that Ex. 2, the Nok sculpture, was exported from Nigeria after 28th June 1978.⁷⁸

The Court then found there was no evidence presented at the preliminary inquiry that the Nok sculpture was exported from Nigeria after 28th June 1978⁷⁹ and all three accused were discharged.

The Crown applied to the Alberta Court of Queen's Bench for an order of *certiorari* to quash the order of the Provincial Court discharging the accused.⁸⁰ The Court of Queen's Bench granted the

Crown's application on other procedural grounds. On the issue of the sufficiency of the evidence to order the discharge of the accused the Court held:

Having ruled that the Provincial Judge lost jurisdiction, it is not necessary for me to deal extensively with the interpretation of the Cultural Property Export and Import Act.

Notwithstanding my ruling that the Provincial Judge lost jurisdiction, I am in agreement with his finding on the whole of the evidence that there is insufficient evidence regarding the expropriation of the Nok artifact from Nigeria.⁸¹

As the Crown was unable to prove that the Nok sculpture was illegally exported from Nigeria after 28 June 1981, the Nigerian government was thereby precluded from requesting the Attorney-General of Canada to institute an action for the recovery of the Nok sculpture.⁸²

The case demonstrates an arguable deficiency in the Act, in that any foreign cultural property that has been illegally exported from the reciprocating State before 28 June 1978, or that is already in Canada before that date, is immune from prosecution under the Act and consequently cannot be the subject matter of a request for the recovery of that property. Therefore until the existing legislation is changed the system will only offer a modest form of protection.

Recovery and Return of Foreign Cultural Property

The Act has also provided a procedure under which a reciprocating State is enabled to gain the recovery and return of its cultural property that has been illegally exported and imported into Canada.

The recovery begins with the government of the reciprocating State submitting a request in writing to the Minister for any foreign cultural property that has been imported into Canada illegally, and that is in the possession of or under the control of any person, institution or public authority.⁸³ The Attorney-General of Canada may then institute an action for the recovery of the property by the reciprocating State. The Court in which the action has been taken may make an order for the recovery and the return of the property to the reciprocating State.⁸⁴ Where the person, institution or public authority involved in such an action is a *bona fide* purchaser for value, or has a valid title to the property, and had no knowledge at the time of purchase or when such title was acquired, that the property had been illegally exported from the reciprocating State, then the Court may fix such amount to be paid as compensation by the reciprocating State to that person, institution or public authority as the Court considers just in the circumstances.⁸⁵

While the protection afforded by the Act to foreign cultural property is not as extensive as one might have hoped, the Act does

accomplish several objectives. First, the cost in taking legal action in a foreign jurisdiction is so high as to dissuade most governments from attempting it, save for the exceptional case. The provisions of Section 37(3) have permitted a reciprocating State to pursue the recovery and return of the property with no cost to it save the amount of compensation the Court may order it to pay in the case of a *bona fide* purchaser for value or a person who has a valid title to property. Second, the issue of ownership or possession of the property by the reciprocating State — which caused the problems for the New Zealand government in obtaining the return of cultural property in *A.G. of New Zealand v Ortiz*⁸⁶ — has been eliminated and replaced with the requirement that the foreign cultural property has been illegally exported from the reciprocating State. Third, the Act has attempted to strike a reasonable balance between the interests of a reciprocating State in the recovery and return of cultural property and the property rights of the *bona fide* purchaser for value or a person holding a valid title to the property.

In conclusion it is submitted the Canadian parliament has initiated the first phase of an important campaign to ensure the preservation and protection of both domestic and foreign cultural property. However, it must be acknowledged that this is a first step. Future efforts must concentrate on better law enforcement techniques; improving existing legislation; the development of greater international cooperation and scrutiny in the traffic of cultural property; as well as a campaign to heighten the public's awareness of the need to preserve their cultural heritage.

