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POLISH ART TREASURES IN CANADA—1940–1960:
A CASE HISTORY

*By J.-G. Castel**

In 1940 the Canadian Government permitted the duty free entry into Canada “as property of the Polish Government and to remain their property” 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 armies could seize them.

At the request of the Polish Consul-General in Canada, the treasures were stored in a federal government building in Ottawa, on the clear

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understanding that Canada was to assume no responsibility for their safekeeping. Thus, at no time was an inventory of these treasures given to the Canadian Government.

In 1945, a few months prior to the unconditional recognition by Canada of the new Polish Government in Warsaw, 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 were first stored in Roman Catholic institutions 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 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 in Ottawa by the custodians appointed by the Polish Government-in-Exile. 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 art treasures that remained in the federal government building in Ottawa were removed by the representatives of the new Polish Government and returned to Poland in 1948.

It took from 1945 to 1960 for the new Polish Government to obtain possession of the treasures deposited in Ontario in the branch of the Bank of Montreal and those held in the Provincial Museum in Quebec.

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 emigrés, 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 time when most Canadian people had little sympathy for socialist regimes. The case was further complicated by the fact that it was alleged that some treasures belonged to private individuals and several Polish church institutions, a claim denied by the new Polish Government, which pointed out that all the art treasures had come from state museums.

Finally, when the Government of Quebec assumed control over a portion of the treasures and maintained that it did not recognize the authority of the new Polish Government, the Federal Government had to face serious international and constitutional problems. What was essentially a dispute between two rival foreign groups that could easily have been solved 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, always a delicate matter in Canadian politics. Such a dispute could also have jeopardized the chances of the federal party in power of being reelected as the Quebec electorate was one of its main supporters. These considerations may explain why the federal authorities argued that the recovery of the treasures was an exclusively Polish matter and that the Government of Poland was "free

to resort to the courts of Canada to assert and enforce any rights it may have as such to property actually situate in Canada.”

The new Polish Government's position was that Canada was under an obligation to locate, protect, and return property belonging to Poland which was within its territory. Thus, the Canadian Government, which under international law is responsible for the acts of officials at all levels of government, was bound to exercise due care and diligence in obtaining the release of the treasures deposited in the Bank of Montreal and those held by the Quebec Government in the Provincial Museum.

As the property of a foreign state, the treasures were immune from local jurisdiction and should not have been impounded by the Quebec Government. Furthermore, once the treasures came under the control of the Province of Quebec, the Canadian Government had the duty to preserve them and would be responsible should they deteriorate as a result of lack of adequate care.

The Polish Government also stated that the Potsdam Declaration concerning the proper safeguarding of Polish property situated in territories under Allied control was binding upon Canada, a claim rejected by the Federal Government on the ground that Canada was not a party to the Declaration.

To support its position the Canadian Government maintained that, although it had made space available for the storage of the art treasures, no responsibility had been accepted by Canada for their safekeeping and that, from the original date of storage until May 1946, Canadian officials had no access to them. This was evidenced by an exchange of correspondence in August 1940 between the Polish Consul-General and the federal Archivist on the question of storage, which the Canadian Government considered as amounting to an informal inter-governmental arrangement.

Canada also pointed out that under international law movable property of a foreign state is accorded immunity on the basis of the consent express or implied of the receiving state to waive its normal absolute jurisdiction over property within its territory. Immunity being founded upon consent cannot subsist if the receiving state did not agree to receive the property into its territory under a general license but in fact indicated its willingness to receive it only under special terms totally inconsistent with such a general license. In 1940, the art treasures were received into Canada under a very special arrangement amounting to a qualified license under which they were to remain in a specified location on property of the Canadian Government in the legal custody and at the responsibility of the Polish State. When the art treasures were removed from their storage place on Canadian Government property by persons who were at that time the representatives of the only government then recognized in Canada, in a clandestine fashion and without notice to the Canadian Government, they were in effect smuggled by Poland into Canada.

The keys of the storage room were retained by representatives of the Polish Government to confirm its retention of legal possession and to facilitate conservation work. In other words, the collection entered Canada in a position similar to property admitted under diplomatic privilege and exempted only conditionally from the operation of local custom laws as long as used for diplomatic purposes. It was in effect admitted under bond which gave the Polish Government no general license to place the treasures elsewhere than in the appointed place. There could be no implied consent by Canada to waive its ordinary territorial jurisdiction over them once they had been placed in the hands of private persons. The presumption of consent to waive territorial jurisdiction in favor of a foreign sovereign which might have a reason under different circumstances was irrelevant here. The Crown in right of Canada which internationally includes its federal and provincial officials and its courts was therefore entitled to exercise within its own territory the ordinary jurisdiction of a sovereign state over movable property situated therein. The rule which exempts a foreign sovereign in the case of a public claim from having to exhaust local remedies depends upon sovereign immunity. The art treasures having become subject to Canadian jurisdiction, the Polish State was in the position of an ordinary alien having a private claim and was thus required to exhaust local remedies before submitting its claim to an international court. The claim of Poland to hold Canada immediately responsible was based upon the assumption that the representative of the Polish State could freely remove the art treasures from Canada. However, there was no proof of this since Poland had not attempted to do so in Canadian courts. Furthermore, if the art treasures were no longer subject to sovereign immunity, it followed that the Canadian Government did not have to either affirm or deny the title of the Polish State to them.

