

PROTECTION OF CULTURAL PROPERTY: THE CANADIAN APPROACH

Sharon A. Williams*

Throughout history, great monuments, temples, sculptures, and works of art have been prized by mankind. They are valued not only because of their aesthetic qualities but also because they perform the vital function of recording and preserving the talent and endurance of man and the history of diverse civilizations. This universal collection of cultural property comprises mankind's cultural heritage.¹ The heritage is a compendium of human suffering and genius and a medium through which intellectual exchange is possible among the peoples of the world. As such, it must be well preserved to ensure that future generations can marvel at the accomplishments of their own epoch and those that came before.²

The problems to be faced in protecting peacetime cultural property are numerous. They include the wholesale destruction of archaeological sites, the export of artifacts and monuments, and the illicit export and import of works of art.³

The archaeological heritage, in particular, is in a vulnerable position. The looting of known and unknown sites, the illegal export and import of artifacts, and urban growth have all destroyed archaeological resources. Concern must be focused on the fate of both discovered sites and undiscovered sites where there are insufficient funds to excavate. Other concerns include the thoughtless destruction of sites by untrained persons and the systematic dismemberment of monuments and their removal to unknown locations. Such disruption makes it difficult to

* Professor of Law, Osgoode Hall Law School, York University, Toronto, Canada.

1. See S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY* 52-53 (1978).

2. Marchisotto, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 689, 705 (1974).

3. S. WILLIAMS, *supra* note 1, at 52.

determine the totality of what occurred on a site. Once lost or destroyed, archaeological property cannot be replaced.

The importance of art to the cultural life and heritage of all states has made its protection and preservation of special interest, often to the subordination of conventional property concepts. For instance, Canada has imposed restrictions on the traditional rights of ownership.⁴ Some nations have devised export control schemes to combat the illegal international movement of cultural property.⁵ Such schemes, however, address only part of the problem. Unless importing nations cooperate in controlling the illicit importation of such property, the exporting nation is virtually impotent.

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership in Cultural Property⁶ reflects a recognized need for every nation to join in an international cooperative effort to protect not only its own cultural heritage, but also to assist in the protection of the cultural heritage of other nations.⁷

The UNESCO Convention was implemented in Canada in 1975 by the Cultural Property Export and Import Act.⁸ Under the terms of this Act, Canada has agreed to aid in the recovery and return of illegally transported cultural property.⁹

This Article analyzes the protection given to cultural property in Canada. Although particular attention will be given to an analysis of Canada's recently adopted Cultural Property Export and Import Act, Canadian national and provincial legislation designed to regulate Canada's archaeological heritage is explored as well.

THE CANADIAN CULTURAL PROPERTY EXPORT AND IMPORT ACT

Although Canada possesses some national legislation protecting historic sites and Indian artifacts¹⁰ and provincial legislation protecting

4. Cultural Property Export and Import Act, 1975, c. 50, §§ 1-52.

5. E.g., France: Law on Historical Monuments of December 31, 1913, art. 21. Italy: Law of June 1, 1939, No. 1089, [1939] Rac. Uff. 3403. Mexico: Ley Federal Sobre Monumentos y Zonas Arqueológicas, Artísticas et Históricas, May 6, 1972, 312 D.O. 16. United Kingdom: WAVERLY REPORT, CHANCELLOR OF THE EXCHEQUER, THE EXPORT OF WORKS OF ART (1952). Further information on these laws can be found in UNESCO, INDEX OF NATIONAL LEGISLATION ON THE PROTECTION OF CULTURAL HERITAGE (1979); BURNHAM, THE PROTECTION OF CULTURAL PROPERTY: HANDBOOK OF NATIONAL LEGISLATIONS (1974).

6. 10 INT'L LEGAL MATERIALS 289 (1971).

7. *Id.*

8. 1975, c. 50, §§ 1-52.

9. *Id.* §§ 31-32. See UNESCO, *The Recommendation on International Principles Applicable to Archaeological Excavations*, 10 INT'L LEGAL MATERIALS 289 (1971).

10. Historic Sites and Monuments Act, CAN. REV. STAT. c. H-6 (1970), as amended by Historic Sites and Monuments Act Amendments Act, 1977, c. 20, § 1; Indian Act, CAN. REV. STAT. c. I-6 (1970).

archaeological sites and objects,¹¹ the Cultural Property Export and Import Act represents Canada's first attempt to legislate on the export and import of cultural property. The Act came into force on September 6, 1977.¹²

The main purposes of the Act are: 1) to ensure that Canadian artifacts, works of art, and other items intrinsic to the Canadian heritage are kept in Canada; 2) to encourage by means of tax incentives the private donation of such works to national and provincial institutions; and 3) to implement international agreements such as the 1970 UNESCO Convention.¹³ Through international cooperation, it is hoped that any cultural property that is illegally exported will be recovered and any item that illegally enters Canada will be returned.