Notes

- 1 Rafzigher, J.A.R., 'International Penal Aspects of Protecting Cultural Property', (1985) 19 *The International Lawyer* 835 at 835.
- 2 Koumantos, G., 'International Legal Protection of Cultural Property', Proceedings of the Thirteenth Colloquy on European Law, Delphi, 20–22 September 1983, at 12.
- 3 Statutes of Canada 1974–75–76 c.50, s.1.
- 4 Communications Canada: Annual Report 1987–88, Cultural Property Export and Import Act, p. 7.
- 5 Clark, I.C., 'The Cultural Export and Import Act of Canada: Legislation to Encourage National Cooperation', (1982–83) 15 *N.Y.J. of Int'l Law & Politics*, 771 at 771.
- 6 Cultural Property Export & Import Act, Revised Statutes of Canada 1985, sec.4. The preservation in Canada of significant examples of Canadian heritage in movable cultural property is also accomplished through tax incentives for private individuals who donate or sell cultural objects to public institutions, and by grants to assist institutions in purchasing cultural objects under certain circumstances. As the scope of this commentary is on the penal aspects of the law only passing, if any, reference will be made to the tax incentive system.

- 7 Ibid., sec.37(3).
- 8 Ibid., sec.4.
- 9 Ibid., secs.7–16.
- 10 Ibid., sec.4. See: The Canadian Cultural Property Export Control List ch.448, 5, Consolidated Regulations of Canada (Consol.Reg.Can.) 3269 (1978).
- 11 Clark, *supra* 5, at 775–776 refers to the Control List as ‘... a detailed definition of the classes of objects which are subject to control. It is the legal reference document for determining whether an export permit is required before cultural property can be exported from Canada’.
- 12 For the rationale behind the inclusion of the italicized objects on the Control List see H.M. Treasury (Great Britain), *The Export of Works of Art: Report of a Committee Appointed by the Chancellor of the Exchequer*, 50 (1952) ‘Waverly Report’ at 36. This report was influential in inspiring the Canadian control system.
- 13 *Supra* 6, sec.4(3).
- 14 Ibid. For the rationale behind these exemptions see Clark, *supra* 5, at 774–775.
- 15 The wording of secs. 7 and 8 of the Act restricts applications for an export permit only to ‘a resident of Canada’. See sec.2 of the Act which defines ‘a resident of Canada’.
- 16 *Supra* 6, sec.17(1)(2).
- 17 There is no requirement in the wording of the Act that the applicant for the export permit be the owner of the object. The writer recognizes the distinction but for the purpose of this commentary refers to the case of an owner seeking an export permit under the Act.
- 18 *Supra* 6, sec.5
- 19 Ibid., sec.7(a).
- 20 Ibid., sec.7(b).
- 21 Ibid., sec.7(c). In 1987–88 the program processed 192 applications, of which 130 were issued export permits by the permit officer. *Supra* 4, p. 3.
- 22 Ibid., sec.16(1).
- 23 Ibid., sec.8(1).
- 24 Ibid., sec.8(2).
- 25 Ibid., sec.8(3).
- 26 Ibid., secs.2 and 6.
- 27 Ibid., sec.9.
- 28 See Clark, *supra* 5, at 777.
- 29 *Supra* 6, sec.10.
- 30 Ibid., sec.11(1)(a).
- 31 Ibid., sec.11(1)(b).
- 32 Ibid., sec.11(2).
- 33 Ibid., sec.11(3).
- 34 Ibid., sec.13(1).
- 35 Ibid., sec.2, 18.
- 36 Ibid., sec.29(1). There is no provision in the Act for the Review Board to extend the period on which a request for a review can be made. In certain circumstances this could result in undue hardship on the part of the applicant.
- 37 *Supra* 6, sec.29(3).
- 38 Ibid., sec.25. This would appear to allow an applicant to request to appear before the Review Board to offer relevant evidence and to make submissions on the merit of the application.
- 39 Ibid., sec.29(4).
- 40 Ibid., sec.29(5)(a).