The better view seems to be that, since all the treasures were still, in spite of their removal, state property, they enjoyed absolute immunity. Also the declaration of ownership by Poland would appear to have precluded investigation of the claim of foreign private interests.

The main question was whether under international customary law, Canada had the duty to protect, preserve, and return the Ontario and Quebec portions of the art treasures by virtue of their character as Polish State property. Although the answer should have been a resounding "Yes," Canada did not feel that such a duty existed. Clearly, under international customary law, Canada had the duty to ensure on its territory the protection of the rights of Poland.

It seems that the Canadian position that because of the agreement under which the treasures entered Canada no responsibility was assumed could not be supported, at least for the treasures that were unjustifiably detained by the Quebec Government. In fact, the impounding of the treasures by the Premier of Quebec increased the international responsibility of Canada, since it constituted an assumption of jurisdiction over the art treasures and thus a direct violation of a

foreign state immunity. The term "Canadian State" includes the Crown in right of Canada which is responsible as a unit not only for the actions of its officials at all levels but also for the actions of its courts. Canada did not discharge its international obligations by merely inviting the Polish Government to bring an action in Canadian courts.

It is a well-known principle of international law that property of a foreign state is immune from jurisdiction and seizure. Thus, the treasures could not be impounded by the Province of Quebec nor could the Bank of Montreal refuse to return them to their rightful owner, the Polish State. Furthermore, the civil courts could not assume jurisdiction over them. Perhaps it was not so much the recognition of the principles which seemed to have caused difficulties but the procedure to be followed to recover such state property since the Polish Government did not wish to institute criminal or civil proceedings in Canadian courts at which time it would have had to establish that the treasures were state property and that Poland was therefore entitled to them. The Polish Government seemed to have been under the impression that since these treasures belonged to Poland, the Canadian federal authorities could just enter the Provincial Museum and the Bank of Montreal, remove the treasures, and deliver them to the Polish officials. Such a procedure, however, could not be followed by the Federal Government since it believed that there were disputing claimants to these treasures. Proper title would have to be established and this could only be done by a competent court. Yet how could this have been done if Poland had invoked jurisdictional immunity? The Polish position on the question of private ownership was that it was a domestic matter to be settled in Poland since the treasures entered Canada as Polish property. The Polish position seems to be unassailable since in 1940 the entire collection of art treasures was regarded by the Canadian Government as the property of the Polish State when it accepted the statement of the Polish Consul-General at face value. The collection was cleared through customs as Polish property. That both governments dealt with the entire collection on this basis was also corroborated by correspondence. Thus it would have been impossible to deny the title of the Polish State. The situation might have been different if the art treasures had been expropriated or nationalized or confiscated property.

Once the ownership of the treasures by the Polish State was recognized, it meant that they were immune from the jurisdiction of Canadian courts in the face of local claims.

The Canadian Government's position was weakened by the fact that in 1946 it ordered a new lock to be fixed on the door of the room of the federal building where the treasures had been stored and had also, with the help of the federal police (R.C.M.P.), made several inquiries concerning the whereabouts of the parts of the treasures that had been removed from the building. Several attempts to arrange a compromise between the opposing parties were also initiated by the Canadian Government. To reconcile these actions with its disclaimer of respon-

sibility, the Canadian Government maintained that its efforts were prompted by a sense of courtesy only.

Eventually, after more than fifteen months of negotiation, on December 31, 1960, the Quebec Government signed an agreement for the return of the treasures to the Wawel Museum.¹ Officially, this was done in response to the desire of the Polish people and authorities of the Roman Catholic Church to have them restored to Poland. Actually, the Quebec action was prompted by an address given by Cardinal Wyszynski on April 26, 1960, in the Cathedral of Gniezno in which he stated that the bishops of Poland were in favor of such a move. This was followed by a letter by Cardinal Wyszynski to Cardinal Léger of Montreal of November 9, 1960, declaring that he had no objection to the delivery of the treasures to representatives of the Wawel Museum without the participation of representatives of the Polish Church. Thus, it was only after the Church of Poland gave its "blessing" to their return that such a move took place.

All the legal arguments put forward by the parties involved had been of little value in the light of political considerations in Poland and in Canada. The solution of this famous international incident does not augur well for the future; it is to be expected that, in the case of legitimate or illegitimate changes of government, art treasures belonging to the state where these changes are taking place may be on display in other countries or may be taken out of the country by dissident groups. Will they be returned to their country of origin if the philosophy of the government in power there does not agree with that of the state of display or safekeeping? Difficulties are also likely to arise if some of these art treasures include objects belonging to private individuals which they had entrusted to state museums.

As for the art treasures deposited in the Ottawa branch of the Bank of Montreal, they were finally released in 1959 upon the presentation of adequate documents by one custodian and the heirs of the other as well as succession duty waivers by the federal and provincial government. The Polish Government also agreed to release the bank from any liability with respect to the treasures.

In conclusion, it must be noted that the Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, had it been in force between Canada and Poland, would have made Canada's obligation more explicit since according to section II:

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

¹A careful and detailed examination of the treasures by the Polish delegation confirmed that they had been well cared for and were in excellent condition. In a letter dated December 31, 1960, the Polish Government agreed that upon release of the art treasures it would hold the Quebec Government free of all responsibility for any damage or deterioration that may have occurred to the objects while in the Provincial Museum.