

Art in Dispute at the Beaverbrook Art Gallery

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Abstract: A long-running dispute between the Beaverbrook Art Gallery and its benefactor foundations illustrates the need for documentation of gifts or loans of artwork. At issue in this dispute is ownership of over 200 of the paintings on display at the gallery valued at up to \$200 million. None of the parties to the dispute has been able to produce records to establish that the paintings were either a gift or on loan to the Beaverbrook. Instead the parties have had to rely on newspaper and magazine articles, speeches, gallery catalogues, and export documents to substantiate their positions. Central to the dispute has been the role of the First Lord Beaverbrook and whether his actions amounted to a breach of his fiduciary duty to the gallery. This article examines the particulars of the parties' claims as well as the decisions that have been made to date. Final resolution of the dispute is not expected until all appeals have been decided.

INTRODUCTION

In 2005 to 2006 the Beaverbrook Art Gallery (the Beaverbrook) held an extremely successful exhibition titled *Art in Dispute*. During the nine months of the exhibit, more than 40,000 people attended.¹ For the city of Fredericton, New Brunswick, with a population of approximately 49,000, the attendance was remarkable. Unfortunately, the reason for the title of the exhibit and the interest in the artworks was a legal dispute between the heirs of the First Lord Beaverbrook and the Beaverbrook. The heirs claim that the artworks belong to the Canadian and U.K. Beaverbrook foundations and were merely on loan to the Beaverbrook. The Beaverbrook claims that the artworks were a gift from the First Lord Beaverbrook to the people of New Brunswick and therefore will not be returned to the foundations. If the foundations are successful in their legal actions, the paintings could be removed from the Beaverbrook and from the province completely.

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Without question, the artwork in dispute deserves a lot of attention: The paintings have been valued at up to \$200 million and include works by artists such as Sandro Botticelli, Salvador Dalí, Lucian Freud, Cornelius Krieghoff, and Jean-Paul Riopelle.² The Beaverbrook foundations commenced legal action to confirm their ownership of more than 200 paintings so that some of the artwork may be sold to provide much needed financial capital. The Beaverbrook has opposed the foundations' claims, in order that all the paintings in question are retained by the Beaverbrook for exhibit to the people of the province. Legal actions were commenced by the parties in the spring of 2004 but are unresolved. Regardless of who is successful, the dispute will have long-term consequences for the relationship between the Canadian and U.K. Beaverbrook foundations and the Beaverbrook as well as for the people of New Brunswick.

BACKGROUND

Lord Beaverbrook

The First Lord Beaverbrook, William Maxwell Aitken, was born in Ontario in 1879 but raised in Newcastle, New Brunswick.³ The son of a Presbyterian preacher, he grew up to be a self-made businessman, millionaire, press baron, and British politician. Aitken's political career began after moving to England in 1910 and included serving as a cabinet minister during both world wars. He also built a newspaper empire, owning both the *Daily Express* and the *Evening Standard*, and was referred to as the *first baron of Fleet Street*.

In New Brunswick, the First Lord Beaverbrook has a reputation as a benefactor of the province. His gifts included scholarships and buildings at the University of New Brunswick, Beaverbrook Art Gallery, Lady Beaverbrook Arena, Fredericton Playhouse, and Lord Beaverbrook Hotel.

Apparently, the generosity of Lord Beaverbrook to the province of his childhood has not benefited his heirs. The current Lord Beaverbrook, Sir Maxwell Aitken, the grandson of the First Lord Beaverbrook, is reported to have inherited only £250,000 from his father.⁴ He declared bankruptcy in 1992 and forfeited his right to sit in the House of Lords.⁵ Sir Maxwell is the chair of the Beaverbrook Foundation (the U.K. foundation), which recently has focused its funds and efforts on the restoration of the First Lord Beaverbrook's country home of Cherkley Court in Surrey, England. Timothy Aitken is the cousin of Sir Maxwell and is another grandson of the First Lord Beaverbrook. He is the president and a director of the Beaverbrook Canadian Foundation (the Canadian foundation), a trustee of the U.K. foundation, and custodian of the Beaverbrook.

The other person of note in the Beaverbrook family history is Lady Dunn, the widow of Sir James Dunn, who became Lady Beaverbrook when she married the First Lord Beaverbrook in 1963, the last year of his life.⁶ The Sir James Dunn Foun-

dation, like other donors, was persuaded by the First Lord Beaverbrook to provide paintings to the Beaverbrook. After the First Lord Beaverbrook's death, Lady Beaverbrook claimed that she had inherited works of art held by the Beaverbrook under the terms of the First Lord Beaverbrook's will. As part of its claim to title to the artworks in dispute, the Canadian foundation maintains that in 1970 it purchased 77 paintings that were on display in the Beaverbrook from Lady Beaverbrook and the Sir James Dunn Foundation.

Beaverbrook Art Gallery

Central to this dispute is the Beaverbrook, which officially opened in 1959. The parties do not question that the First Lord Beaverbrook gifted the physical building to the Province of New Brunswick but do not agree whether more than 200 paintings that are part of the gallery's collection were a gift or a loan. The operation of the Beaverbrook is governed by the *Beaverbrook Art Gallery Act*⁷ (Gallery Act), which replaced the former *Lord Beaverbrook Art Gallery Act*⁸ (1957 Act). Section 10(3) of the Gallery Act provides that: "All gifts heretofore or hereafter made in favour of the body corporate called 'The Board of Governors of the Lord Beaverbrook Art Gallery' [the corporate body under the previous legislation] shall avail to and be vested in The Beaverbrook Art Gallery [the corporate body under the Gallery Act]."

Under section 5(2) the board of governors is made up of 18 members who are appointed by the Lieutenant Governor in Council plus the custodian appointed under section 4(1). The custodian is currently Timothy Aitken. The First Lord Beaverbrook was the original custodian under the 1957 Act. The custodian was given final authority over which paintings were brought into or taken out of the Beaverbrook, which created some questions about the responsibility and authority of any person appointed as curator of the Beaverbrook.⁹

Under section 5(2) of the Gallery Act, the custodian can nominate 4 of the 18 governors. One of the current governors is Vincent Prager, director and vice president of the Canadian foundation.¹⁰ The Beaverbrook has argued that a conflict of interest exists for Timothy Aitken and Vincent Prager, who were allegedly acting to forward the best interests of the Canadian foundation while in their positions as board members of the Beaverbrook.

