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The Polish Art Treasures in Canada, 1940-60

SHARON A. WILLIAMS*

THE CASE OF the Polish art treasures in Canada presents two important issues: the question of immunity of a foreign state's public movable property and the question of state responsibility for such property.

REMOVAL FROM POLAND AND ENTRY INTO CANADA

In 1940 the Canadian government permitted the duty free entry into Canada, as property of the Polish state, of a number of cases and trunks containing Polish art treasures which had been removed from the museum at the Wawel Royal Castle in Cracow before invading German armies could seize them.¹ The treasures were stored in the Records Storage Building at the Central Experimental Farm in Ottawa, on the clear understanding that Canada was to assume no responsibility for their safekeeping. At no time was an inventory of the treasures given to the Canadian government.

In 1945, a few months prior to the unconditional recognition of the new Polish communist government in Warsaw by Canada, most of the treasures were removed, without the knowledge or consent of the Canadian government, by representatives of the Polish government-in-exile. The greatest part of these was first stored in the Hôtel Dieu, a Roman Catholic institution in the province of Quebec, and subsequently transferred to the Provincial Museum in Quebec City by order of the Quebec government. At that time the Premier of

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¹ The facts of this dispute and the arguments of the parties are derived from unpublished material to which the writer was kindly given access by the Department of External Affairs of the Government of Canada and the Ministry of Justice of the Province of Quebec.

Quebec declared that the art treasures would only be released by the government of the province in compliance with the decision of "a competent court." Two trunks were also deposited in a branch of the Bank of Montreal by the two custodians who had brought the collection into Canada. At the time of the deposit they did not disclose to the bank the nature of their contents and whether they were acting in their official capacity or as private individuals. The few treasures that remained in the federal building in Ottawa were removed by the representatives of the new Polish government and returned to Poland in 1948, but it was not until 1960 that the new Polish régime obtained possession of the treasures deposited in Ontario in the Bank of Montreal and in the Provincial Museum in Quebec.

The federal government of Canada had to face serious international and constitutional problems when the Quebec government assumed control over a portion of the treasures and maintained that it did not recognize the authority of the new Polish government. What was essentially a dispute between two rival foreign groups that could have been solved easily by the Canadian government in accordance with recognized principles of international law became a domestic dispute which, if not handled properly, could have done much harm to federal-provincial relations, an always delicate matter in Canadian politics. This aspect of the case may explain why the federal authorities argued that the recovery was exclusively a Polish matter and that Poland was free to resort to Canadian courts.

Poland claimed that Canada was obligated to locate, protect, and return Polish property within its territory, and was bound to exercise due diligence in obtaining the release of the portions held in Ottawa and Quebec City. The treasures, as the movable public property of a foreign state, were immune from local jurisdiction and should not have been impounded by Quebec. Once the Canadian government had recognized the new Polish government it should necessarily have made restitution of the Polish art collection wherever situated in Canada. On the other hand Canada maintained that although it had originally made space for the treasures, it had not accepted any responsibility for them.

IMMUNITY OF POLISH STATE PROPERTY IN CANADA

The rule that as a result of the principle of sovereign immunity no state can assume jurisdiction over the public movable property of

another state within its territory was laid down by the House of Lords in *The Cristina* case,² and the Polish government argued that under this rule the art collection being property of the state was immune, could not be impounded, and should be returned to Poland.

Legal Problems Concerning the 1940 Agreement: Was It a Treaty?

The agreement in 1940 between the émigré government in London and Canada under which the art treasures were sent to Canada, and according to which Canada was to be freed from any liability, has been the subject of various arguments by the parties concerning its standing in law and its legal effects. The agreement was embodied in an exchange of letters between the Polish Consul General and the Dominion Archivist, dated August 1 and 2, 1940.³ It was questioned by the Canadian government whether this exchange could constitute an international agreement binding on Canada, and a waiver of sovereign immunity on the part of the Polish government.

Article 2 of the Vienna Convention on the Law of Treaties, 1969, defines a treaty for the purpose of the Convention as:

an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation . . .⁴

² *Compania Naviera Vascongado v. Cristina S.S.*, [1938] A.C. 485. See the recent approval of this case in the Privy Council decision, on appeal from the judgment of the Full Court of the Supreme Court of Hong Kong, in *Owners of the Ship Philippine Admiral v. Wallem Shipping (Hong Kong) and Others*, [1976] 1 All E.R. 78, which raises the question of the restrictive theory of sovereign immunity where a government-owned ship is used for private service. The United Kingdom Court of Appeal in *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356, extends the restrictive doctrine of immunity, which was upheld in an action *in rem* in the *Philippine Admiral*, to actions *in personam*. This position is consistent with the European Convention on State Immunity, (1972) 11 Int. Leg. Mat. 470, which although not ratified as yet by the United Kingdom has recently come into force; (1977) 16 Int. Leg. Mat. 765. The Supreme Court of the United States has held in *Alfred Dunhill of London Inc. v. Republic of Cuba* (1976), 96 S. Ct. 1854, that the doctrine of restrictive immunity is the official policy of the United States. The Foreign Sovereign Immunities Act, 1976, 28 U.S.C. Supp. (1977), ss. 1602 *et seq.*, 90 Stat. 2892, defines the jurisdiction of the United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit, and the circumstances in which execution may not be levied on their property.

³ The letters are reproduced in an appendix to S. A. Williams, *The Polish Art Treasures in Canada: Legal Problems and Political Realities* 153-54 (unpublished LL.M. thesis, Osgoode Hall Law School, 1974).

⁴ (1969) 8 Int. Leg. Mat. 679-768. The Convention, of course, was not in

It is an agreement between states or organizations of states, creating legal rights and obligations between the parties. The format of the treaty depends on the gravity of the transaction.