- 41 *Ibid.*, sec.29(5)(b).
- 42 *Ibid.*, sec.29(6).
- 43 *Ibid.*, sec.29(7).
- 44 *Ibid.*, sec.30(1).
- 45 *Ibid.*
- 46 *Ibid.*, sec.30(2). There is no requirement in the Act that the other party is sent a copy of the notice.
- 47 *Supra* 6, sec.30(4).
- 48 *Ibid.*, sec.30(3).
- 49 *Ibid.*
- 50 *Ibid.*, sec.30(5).
- 51 *Ibid.*
- 52 *Ibid.*, sec.16.
- 53 Williams, S., 'The Protection of the Canadian Cultural Heritage: The Cultural Property Export and Import Act', (1976) *The Canadian Yearbook of Int'l Law*, 292 at 305–306.
- 54 *Supra* 6, sec.17(1)(2).
- 55 *Supra* 5, at 779. Sec.17(1) restricts such applications to 'a resident of Canada'.
- 56 *Ibid.*, sec.17(2).
- 57 *Supra* 5, at 779–780.
- 58 *Supra* 6, sec.17(1)(2).
- 59 *Ibid.*, sec.40.
- 60 *Ibid.*, sec.41.
- 61 *Ibid.*, sec.42.
- 62 *Ibid.*, sec.45(1)(a).
- 63 *Ibid.*, sec.45(1)(b). Rafzigher, J.A.R., *supra* 1, at 844 states: 'Canada's system ... is particularly interesting because it imposes the heaviest fines – up to \$25,000 (Canadian) – and is one of the newest and most elaborate schemes.' However, it must be observed that the Act makes no provision for the confiscation, seizure or forfeiture of the object which is the subject matter of the offence. Clearly a penalty which included the possibility of the confiscation, seizure or forfeiture of the object would act as a strong deterrent to any potential smuggler.
- 64 *Ibid.*, sec.46.
- 65 *Ibid.*, sec.47.
- 66 *Ibid.*, sec.45(2).
- 67 *Supra* 5, at 785.
- 68 *Supra* 6, sec.37(2).
- 69 *Ibid.*, sec.37(3).
- 70 *Ibid.*, sec.37(1).
- 71 *Ibid.*, sec.37(1)(2).
- 72 *Ibid.*, sec.43.
- 73 *Ibid.*, sec.37(2).
- 74 *Ibid.*, sec.37(1).
- 75 (1983) 27 *Alta. Law Reports* (2d) 346 (P.C.J.).
- 76 The offence was contrary to secs. 37 and 39(1) which have since been amended to secs. 37(2) and 41.
- 77 *Supra* 75 at 347–348.
- 78 *Ibid.* at 353–354.
- 79 This date marks Canada's becoming a party to the UNESCO Convention.
- 80 *R. v Heller et al.* (1984) 30 *Alta. Law Reports* (2d) 130.
- 81 *Ibid.* at 138. A similar conclusion was reached in *United States v McLain*, 545 F 2d 933 where the Court held at 1003: 'In order to say whether any of

the pre-Columbian movable artifacts were “stolen”, it is necessary to know first when the artifact was exported from Mexico. If the exportation occurred after the effective date of the 1972 law, the artifact may have been stolen — but only if it were not legitimately in the seller’s hands as a result of prior law ... If the exportation occurred before 1972, but after the effective date of the 1934 law, it would be necessary to show the artifact was found on or in an immovable archaeological monument. If the exportation occurred before the effective date of the 1934 law, it could not have been owned by the Mexican government, and illegal exportation would not, therefore, subject the receiver of the article to the strictures of the National Stolen Property Act. Because the jury was not told that it had to determine when the pre-Columbian artifacts had been exported from Mexico and to apply the applicable Mexican law to that exportation, convictions of all the appellants must be reversed.’

82 *Supra* 6, sec.37(3).

83 *Ibid.*

84 *Ibid.*, sec.37(5).

85 *Ibid.*, sec.37(6). The legal obligation in establishing a claim under this subsection is: that one is a *bona fide* purchaser for value or had a valid title to the property; *and* had no knowledge at the material time that the property had been illegally exported from the reciprocating State; rests upon the party seeking the order of compensation and the standard of proof is on a balance of probabilities.

86 [1982] 1 Q.B. 349 rev’d [1982] 3 W.L.R. 570 (C.A.) appeal dismissed [1984] A. C. 1 (H.L.).