THE DISPUTE

Timeline

In the fall of 2003, the two foundations proposed that the board of governors enter into agreements with them acknowledging that title to certain works in the Beaverbrook belonged with the U.K. or Canadian foundation, to formalize a loan

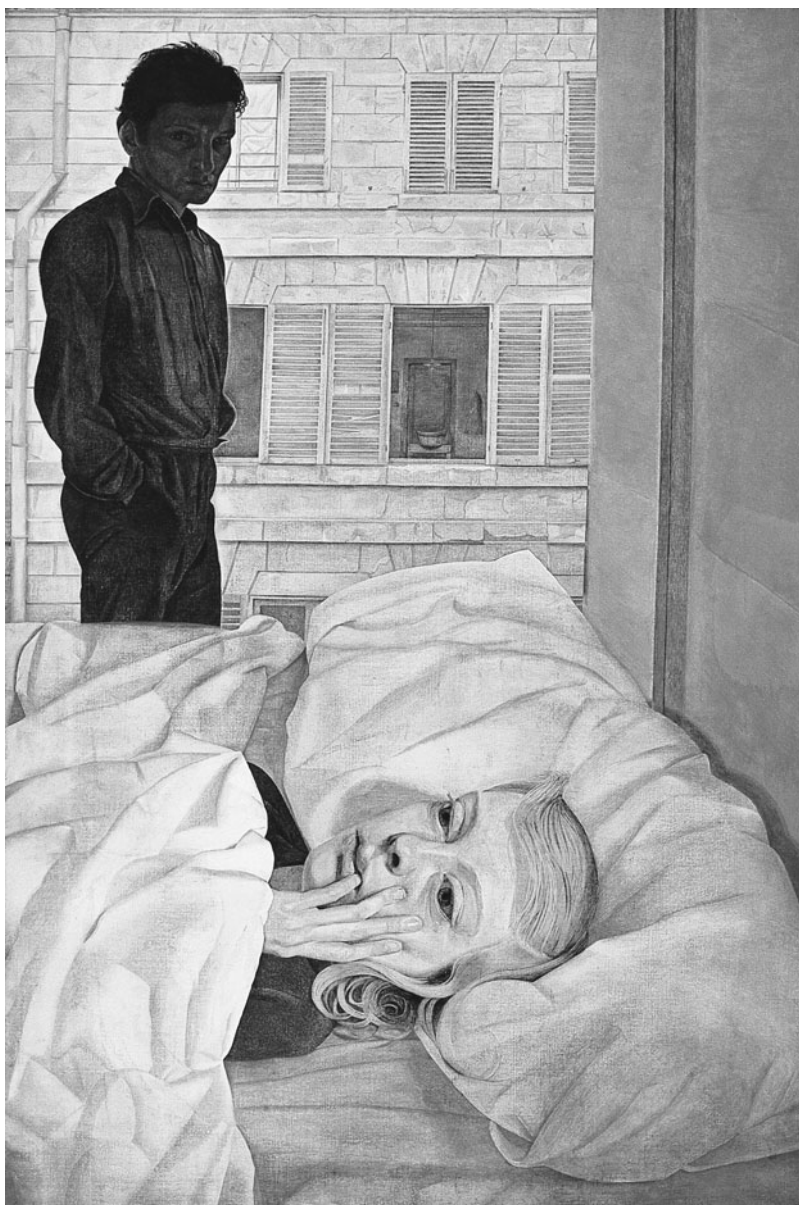


FIGURE 1. Lucian Freud (British, 1922–); *Hotel Bedroom*, 1954; oil on canvas; The Beaverbrook Art Gallery/The Beaverbrook Foundation (in dispute, 2004); Reproduced with permission of the artist.

agreement for the works, and to sell two works, in return for which the Beaverbrook would receive \$5 million. The two works proposed for sale were *Hotel Room* by Lucian Freud and *Fountain of Indolence* by J. M. W. Turner. The Freud is reported to have been appraised by Sotheby's at \$4 million to \$5 million, whereas the Turner has been appraised at \$25 million.¹¹

A media release by the Canadian foundation asserts that the proposal came about because of strengthened legal obligations in the United Kingdom on trustees of foundations to protect assets and ensure they are available for public viewing.¹² Sotheby's was engaged by the foundations to take an inventory, which determined that the paintings in the Beaverbrook were underinsured and some were not on display as required under U.K. tax and charity rules. The proposed 10-year loan agreement was to provide for adequate insurance, maintenance, and display.¹³ However, Stuart Smith, curator of the Beaverbrook from 1964 to 1969, is reportedly of the opinion that "the complaint by the Aitkens that not enough people see the gallery's art work is an attempt to disguise their real motive, which he believes is selling the paintings."¹⁴

After receiving draft agreements from the foundations in writing, the board of governors decided to conduct due diligence into the foundations' claim to title as the paintings in total represented a significant part of the Beaverbrook's collection.¹⁵ The Beaverbrook was unable to complete its investigations into title in a time frame acceptable to the foundations. By March 2004, some members of the board felt threatened by the demands being made by Timothy Aitken. In his affidavit dated October 15, 2004, board member Dr. Robert Neill quotes this passage from a letter to the chair of the board of governors from Timothy Aitken received on March 12, 2004:

Finally let me make it crystal clear that I am in constant touch with Lord Beaverbrook, that we have fully discussed all these matters in detail and are of one mind as to what the positive outcome should be. Should you choose to imperil that outcome for whatever personal reasons you and some other directors have developed, then not only will you be subject to the financial consequences of those actions, but so will the Gallery and the rest of the Board.¹⁶

On March 14, 2004, 14 members of the board resigned on the grounds it would be impossible to carry out their statutory duties in light of the pressure from Mr. Aitken to sign the agreements. New board members were appointed effective April 8, 2004, and included reappointments of previous members as well as some members new to the board. The new appointees included Roy Heenan, senior partner at Heenan Blaikie; Richard Currie, chair of BCE Inc.; and Allison McCain, chair of McCain Foods Limited.¹⁷ At a special meeting of the board of governors held on April 16, 2004, a resolution was passed to conclude negotiations with the foundations regarding the paintings by April 30, 2004.¹⁸ On April 26, 2004, the Beaverbrook informed the U.K. and Canadian foundations of the conclusions reached on the basis of its research: The paintings were gifted to the Beaverbrook, and no evidence was found to support that title to the works belonged with the foundations.¹⁹

At the end of April 2004, the Beaverbrook and the two foundations entered into discussions about the use of mediation to resolve the dispute over the artworks. These discussions came to an end when the U.K. foundation commenced legal

action against the Beaverbrook in London, England, on May 5, 2004.²⁰ Timothy Aitken stated that it was, “very painful to me and my cousin, the current Lord Beaverbrook (on behalf of the Beaverbrook Foundation), to have just taken the drastic step of initiating legal action against the Beaverbrook Art Gallery that bears my grandfather’s name.”²¹ The Beaverbrook responded by filing its own action in New Brunswick against the U.K. foundation, the Canadian foundation, Timothy Aitken, and Vincent Prager.

In July 2004, the U.K. foundation and the Beaverbrook agreed to resolve their U.K. dispute about the ownership of 133 of the Beaverbrook’s paintings through binding arbitration (U.K. foundation dispute). The Honorable Peter Corey, a former justice of the Supreme Court of Canada, was named as arbitrator with evidence to be heard in New Brunswick and through video conference from England.²² As a result of the agreement to arbitrate, the Beaverbrook discontinued its action against the U.K. foundation. (The title to 78 paintings in dispute between the Beaverbrook and the Canadian foundation is not covered by the arbitration.)

On August 17, 2004, the Canadian foundation and Timothy Aitken commenced an action in New Brunswick against the Beaverbrook and Judy Budovitch, one of the governors, alleging misrepresentation as to the title of the artworks in dispute.²³ This action was discontinued on March 15, 2005.

On August 20, 2004, an action was commenced by the Canadian foundation against the Beaverbrook regarding ownership of the 78 paintings in dispute (Canadian foundation dispute). This action was later consolidated with the action by the Beaverbrook against the Canadian foundation by a consent order on June 21, 2005.²⁴ The Canadian foundation is the plaintiff in the consolidated action and the Beaverbrook is the defendant with its claims asserted through counterclaim.