The Vienna Convention uses the word "treaty," but in practice a whole range of terms issued. The International Law Commission's Commentary reads:

Thus, in addition to "treaty," "convention" and "protocol," one not infrequently finds titles such as "declaration," "charter," "covenant," "pact," "act," "statute," "agreement," "concordat," whilst names like "declaration," "agreement" and "*modus vivendi*" may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as "agreement," "exchange of notes," "exchange of letters," "memorandum of agreement," or "agreed minute" may be more common than others. It is true that some types of instruments are used more frequently for some purposes rather than others; it is also true that some titles are more frequently attached to some types of transaction rather than to others. But there is no exclusive or systematic use of nomenclature for particular types of transaction.⁵

It has been said that an "Exchange of Notes" and an "Exchange of Letters" take the form of an exchange of correspondence between states that is not unlike the offer and acceptance letters in the law of contract.⁶

To determine what is a treaty in international law one has to take into consideration several factors. Generally, it is only political entities that have fulfilled the conditions of statehood,⁷ or international organizations, who are competent to be parties to treaties. Article 3 of the Vienna Convention provides that:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

existence at the time of the controversy, but is relied upon here as it codifies existing customary international law.

⁵ *Yearbook of the I.L.C.* 1966, Vol. II, at 188.

⁶ J. G. Starke, *Introduction to International Law* 397 *et seq.* (7th ed., 1972).

⁷ Montevideo Convention 1933 (165 L.N.T.S. 19) Art. 19.

- (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Thus, informality is immaterial if it is intended by the parties that the agreement should be binding. However, agreements of a technical nature are made between the government departments of different states, and are signed by representatives of these departments. The persons who sign must be authorized to do so. Article 8 of the Convention provides that:

An act relating to the conclusion of a treaty performed by a person who cannot be considered under Article 7 as authorized to represent a state for that purpose is without legal effect unless afterwards confirmed by that state.

Whether or not signature is effective in bringing the treaty into operation depends on the intentions of the parties.

In form, the letters of August 1 and 2, 1940, between the Consul General of Poland, Mr. V. Podoski, and the Dominion Archivist, Mr. C. Lanctot, were an exchange of letters between a representative of the Polish government in Canada and an official of the Canadian government. Such an exchange of letters would not normally be regarded as constituting an international agreement binding on the respective governments, even though the officials intended it to be so, unless they had been empowered to conclude an agreement by their governments.

In Canada, by virtue of its prerogative, the Crown enjoys the right of making international agreements. For this reason authorization is customarily obtained from the Governor General in Council, who acts on the advice of the appropriate minister and in particular, the minister responsible for foreign relations, the Secretary of State for External Affairs.⁸ However, occasionally a Cabinet decision alone has been secured. The rule that authority to enter into international agreements derives from the prerogative is designed to prevent the Canadian government from being bound internationally by the acts of its officials who were not properly authorized.

It is debatable whether the parties to the 1940 agreement were duly authorized to act on their governments' behalf, and to conclude an international agreement in the terms of this exchange of letters. Article 11 of the Vienna Convention states:

⁸ A. E. Gotlieb, *Canadian Treaty-Making* 5 (1968).

The consent of a state to be bound by a treaty may be expressed by the signature of its representative when:

- (a) the treaty provides that signature shall have that effect;
- (b) it is otherwise established that the negotiating states were agreed that signature should have that effect; or
- (c) the intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

It then follows from Article 13 that:

The consent of States to be bound by a treaty constituted by instrument exchanged between them is expressed by that exchange when:

- (a) the instruments provide that their exchange shall have that effect; or
- (b) it is otherwise estimated that those states were agreed that the exchange of instruments should have that effect.

Consequently it was uncertain whether Mr. Lanctot was duly authorized in accordance with Canadian constitutional procedures. Moreover, it was not known at the Department of External Affairs whether the Consul General, Mr. Podoski, received instructions and authorization to conclude an agreement intended to be binding on the Polish government.

For these reasons doubt was expressed as to whether the exchange did meet the required standards of international treaty-making, and did create rights and obligations between Poland and Canada. In strict law it might be argued that it was no more than an administrative arrangement. In such a situation, if the subsequent conduct of the governments shows clearly that both regarded themselves as bound internationally by the provisions of the arrangement, the question of whether they in fact duly authorized and empowered their representatives to conclude an agreement intended to be binding *inter se* may be irrelevant. However, in the present case it is clear from the conduct of the Polish government since 1946 that in its view the Canadian government was not relieved of responsibility under customary international law for the protection of the collection.

In his letter of August 1, 1940, Mr. Podoski stated in part:

It is understood that the articles in question will in no way involve the responsibility of the Canadian Government, since they have not been placed in its hands. On the contrary, it is the undersigned who as the representative of the Polish Government, accepts full responsibility for the space which was placed at his entire disposal for the period during which the articles will be stored.

Mr. Lanctot stated in part in his reply of August 2, 1940: "I take note of your declaration to the effect that the Polish Government assumes full responsibility for the period during which these articles will be in safekeeping. The Canadian Government agrees to this arrangement and is glad to render that service to the Polish Government."

This arrangement, in spite of its informality, would seem to have amounted to a valid international agreement. The British jurist, Lord McNair, has observed that international law does not prescribe either form or procedure for an international arrangement, though the constitutional law of certain states frequently prescribes both.⁹ The law of the United Kingdom does not prescribe any particular form for the conclusion of such an agreement. In the absence of the issuance of a full power to an official it has been suggested that ratification is necessary to effect such an agreement. A full power is a formal instrument given either by the head of state or by the Minister of Foreign Affairs. However, the Department of External Affairs in Canada, in a memorandum on the subject of international agreements, in 1948 stated that full power is not invariably required with respect to making interdepartmental agreements. It must be borne in mind that international agreements as such do not require ratification. It only becomes necessary when upon reasonable construction the agreement is assumed to be intended to be subject to ratification. On the basis of the language used and of its subsequent implementation, the 1940 agreement was valid and binding in international law.