The Act seeks to protect and preserve moveable property rather than the archaeological sites themselves. It does, however, encompass "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."¹⁴ The Act also extends protection to objects worth more than Can\$500 which are made by or relating to the aboriginal peoples of Canada.¹⁵

11. *E.g.*, Alberta: The Provincial Parks Act, ALTA. REV. STAT. ch. 288 (1970), *as amended by* Alta. Stat. ch. 51 (1974); Alberta Historical Resources Act, ALTA. REV. STAT. ch. 13 (1970), *as amended by* Alta. Stat. ch. 5 (1973), Alta. Stat. ch. 4 (1978). British Columbia: The Archaeological and Historic Sites Protection Act, B.C. REV. STAT. ch. 4 (1972); The Heritage Conservation Act, B.C. REV. STAT. ch. 37 (1977), *as amended by* B.C. Stat. ch. 25, § 332 (1978). Manitoba: The Historic Sites and Objects Act, MAN. REV. STAT. ch. H-70 (1970), *as amended by* Man. Stat. ch. 81, § 11 (1972), Man. Stat. ch. 42, § 24 (1975); Heritage Manitoba Act, Man. Stat. ch. 42 (1974), *as amended by* Man. Stat. ch. 15 (1975), Man. Stat. ch. 49, § 49 (1978); The Foreign Cultural Objects Immunity from Seizure Act, Man. Stat. ch. F-170 (1976); The Provincial Parks Act, Man. Stat. ch. 67 (1972). New Brunswick: The Parks Act, N.B. REV. STAT. ch. P-2 (1973); Historic Sites Protection Act, N.B. REV. STAT. ch. H-6 (1973), *as amended by* N.B. Stat. ch. 79, § 11 (1975), N.B. Stat. ch. 30, §§ 1-2 (1976), N.B. Stat. ch. 27, § 2.1 (1977), N.B. Stat. ch. 28, §§ 1, 2, 7.1, 9, 9.1 (1978), N.B. Stat. ch. 41, §§ 5, 91 (1979). Newfoundland: An Act Respecting Historic Objects, Sites and Records, Nfld. REV. STAT. ch. 153 (1970), *as amended by* Nfld. Stat. No. 85 (1973), Nfld. Stat. No. 113 (1974), Nfld. Stat. No. 80 (1977). Northwest Territories: Regulations for the Protection and Care of Archaeological Sites in the Northwest Territories, N.W.T. REV. ORD. S.O.R. 60-31 (1974). Nova Scotia: Provincial Parks Act, N.S. REV. STAT. ch. 244 (1967), *as amended by* N.S. Stat. ch. 61 (1970); The Public Archives Act, N.S. REV. STAT. ch. 246 (1967). Ontario: The Archaeological and Historic Sites Protection Act, ONT. REV. STAT. ch. 26 (1970), *as amended by* Ont. Stat. ch. 50 (1971), Ont. Stat. ch. 122 (1974); Archives Act, ONT. REV. STAT. ch. 28 (1970); Historical Parks Act, Ont. Stat. ch. 6 (1972). Prince Edward Island: The Recreation Development Act, P.E.I. REV. STAT. ch. R-9 (1974); Heritage Foundation Act, P.E.I. REV. STAT. ch. H-4 (1974), *as amended by* P.E.I. Stat. ch. 12 (1976); Archaeological Investigation Act, P.E.I. REV. STAT. ch. A-15 (1974); Archives Act, P.E.I. REV. STAT. ch. A-17 (1974). Saskatchewan: The Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act, SASK. REV. STAT. ch. 54 (1965), *as amended by* Sask. Stat. ch. 9 (1966), Sask. Stat. ch. 84 (1973-74), Sask. Stat. ch. 34 (1974-75); The Saskatchewan Heritage Act, Sask. Stat. ch. 45 (1974-75).

12. Cultural Property Export and Import Act, 1975, c. 50, § 52.

13. See 10 INT'L LEGAL MATERIALS 289 (1971).

14. Cultural Property Export and Import Act, 1975, c. 50, § 3(2)(a).

15. *Id.* § 3(2)(b).

Export Control

The Act sets up an export control list based on age and value limits.¹⁶ The age criterion is deemed to establish the rarity of an object while the value criterion aids in establishing its quality.¹⁷ Thus, in its simplest form, the approach of the Act is to apply export controls to works that are over a certain age and value limit, and not to exert any control over items below those limits.¹⁸ The control list covers items of cultural property situated in Canada, without regard to their place of origin or the nationality of their creator. No object is included in the control list that is less than fifty years old¹⁹ or made by a person who is still living.²⁰

The Cultural Property Export and Import Act applies only if the owner of a cultural object included in the control list wishes to export it. Such a person must first obtain an export permit from a permit officer.²¹ The Act provides procedures for application and for review of a

16. *Id.* § 3(2)(a)-(f).

17. H.C., Feb. 7, 1975, at 3025. Secretary of State Faulkner stated:

Thus, the legislation before the House proposes that the export of cultural property be based on two factors, age and value; that an independent review board be charged with the responsibility of judging appeals from individuals who, having applied for permission to export an object, have been refused by the Customs authorities on the advice of expert examiners; that in dealing with cases referred to it, the review board, like the expert examiners, be guided by criteria which, although by necessity subjective, have been inspired by successful experience in the application of like rules in the United Kingdom.