Ancillary Issues

On September 15, 2004, Timothy Aitken and Vincent Prager commenced an action against the Beaverbrook claiming indemnification for their legal costs. Their application for an order was dismissed.²⁵ Justice W.T. Grant found that significant facts remained in dispute between the parties so as to prevent granting an order on an application. These facts in dispute included whether Mr. Aitken and Mr. Prager were acting in their capacities as members of the board of the Beaverbrook or as representatives of the Canadian foundation and whether Mr. Aitken and Mr. Prager breached their fiduciary duties through dishonesty, willful neglect, or default.²⁶ These matters must be determined at trial.

On December 17, 2004, the provincial government announced that it would provide financial assistance to the Beaverbrook by way of a \$1 million interest-free, five-year loan.²⁷ The government would also provide an operating grant of \$50,000 that it promised to increase to \$200,000 in the future.²⁸ The Canadian foundation had ceased its \$200,000 annual operating grant to the Beaverbrook as

well as any funding or donations in the province. Timothy Aitken explained that the actions of the Beaverbrook will not

help the many educational, sporting and social institutions in the province who have benefited from the philanthropic and charitable work of the Canadian Foundation. As long as these legal disputes continue, funds normally available to them must be used to prevent the foundation's assets from being seized by the gallery.²⁹

The charitable funding withdrawn was estimated to be in the hundreds of thousands of dollars.³⁰

In March 2005 an application by Timothy Aitken and Vincent Prager for an order to compel the chair of the board of governors of the Beaverbrook to attend at an examination for discovery was dismissed.³¹ The order was sought because Mr. Aitken and Mr. Prager intended to commence an action against the Beaverbrook alleging that the terms of the Gallery Act prevented the Beaverbrook from borrowing funds. Justice Grant found that Mr. Aitken and Mr. Prager were in a conflict of interest because of their positions with both organizations in the dispute and had no standing to pursue the issue before the Court. Although the Gallery Act does not expressly allow the Beaverbrook to borrow money, it could be interpreted to permit a loan, particularly when the funds were needed to defend against a claim to ownership of a substantial part of the Beaverbrook's collection,

In my opinion the Board would be derelict in its duty to manage, control and administer what it believes to be the property of the Gallery if it did not resist the claims to ownership advanced by the Foundations. Doing so requires money which, I infer, they do not have in their operating budget. The only way they can fulfill their duty as set out in the Act, therefore, is to borrow money. The Act doesn't expressly authorize them to do so but I find that the power to do so can and should be reasonably implied in Section 6(c) of the Act in the circumstances now faced by the Board. Any other finding would, in my opinion, tie their hands in a manner that I cannot conceive to have been intended by the Legislature or any of the persons involved in the creation of this corporation as it would prevent them from doing that which the legislation mandates them to do—manage, control and administer the Gallery's property.³²

As of September 2007, the provincial government is reported to have provided a total of \$4.5 million of financial assistance to the Beaverbrook in respect of the costs the Beaverbrook has incurred to resolve the U.K. foundation and Canadian foundation disputes.³³

Subsequent legal challenges were brought before the court as to whether the examination for discovery of Timothy Aitken should take place in Fredericton or London, England.³⁴ The New Brunswick Court of Appeal agreed with the lower court that the discovery should take place in Fredericton, but the Canadian foundation was given leave to appeal the portion of the order that gave the defendant

gallery the option to decide that the discovery could take place in London.³⁵ The examination of Timothy Aitken has yet to take place.

U.K. FOUNDATION DISPUTE

The arbitration hearing into the dispute between the trustees of the U.K. foundation and the Beaverbrook took place over 32 days from October to December in 2006. The award was issued by the arbitrator, The Honourable Peter Cory on March 20, 2007.³⁶

Issues

At issue in the arbitration was whether the works in question were gifted to the Beaverbrook or, if not gifted, were intended to remain on permanent loan to the Beaverbrook as long as the paintings were on exhibit. The U.K. foundation argued that the works were not a gift to the Beaverbrook or if they were a gift, that the foundation had valid defenses to the Beaverbrook's claim.

The arbitrator divided the works in issue into two categories: the 88 works in issue that were located in the Beaverbrook prior to or at the time of opening of the Beaverbrook (opening works in issue) and the remaining 45 works in issue that were acquired by the U.K. foundation after the opening of the Beaverbrook (postopening works in issue). Included in the opening works in issue were several paintings that had been taken by the U.K. foundation and had either been sold or retained without providing compensation to the Beaverbrook (converted works).

Opening Works in Issue

The arbitrator concluded that the 88 opening works in issue were a perfected gift made to the Beaverbrook by the U.K. foundation and this gift was irrevocable. The three elements of a perfected gift were found to have been satisfied: (1) the intention to donate, (2) an acceptance, and (3) a sufficient act of delivery.

Intention to Donate

Lord Beaverbrook's intention to make a gift of the paintings in the Beaverbrook at the date of its opening was established by various newspaper and magazine articles, speeches given at that time, the Beaverbrook catalog, export documents, and the evidence of witnesses at the hearing. Regarding the newspaper and magazine articles published at the time of the Beaverbrook opening, the arbitrator considered each article in depth. The articles made various references to the generosity of Lord Beaverbrook and his gift of a gallery fully equipped with paintings.

The U.K. foundation argued that newspaper articles could not be used to establish an intention to make a gift. The arbitrator disagreed. Relying in particular

on a decision of the Alberta Court of Appeal, *Canadian Pacific v. Lamont et al.*,³⁷ the arbitrator concluded that newspaper articles, although hearsay, should be given weight in situations where an article is brought to a person's attention and the person does not object or attempt to correct the article. In respect of many of the articles, the First Lord Beaverbrook either approved or commissioned the articles or specifically praised or adopted them. As a result, the arbitrator concluded the following:

Applying the highest standard of proof, the articles establish the clear intent of Lord Beaverbrook to give paintings, including the Opening Works in Issue to the Gallery. The gift was perfected by the delivery and further confirmed by the speeches given at the time of the opening. Some of the articles standing alone, and to an even greater extent when considered as a whole, establish the intention of Lord Beaverbrook to make a gift of the paintings. The articles, taken together, and in context, have a cumulative effect that very clearly and irrefutably establish that intent.³⁸

Lord Beaverbrook's intention was held to be the intention of the U.K. foundation because he was a trustee of the foundation and a directing mind. In addition, the speeches, records, correspondence, and trust documents entered into evidence established that the opening works in issue were a gift to the Beaverbrook and not a loan.

Similar to the articles, speeches given at or around the time of the opening of the Beaverbrook were found to demonstrate a clear intention to make a permanent gift of the works of art in question and not a loan. The catalog prepared for the opening of the Beaverbrook was also held to reinforce the intention to make a gift. The preparation of the catalog had been overseen by the First Lord Beaverbrook who emphasized the need to take extraordinary care and avoid mistakes. The catalog clearly identified works of art that were on loan, but none of the opening works in issue were so identified. The arbitrator concluded that "those paintings in issue in the gallery on the day of its opening that were not designated as loans were indeed gifts made to the Gallery."³⁹

Reliance by the arbitrator on designations made in the catalog has been questioned.⁴⁰ The catalog may have only identified paintings as on loan if they were loaned by third parties, not by Lord Beaverbrook, so as to acknowledge the contributions of other persons. Additionally, a 2003 decision of the Supreme Court of Victoria cautions against reliance on exhibition catalogs as proof of attribution of ownership.⁴¹ This decision was not referred to in the arbitration award.