Immunity of Polish State Property and the 1940 Agreement

Movable property of a foreign state is usually accorded immunity on the basis of consent, which can be express or implied on the part of the receiving state. By such consent the latter agrees to waive its normal absolute jurisdiction over property within its own territory. Immunity, being founded upon consent, cannot subsist if the receiving state did not agree to allow the property into its territory under a general licence, but confirmed its willingness to receive the property under terms totally inconsistent with such a licence. The art collection was received into Canada in 1940 with very special arrangements amounting to a qualified licence under which it was to remain in a specified location on property belonging to the Cana-

⁹ A. D. McNair, *The Law of Treaties* 6-7 (1961).

dian government. The collection was entered as the property of the Polish government and was to remain its property; it was expressly agreed that the custody and responsibility for the treasures were those of the Polish state and not of Canada.

It was argued by Canada that when the collection was removed from its storage place in a clandestine manner, without notice to the Canadian government, by persons who at the date of removal were representatives of the only government recognized by Canada, it was in effect smuggled into Canada by Poland. The keys of the storage room had been retained by representatives of the Polish government to confirm its retention of legal possession, and to facilitate conservation work. The collection had entered Canada in 1940 in a similar position to property under diplomatic privilege and in such cases the property concerned is exempted only conditionally from the operation of local tax and custom and excise laws during the continuous years for which there is a diplomatic purpose. The Polish art treasures were in effect under bond. No general licence was given to allow the Polish authorities to place the collection elsewhere in Canada. Unless the property was kept in the appointed place, in the custody of the Polish state, there could be no implied consent by Canada to waive its ordinary territorial jurisdiction over movable property brought into Canada. Once it was put into the hands of private persons or elsewhere in Canada, the waiver ceased to be of effect. Thus, in the view of the Canadian government the only property to retain the immunity with which it entered was the property left in the Records Storage Building. The part of the collection that had been put into the hands of third parties was now subject to Canadian jurisdiction; thus, the Polish state was in the position of an ordinary alien and could be required to exhaust local remedies before submitting its claim to international adjudication.

It is not at all certain that the exchange of correspondence between the Consul General of Poland and the Dominion Archivist can be regarded as a waiver of any claim to sovereign immunity by the Polish government. Surely the 1940 agreement under which the treasures entered Canada did not relieve the Canadian government of all responsibility for their period of storage in the Records Storage Building. Thus the Canadian government's responsibility was not diminished by virtue of this agreement after the removal of the art treasures from the building. Even if Canada had been relieved of general responsibility in international law for the period of storage,

that responsibility would have revived on the removal of the collection to other locations.

The Canadian government in later correspondence with the new Polish régime again declined to accept responsibility when assisting the legation to secure the possession of the treasures. But it is doubtful whether the Canadian government could refuse to grant protection to the property of a foreign state once it had permitted its entry. There is a duty on the part of a state, arising out of customary international law, to protect foreign state property. If the Polish government did not waive its right to hold Canada responsible under the 1940 agreement, it is unlikely that that waiver could be implied because the property was removed.

Regardless of the 1940 agreement, Canada had assumed a special responsibility towards the art treasures by the fact of their very presence on Canadian soil. Canada's responsibility under customary international law for the protection of Polish state property in Canada was not diminished or excluded by the arrangement under which they had entered Canada. In fact, it is doubtful whether this arrangement had any effect from the time of the dispersal of the collection.

The Property Impounded in Quebec

From the moment when this portion of the collection was removed from the Hôtel Dieu to the Provincial Museum in Quebec, the Crown in right of Quebec would appear to have assumed jurisdiction over the public movable property of a foreign state. In international law the Dominion government was responsible for this action by the Quebec government, which was an illegal assertion of jurisdiction and consequently a direct threat to the Polish property's immunity.

By this act of seizure Canada assumed a jurisdiction over the property, which it had not declared before, and also custody for the purpose of preventing the free removal of the property from Canada by the Polish state. This act was inconsistent with the terms of the 1940 agreement. Decisions upholding the immunity of movable property of a foreign state from local territorial jurisdiction have assumed that a foreign state could freely move its property.¹⁰ This part of the collection was not in an unknown place or in the possession of private individuals. A seizure by the Crown, including the Queen's courts,

¹⁰ *Vasseur v. Krupp* (1878), 9 Ch. 351.

entitles a foreign state to claim immunity since seizure amounts to an assumption of jurisdiction over the property impounded. So long as the property remains in the hands of private persons or in an unknown place, it may be argued that there has been no infraction of the rights of a sovereign state. However, the law on this point is not settled.¹¹ If the argument is valid it would oblige a foreign state to proceed in court to recover its movable property and would render its mere declaration of ownership ineffective whenever the property was in the hands of third parties. However, Lord Maugham, the proponent of this view, excepted the case of the "public property of a foreign state," which cannot be seized or detained by legal process whether it is a party to the proceedings or not.¹²

In a constitutional monarchy such as Canada, sovereign immunity involves immunity from jurisdiction in all its manifestations, including the Queen's courts. The impounding of movable property by the Crown is in law equivalent to its seizure under judicial process *in rem*.¹³ The foreign state is entitled to declare its ownership and claim immunity. The declaration of ownership by Poland could obviously not be made at random with reference to any property in Canada. The authorities appear to establish that a declaration of ownership must be accepted if made under a substantial right such as may be afforded by the fact of the art collection having been brought into Canada as the public property of the Polish state.¹⁴ Seizure by the Crown, therefore, enables a sovereign state to assert effectively its sovereign immunity. As far as Canadian responsibility is concerned it should be noted that there is a greater degree of responsibility in international law for the acts of officials than for the acts of private persons.¹⁵

From this it can be seen that the Polish state was entitled to raise, by declaration, the sovereign immunity of the part of the collection

¹¹ See *The Cristina*, *supra* note 2, per Lord Maugham, at 515-16; Dicey, *The Conflict of Laws* (6th ed., 1949) 134; *Halsbury's Laws of England* (1952) Vol. 1, Section 22 note (i).

¹² *The Cristina*, *supra* note 11, *idem*; see also *The Philippine Admiral*, *supra* note 2.