Id.

18. *Id.* at 3026. The Cultural Property Export and Import Act, 1975, c. 50, § 3(2)(b)-(f) sets forth the conditions of age and value:

(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 watercolours 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.

19. Cultural Property Export and Import Act, 1975, c. 50, § 3(3)(a).

20. *Id.* § 3(3)(b).

21. Permit officers are designated by the Secretary of State, with the approval of the Minister of National Revenue. *Id.* § 4. *Id.* § 6(a)-(c) provides that an export permit must be granted by the permit officer to an applicant who is a Canadian resident if the object:

a) was imported into Canada within thirty-five years immediately preceding the date of application and was not exported from Canada under a permit issued under [the] Act prior to that importation;

b) was loaned to an institution or public authority in Canada by a person who was not a resident of Canada at the time the loan was made; or

permit denial.²² The review is undertaken by the Export Review Board, which is empowered to decide whether an object is of importance to the Canadian heritage. If the Board decides that an object is not of national importance to Canada, a permit will be issued for export.²³ If, on the other hand, the Board determines that the object is of national importance and of outstanding value and that some institution or public authority in Canada might purchase it, a delay of six months may be imposed on the object's exportation.²⁴ If the Board decides that such an offer to purchase is unlikely or if the six month delay period has expired, the Board must direct that an export permit be issued.²⁵ In cases where an offer is made but is not accepted, either the applicant or the public authority that made the offer can request the Review Board to determine what is a fair offer.²⁶

If, after the Review Board has determined the amount of a fair cash offer, the institution or public authority does not proceed with the transaction, an export permit must be issued.²⁷ The owner may refuse any offer, even one equal to or greater than the fair cash offer determined by the Review Board. Refusal of an offer equal to or greater than the fair cash offer does not leave the owner free to export the object. The owner must retain the work or deal with it exclusively inside Canada and may not reapply for an export permit for two years.²⁸

c) is to be removed from Canada for a purpose prescribed by regulation for a period of time not exceeding such period of time as may be prescribed by regulation for the purposes of this paragraph.

If a permit officer refuses to issue an export permit and is unaware of any prior permit refusal within the two years immediately preceding the date of application, the officer must determine whether the object falls within the control list. *Id.* § 7(1). If the object is included within the control list, a permit is issued. *Id.* § 7(2). If, on the other hand, the permit officer determines that the object is or might be subject to control, the application is referred to an expert examiner. *Id.* § 7(3).

The expert examiner undertakes a similar renewal procedure. Initially, the examiner determines whether the object is on the control list. *Id.* § 8(1). If the object is determined not to be on the list, the examiner advises the permit officer to issue an export permit. *Id.* § 8(2). If, however, the object falls within the control list, the examiner must determine both whether the object is of outstanding significance to Canadian culture and whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. *Id.* § 8(3). An object is significant if it is closely associated with Canadian history or national life, aesthetic, or valuable to the arts or sciences. *Id.* § 8(3)(a)(i)-(iii). If an object is determined to be of outstanding significance or national importance, the examiner advises the permit officer not to grant the requested export permit. *Id.* § 8(5). If an object is not of outstanding significance or national importance, the examiner will advise the permit officer to issue an export permit to the applicant. *Id.* § 8(4).

22. *Id.* §§ 4-25.

23. *Id.* § 23(4).

24. *Id.* § 23(5)(a).

25. *Id.* § 23(5)(b).

26. *Id.* § 24(1),(3).

27. *Id.* § 24(5).

28. *Id.* § 13.

Import Control

The Cultural Property Export and Import Act is not limited to the control of the export of cultural property from Canada. It also deals with the problems posed by the importation into Canada of cultural property illegally exported from foreign states.²⁹ The Secretary of State, in the debate on the second reading of the Act, stated:

The movement of cultural property from one country to another can no longer be a casual and informal matter. Just as I believe that the Canadian government has a responsibility to act as a guardian of the heritage of Canadians, I also believe that this responsibility extends to the cultural heritage of mankind. During the negotiations to repatriate the Speyer Collection of Canadian Indian ethnography from West Germany, . . . it was axiomatic that the West German authorities should be kept informed of our intentions. In fact they facilitated our obtaining this important collection for Canada. I think nonmembers would agree that we should not become a point of entry for illicit traffic in cultural goods.³⁰

The provisions governing the importation of cultural property are less complicated than those concerned solely with export. The Canadian government may enter into either bilateral or multilateral agreements³¹ relating to the prevention of the illicit traffic in cultural property.³² Once such a cultural property agreement has come into operation between Canada and a foreign state, it is illegal to import into Canada any foreign cultural property that has been illegally exported from the foreign state.³³

The Act establishes procedures under which a reciprocating foreign state³⁴ may gain the recovery and return of foreign cultural property³⁵ that has been illegally exported from the foreign state and imported into Canada. The government of the foreign state must send a written request to Canada's Secretary of State for aid in the recovery and return of any foreign cultural property that has been illegally imported into Canada.³⁶ At the time of the request, the property must be present in Canada in the possession or under the control of a person, institution, or public authority.³⁷ In such a situation, the Attorney

29. *Id.* §§ 31-45.