Export documents prepared by the U.K. foundation were found to be evidence of an intention to gift the opening works in issue. The arbitrator saw no reason to distinguish the decision of the Supreme Court of Canada in *R. v. Finestone*,⁴² where the Court concluded that although customs forms contained hearsay information, the source of the information was trustworthy because "the law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity." Furthermore, a four-part test for admissibility

of public documents as an exception to the rule against hearsay evidence had been satisfied on the facts.⁴³ The arbitrator found that the documents were supplied on behalf of the exporter by a public official; in discharge of public functions; intended to serve as a permanent record; and available for inspection in the public records. Therefore, the arbitrator concluded that the export documents could be considered as evidence of a continuing intention by the U.K. foundation to make a gift of the paintings to which they referred.

In terms of witnesses, the arbitrator placed particular emphasis on the evidence of Thomas Forrestall, who had maintained the accession records of the Beaverbrook at the time of its opening. Although the arbitrator remarked that it was unfortunate that the U.K. foundation had been led to believe at discovery that Mr. Forrestall's role at the Beaverbrook was relatively unimportant, counsel had ample opportunity to cross-examine this witness at the hearing. According to Mr. Forrestall, notations on the accession records that certain paintings were the "Property of the Beaverbrook Foundations" were not on the accession sheets at the time of the Beaverbrook's opening.⁴⁴ The arbitrator concluded that the accession records were altered subsequent to the opening of the Beaverbrook to change the designation of the works to be the property of the foundation.

The U.K. foundation and the Beaverbrook called expert witnesses on the interpretation of the trust deed under which the foundation acted in presenting paintings to the Beaverbrook. At issue was whether one of the original clauses of the deed could be interpreted so as to permit a loan of the paintings or whether this clause only permitted gifts. The wording of this clause was amended on January 1, 1960, to clearly permit the purchase of art works by the U.K. foundation, which could then be loaned to museums, galleries, or libraries for public exhibition. The arbitrator concluded that the natural meaning of the original clause indicated that it referred to gifts and not loans. The amendment of the trust deed in January 1960 supported the conclusion that prior to that date, the trustees intended to make gifts of the paintings to the Beaverbrook and not loans. Only after the January 1960 amendment was the U.K. foundation permitted to make loans of paintings without any transfer of ownership.

Delivery and Acceptance of the Gift

At common law, the transfer of possession does not have to be contemporaneous with the expression of the intention to donate so long as the intention continues until the gift is complete. As well, the physical act of delivery is sufficient to complete a gift of personal property, such as a painting. Further, once an intended gift is completed, the gift is not revocable at the option of the donor unless the donor has expressly reserved a power of revocation at the time of making the gift.⁴⁵

Applying these principles to the facts and having found that the intention to make a gift of the opening works in issue was clearly established, the arbitrator concluded that the works were delivered to and accepted by the Beaverbrook. The

gift was completed and could not be revoked. This conclusion was reinforced by the 1957 Act, which provided at section 7(3) that any gifts made shall inure to the benefit of the board of governors. Accordingly, the arbitrator found the following:

It is significant that neither the common law nor the Act require any special language of gift for it to be valid and no special acceptance is required. In this case, I have found that the expressed intention of Lord Beaverbrook and through him, the Foundation, was to make a gift of the Opening Works in Issue to the Gallery. The Works in Issue which were the subject matter of the gift were delivered to the Gallery. They were accepted and displayed by the Gallery as its collection. The gift was completed and perfected at the latest when the Gallery was opened. It is reasonable to infer and I do so find that the Board of Governors was intended to be benefited.⁴⁶

The arbitrator concluded that the U.K. foundation had made a perfected gift of the 88 opening works in issue to the Beaverbrook and the gift was irrevocable. Included in the opening works in issue were the converted works that were returned to the U.K. foundation at its request. The arbitrator found that these works were converted, and the Beaverbrook was entitled to be paid the value of the converted works plus interest from the time of conversion until the date of payment or until the works were returned to the Beaverbrook. The parties had agreed that the value of the converted works was \$2.4 million.

Postopening Works in Issue

The postopening works in issue were shipped to the Beaverbrook more than a year after it opened and after the trust deed had been amended to permit loans. The accession records of the Beaverbrook clearly indicated that these works were on loan from the U.K. foundation.

The Beaverbrook argued that the terms of the loan were that the loan would continue so long as the works were on exhibit for the benefit of the people of the province of New Brunswick. The arbitrator did not agree with this position, because such a loan would require specific terms of a trust, which were not established. As a result these works were held to be on loan and could be recalled by the U.K. foundation at any time.

Although this aspect of the award represented a potential loss to the Beaverbrook of approximately one-third of the works in question if the U.K. foundation recalls the paintings, it has been commented that the most valuable works with very few exceptions are included in the opening works in issue.⁴⁷ For example, the two works which were at the genesis of the dispute, J.M.W. Turner's *The Fountain of Indolence* and Lucien Freud's *Hotel Bedroom*, are part of the opening works in issue and according to the arbitrator were irrevocably gifted to the Beaverbrook.

Defenses of the U.K. Foundation

The Beaverbrook acknowledged that for more than 40 years up until shortly before the beginning of this litigation, it believed that the U.K. foundation owned the works at issue. The U.K. foundation argued that had it not been for these admissions by the Beaverbrook, it would not have allowed the Beaverbrook to retain possession of the works in issue. According to the U.K. foundation, it was severely prejudiced by the resulting delay in its commencing proceedings against the Beaverbrook and therefore the principles of waiver, acquiescence, estoppel, and laches should prevent the Beaverbrook from denying the U.K. foundation's title to the works at issue.

The arbitrator found that the delay in addressing the ownership of the works in issue was in large part because of the failure of the First Lord Beaverbrook to advise the Beaverbrook of his change of position from giving the paintings to the Beaverbrook to loaning them. Lord Beaverbrook was found to have carefully concealed this change of intention until he had his assistant make changes to the records of the Beaverbrook. As a fiduciary in a special position with regard to the Beaverbrook, the First Lord Beaverbrook was found to have breached his duty to fully disclose matters of importance to the Beaverbrook. As a consequence of this breach, the issue of ownership of the works did not crystallize for the Beaverbrook until many years later.

Regarding the defense of prejudice, the arbitrator found that the loss of documents or the testimony of witnesses affected both parties and did not automatically create prejudice. As well, the paramount responsibility for the delay was on the First Lord Beaverbrook who had insisted that the 1957 Act provide that he be a member of the board of governors and the custodian of the Beaverbrook. These positions imposed strict fiduciary duties.

The U.K. foundation argued that various curators of the Beaverbrook had known that the foundation asserted ownership of the works in issue and the curators accepted this ownership. According to the U.K. foundation, the curators' actions should bind the Beaverbrook. The arbitrator disagreed, finding the terms of the statute did not authorize the curator to dispose of or transfer ownership of works of art. These actions required the approval of the board of governors.