¹³ See *The Jupiter* (No. 3), [1927] P. 122 per Hill, J. at 137-38, *aff'd*, [1927] P. 250, and *Bank of Ethiopia v. National Bank of Egypt and Liguori*, [1937] Ch. 513.

¹⁴ See *Luther v. Sagor*, [1921] 3 K.B. 532, at 555, per Scrutton, L.J.

¹⁵ Eagleton, *Responsibility of States* 79 (1928); Hackworth, *Digest of International Law* (1940-44), Vol. V, 525.

not in possession of third parties. The basic requirement of exhaustion of local remedies by an alien is inconsistent with the concept of sovereignty and cannot apply to a sovereign state. A state is immediately liable for acts of senior officials, without the exhaustion of local remedies. Hence Canada's liability for Quebec. Thus, the Polish state was not obliged to exhaust local remedies in the Canadian courts to recover this portion of the treasures.

Conclusions

On this basis it is obvious that Poland was able to plead sovereign immunity over its public movable property, in respect of the whole collection brought into Canada in 1940. It is obviously so for the portion impounded in Quebec and the part left in the Records Storage Building. However, even though the portion in the Bank of Montreal was in the hands of a third party the Polish government still claimed immunity. In fact, it was not the recognition of the principle of immunity which caused difficulties, but the procedure to be followed to recover such state property since the Polish government did not want to institute criminal or civil proceedings in Canadian courts. The Polish government seemed to believe that since these treasures were the property of the Polish state, the Canadian authorities could just enter the Provincial Museum and the Bank of Montreal, retrieve the treasures, and hand them over to the Polish officials without due process of law. Such a procedure, however, could not be followed in Canada, especially since there were disputing claimants to the collection. Proper title would have to be established and this could only be done in a competent court. The Polish position was that title was a domestic matter to be settled in Poland since the treasures had entered Canada *en masse* as state property, and Canada had at that time accepted the property as belonging to the Polish state. Therefore, the question of title could not be an issue. It would have been a different matter had the art treasures been expropriated or nationalized.

That Canada had taken a position on the question of title to the property is shown by the fact that in May 1946 the Department of External Affairs asked the Department of Public Works to put a new lock on the room in the Records Storage Building in order to keep out the London Poles who had keys to the old lock. The Canadian government had also made enquiries with the help of the R.C.M.P. concerning the removal of most of the art treasures from

the Central Experimental Farm, and had made attempts to get a compromise between the émigré government and the communist government. In order to reconcile these actions with its disclaimer of all responsibility, the Canadian government maintained that its efforts were prompted only out of courtesy.

STATE RESPONSIBILITY

The Polish collection was the property of the Polish state and the government of that state fully authorized to exercise its proprietary rights. The Canadian government had a special responsibility for the collection while it was situated in Canada, transcending that ordinarily accorded to the personal property of an alien. The principles of international law on which the Poles based their case in various communications with the Canadian government are well established and generally accepted.

Property of One State in the Territory of Another

The mere location of property of the Polish state in Canada raises important questions of international law concerning the responsibility of a state for the protection of aliens and their property within its jurisdiction. A state owes at all times a duty to protect other states against injuries by individuals, either private or official within its jurisdiction. This has a special application to the present case, where the rights were attached to the movable public property of the Polish state. Every state is entitled to have its rights respected and protected by others. The ordinary rules of international law for the protection of aliens become a matter of even greater concern when the rights of the alien state itself are involved. In such a case a public claim is constituted, that is, a claim that the foreign state is making on its own behalf. An important group of such claims is related to attacks or insults directed against the state itself, the head of state, its ambassador or other representative, or against its flag. But of equal importance are claims related to the counterfeiting of currency, injury to public ships, and foreign assets held within the jurisdiction of the state. The claim concerning the Polish art collection appears to fall within the general category of public claims. It follows that with respect to the protection of the collection, Canada had in accordance with the principles of international law a special responsibility, which was something more than the general responsibility for the protection of the rights of aliens.

The Right of Aliens to Protection

Each country is bound to give the nationals of another country in its territory the benefits of the same laws, the same administration, the same protection, and the same redress for injuries which it gives to its own citizens, neither more nor less, provided that the protection which the country gives to its own citizens conforms to the established standard of civilization. The majority of states accept that the national state can make a claim if the foreign country's laws or behaviour fall below the minimum international standard. "The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."¹⁶

If an alien suffered at the hands of a private person, his remedy is usually against that person and state responsibility does not arise in the absence of dereliction of duty on the part of the state itself in connection with the injury by failing to afford a remedy or to apply an existing remedy. When local remedies are available the alien is ordinarily not entitled to the intervention of his government until he has exhausted those remedies, and has been denied justice. In theory the unredressed injury to the alien constitutes an injury to his state giving rise to international responsibility. If the government does not afford effective protection to foreigners whom it consents to admit to its territory it must make the only amends within its power, namely to compensate the sufferer. If no local remedy is available or the available local remedy is exhausted without redress for the injuries suffered, the state is responsible. Of course, local remedies do not have to be exhausted when it is clear in advance that the local courts will not provide redress for the injured alien.¹⁷ According to the court in the *Chorzow Factory (Indemnity)* case, it is a principle of international law that "any breach of an engagement involves an obligation to make reparation."¹⁸

These rules appear to be relevant to the present case, which involves a responsibility even more exacting than that described in the foregoing paragraph. In the case of a public claim, and the Polish representation with respect to the art collection must be so classified,

¹⁶ *Neer Claim* (1926), IV U.N.R.I.A.A. 60, at 61-62.

¹⁷ *Robert E. Brown's Claim* (1923), VI U.N.R.I.A.A. 129.

¹⁸ (1928), P.C.I.J. Ser. A, No. 17, at 29.

the practice has been to exclude local remedies and to claim at once through diplomatic channels. This procedure is almost invariably adopted when the injury arises out of an act of an agent of the state.