30. H.C., Feb. 7, 1975, at 3029.

31. Cultural Property Export and Import Act, 1975 c. 50, § 31(1).

32. *Id.*

33. *Id.* § 31(2).

34. A "reciprocating state" is a "foreign State that is a party to a cultural property agreement." *Id.* § 31(1).

35. "[F]oreign cultural property . . . means any object that is specifically designated by [a reciprocating] State as being of importance for archaeology, prehistory, history, literature, art or science." *Id.*

36. *Id.* § 31(3).

37. *Id.*

General is empowered to institute legal proceedings in the Canadian courts to accomplish restitution of the property to the reciprocating state.³⁸ The interests of bona fide purchasers are protected under the Act through court-ordered compensation paid by the reciprocating state. Compensation will be ordered by a court if it is satisfied that the possessor either a) is a bona fide purchaser for value without knowledge of the illegal exportation, or b) has valid title to the property and had no knowledge at the time such property was acquired that it had been illegally exported from the reciprocating state.³⁹

Offenses and Penalties

The Act makes it illegal to export or to attempt to export from Canada any object included in the control list unless an export permit is issued.⁴⁰ The Act further proscribes exportation of or attempts to export foreign cultural property that has been illegally brought into Canada (1) if a written request for recovery of such property has been made by a reciprocating state and if the Attorney General has instituted an action for the recovery of the property, or (2) if a court has issued an order for recovery of the property.⁴¹ After issuance of a court order, the reciprocating state may, with the consent of the Canadian Secretary of State, export the property.⁴²

Upon summary conviction, a person who has violated the Act may be punished by a fine of up to \$5,000, imprisonment for up to twelve months, or both.⁴³ Conviction may also proceed upon indictment and result in the imposition of a fine not exceeding \$25,000, imprisonment for a term not exceeding five years, or both.⁴⁴ The prosecution for the summary offense may be instituted at any time within three years from the date when the subject matter of the complaint arose.⁴⁵ Legal pro-

38. *Id.*

39. *Id.* § 31(6).

40. *Id.* § 34. Once issued, permits are not transferable. *Id.* § 35. Anyone who willfully furnishes false or misleading information in connection with an export permit application has committed an offense under the Act. *Id.* § 36.

41. *Id.* §§ 31(3), (5), 38. The written request must allege both that the foreign property has been illegally exported from the reciprocating state and that it is currently in the possession or under the control of any person, institution, or public authority within Canada. *Id.* § 31(3). Upon the receipt of such a request, the Attorney General of Canada may institute an action for recovery of the property in either Canadian federal court or in the superior court of a province. *Id.* Upon a determination that the illegal foreign property is in the possession of a person, institution, or public authority within Canada, the court must issue an order sufficient to insure the property's return to the reciprocating state. If the person, institution, or public authority in possession of the property is a bona fide purchaser for value, *id.* § 31(6)(a), or holds valid title to the property, *id.* § 31(6)(b), and such purchase was made or title acquired without knowledge of the property's illegal origin, just compensation may be awarded. *Id.* at § 31(6).

42. *Id.* § 38(2).

43. *Id.* § 39(1)(a).

44. *Id.* § 39(1)(b).

45. *Id.* § 31(8).

ceedings under the Act may be instituted, tried, or determined anywhere in Canada where the offense was committed,⁴⁶ where the accused resides, or where the accused has his place of business at the time proceedings are instituted.⁴⁷

The most positive and beneficial aspect of the Act is that it attempts to keep Canadian national treasures not only within Canada, but also within the public domain.⁴⁸ This result is accomplished by giving Canadian institutions as well as individual Canadian buyers the first opportunity to acquire cultural objects that are deemed of outstanding significance and national importance. Moreover, by establishing the Canadian Heritage Preservation Endowment Fund, the Act ensures that Canadian institutions will have the financial means to buy cultural works that are in danger of exportation.⁴⁹ The Act attempts to strike a balance between restrictions on export and incentives to ensure that the number of works of art in Canadian public institutions will be increased.

NATIONAL LEGISLATION CONCERNING HISTORIC SITES AND INDIAN ARTIFACTS

National legislation in Canada is primarily concerned with the protection of moveable cultural property. While it is true that moveable works are more susceptible to illicit transfer, the fact remains that archaeological and historic sites are also in a perilous position.

In this regard, it is necessary to analyze the national protection of historic sites in Canada. The Historic Sites and Monuments Act⁵⁰ defines "historic place" as a site, building, or other place of national historic interest or significance.⁵¹ The Act includes buildings or structures that are of national interest, either by reason of age or of architectural design.⁵²

Under the Act, the Minister of Indian Affairs and Northern Development is empowered to mark or commemorate historic places by means of plaques or signs,⁵³ to make agreements with persons for the marking, care, and preservation of historic sites,⁵⁴ and with the approval of the Governor in Council, to establish historic museums.⁵⁵ In

46. *Id.* § 41.