The argument of estoppel was dismissed as not applicable in the face of an express statutory provision. To allow a curator's confirmation of ownership as the basis of an estoppel when the Gallery Act specifies only the board of governors could divest the Beaverbrook of ownership would be inconsistent. Even if the principles of estoppel would apply, the arbitrator found that the U.K. foundation could not reasonably rely on the representations by the Beaverbrook when those representations came about because the foundation concealed material facts from the Beaverbrook. The U.K. foundation was found to have either actual knowledge or constructive knowledge of the concealed facts.

The actions of Lord Beaverbrook himself were fatal to the U.K. foundation's position. The arbitrator dismissed the foundation's defenses:

The Gallery's claim cannot, therefore, be barred by principles of estoppel or any other equitable principles. It was the lack of disclosure and calculated concealment by Lord Beaverbrook himself which led to the problems presented in this case. He did not act in the best interests of the Gallery. He breached his fiduciary duty to the Gallery. His acts and his failure to disclose material facts to the Gallery prevent the Foundation from using defences of estoppel, laches or limitations. It was his actions and his failure to disclose pertinent facts which gave rise to this unfortunate situation and the ensuing litigation.⁴⁸

The arbitrator went further to find that the actions of Lord Beaverbrook amounted to a fraudulent concealment of a cause of action as to the ownership of the opening works in issue and as a result, the operation of any limitation period was suspended.

Costs

In a subsequent award, the arbitrator awarded costs in favor of the Beaverbrook of \$4.8 million.⁴⁹ In making this award, the arbitrator considered that the U.K. foundation had rejected a settlement offer from the Beaverbrook prior to the commencement of the hearing.

Appeal

The U.K. foundation immediately announced its intention to appeal and served its notice of appeal on the Beaverbrook on April 19, 2007. In essence, the appeal seeks to overturn all the arbitrator's findings. The U.K. foundation seeks dismissal of all claims made by the Beaverbrook regarding the opening works in issue or the converted works or, alternatively, that all portions of the award in favor of the Beaverbrook be set aside and a new hearing be held before a new arbitrator.

The grounds of the appeal include that the arbitrator erred in finding that the opening works in issue had been gifted to the Beaverbrook. Numerous errors by the arbitrator are alleged including that Justice Cory failed to apply the correct legal tests and failed to give effect to important factual and legal distinctions between the First Lord Beaverbrook and the U.K. foundation.

The U.K. foundation alleges more than 20 errors in the arbitrator's findings in favor of the Beaverbrook, such as his failure to take into account the absence of documents by which Lord Beaverbrook or the U.K. foundation purported to donate the opening works at issue to the Beaverbrook. The U.K. foundation argues that the arbitrator erred in finding certain magazine and newspaper articles and public speeches effected a gift of the opening works in issue and by relying on the 1959 gallery catalog as distinguishing between works that were gifts and works that were on loan. Also at issue are the arbitrator's reliance on export forms, which were not filled out by the U.K. foundation, and the arbitrator's interpretation of the trust deed. The arbitrator's reliance on the evidence of Thomas Forrestall was

alleged to be an error in light of the Beaverbrook's admission at discovery that Mr. Forrestall was a peripheral witness with little or no direct involvement in the maintenance of the Beaverbrook's accession records.

Alternatively, the U.K. foundation argues that the arbitrator erred in failing to find that the defenses raised by the foundation applied to the facts. The U.K. foundation raised 14 particular grounds of appeal under this heading.

In addition, the U.K. foundation appealed the arbitrator's findings regarding the converted works and awarding damages in respect to some of those works. The U.K. foundation took issue with some of the arbitrator's comments, including his comments during the hearing comparing the First Lord Beaverbrook to Joseph Goebbels, the propaganda minister in Hitler's Third Reich.

The appeal is to be heard by a panel of three retired judges. The chair of the panel is Edward Bayda, a former chief justice of the Saskatchewan Court of Appeal. The chair was selected by the other two judges: Coulter Osborne, former chief justice of Ontario, who was chosen by the Beaverbrook, and Thomas Braidwood, a former member of the British Columbia Court of Appeal, who was chosen by the U.K. foundation.⁵⁰ In March 2008 the U.K. foundation filed its 284-page factum with the panel.⁵¹ The Beaverbrook had until June 2008 to file its response. The appeal hearing is tentatively scheduled for September 2008.⁵²

The appeal is expected to delay hearing of the Canadian dispute, which has been put on hold pending a decision in the U.K. foundation matter.⁵³ In the interim, the arbitration process is reported to have caused serious financial difficulties for the U.K. foundation. In September 2007 the foundation sold 93% of its stock portfolio and put one-third of the proceeds, approximately \$3 million, toward its legal bills arising from the dispute.⁵⁴ Those legal bills are estimated at more than \$7 million to date.⁵⁵

Canadian Foundation Dispute

The Canadian foundation dispute is being held in abeyance until the U.K. foundation dispute is resolved. The positions of the parties to this dispute can be determined from the statements of claim and defense that have been filed by the Canadian foundation and by the Beaverbrook, respectively.

The Plaintiff: Beaverbrook Canadian Foundation

In its statement of claim, the Canadian foundation alleges that in 1970 it acquired ownership of numerous works of art on display in the Beaverbrook, which were subsequently loaned to the Beaverbrook subject to the order and direction of the Canadian foundation.⁵⁶ The plaintiff alleges that it has retained title to the loaned paintings, which has been acknowledged by the Beaverbrook without exception since 1970. The Canadian foundation has demanded the return of the paintings,

but the Beaverbrook has refused to deliver the artworks; so the Canadian foundation claims that the Beaverbrook has wrongfully detained its property and that the property has been converted by the Beaverbrook for its own use. The relief sought by the plaintiff includes an order that the Canadian foundation is the legal owner of the paintings; Beaverbrook deliver the paintings to the Canadian foundation; or alternatively, damages be paid in the amount of the value of the artworks.

The relief sought by the Canadian foundation is based on the tort of detinue: The plaintiff has a right to the immediate possession of the artwork, it has demanded its return, and the defendant has refused to comply with the demand.⁵⁷ The most common remedy provided if the tort is proven is an order to return the chattel or pay damages for its value and for its detention. The Canadian foundation is also claiming conversion: The Beaverbrook has intentionally interfered with assets to which the Canadian foundation has title and the interference is so serious that the Beaverbrook should be ordered to pay the full market value of the assets to the Canadian foundation.⁵⁸ One can assume that the Canadian foundation does not have an actual loan agreement with the Beaverbrook or else the plaintiff would also have an action for breach of contract and a claim for expectation losses.⁵⁹ In the U.K. foundation dispute, the Beaverbrook argued that the postopening works in issue were on permanent loan but had no written agreement to support its position which was ultimately unsuccessful.

In terms of the claim of detinue, the Canadian foundation has certainly demanded the return of the artworks, and the Beaverbrook has refused to comply. As with the U.K. foundation dispute, the main question of fact for the claims of detinue and conversion will be whether the Canadian foundation can show that it does hold title to the paintings. The Canadian foundation alleges to have acquired title through the purchase of paintings displayed in the Beaverbrook in 1970. In November 1970, its directors authorized the purchase of 47 paintings from Lady Beaverbrook for \$132,000 and the purchase of 30 paintings from the Sir James Dunn Foundation for \$118,000 with the paintings to be left on loan to the Beaverbrook.⁶⁰ Lady Beaverbrook had threatened to remove the paintings from the Beaverbrook. The paintings, which include two works by Salvador Dalí and three by Walter Richard Sickert, were described by New Brunswick's then-Lieutenant Governor Wallace Bird as the "life blood of the gallery" and their removal would strike a "grievous blow."⁶¹ Sir Maxwell interceded and Lady Beaverbrook agreed to accept payment for the paintings that remained on display in the Beaverbrook.