In asking the Canadian government to assist in restoring the treasures and in holding the Canadian government responsible for their condition and protection, the Polish government asserted a claim on its own behalf based on the duty of a state to ensure on its territory the protection of the rights of other states. As it was stated in the *Corfu Channel* case, it is "every State's obligation not to allow knowingly its territory to be used contrary to the rights of other States."¹⁹ It may be that such knowledge may be imputed to a state, even where it is not admitted. Thus, a state owes at all times a duty to protect other states against injuries by individuals (private or official) within its jurisdiction.

The Test of Due Diligence

In deciding whether or not a state has fulfilled its obligation to protect the person and property of aliens, the criterion of "due care and diligence" is applied. It is impossible to state this rule with precision. The degree of diligence required may be defined as follows: the diligence must be such as to render impossible any better or more careful attention, so as not to omit anything practicably possible which ought to have been done.²⁰ In more practical language this means that the duties must be performed in such a manner that the state can show that it has employed all reasonable means possible, irrespective of the material result of the effort. In the long controversy over the *Alabama* claims, the United States considered as insufficient the British view of diligence, namely that which the nation is in the habit of employing in the conduct of its own affairs. The most common rule is that a state must use every means at its disposal to afford the protection which responsibility in international law requires. Nevertheless the state is not a guarantor or insurer of successful prevention of injury, and provided it has exercised due diligence to preserve order, prevent crime, and confer reasonable protection to the person and property of nationals of a foreign state and there is no delinquency on its part, it can be considered to have discharged its duty and cannot be held responsible under international law.

¹⁹ (1949), I.C.J. Rep. 4, at 22.

²⁰ G. von Glahn, *Law among Nations* 228 *et seq.* (3rd ed., 1976).

These rules become a matter of much greater concern when the rights of the foreign state itself are involved and a public claim is constituted. Thus, where state property is in issue the courts will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control.²¹ Most cases of this kind involve public ships or foreign assets held within the jurisdiction, but there is no essential difference between such claims and that of the Polish government in the present case — all involve public property of the state.

Since the new Polish government was legally entitled to the treasures which were Polish property, it was entitled to expect that its proprietary rights would be respected as long as the treasures were located in Canada. These rights involved the protection and preservation of the property. Thus, Canada had a special responsibility with respect to the *whole* collection arising from its being state property situated in Canada.

The Polish government argued that the Canadian government by instituting (though belatedly) the search for the collection, only in part discharged the obligations resting with it. They stressed the inadequacy of measures taken when the place where a part of the collection was stored had been discovered (*i.e.* the Hôtel Dieu), arguing that one could have expected that the collection would have been safeguarded in such a way that no third party would have been able to remove it under the eyes of the authorities. The Polish government had the right to expect that diligence would be used, considering that the collection constituted a priceless national heritage and could have been the cause of a severe breakdown in Polish-Canadian relations. In view of this lack of due diligence, the Polish authorities claimed that they could not accept the Canadian disclaimer of all responsibility.

In order to ascertain Canada's responsibility in international law with respect to the collection it is necessary to distinguish between the responsibility as it related to that part of the collection which had been impounded in Quebec and the responsibility as it related to the remaining portion, not so impounded.

The Portion of the Collection in the Bank of Montreal

The Canadian position with regard to the remaining portion of the collection which had not been impounded in Quebec was that

²¹ *The Cristina*, *supra* note 2, at 490, per Lord Atkin.

there was no obligation in international law resting upon Canada to recover and return to the Polish state this part of the collection. Canada's reasons were mainly based on the 1940 arrangement, which had the essential elements of an intergovernmental agreement which neither Poland nor Canada could repudiate unilaterally. It placed full responsibility for the safekeeping of the articles on the Polish government and relieved the Canadian government of such responsibility. The Canadian government argued that this agreement overrode the general principles of international law upon which the Polish government was basing its claim. There was no subsequent arrangement or agreement which varied the terms of the original agreement. The space in the Public Records Building, where the treasures were stored, was termed "the safest possible place for them" by Mr. Podoski, the Polish Consul General, and Mr. Lanctot, the Dominion Archivist, referred to it as a place "where these articles are now safe." In the view of the Canadian government, either government could have intended that Canada would assume a general responsibility for the collection by reason of its being in Canada when it did not assume such responsibility while the collection remained in "the safest possible place."

The Canadian government through its agent, Mr. Lanctot, clearly regarded "the period during which the articles *will be stored*" as being "the period during which these articles *will be in safe-keeping*." It was, therefore, argued that Canada, and by inference Poland, intended that the 1940 agreement was to remain in force and to govern each country's responsibility with respect to the collection as long as it remained in safekeeping anywhere in Canada.

The argument that there was no responsibility on the part of the Canadian government was based essentially on the fact that Canada contracted out of liability. Under the terms of the 1940 agreement Poland was precluded from alleging Canadian responsibility by reason of this part of the collection being on Canadian territory. Poland could not, therefore, rely on the general principles of international law governing the responsibility of states when those principles were inconsistent with the specific agreement entered into between the two governments. In other words, Poland had waived its right to rely on these principles when it concluded the agreement. Moreover, Poland could not invoke the principle of sovereign immunity in support of its claim to this part of the collection, over which no jurisdiction had been asserted by the Crown.

It was of course, quite open to Canada to maintain that the 1940

exchange of letters was intended to and did constitute a valid agreement by which Poland relieved her of all responsibility for the collection under the general principles of international law. It must be appreciated, however, that had the case ever come before an international court, the Polish government would undoubtedly have repudiated this interpretation and it is conceivable that the tribunal would have held that Canada's responsibility under customary international law for the protection of Polish state property in Canada was not diminished or excluded by the arrangement under which it had entered Canada.

However, on analysis, it appears that there is room to doubt whether, prior to the disappearance, the Canadian government had exercised due diligence with respect to the protection of the collection. In view of the special nature of the protection which should be afforded to the property of a foreign state, the Canadian government might well have taken precautions in addition to the so-called agreement on storage to safeguard the collection. Canada was under duties based on customary international law, which a state with property on foreign territory has a right to expect.