47. *Id.*

48. Financial Post, June 14, 1975, at 14.

49. Cultural Property Export and Import Act, 1975, c. 50, § 30.

50. CAN. REV. STAT. c. H-6 (1970), as amended by Historic Sites and Monuments Act Amendment Act, 1977, c. 20, § 1.

51. CAN. REV. STAT. c. H-6, § 2 (1970).

52. *Id.*

53. *Id.* § 3(a).

54. *Id.* § 3(b).

55. *Id.* § 3(c).

addition, the Minister may provide for the administration and maintenance of any historic places or museums established under the Act,⁵⁶ and with the approval of the Treasury, may also acquire any historic places or lands for historical museums by purchase, lease, or otherwise on behalf of Her Majesty in right of Canada.⁵⁷

The Act sets up a Canadian Historic Sites and Monuments Board.⁵⁸ The powers and duties of the Board consist of receiving and considering recommendations concerning the marking or commemoration of historic places, establishing historical museums, and administering, preserving, and maintaining historic places and museums.⁵⁹ The Board is also empowered to advise the Minister.⁶⁰

It is apparent that the Act is restricted in its application. It does not seek to regulate archaeological sites that are in danger of destruction, and thus does not interfere with the provincial competence under the British North America Act of 1867.⁶¹

On the federal level, the only other relevant legislation is section 91 of the Indian Act.⁶² That section provides that no one may, without obtaining the written consent of the Minister of Indian Affairs and Northern Development, remove, destroy, or acquire title to any of the following items situated on a reserve: Indian grave houses; carved grave poles; totem poles; carved house posts; or rocks embellished with paintings or carvings.⁶³ This prohibition does not apply to chattels falling within the above descriptions that are manufactured by the Indians for sale.⁶⁴ Anyone violating these provisions is guilty of a criminal offense and upon summary conviction is punishable by a fine of up to \$200 or up to three months imprisonment.⁶⁵

PROVINCIAL LEGISLATION REGARDING HISTORIC AND ARCHAEOLOGICAL SITES AND OBJECTS

The several provinces of Canada, together with the Northwest Territories and the Yukon, have legislation that seeks to protect and preserve their archaeological and historical resources. Except for the Quebec Cultural Property Act,⁶⁶ these statutes are not comprehensive in their approach.

56. *Id.* § 3(e).

57. *Id.* § 3(d).

58. Historic Sites and Monuments Act Amendment Act, 1977, c. 20, § 1.

59. CAN. REV. STAT. c. H-6, § 5 (1970).

60. *Id.*

61. 30 & 31 Vict., c. 3.

62. CAN. REV. STAT. c. I-6 (1970).

63. *Id.* §§ 91(1)(a)-(e), 93.

64. *Id.* § 92.

65. *Id.* § 91(4).

66. Que. Stat. ch. 19 (1972).

Quebec

The Quebec Cultural Property Act utilizes a rigid method of classification and export control. That Act defines cultural property as "a work of art, a historic property, a historic monument or site, or an archaeological property or site."⁶⁷ Archaeological sites and artifacts comprise only a small part of the conservation system. Archaeological property is defined as "any moveable or immovable property indicating prehistoric or historic human occupation" and an archaeological site is a place where archaeological property is found.⁶⁸

A major objective of the Act was the establishment of a Cultural Property Commission⁶⁹ which advises the Minister of Cultural Affairs on any questions referred by him.⁷⁰ The Commission may also make recommendations to the Minister on any matter relating to the conservation of cultural property.⁷¹ The Act authorizes the Minister of Cultural Affairs to recognize or classify cultural property in whole or in part.⁷² A register is maintained of all recognized⁷³ or classified⁷⁴ cultural property.⁷⁵ This register must sufficiently describe the recognized or classified cultural property, indicate the name of the owner or custodian, and mention any deeds of transfer made since its registration.⁷⁶ The Minister may recognize any cultural property whose conservation is in the public interest.⁷⁷

Any recognized or classified cultural property may not be transported outside the Province of Quebec without the permission of the Minister or the advice of the Commission.⁷⁸ Destruction, alteration, restoration, repair, or change in any manner of recognized cultural property or, in the case of a recognized immovable item, using it as backing for construction, may not be undertaken without giving the Minister sixty days notice of such intention⁷⁹ and receiving authorization from him.⁸⁰ Classified cultural property must be kept in good con-

67. *Id.* art. 1(a).

68. *Id.* art. 1.

69. *Id.* art. 2.

70. *Id.* art. 5.

71. *Id.*

72. *Id.* art. 8.

73. Cultural property is "recognized" when it is recorded in a register kept at the Department of Cultural Affairs. *Id.* art. 16. This register contains a description of all recognized or classified cultural property, the name of the property's owner or custodian, and all transfers made since the property was recorded.

74. Cultural property is "classified" if its conservation is determined to be in the public interest by the Minister of Cultural Affairs. *Id.* art. 24.

75. *Id.* art. 11.

76. *Id.* art. 12.

77. *Id.* art. 15.

78. *Id.* art. 17.

79. *Id.* art. 18.