The agreements of sale were sent to the Beaverbrook and acknowledged in a letter dated January 7, 1976, from the secretary of the Beaverbrook, stating in part the following:

I confirm:

(a) that the Gallery recognizes that all of the paintings and sculptures described in the agreement are now the property of the Beaverbrook Canadian Foundation; and

(b) that the Gallery will hold those works of art hence forward subject to the order and direction of the Beaverbrook Canadian Foundation.⁶²

The Canadian foundation also relies on plaques in the Beaverbrook, catalog records, and other documents prepared by the Beaverbrook that confirm the paintings were on loan from the Canadian foundation. On this basis, the plaintiff argues that the Beaverbrook is estopped from now claiming ownership. However, the evidence referred to by the plaintiff does not include a resolution of the board of governors entering into a loan agreement with the Canadian foundation as would be required under the terms of the Gallery Act. Timothy Aitken is of the opinion that the evidence uncovered by the Canadian and U.K. foundations is sufficient to prove ownership. In a newspaper interview in 2004, he is quoted as saying the following:

And I think eventually that it (ownership) will be proved beyond a shadow of a doubt. At the present time, the English foundation has employed forensic accountants who were responsible for doing a lot of the work with the Holocaust case against the Swiss banks. They are doing work on the original documentation which the English Foundation has now surfaced and the case will be completely convincing.⁶³

Mr. Aitken may be less confident today given the documentation was insufficient to convince Justice Corey that the U.K. foundation retained title to the opening works in issue in the U.K. foundation dispute.

The Defendant: Beaverbrook Art Gallery

Statement of Defense

The Beaverbrook claims that it was the intended beneficiary of a gift of the artworks in question and that title vested in the Beaverbrook by operation of the common law or by the provisions of the Gallery Act.⁶⁴ Section 10(3) of the act vests all gifts under the predecessor act in the Beaverbrook. The plaintiff argues that title to the artworks could only pass to the Canadian foundation by a resolution of the board of governors under section 7 and a resolution has not been passed despite pressure from the Canadian foundation.

Alternatively, the Beaverbrook claims if the Canadian foundation ever held title to the artworks then the title was held in trust for the benefit of the Beaverbrook. The plaintiff allegedly breached the trust by removing and disposing of paintings in the past and by seeking to assert title and remove further works of art, contrary to the interests of the beneficiary, the Beaverbrook.

As with the U.K. foundation dispute, the Beaverbrook relies on evidence from journal articles, speeches, and records to show that the First Lord Beaverbrook intended to make a gift of the gallery building and the artworks it contained to the people of the province of New Brunswick. By establishing the donor's intention to give and the delivery and acceptance of artworks by the Beaverbrook, the Beaverbrook argues that it obtained a gift of the artworks in question and that the

gift was irrevocable. This evidence and argument was successful in the U.K. foundation dispute regarding the opening works in issue. If the arbitration award is upheld on appeal and the works in issue in the Canadian foundation dispute were in the Beaverbrook at its opening, the Beaverbrook will have significantly strengthened its position.

The Beaverbrook acknowledges that the title may have been temporarily placed with the predecessor foundations from time to time for tax and estate planning purposes but that the title to the works was always held for the benefit of the Beaverbrook. Timothy Aitken does not agree that the artworks may have been listed as on loan for tax advantages:

That's crap. . . . These boys down in New Brunswick are very stubborn. . . . The whole thing about tax is complete rubbish. There was no tax issue. There was no tax issue with my grandfather either, as they are maintaining. I am so tired of this rubbish.⁶⁵

The particular question in the Canadian foundation dispute that differs from the facts in the U.K. foundation dispute is whether title to the works in issue passed to the Canadian foundation by reason of the transaction with Lady Beaverbrook in 1970. The defendant states that the claim of inheritance by Lady Beaverbrook of 50 artworks from the First Lord Beaverbrook is specious because those works were gifted to the Beaverbrook. Sir Maxwell Aitken (Sir Maxwell), son of the First Lord Beaverbrook and then cocustodian of the Beaverbrook, allegedly resisted the claims by Lady Beaverbrook at the time and asserted that the paintings belonged to the Beaverbrook. The Beaverbrook argues that the Canadian foundation could not have acquired good title to the paintings through a purchase from Lady Beaverbrook and the Sir James Dunn Foundation because the vendors did not hold title to the goods.

If the Canadian foundation did acquire good title in 1970, the Beaverbrook argues in the alternative that the title was held on trust for the benefit of the Beaverbrook and that the Canadian foundation has breached its obligations as trustee. The trust is implied because the Beaverbrook does not refer to any agreement establishing an express trust. An argument of an implied trust of the postopening works in issue was unsuccessful in the U.K. foundation dispute because the arbitrator found that such an agreement must be put in writing.

The alleged breach of trust relates to representations by the Canadian foundation and Sir Maxwell, in particular, to volunteers and staff at the Beaverbrook that the artworks were owned by the Canadian foundation. The Beaverbrook argues that the Canadian foundation knew that the Beaverbrook staff would not challenge the directions of Sir Maxwell and acted on his instructions to change the records of ownership. The Beaverbrook argues that Sir Maxwell, as the custodian and a member of the board of governors, owed a duty of care to the Beaverbrook to safeguard its property and his actions on behalf of the foundations conflicted with this duty. The Canadian foundation is also argued to have owed a duty of

care to the beneficiary gallery and failed to discharge that duty. As a result, the Beaverbrook argues that the Canadian foundation is estopped from relying on any acknowledgement by the Beaverbrook of the title held by the Canadian foundation since 1970, because such statements were made in reliance on the plaintiff's misrepresentations.

In the U.K. foundation dispute, the arbitrator found that estoppel as argued by the U.K. foundation could not apply in the face of express statutory provisions, which required the board of governors of the Beaverbrook to approve transfer of ownership of works of art. In addition, the First Lord Beaverbrook was found to have breached his fiduciary duty to the Beaverbrook by his actions, including his lack of disclosure and concealment of information. The First Lord Beaverbrook was no longer alive in 1970; so the Beaverbrook must establish that, similar to his father, Sir Maxwell breached his fiduciary duties as a member of the board of governors and custodian of the Beaverbrook.

If the Beaverbrook is estopped from asserting its ownership based on correspondence, records, and documents, the Beaverbrook argues that the Canadian foundation is also estopped from relying on these various documents because they resulted from the alleged misrepresentations of the Canadian foundation. "As a result, the doctrine of cross-estoppel applies and sets the matter at large."⁶⁶

Counterclaim

The Beaverbrook alleges that in the past the Canadian foundation, in concert with the U.K. foundation, wrongfully removed works of art that were the property of the Beaverbrook and either retained the works or sold them and retained the proceeds.⁶⁷ The Beaverbrook asserts that the Canadian foundation converted the property of the Beaverbrook and is liable for the current value of those works. The relief sought by the Beaverbrook includes a declaration that the works at issue in the plaintiff's action were gifts to the Beaverbrook and vest in the Beaverbrook, an injunction restraining the Canadian foundation from removing or disposing of the artworks, damages for the present day value of the removed paintings estimated at \$10 million, and an order that works wrongfully removed be returned to the Beaverbrook.

