Canada's Cultural Property Export Controls: An Analysis of the Colonial and Heritage Discourses that Animate the *Cultural Property Export and Import Act*

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Abstract

This thesis critiques Canada's *Cultural Property Export and Import Act* (CPEIA) and its framing as a legal instrument intended to protect and preserve Canada's cultural heritage. It focuses on the export provisions of the Act and the related experts and administrative bodies who oversee disputes under those provisions. I argue that colonial and capitalist heritage and property discourses are the foundation that underpins the CPEIA and as a result, the legislation both expressly and implicitly privileges colonial and capitalist ideas about heritage and property ownership. The legislation, on its face and through the limited examples of available application, leaves little room for alternative ideas about the meaning of "heritage" and its association with culture. Relying on Laurajane Smith and Fiona Macmillan's work on the Authorized Heritage Discourse, I provide an updated historical account of the CPEIA and Canada's perceptions of cultural property as a settler state in light of new opportunities to engage with the application of the legislation following recent decision from the Federal Court of Appeal and the Canadian Cultural Property Export Review Board.

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Table of Contents

Abstract ii

Acknowledgements iii

Table of Contents iv

Chapter 1: Introduction 1

  Introduction 1

  Acknowledgement and Definitions 6

  Methodology 10

Chapter 2: Literature Review 15

Chapter 3: History and Historiography – Heritage Discourses, the Use of Cultural Objects and Changing Societies 39

  Introduction 39

  The Rise of Heritage 40

  The Waverley Report 48

  The 1970 UNESCO Convention 55

  Cultural Property Debates in Canada in the 1970s 60

  Later Changes to the CPEIA 65

  Conclusion 67

Chapter 4: Analysis of Canada's Cultural Property Export Regime 69

Introduction 69

The CPEIA Export Process 71

Categories of Cultural Property 74

Expertise and the Administration of the CPEIA 76

Aesthetic Qualities of Objects 88

The Old, the Grand, and the Valuable 92

Canadian Nationalism and Cultural Property Internationalism 95

Different Ways of Thinking About Heritage Laws 99

Conclusion 103

Chapter 5: Conclusion 105

Bibliography 108

Chapter 1: Introduction

Introduction

Canadian parliament adopted the first *Cultural Property Export and Import Act* in 1977. It was enacted, in part, in response to Canada's obligations under the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (the 1970 UNESCO Convention), which imposed obligations on signatories to adopt domestic measures that would "prohibit and prevent the illicit trafficking of cultural property".[1] In both its original and current forms, the Act borrowed heavily from the conclusions reached in the 1952 *Report on the Committee on the Export of Works of Art, etc*. (the Waverley Report), especially the criteria that the Waverley Report recommended adopting for assessing whether the government of the United Kingdom should grant requests to export cultural objects from Britain.[2] Today, the *Cultural Property Export and Import Act*, RSC 1985, c C-51 (CPEIA) functions, in part, as a trade instrument that imposes export controls on prescribed categories of cultural objects within Canada. These export controls ostensibly protect Canada's heritage by keeping culturally significant objects physically in the country. According to the Canadian Cultural Property Export Review Board (CCPERB), a central concern of the CPEIA's export controls is balancing the rights of cultural property owners against the public's interest in having cultural property in Canada.[3] To achieve this goal, the CPEIA incorporates a system of export and import

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[1] "About the 1970 Convention", (12 February 2020), online: *UNESCO* <https://en.unesco.org/fighttrafficking/1970>.
[2] Katherine Jane McCartney, *Legislating identity: A critical review of the Cultural Property Export and Import Act* (M.A., Queen's University (Canada), 1996) [unpublished] at 67 [McCartney].
[3] "About CCPERB | CCPERB", online: *Canadian Cultural Property Export Review Board* <https://ccperb-cceebc.gc.ca/en/about-us/about.html> [About CCPERB].

controls for cultural objects and incentivizes the donation of cultural objects to Canadian cultural institutions through tax breaks in exchange for those donations.[4]

Interpreting heritage and history are inherently political acts. Throughout this thesis, I aim to demonstrate that heritage and history have been used by various political actors (and most especially colonial powers) to craft narratives that justify colonialism and the treatment of subaltern communities from the colonial period through to the present. This thesis aims to critique the CPEIA and its framing as a legal instrument intended to protect and preserve in Canada cultural objects that contribute to Canada's national heritage.[5] I focus primarily on the export provisions of the Act and the related experts and administrative bodies who oversee disputes under those provisions. I argue that colonial and capitalist heritage and property discourses are the foundation that underpins the CPEIA and because of those discursive foundations, the legislation both expressly and implicitly privileges certain colonial and capitalist notions of heritage and property ownership. The legislation, on its face and through the limited examples of available application, leaves little to no room for alternative ideas about the meaning of "heritage" and its association with culture.[6] As a result, the CPEIA pushes out different legal systems and worldviews, particularly those of Indigenous peoples in Canada.