80. *Id.* art. 31.

dition.⁸¹

The Act prohibits anyone, including the owner of the land, from making excavations or surveys for the purpose of discovering archaeological property or sites without obtaining an archaeological research permit from the Minister.⁸² Such a permit is valid for one year from the date of its issue.⁸³ It may, however, be revoked at any time by the Minister if the holder does not comply with the conditions.⁸⁴ When the applicant is not the owner of the land he must attach the owner's written consent to his application.⁸⁵

Anyone who discovers an archaeological site must inform the Minister of such discovery within fifteen days.⁸⁶ If, during the excavation of land, or in the course of construction undertaken for other than archaeological reasons, a cultural object or site is discovered, the Minister must be informed without delay.⁸⁷ After an examination by experts, the Minister may order the suspension, for a period not exceeding seven days, of all excavations or construction that would compromise the integrity of the object or site.⁸⁸ If the object is one that would have been a classified cultural property if it had been discovered before the start of the work, the Lieutenant Governor in Council may, on the recommendation of the Minister, order the continuance or the suspension of work for fifteen days.⁸⁹ The Lieutenant Governor may also order any modification of work or construction plans necessary to ensure that the integrity of the site and its value is maintained.⁹⁰ The Minister may acquire either by agreement or expropriation any recognized or classified cultural property⁹¹ after obtaining the advice of the Commission.

The Quebec Act is protectionist in the extreme; it is intent on securing all objects without exception. No recognized or classified cultural property may be alienated without informing the Minister,⁹² and in the case of classified property, without obtaining written permission.⁹³ A review procedure prohibiting the transportation outside of Quebec of classified or recognized cultural property without the permission of the Minister or the advice of the Commission leads to large

81. *Id.* art. 30.

82. *Id.* art. 35.

83. *Id.* art. 37.

84. *Id.*

85. *Id.* art. 38.

86. *Id.* art. 40.

87. *Id.* art. 41.

88. *Id.*

89. *Id.* art. 42(a).

90. *Id.* art. 42(c).

91. *Id.* art. 51(a).

92. *Id.* art. 20.

93. *Id.* art. 32.

administrative problems. The problems will end in one of two ways: either there will be only a superficial application of the Act, or no recognized or classified cultural property will leave Quebec.

This restrictive approach contradicts the theory that cultural property is the common heritage of mankind. Not only does the Act seek to restrict free export to another state, but also to restrict movement to any of the other Canadian provinces.

Other Provincial Legislation

The Alberta,⁹⁴ British Columbia,⁹⁵ Manitoba,⁹⁶ New Brunswick,⁹⁷ Newfoundland,⁹⁸ Northwest Territorial,⁹⁹ Nova Scotia,¹⁰⁰ Ontario,¹⁰¹ Prince Edward Island,¹⁰² Saskatchewan,¹⁰³ and Yukon Territorial¹⁰⁴ legislatures have enacted legislation that regulates the excavation and preservation of archaeological sites and artifacts found therein.

The statutes generally require the Minister to maintain a register of sites that have been designated, usually by appraisal of objects, as being of significance to the heritage of the province.¹⁰⁵ In some provinces, where a site is in danger of alteration or destruction as a result of, for example, industrial, agricultural, or other commercial activity, the Minister may with certain provisos acquire the site on behalf of the government.¹⁰⁶

94. Alberta Historical Resources Act, Alta. Stat. ch. 5 (1973), *as amended by* Alta. Stat. ch. 4 (1978).

95. Heritage Conservation Act, B.C. REV. STAT. c. 37 (1977), *as amended by* B.C. Stat. ch. 25 (1978).

96. Historic Sites and Objects Act, MAN. REV. STAT. ch. H-70 (1970), *as amended by* Man. Stat. ch. 81, § 11 (1972), Man. Stat. ch. 42, § 24 (1975).

97. Historic Sites Protection Act, N.B. REV. STAT. ch. H-6 (1973), *as amended by* N.B. Stat. ch. 79, § 11 (1975), N.B. Stat. ch. 30, §§ 1,2, (1976), N.B. Stat. ch. 27, § 2.1 (1977), N.B. Stat. ch. 28, §§ 1,2, 7.1, 9, 9.1 (1978), N.B. Stat. ch. 41, §§ 5, 9.1 (1979).

98. Historic Objects, Sites and Records Act, NFLD. REV. STAT. ch. 153 (1970), *as amended by* Nfld. Stat. ch. 85 (1973), Nfld. Stat. ch. 113 (1974), Nfld. Stat. ch. 80 (1977).

99. Regulations for the Protection and Care of Archaeological Sites in the Northwest Territories, N.W.T. REV. ORD. S.O.R. 60-31 (1974).

100. An Act to Provide for the Protection of Historical Objects, N.S. Stat. ch. 8 (1970).

101. An Act to Provide for the Conservation, Protection and Preservation of the Heritage of Ontario, ONT. REV. STAT. ch. 122 (1975).