After it was brought to the Canadian government's attention that the treasures had been removed, it is probable that due diligence was exercised to locate the missing portions, as the R.C.M.P. had been instructed to undertake a search, and border officials had been warned to report any attempt at removal from Canada. Also, a new lock was placed on the door in the Records Storage Room to protect the remaining treasures from the émigré Poles. Once the portions of the property were located, the Canadian government was required to exercise due diligence to ensure their protection. It is doubtful whether this requirement was met. Although efforts were made to recover all portions of the treasures, nothing was done to ensure that they had not deteriorated. If the treasures at the Bank of Montreal and the ones presumed to be elsewhere had been regularly inspected there would have been no responsibility in spite of no action by the Canadian government.

Canada was not bound to assist the Polish government by taking court action to retrieve the treasures. Due diligence does not extend to taking legal proceedings to recover state property in private hands unless some criminal act has been committed, and the persons are charged with and convicted of receiving stolen goods. There was no evidence that a crime under the laws of Canada had been com-

mitted and the Canadian government could not be held responsible for not having initiated action in this direction.

The Position of the Portion Impounded in Quebec

When part of the collection was impounded by the Quebec authorities in the Provincial Museum, a different situation arose with respect to the responsibility of Canada in international law. The Canadian government by not preventing the impounding of these treasures had failed to protect the interests of the Polish state, and had not used "due care and diligence" to see that those rights were respected, as Canadian officials had illegally assumed jurisdiction over the collection, which as public movable property of the Polish state was immune from seizure.

From time to time the Canadian government made efforts to recover this portion of the collection. However, it is very doubtful whether it could be deemed to have exercised due diligence in seeking their recovery despite the grave political and constitutional difficulties involved. As regards protection of the collection from deterioration, it is understood that experts were permitted on certain occasions to inspect the collection at the Provincial Museum to safeguard its condition. The test of due diligence in this respect may have been met, although the Canadian government was unable to ensure that these measures were adequate, as they were largely dependent on officials over whom they had no control. Thus, it is not known whether the Canadian government used every means at its disposal to afford adequate and reasonable protection.

The Responsibility of the Federal Government for the Provincial Authorities

The basic feature of a federal state is that authority over internal affairs is divided by the constitution between the federal authorities and the member states of the federation, while foreign affairs are normally handled solely by the federal authorities. Consequently, for the purposes of international law, it is the federal government that is regarded as the entity that carries on international relations. Thus, international jurisprudence has affirmed the liability of a federal state if a member of the federation acts in a manner that is not compatible with international law, and would amount to an international delinquency if committed by the state itself. The Polish government argued that Canada could not shield itself at the inter-

national level by its lack of jurisdiction over provincial authorities.

Federal constitutions often leave the residuum of competence to the federal parts and concede to the federation only strictly determined powers and federal governments have often faced the dilemma of international responsibility on the one hand and internal political worries on the other. For a federal government the prospect of international responsibility, especially when the adversary restricts himself to oral and written protests, albeit numerous, will surely seem more attractive than the prospect of difficulties with provincial or state authorities.

From the moment when the portion of the treasures was removed from the Hôtel Dieu to the Provincial Museum, the Crown in right of Quebec would appear to have assumed jurisdiction over Polish state property which by its nature was immune from jurisdiction. This action was inconsistent with the terms of the 1940 agreement. Thus, there was an unfulfilled obligation in international law resting upon Canada with respect to this portion of the collection. In international law the federal government was responsible for this action by the Quebec government. The action was an assertion of jurisdiction by an organ of the state and consequently a direct threat to the property's immunity. Decisions upholding the immunity of movable property of a foreign state from local foreign jurisdiction have assumed that the foreign state could freely move its property.²²

It is a universally recognized principle of international law that a state may not plead the shortcomings of its internal legislation and particularly the lack of sanctions with regard to local authorities as an obstacle to the claims of another state, and "a federal government may not plead that, under the constitution, the member states are independent or autonomous."²³ A state is not able to plead a rule or gap in its own municipal law as a defence to a claim based on international law. In the *Free Zones* case the Permanent Court of International Justice said: "it is certain that France cannot rely on her own legislation to limit the scope of her international obligations."²⁴

²² *Vavasseur v. Krupp*, *supra* note 10.

²³ Report of the Committee of Experts for the Progressive Codification of International Law to the Council of the League of Nations; Hackworth, *op. cit.*, *supra* note 15, at 595. See also Draft Articles on State Responsibility, Art. 6, International Law Commission, Report on the Work of Its Twenty-Fifth Session (1973), Doc. A/9010, at 84 *et seq.*

²⁴ (1932), P.C.I.J. Ser. A/B, No. 46 at 167.

Canada could not, therefore, plead its constitution and it could be held internationally responsible for acts of its provincial authorities. However, there is no provision in the Canadian constitution that could enable the Canadian government to compel the Quebec authorities to release the property. Grave domestic political considerations also rendered impossible such acts and in fact explained why the collection was not turned over to the Polish authorities earlier. But these could not alleviate Canada's position in international law with respect to this part of the collection.

The principle that a federal state is responsible internationally for the acts of its provincial or state authorities arose between Canada and the United States in the *Cutting* case, which involved the international responsibility of the Canadian government for the refusal of the province of Quebec to comply with a judgment of a Quebec court. The Superior Court of Quebec had held that two hundred and seventy-five shares of stock of the Bank of Montreal, which were registered under the by-laws of that Bank in New York, were not subject to succession duty of \$13,000 imposed by the province of Quebec and paid under protest by the executor of the estate of a United States citizen.²⁵ The Supreme Court held that the executor was entitled to reimbursement of the sum with interest from the date of payment. The province of Quebec appealed unsuccessfully to the Court of Queen's Bench of Quebec and to the Supreme Court of Canada. Special leave to appeal was refused by the Judicial Committee of the Privy Council. The Quebec authorities repaid the duty but refused to pay the interest, and the Department of State protested to the Canadian government. In a note of October 11, 1938, the Canadian government stated that it was not prepared to admit responsibility and liability for the province of Quebec in respect of the claim. To avoid any suggestion that it was responsible for denial of justice, it stated that it was ready to have the question of liability and the circumstances of the case determined by international arbitration. Subsequently, however, the Canadian government decided that the cost of arbitration rendered proceedings inadvisable and a cheque for the sum of \$3,836.68 was transmitted to the United States under a note of July 8, 1941, from the Department of External Affairs.²⁶

A further question arises whether the responsibility of Canada

²⁵ [1930] 2 D.L.R. 297 (Que.).