In its defense to the counterclaim, the Canadian foundation denies that the Beaverbrook is the owner of the works of art or that it removed artworks that were the property of the Beaverbrook.⁶⁸ The plaintiff also argues that the claim in regards to the removed paintings is barred by the *Limitations of Actions Act*.⁶⁹ The defendant responded that the Beaverbrook was unaware of a cause of action until it performed its due diligence in response to the request from the Canadian and U.K. foundations to execute loan agreements in the winter of 2004. The action would not be time barred if the limitation period began at that time.⁷⁰

In the U.K. foundation dispute, the arbitrator found that the actions of the First Lord Beaverbrook prevented the U.K. foundation from relying on defenses of estoppel, laches, or limitations. In addition, the First Lord Beaverbrook was found to

have fraudulently concealed a cause of action regarding the ownership of the works in issue, and therefore the operation of any limitation period was suspended. In the Canadian foundation dispute, the court must assess the actions of Sir Maxwell and determine if they amounted to a breach of fiduciary duty or fraudulent concealment and would similarly prevent the Canadian foundation from relying on any equitable defenses.

If the Canadian foundation is found to have title to the works in issue, more of the paintings currently on exhibit in the Beaverbrook may be sold. The current Lord Beaverbrook has been quoted as saying he is not concerned about selling more works from his grandfather's collection. As reported in the *Independent*,

"The collection has evolved over the years. We've sold some and bought some as well," said Lord Beaverbrook, who also indicated that he considers selling expensive works to be the best strategy. "You can sell one valuable painting or 20 cheap ones but if you've got an art gallery you probably need to retain quantity because you need to cover the walls," he said.⁷¹

ISSUES ARISING FROM THE DISPUTE

The various legal actions raise questions about the structure of the board of governors of the Beaverbrook under the Gallery Act. Section 4(1) of the act provides the following:

Sir John William Maxwell Aitken and Lady Beaverbrook are Custodians of the Gallery until his or her death or resignation and after the death or resignation of Sir John William Maxwell Aitken, the Lieutenant-Governor in Council shall appoint another Custodian nominated by The Beaverbrook Canadian Foundation as occasion requires.

Under section 5(2) the custodian is able to nominate four of the 18 governors to be appointed by the lieutenant governor in council. These provisions of the act that allow nomination of the custodian by the Canadian foundation and then permit the custodian to further nominate four governors appear to recognize the historic importance of the Canadian foundation to the Beaverbrook. The First Lord Beaverbrook gave or loaned to the Beaverbrook a substantial part of its collection and the Canadian foundation until recently has provided operating funds to the Beaverbrook.

In its statement of defense, the Beaverbrook alleges that Sir Maxwell, then the custodian of the Beaverbrook, was in a conflict of interest between his duties to the Beaverbrook and to the Canadian and U.K. foundations when he directed gallery staff to designate the ownership of artworks displayed at the Beaverbrook. In a brief prepared regarding the application of Timothy Aitken and Vincent Prager for indemnification, the Beaverbrook argued that Mr. Aitken, the custodian, and Mr. Prager, a governor, breached their duty of loyalty to the Beaverbrook when

they subordinated the best interest of the Beaverbrook to the interests of the Canadian foundation.⁷² Timothy Aitken is reported in the press as stating his motivation: "Number one, number one and number one is to protect the assets of the foundation and respective foundations. We have a legal obligation to the trustees to protect the assets of the foundation."⁷³

Dr. Neill, a governor of the Beaverbrook, in his affidavit refers to abusive and intimidating conduct by Mr. Aitken. He also mentions the refusal by Aitken and Prager to acknowledge a conflict of interest or to absent themselves from meetings regarding the foundations' proposed loan agreements.⁷⁴

Beyond the repercussions of the structure of the board of governors for the evolution of the current dispute are considerations of how that structure may need to be changed depending on the outcome. If the Canadian foundation is successful in its action, all the artworks in question may be removed from the Beaverbrook. Mr. Prager has been quoted as saying that the Canadian foundation will open a new gallery in Saint John, New Brunswick, to display the paintings.⁷⁵ With this outcome, the Canadian foundation would likely cease any financial support of the Beaverbrook and the selection of the custodian and governors under the act would need to be amended.

Given the acrimonious nature of the dispute to date, at a minimum the Beaverbrook may wish to implement some guidelines for the conduct of nominee governors. In addition, a review of the Gallery Act may be in order. The province should consider whether the procedure for nominating members of the board of governors should be amended and in particular whether the legislation should still provide that the custodian will be nominated by the Canadian foundation or should instead be nominated by the Lieutenant Governor in Council.

CONCLUSION

Resolution of the two disputes is still some time into the future. The parties to the Canadian foundation dispute have yet to resolve all preliminary matters, examine their witnesses, or review all the documents. If the appeal of the U.K. foundation dispute is heard in the fall of 2008 and a decision is made by the end of the year, that decision may assist the Beaverbrook and the Canadian foundation to reach a settlement of their dispute without incurring the significant cost of going to trial.

At the end of the legal actions, the Beaverbrook could lose a significant part of its collection if the Beaverbrook foundations are given title to at least some of the works in issue. Even if successful in its position, the paintings will remain on display but the primary source of the Beaverbrook's operating funds may be in jeopardy. If the foundation removes or reduces its funding, the Beaverbrook's survival could depend on finding other donors willing to support the Beaverbrook or relying on the provincial government to continue with its financial support. Both parties continue to incur significant legal costs. As Timothy Aitken

has commented, “This could all end up in tragedy for them. . . . They could end up with no pictures. And the costs! Our costs already are horrendous.”⁷⁶

The parties are in difficult positions. As stated by Justice Grant, “the Board would be derelict in its duty to manage, control and administer what it believes to be the property of the Beaverbrook if it did not resist the claims to ownership advanced by the Foundations.”⁷⁷ The governors were required to conduct due diligence and resist the claims of ownership if their research showed the paintings were owned by the Beaverbrook. In doing so they may have irreparably damaged the relationship with their benefactors, the Canadian and U.K. foundations. The Canadian and U.K. foundations themselves are in need of funds and see the paintings in the Beaverbrook as assets available for sale. By pursuing their claim to the paintings, however, the foundations may have tarnished their family’s image in the province.

A favorable outcome to the legal actions would be one that reaches an agreement on the ownership of the paintings and rebuilds the relationship between the parties. History shows a long and fond affiliation between the First Lord Beaverbrook, his successors, and the Province of New Brunswick. Ideally, when the disputes are over, the reputation of the First Lord Beaverbrook and his family will be restored, the Beaverbrook Art Gallery will remain as the designated provincial art gallery, and the people of New Brunswick will still be able to view an impressive collection of art but a collection that is not longer in dispute.