102. Heritage Foundation Act, P.E.I. REV. STAT. ch. A-15 (1974), *as amended by* P.E.I. Stat. ch. 12 (1976).

103. Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act, SASK. REV. STAT. ch. 54 (1965), *as amended by* Sask. Stat. ch. 9 (1966), Sask. Stat. ch. 84 (1973-74), Sask. Stat. ch. 34 (1974-75); Saskatchewan Heritage Act, Sask. Stat. ch. 45 (1974-75).

104. Yukon Archaeological Sites Regulation, YUK. REV. ORD. App. (1956).

105. Historic Sites and Objects Act, MAN. REV. STAT. ch. H-70, § 4 (1970); Historic Sites Protection Act, N.B. REV. STAT. ch. H-6, §§ 1,2 (1973); An Act to Provide for the Protection of Historical Objects, N.S. Stat. ch. 8, § 2(1), (2) (1970); An Act to Provide for the Conservation, Protection and Preservation of the Heritage of Ontario, ONT. REV. STAT. ch. 122, § 47 (1975); Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act, SASK. REV. STAT. ch. 54, §§ 4-5 (1965); Saskatchewan Heritage Act, Sask. Stat. ch. 45, §§ 2(h), 4(3), 6 (1974-75).

106. *E.g.*, Alberta Historical Resources Act, Alta. Stat. ch. 5, §§ 4, 28(a) (1973); Historic Sites and Objects Act, MAN. REV. STAT. ch. H-70, §§ 5, 15 (1970); Saskatchewan Heritage Act, Sask. Stat. ch. 45, § 4(1)(a) (1974-75).

The Minister is also responsible for carrying out surveys and investigating and excavating sites.¹⁰⁷ No one may carry on archaeological investigations in a province without a valid permit issued by the appropriate Minister.¹⁰⁸

A permit may be issued to any person conducting archaeological investigations and/or for the removing or collecting of archaeological specimens.¹⁰⁹ An archaeological specimen may be defined as an object of archaeological, ethnological, or historical importance.¹¹⁰ No permit for removal or excavation will be issued if the Minister is of the opinion that the structure or object should be permanently preserved at the site.¹¹¹

In some provinces, the Minister's decision to issue a permit is discretionary.¹¹² In others, however, the Minister's decision is open to review by a special board.¹¹³ The Minister may condition the issuance of a permit; for example, he may require detailed progress reports, restoration of the site to its preexcavation condition to the extent feasible, and/or delivery of all funds to a designated public institution.¹¹⁴ A time limit may be imposed, as well as a restriction on the location in which the permit may be used.¹¹⁵ A permit may generally be cancelled

107. *E.g.*, Alberta Historical Resources Act, Alta. Stat. ch. 5, §§ 14(a), (d), (e) (1973); Heritage Conservation Act, B.C. REV. STAT. ch. 37, § 7 (1977); Historic Sites and Objects Act, MAN. REV. STAT. ch. H-70, § 15 (1970).

108. *E.g.*, Alberta Historical Resources Act, Alta. Stat. ch. 5, § 20 (1973); Heritage Conservation Act, B.C. REV. STAT. ch. 37, § 6 (1977); Historic Sites and Objects Act, MAN. REV. STAT. ch. H-70, § 13(1) (1970); Historic Sites Protection Act, N.B. REV. STAT. ch. H-6, § 4(2) (1973); Historic Objects, Sites and Records Act, NFLD. REV. STAT. ch. 153, § 33 (1970); An Act to Provide for the Conservation, Protection and Preservation of the Heritage of Ontario, ONT. REV. STAT. ch. 122, § 48(1), 56 (1975); Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act, SASK. REV. STAT. ch. 54, § 12 (1965); Yukon Archaeological Sites Regulation, YUK. REV. ORD. App., § 3 (1956).

109. *E.g.*, Heritage Conservation Act, B.C. REV. STAT. ch. 37, § 5(1) (1977); Regulations for the Protection and Care of Archaeological Sites in the Northwest Territories, N.W.T. REV. ORD. 60-31, § 5 (1974); Yukon Archaeological Sites Regulation, YUK. REV. ORD. App., § 3 (1956).

110. *E.g.*, Regulations for the Protection and Care of Archaeological Sites in the Northwest Territories, N.W.T. REV. ORD. 60-31, § 2(1)(b) (1974); Yukon Archaeological Sites Regulation, YUK. REV. ORD. App., § 2(1)(b) (1956).

111. *E.g.*, Regulations for the Protection and Care of Archaeological Sites in the Northwest Territories, N.W.T. REV. ORD. 60-31, § 6 (1974); Yukon Archaeological Sites Regulation, YUK. REV. ORD. App., § 7 (1956).

112. *E.g.*, Alberta Historical Resources Act, Alta. Stat. ch. 5, § 20(1) (1973); Heritage Conservation Act, B.C. REV. STAT. ch. 37, § 5(1) (1977); Regulations for the Protection and Care of Archaeological Sites in the Northwest Territories, N.W.T. REV. ORD. 60-31, § 5 (1974); Yukon Archaeological Sites Regulation, YUK. REV. ORD. App., § 5 (1956).

113. *E.g.*, An Act to Provide for the Protection of Historical Objects, N.S. Stat. ch. 8, § 3(6) (1970); An Act to Provide for the Conservation, Protection and Preservation of the Heritage of Ontario, ONT. REV. STAT. ch. 122, § 49 (1975).