²⁶ Hackworth, *op. cit. supra* note 15, at 561-63.

towards Poland in international law, in respect of the portion of the collection impounded by the Premier of Quebec, arose directly or only in the event that the Polish state had exhausted local remedies in Canada, or alternately had met with a "denial of justice." However, there is no general obligation resting upon a foreign state to exhaust local remedies as a condition of manifesting a valid claim on its own behalf against another state. The Polish state was entitled to raise, by a declaration, sovereign immunity for the collection held by the provincial authorities. Poland as a sovereign state was not in the position of an ordinary alien. This distinction is important. It is generally accepted that an alien must exhaust local remedies, and, if he meets with a denial of justice, he may then ask his state to espouse his claim. By espousing such a claim, a state makes the claim its own, but, if the respondent state shows that the claim so presented is lodged on behalf of an alien who has not exhausted local remedies, it is relieved of responsibility, at least until such time as the alien exhausts such remedies or meets with a denial of justice. The basis of the rule that an alien must exhaust local remedies is that upon entering a foreign state, or placing his property therein, he acquires local protection and assumes local obligations under its law. With the exception of the case where the receiving state is relieved of responsibility by overriding contract provisions and where the sending state may be said to have assumed local obligations, it is clear that a foreign sovereign state is not in the same position as an alien. If it were in such a position, it would no longer be sovereign. The basic condition which requires the exhaustion of local remedies by an alien is inconsistent with the concept of sovereignty and cannot apply to a sovereign state. This conclusion is implicit in the numerous authorities dealing with sovereign immunity and affords a separate and quite distinct ground for the conclusion that the Polish state was not obliged to exhaust local remedies in Canadian courts in its efforts to recover this part of the collection.²⁷

There did not seem to be any obligation in international law for the Canadian government to espouse or protect the claim of the church authorities in Poland to part of this collection as against the Polish state itself. It would be a new departure in customary inter-

²⁷ Only the right or title to property of a foreign state may be questioned in the courts of another state. Once that right or title is established the sovereign's immunity prevails. See *The Schooner Exchange v. McFaddon* (1812), 7 Cranch 116, and Bishop, "Immunity from Taxation of Foreign State-Owned Property" (1952), 46 Am. J. Int'l L. 239.

national law if a government espoused the claim of a foreign national against his own state. From the facts, it is evident that the Polish state acquired possession of all the articles of the collection before its entry into Canada in 1940. It is to be presumed, therefore, that the transfer of any of the articles to the Polish state was effected pursuant to some agreement concluded between the Polish government and the church institutions concerned. Such an agreement must be interpreted and enforced according to the laws of Poland. Consequently, any dispute regarding the ownership of the articles of the collection was a matter to be settled between the church authorities in Poland and the Polish state, and the Quebec authorities were precluded from assuming jurisdiction over the collection on account of the claims from the Polish church and individual Polish citizens.

Conclusions

With respect to the whole of the collection, the Canadian government was responsible for the protection of the property from the mere fact of its location in Canada, and by virtue of its character as Polish state property. The Canadian government was not responsible for the disappearance or removal of the part of the collection from the Records Storage Building since the articles were removed by the then lawful custodians, who were in charge of their storage, prior to the recognition of the new régime. Due diligence was exercised in determining the whereabouts of these portions of the collection. With regard to the two trunks at the Bank of Montreal and the eight cases presumed to be situated elsewhere the Canadian government was not obliged to take legal action to recover them, as they were in private hands and no crime as such had occurred. However, overall responsibility for protecting these treasures remained undiminished.

As regards the portion of the collection in the Quebec Provincial Museum, jurisdiction had been assumed by the provincial government authorities over property which by its nature and in accordance with accepted principles of international law was immune from such jurisdiction. In respect of this portion of the collection the Canadian government being responsible internationally for the actions of its provinces, and not being able to plead that Quebec was independent or autonomous, was responsible for its unjustified retention, for its recovery, and for its physical well-being.

Canada was, therefore, liable to Poland upon three principles of

international law: one, immunity from local jurisdiction for the public movable property of a sovereign state; two, the obligation of one state to respect and protect within its territory the property of another state; three, the international responsibility of the central government for its political subdivisions in a federal state.

RESOLUTION OF THE CASE

The legal arguments put forward by both Poland and Canada ultimately were of little weight in the final settlement of the dispute. The main obstacle to giving satisfaction to Poland was of a political nature, as the return of the treasures was opposed by the Polish government-in-exile, Polish émigrés, and the Roman Catholic Church of Poland, which was supported by the Roman Catholic Church of Quebec and the Premier of that province, a dedicated anti-communist at a period when there was little sympathy in Canada for socialist régimes.

The solution of this dispute does not give great hope for the future, as it is quite possible that in the case of a legitimate or an illegitimate change of government, art treasures belonging to the state where this change is taking place will be on display in other countries, or will be taken out of the country by representatives of political groups opposed to the new government. Would the same situation occur as did in Canada over the Polish treasures? Would the state of display or safekeeping return the art treasures to the state of ownership if it did not recognize or share the political philosophy of the new government in power?²⁸

Another cause for alarm is that the lack of suitable constitutional provisions in some federal states often may result in a federal government not being able adequately to control the actions of its subdivisions in matters of international concern. Thus, in Canada the dispute between the Canadian government and Quebec over the

²⁸ A case in point which answers this problem positively is that of the Prado collection. Almost at the end of the Civil War in Spain, the Republican government put its famous Madrid collection from the El Prado Museum under the protection of the League of Nations. When the Civil War ended with the victory of General Franco, the Secretary General of the League of Nations transferred immediately to him the Madrid collection, although the Republican government was the depositor, considering, according to the established principle, that the change in the system of the state does not change its identity as a subject of the law of nations. Constructively, the same situation occurred in the Polish case. One government evacuated the collection, and another requested its return.