In this thesis, I provide an updated historical account of the CPEIA and Canada's perceptions of cultural property as a settler state. Since 2019, new opportunities have arisen to engage with the actual application of the legislation following the Federal Court of Appeal's decision in *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82 (*Heffel*). There have also been a limited number of export permit appeal decisions published by the CCPERB since

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[4] *Ibid*.
[5] Canada, *Summative Evaluation of the Movable Cultural Property Program (MCPP)*, by Evaluation Services Corporate Review Branch (Ottawa: Canadian Heritage, 2005) at 1.
[6] McCartney, *supra* note 2 at 83.

the release of the *Heffel* appeal decision, which help to demonstrate how the CCPERB itself views its role and applies the legislation.[7]

Analyzing how colonial discourse animates the CPEIA is an important exercise in understanding how cultural property, and the people who create it, continue to encounter colonialism through cultural property trade and trade regulations. There is a live and important question of whether the Act can achieve its stated goals of protecting heritage if its foundation is mired in colonialist and capitalist discourses and values that fail to acknowledge alternative views of cultural ownership and broader notions of the intangible importance of cultural heritage. Furthermore, the Act's express concern with Canada's national heritage raises some immediate concerns with respect to its ability to adequately comprehend, let alone adjudicate disputes about, the cultural heritage of subaltern communities that exist within but are separate and distinct from Canada as a nation state. More specifically: identifying "national heritage" as a singular and overarching concern of the CPEIA arguably has the effect of minimizing or even erasing altogether how subaltern communities within Canada think about their own heritage.[8]

By virtue of its objectives and its form, the CPEIA acknowledges that there is something intangible and special about some cultural objects that warrants a limited form of legal protection. However, that intangible significance is defined in settler terms rather than by the communities in which the cultural objects originated. Further, the intangible significance is only formally acknowledged where an object first meets specific criteria regarding its age, monetary/market

[7] In the writing of this thesis, I came across two graduate theses that examined the CPEIA as it existed in the 1990s: Katherine McCartney's *Legislating Identity: A Critical Review of the Cultural Property Export and Import Act*, *supra* note 2, and Anne E. Price's *Changing Meanings of Native Cultural Objects: Taste, Politics and Processes of Culture*, *infra* note 171. This thesis builds on some of the work and conclusions included in each of McCartney and Price's academic works on heritage discourses generally and the CPEIA specifically.

[8] McCartney, *supra* note 2 at 83. Karen Aird & Gretchen Fox, *Indigenous Living Heritage in Canada* (Canadian Commission for UNESCO's IdeaLab, 2020) [Aird & Fox]; Laurajane Smith, *Uses of Heritage* (London: Routledge, 2006) at 82 [*Smith*]; Fiona Macmillan, *Intellectual and Cultural Property: Between Market and Community* (London: Routledge, 2020) at 140 [*Macmillan*].

value, and whether the creator of the object is still living. Even with the implicit acknowledgement of some intangible significance, the CPEIA's primary concern is with tangible (tradeable) objects. George Nicholas *et al* argue "most or all tangible cultural resources have intangible components in the form of associations and significance" and, along the same vein, "many intangible resources have tangible components".[9] In both of these cases, the tangible and intangible are inextricably linked. Similarly, Laurajane Smith argues that all cultural heritage is intangible, though it may have tangible manifestations, and it is the vital intangible context that makes physical objects significant to a community.[10] Creating distinctions between tangible and intangible cultural heritage based on Western or settler ideas about heritage, private property, and property ownership allows cultural objects to be removed or alienated from their culture of origin. This alienation can be destructive not only because it removes the object from its vital cultural context, but also because it severs ties between a part of a culture and the community that created it.[11]