ENDNOTES

1. “Controversial Exhibit Ends Successful Run,” *CBC News*.
2. “Controversial Exhibit Ends Successful Run,” *CBC News*.
3. This brief biography of Lord Beaverbrook is based on “Max Aitken, 1st Baron Beaverbrook.” Available at http://en.wikipedia.org/wiki/Max_Aitken%2C_1st_Baron_Beaverbrook/; and “Lord Beaverbrook William Maxwell Aitken,” *CBC News* (accessed 30 June 2008).
4. Ian Herbert, “Read All About It.”
5. Marcus Warren, “Beaverbrooks Accused of Plundering.”
6. This description of events is based on McInnes Cooper and Osler, Hoskin and Harcourt LLP, “Statement of Defence and Counterclaim” in *The Beaverbrook Canadian Foundation v. The Beaverbrook Art Gallery* (August 22, 2005).
7. R.S.N.B. 1973, c.B-1.
8. 1957 c.10–6 Elizabeth II.
9. Poitras, *Beaverbrook*, 101.
10. Affidavit of Dr. Robert Donald Neill for application to be heard October 22, 2004, regarding *Timothy Aitken and Vincent Prager v. The Beaverbrook Art Gallery* (October 15, 2004) at para. 4.
11. Grant, “Beaverbrook Art Gallery Controversy.”
12. Beaverbrook Canadian Foundation, “Beaverbrook Family Clarify.”
13. Beaverbrook Canadian Foundation, “Beaverbrook Family Clarify.”
14. “Art Attack,” *Stratford Beacon Herald*.
15. Neill Affidavit 2004, at para. 16.
16. Neill Affidavit 2004, at para. 26.
17. “New Gallery Board Appointed,” *CBC News*.
18. Neill Affidavit 2004, at para. 37–39.

19. *Aitken v. Beaverbrook Art Gallery*, [2004] N.B.J. No. 512 (Q.B. (T.D.)) at para. 10 [*Aitken*].
20. “Indepth: Lord Beaverbrook Timeline,” *CBC News*.
21. Beaverbrook Canadian Foundation, “Beaverbrook Family Clarify.”
22. “Canada to Rule on Disputed Art Works,” *Toronto Star*.
23. Neill Affidavit 2004, at para. 51.
24. Affidavit of Bernard Riordan O.C. re: *The Beaverbrook Canadian Foundation v. The Beaverbrook Art Gallery* (December 12, 2005) at para. 14.
25. *Aitken v. Beaverbrook Art Gallery*, [2004] N.B.J. No. 512 (Q.B. (T.D.)) at para. 10.
26. *Aitken v. Beaverbrook Art Gallery*, [2004] N.B.J. No. 512 (Q.B. (T.D.)) at para. 20–22.
27. *Prager v. Beaverbrook Art Gallery*, [2005] N.B.J. No. 168 (Q.B. (T.D.)) at para. 5.
28. Globe and Mail, “Art Gallery Gets Funding Boost for Battle.”
29. Beaverbrook Canadian Foundation, News Release, December 17, 2004.
30. “Indepth: Lord Beaverbrook Timeline,” *CBC News*.
31. *Prager v. Beaverbrook Art Gallery*, [2005] N.B.J. No. 168 (Q.B. (T.D.)) at para. 5.
32. *Prager v. Beaverbrook Art Gallery*, [2005] N.B.J. No. 168 (Q.B. (T.D.)) at para. 30.
33. “Judging Panel to Hear Appeal,” *CBC News*.
34. *The Beaverbrook Canadian Foundation v. The Beaverbrook Art Gallery* (December 16, 2005), Fredericton F/C/407/04 (N.B. Q.B. (T.D.)).
35. *Beaverbrook Canadian Foundation v. Beaverbrook Art Gallery*, [2006] N.B.J. No. 121 (C.A.).
36. *The Trustees of the Beaverbrook Foundation v. the Beaverbrook Art Gallery*, 2007 (Corey). Available at <http://www.beaverbrookartgallery.org/admin/assets/documents/2007-03-26-decision.pdf/> (accessed 30 June 2008).
37. *Canadian Pacific v. Lamont et al* (1983), 43 A.R. 257 (ABCA).
38. *The Trustees of the Beaverbrook Foundation v. the Beaverbrook Art Gallery* at 71.
39. *The Trustees of the Beaverbrook Foundation v. the Beaverbrook Art Gallery* at 42.
40. Jahn, “Loans versus Gifts,” 88–90.
41. *Nolan v. Nolan*, [2003] V.S.C. 121.
42. *R. v. Finestone*, [1953] 2 S.C.R. 107.
43. *R. v. P. (A)* (1996), 92 O.A.C. 376, 109 C.C.C. (3d) 385 (Ont. C.A.).
44. *The Trustees of the Beaverbrook Foundation v. the Beaverbrook Art Gallery* at 83.
45. See, for example, Lind, Jarvis, and Phelan, *Art and Museum Law*, 574.
46. *The Trustees of the Beaverbrook Foundation v. the Beaverbrook Art Gallery* at 74.
47. Poitras, *Beaverbrook*, 276.
48. *The Trustees of the Beaverbrook Foundation v. the Beaverbrook Art Gallery*, at 106–107.
49. “Beaverbrook Foundation Ordered,” *CBC News*.
50. “Judging Panel to Hear Appeal,” *CBC News*.
51. Beaverbrook Foundation, Factum of the Appellants.
52. “Beaverbrook Foundation Outlines,” *CBC News*.
53. “85 Disputed Paintings,” *CBC News*.
54. Drache, “Canadian Beaverbrook Wins Another Round.”
55. “Beaverbrook Foundation Ordered to Pay Gallery’s Legal Bills,” *CBC News*.
56. Description of the plaintiff’s claim is based on Gilbert McGloan Gillis, “Statement of Claim” in *The Beaverbrook Canadian Foundation v. The Beaverbrook Art Gallery* (August 20, 2004).
57. Osborne, *The Law of Torts*, 959.
58. Osborne, *The Law of Torts*, 962.
59. Palmer, *Art Loans*, 24–25.
60. Gilbert McGloan Gillis, “Reply and Defence to Counterclaim” in *The Beaverbrook Canadian Foundation v. The Beaverbrook Art Gallery* (September 6, 2005) at para. 10.
61. Poitras, *Beaverbrook*, 154–159.
62. Reply and Defence to Counterclaim, at para. 10(5).
63. Taylor, “Timothy Aitken Is Not Amused.”
64. The description of the defendant’s claim is based on Statement of Defence and Counterclaim.
65. Goddard, “The Ghost in the Gallery.”

66. Osler Hoskin and Harcourt and McInnes Cooper “Reply to Defence to Counterclaim on Behalf of the Beaverbrook Art Gallery” in *The Beaverbrook Canadian Foundation and The Beaverbrook Art Gallery* (September 13, 2005).
67. This description is based on Statement of Defense and Counterclaim.
68. Reply and Defence to Counterclaim, at para 16.
69. R.S.N.B. 1973, c.L-8.
70. Reply to Defence to Counterclaim.
71. Herbert, Ian. “Read All About It.”
72. McInnes Cooper, Brief on Law on behalf of the Respondent, The Beaverbrook Art Gallery for application to be heard October 22, 2004, regarding *Timothy Aitken and Vincent Prager v. The Beaverbrook Art Gallery* (October 20, 2004) at para. 61.
73. Taylor, “Timothy Aitken Is Not Amused.”
74. Neill Affidavit 2004, at para. 29–45.
75. “Beaverbrook Heirs Propose New Gallery,” *CBC News*.
76. Goddard, “The Ghost in the Gallery.”
77. *Prager v. Beaverbrook Art Gallery*, at para. 30.

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