114. *E.g.*, Alberta Historical Resources Act, Alta. Stat. ch. 5, § 20(3) (1973); Historic Sites and Objects Act, MAN. REV. STAT. ch. H-70, § 13(4) (1970); Historic Sites Protection Act, N.B. REV. STAT. ch. H-6; §§ 4(2), 7 (1973).

115. *E.g.*, An Act to Provide for the Conservation, Protection and Preservation of the Heritage of Ontario, ONT. REV. STAT. ch. 122, § 48(4) (1975); Heritage Foundation Act, P.E.I. REV. STAT. ch. A-15, § 3(2) (1974); Yukon Archaeological Sites Regulation, YUK. REV. ORD. App. § 8(1) (1956).

at any time and is not transferable.¹¹⁶ If the site is on private property, the permit holder must obtain the prior consent of the owner or occupier.¹¹⁷

Any objects found during the excavations will belong to the province in which the "dig" took place.¹¹⁸ Naturally, a report must be made as to any finds made.¹¹⁹ The permit holder is entitled to receive compensation for delivering his archaeological specimens to the province.¹²⁰

When it is shown that as a result of archaeological excavations and investigations the value of the land is diminished, the party carrying out the investigations must compensate the owner for the diminution in value.¹²¹ If a sum cannot be agreed upon then it may be assessed either by a judge of the supreme court of the province¹²² or by arbitration, depending on the terms of the relevant statute. Upon summary conviction, persons contravening the various provincial statutes are liable to a fine or to a term of imprisonment or to both.¹²³

CONCLUSION

Cultural property has always been in a precarious position because it is a nonrenewable resource. It is thus imperative for states to employ means designed to protect the cultural heritage located within their territories and to aid other states in their efforts to do the same.

The Cultural Property Export and Import Act represents Canada's attempt to join with other nations in the crusade to recover and return

116. *E.g.*, Alberta Historical Resources Act, Alta. Stat. ch. 5, § 20(4) (1973); Heritage Conservation Act, B.C. REV. STAT. ch. 37, § 5(2) (1977); Historic Objects, Sites, and Records Act, Nfld. REV. STAT. ch. 153, § 34(3) (1970).

117. *E.g.*, Historic Sites Protection Act, N.B. REV. STAT. ch. H-6, § 5(1) (1973); Historic Objects, Sites and Records Act, Nfld. REV. STAT. ch. 153, § 35(1) (1970); An Act to Provide for the Protection of Historical Objects, N.S. Stat. ch. 8, § 3(4)(a) (1970); Heritage Foundation Act, P.E.I. REV. STAT. ch. A-15, § 4(1) (1974).

118. Alberta Historical Resources Act, Alta. Stat. ch. 5, § 20.2(1) (1973). *Contra*, Historic Sites and Objects Act, MAN. REV. STAT. ch. H-70, § 9(1) (1970); An Act to Provide for the Protection of Historical Objects, N.S. Stat. ch. 8, § 5(1) (1970); Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act, SASK. REV. STAT. ch. 54, § 15 (1965).

119. *E.g.*, Alberta Historical Resources Act, Alta. Stat. ch. 5, § 20(1) (1973); Historic Sites and Objects Act, MAN. REV. STAT. ch. H-70, § 12 (1970); An Act to Provide for the Protection of Historical Objects, N.S. Stat. ch. 8, § 5(2) (1970); An Act to Provide for the Conservation, Protection and Preservation of the Heritage of Ontario, ONT. REV. STAT. ch. 122, § 69 (1975).

120. *E.g.*, Alberta Historical Resources Act, Alta. Stat. ch. 5, § 36 (1973); An Act to Provide for the Protection of Historical Objects, N.S. Stat. ch. 8, § 5(3) (1970).

121. *E.g.*, Alberta Historical Resources Act, Alta. Stat. ch. 5, § 36 (1973); Historic Sites Protection Act, N.B. REV. STAT. ch. H-6, § 5(2) (1973); Historic Objects, Sites, and Records Act, Nfld. REV. STAT. ch. 153, § 35(2) (1970); Heritage Foundation Act, P.E.I. REV. STAT. ch. A-15, § 4(2) (1974).

122. Historic Sites Protection Act, N.B. REV. STAT. ch. H-6, § 5(2) (1973).

123. *E.g.*, Alberta Historical Resources Act, Alta. Stat. ch. 5, § 38 (1973); Heritage Conservation Act, B.C. REV. STAT. ch. 37, § 29 (1977); Historic Sites and Objects Act, MAN. REV. STAT. ch. H-70, § 20 (1970); Historic Sites Protection Act, N.B. REV. STAT. ch. H-6, § 9 (1973).

illegally transferred foreign cultural property. Although Canada possesses some national legislation regarding historic sites and Indian artifacts, and some provincial legislation protecting archaeological sites and objects, the Act is Canada's first general legislation on the export and import of cultural properties. Only time will tell whether this legislation is sufficient to combat the illegal transfer and destruction of Canadian cultural property.