Polish art treasures could happen again with respect to other matters involving the international responsibility of the federal government. It is unlikely that in 1978 the Canadian government would be more successful in compelling a province to do something against its wishes and be prepared to face the domestic political consequences.

In the case of the Polish art treasures, would the outcome of the dispute have been simplified if Canada had been a party to the Hague Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict?²⁹ Indeed, in 1954, the Department of External Affairs considered the possibility of Canada becoming a signatory to this convention for the protection of cultural property, as she could have done after December 31, 1954.³⁰ It would, after this date, have been possible for her also to have acceded to the Convention after its entry into force.³¹ Serious doubts, however, were expressed concerning the wisdom of Canada's becoming a party to either instrument, or even signing the documents, for a number of reasons. Article 4 of the Convention requires the parties to stop "any form of theft, pillage or *misappropriation* of, and any acts of vandalism directed against, cultural property."³² Although the general purpose of the Convention is to protect cultural property in time of armed conflict, it is not clear whether Article 18 necessarily limits the effect of Article 4 to time of war. The use of the word "misappropriation" might have enabled the Polish government to argue that the art treasures had been misappropriated (in the sense that they were not in the possession of their legal owner — the Polish state), despite the fact that no crime had been committed under the laws of Canada. The use of this word in addition to that

²⁹ (1956), 249 U.N.T.S. 240.

³⁰ Art. 30 of the Convention. On the Hague Convention generally see Noble-court, *Protection of Cultural Property in the Event of Armed Conflict* 15 (1958).

³¹ Art. 32 of the Convention. U.N.E.S.C.O. Doc. CL/2438, at 15-19 (June 24, 1975). Canada has not acceded to the Convention or the Protocol although she has considered doing so on several occasions. In 1972 and 1973 consultations took place with the provinces and territories and the federal departments interested, primarily the Department of External Affairs, National Defence, and the Department of Indian and Northern Affairs. Although little opposition has been expressed to accession, the major factors causing postponement lie in the concern about resulting budgetary expenses, the lack of administrative structures called for under the Convention, and the need for further interdisciplinary federal-provincial consultations.

³² Emphasis added.

of "theft" may indicate an intention to cover acts falling short of an offence under the criminal law.

Article 18 of the regulations for the execution of the Convention, which form an integral part of it, provides that in respect of cultural property transferred to another country:

(a) While the cultural property remains on the territory of another State, that State shall be its depositary and shall extend to it as great a measure of care as that which it bestows upon its own cultural property of comparable importance;

(b) The depositary State shall return the property only on the cessation of the conflict; such return shall be effected within six months from the date on which it was requested;

(c) During the various transfer operations, and while it remains on the territory of another State, the cultural property shall be exempt from confiscation and may not be disposed of either by the depositor or by the depositary. Nevertheless, when the safety of the property requires it, the depositary may, with the assent of the depositor, have the property transported to the territory of a third country, under the conditions laid down in the present article;

(d) The request for special protection shall indicate that the State to whose territory the property is to be transferred accepts the provisions of the present Article.

In the case of the Polish treasures, the Canadian government consistently denied that it was at any time a depositary or trustee for the collection. It would, therefore, have been embarrassing for Canada to have become at that time a party to, or sign a convention, containing such a principle, in view of her own difficulty regarding the Polish treasures. Even though the Convention would only have been legally binding for future events, it would have been a sign of bad faith to deny its application to existing circumstances. Difficulties would also have arisen out of Section I of the Protocol, which demands that the property be returned on the cessation of hostilities to the competent authorities of the territory previously occupied.

Canada's obligation would certainly have been made more explicit had the Convention been in force between herself and Poland, as according to Section II(5):

Cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came.

This, in Canada's situation, would have also been distinctly embarrassing.

Signature of an international agreement is not an act devoid of legal meaning³³ and though not implying an obligation of ratification, it does imply the duty to take some action showing a deliberate acknowledgment of the principle that eventual ratification is the natural outcome and purpose of the signature. However, if Canada had been a party, and her obligations had been clearly set out, the political and procedural aspects of the case would have remained.

Fortunately, reason prevailed and the art treasures were returned to Poland. It is to the discredit of internal Canadian politics that the return of the treasures to Poland was so long delayed when international law was clearly but impotently on her side. However, the Polish government-in-exile had accomplished something. By opposing the return of the treasures for more than fifteen years, it had attracted world attention to the collection and made the Polish people fully aware of its value, thus ensuring that the Wawel art treasures could never be returned to the Soviet Union, where they had once been taken.

Canada by her inaction did little to promote international harmony and cultural interchange. Her internal politics and conduct in this *cause célèbre* certainly did not promote the spirit of the theory that cultural property is the heritage of mankind and thus is to be protected by all nations regardless of custodianship. Although it can be said that Poland displayed nationalistic fervour, this was counterbalanced by the negative approach of Canada, who displayed an attitude of non-involvement and an emphatic desire to remain aloof from the problem in which she had implicated herself by admitting the Polish art treasures in 1940.

The case also highlights the fact that much remains to be done on the international level, if cultural property is to be effectively safeguarded. Perhaps a distinction should be drawn between the nation or state as represented by its people, and its government. The Polish authorities were right in stressing that the art treasures were for the educational and cultural enlightenment of the Polish people and that their return should not be affected by the politics of the régime in power. To protect the cultural heritage of states effectively, changes of government should be disregarded by the international

³³ See the Vienna Convention on the Law of Treaties, *supra* note 4, Art. 12.

community unless the new government has decided to destroy that heritage, in which case the depositary state could act as trustee until better conditions prevail. The return of the cultural property of a nation should not be governed by the principles upon which recognition of states and governments rests.