

Gifter's Remorse: The Beaverbrook Art Gallery arbitration

Kluwer Arbitration Blog

September 11, 2009

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Please refer to this post as: Luke Eric Peterson, 'Gifter's Remorse: The Beaverbrook Art Gallery arbitration', Kluwer Arbitration Blog, September 11 2009, <http://arbitrationblog.kluwerarbitration.com/2009/09/11/gifters-remorse-the-beaverbrook-art-gallery-arbitration/>

If you ever have the pleasure of visiting Fredericton, New Brunswick – the charming Canadian town where I grew up – you'll want to spend an afternoon at the [Beaverbrook Art Gallery](#).

Indeed, thanks to the outcome of a recent arbitration – which has just been upheld on appeal – you'll see a number of remarkable paintings, including works by J.M.W. Turner and Lucian Freud, which had been at the centre of a struggle between the Gallery and a UK Foundation claiming ownership of the paintings.

I can't do justice to the story in this space; however, it's a fascinating one involving the former Lord Beaverbrook, who was raised in New Brunswick, but made his name in the United Kingdom as a press baron, and later as Minister of Aircraft Production in Churchill's war cabinet.

Lord Beaverbrook remained a major benefactor to his former province, and in the late 1950s, he established and endowed a world-class art gallery in New Brunswick's tiny capital city (which boasted fewer than 20,000 citizens at that time).

Although Lord Beaverbrook passed away in 1964, his imprint in New Brunswick remains strong: his name continues to adorn university buildings, scholarships,

hockey arenas and countless other institutions and buildings.

However, some 40 years later, a vicious battle erupted between the trustees of the Beaverbrook Foundation and the Art Gallery over ownership of a number of paintings long thought to have been gifted to the province of New Brunswick.

You can find a chronology of the dispute [here](#) on the website of the Canadian Broadcasting Corporation.

Suffice to say that the Gallery and the Foundation ultimately agreed in 2004 to settle their differences via an arbitration proceeding presided over by a retired Justice of Canada's Supreme Court.

The arbitration was conducted under the New Brunswick Arbitration Act and according to the province's "rules of court". The proceeding was unusual in that it was conducted in public, and attracted considerable media attention in Canada.

Ultimately, the sole arbitrator, Justice Peter Cory, would rule that the bulk of the contested works were gifted to the Art Gallery in 1959, notwithstanding the fact that Lord Beaverbrook appeared to have had a prompt change of heart and took surreptitious steps to re-characterize the paintings as a long-term loan from his Foundation.

Indeed, Justice Cory offered a critical re-appraisal of one of New Brunswick's leading figures. On the surface, Lord Beaverbrook basked in the gratitude of New Brunswickers - and in laudatory press coverage in the UK and Canada (some of it engineered by his own newspapers or contacts).

However Justice Cory's scrutiny of the historical record found that Lord Beaverbrook promptly breached his fiduciary duty as a member of the Gallery's Board by concealing his abrupt change of heart with respect to the "gifted" art works. Indeed, it emerged that Lord Beaverbrook, deployed an assistant to alter certain records at the Gallery in the summer of 1960 so as to give the impression that much of the gallery's collection was a long-term loan, rather than a gift.

Indeed, the Gallery, and a succession of curators and board members, had come to view the gifted paintings as a loan (albeit a presumably permanent one) until the Beaverbrook Foundation attempted to call in parts of this loan earlier this decade. At this point, historical investigations were undertaken, and a more complicated

portrait of the Gallery's founder began to emerge.

In his March, 2007 arbitral award, Justice Cory held that Lord Beaverbrook's covert reversal of course had been too little, too late; and the artworks that had been given to the Gallery at the time of its opening – but later represented to be a loan – were in fact irrevocably gifted. (Certain works that were presented to the Gallery after its opening were deemed by the arbitrator to have been on loan, and thus owned by the Foundation).

For the most part, the award was a victory for the Gallery – confirming that it owned many of its most celebrated works. Indeed, Justice Cory would order the Foundation – on the loser pays principle – to reimburse the Gallery for nearly \$5 Million in costs (which included extensive investigative and archival research undertaken by the Gallery to study the ownership of the contested paintings).

Following the award and costs order, the Foundation asserted its right of appeal under the arbitration agreement.

That agreement was notable for providing either party a right of “appeal” to the New Brunswick Courts, if both parties approved of the court's involvement; otherwise the appealing party would have its challenge to the arbitral award heard by a special “appellate arbitral tribunal” consisting of three retired members of the Canadian appeals courts.

In the event, the latter body was convened to hear the Foundation's challenges to Justice Cory's award.

The appellate tribunal ultimately held in a ruling dated August 27th, 2009 – and released to the public this week – that it would leave the award undisturbed.

A copy of the appellate ruling has been made [available for download](#) on the website of a Canadian newspaper. It makes for entertaining reading, particularly the account of the Gallery's creation and Lord Beaverbrook's behind-the-scenes machinations.

Lawyers may take particular interest in the discussion as to whether certain critical comments made by Justice Cory during the arbitration proceedings – discussing Lord Beaverbrook's penchant for propagandizing and manipulation – could be viewed as signs of apparent (or perhaps actual) bias on the part of the arbitrator.

On this point, the appellate panel ruled that the Foundation should have voiced its concerns during the proceedings, and failure to do so served to preclude objections at the post-award stage. However, even on their merits, Justice Cory's comments were not deemed sufficient to give rise to a reasonable apprehension of bias on his part.

While I commend the appellate panel's judgment, I'd be remiss if I didn't also take the opportunity to put in a plug for my native province - which is a splendid place to visit in (early) autumn. The province boasts some of the same pleasures as its more celebrated neighbours, Maine and Nova Scotia: rugged coast-lines, friendly locals, and a relaxing pace.

Of course, in light of recent legal events, New Brunswick can also look forward to many more years of punching above its weight-class in the art world.