Pressure is mounting on cultural institutions and private collectors around the world to repatriate objects taken from colonies during the European colonial period. Perhaps most well-known is Greece's persistent demands to British parliament and the British Museum for the return of the Parthenon Marbles, which were removed from Athens in the nineteenth century by the British Lord Elgin. After decades of staunch refusal by the British Museum, the tide may be turning and reports have emerged of talks between the British Museum and the Greek government to return the Parthenon Marbles to Greece. Even in light of such talks, however, the topic is a contentious one. At the time of writing this thesis, a spokesperson for Prime Minister Rishi Sunak had recently

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[9] George Nicholas et al, "Intellectual Property Issues in Heritage Management: Part 2: Legal Dimensions, Ethical Considerations, and Collaborative Research Practices" (2010) 3:1 Herit Manag 117–147 at 118.
[10] Smith, *supra* note 8 at 3, 57.
[11] Macmillan, *supra* note 8 at 140; Laurajane Smith, "Discourses of heritage : implications for archaeological community practice." (2012) Nuevo Mundo Mundos Nuevos Nouv Mondes Mondes Nouv - Novo Mundo Mundos Novos - New World New Worlds, online: <http://journals.openedition.org/nuevomundo/64148> [Smith, "Discourses of Heritage"].

stated that there were no plans to amend the *British Museum Act*, which would be required to facilitate the return of the Marbles to Athens.[12] Other recent examples of successful repatriations and restitutions include the return of a collection of Benin Bronzes from Germany to Nigeria,[13] and the pledge from the Horniman Museum of Anthropology and Natural History in the United Kingdom to return its collection of Benin Bronzes.[14] These returns have propelled the restitution discourse among the public, where even celebrities are becoming active participants.[15]

Understanding Canada's domestic cultural heritage export regime and the colonial and capitalist discourses that animate its application is an important exercise in understanding and demonstrating how these regimes create barriers to restitution of objects not just for Indigenous peoples in Canada, but for communities around the world that were subjected to European colonialism. It is also demonstrative of how Indigenous peoples continue to encounter colonialism through the treatment of their cultural heritage, and how the modern Canadian government perceives "heritage" and the values that the government emphasizes when it comes to that perception. This is a significant step in understanding Canada's policy concerns with respect to heritage preservation, why Canada might be interested in preserving a certain type of heritage, and the barriers that such concerns create for cultural transmission and regeneration in Indigenous communities.

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[12] Tom Seymour, "Secret talks between British Museum and Greece to return Parthenon Marbles in 'advanced stages'", *Art Newsp* (5 December 2022), online: <https://www.theartnewspaper.com/2022/12/05/after-spending-200-years-in-the-british-museum-the-elgin-marbles-may-be-about-to-return-to-greece> [Seymour].

[13] Philip Oltermann, "Germany returns 21 Benin bronzes to Nigeria – amid frustration at Britain", *The Guardian* (20 December 2022), online: <https://www.theguardian.com/world/2022/dec/20/germany-returns-21-benin-bronzes-to-nigeria-amid-frustration-at-britain> [Oltermann].

[14] David Frum, "Who Benefits When Western Museums Return Looted Art?" *The Atlantic* (14 September 2022), online: <https://www.theatlantic.com/magazine/archive/2022/10/benin-bronzes-nigeria-return-stolen-art/671245/> [Frum].

[15] Sophie Lee, "How Kim Kardashian Unexpectedly Helped Return Stolen Artifacts—Twice" *Cult Mag* (3 January 2023), online: <https://www.culturedmag.com/article/2023/01/03/kim-kardashian-art-egypt-rome-artifacts> [Lee]; "'Monuments Men' Actor George Clooney Is Calling for the UK to Repatriate the Elgin Marbles to Greece", (8 March 2021), online: *Artnet News* <https://news.artnet.com/art-world/george-clooney-elgin-marbles-1949908>; *Museums: Last Week Tonight with John Oliver (HBO)* (New York: HBO, 2022).

Acknowledgement and Definitions

This work examines and critiques an area of Canadian settler law and addresses, in part, how that law encounters Indigenous peoples' property and heritage. As a white Canadian settler, I am not an expert in Indigenous legal orders or Indigenous peoples' conceptions of property and my intention is not to speak for or on behalf of Indigenous peoples in the geographic territory known as Canada. I do, however, hold space for Indigenous orders of law-making and property in this thesis, and I reference the work of a number of Indigenous activists and legal scholars in Canada, the United States, and Australia for their expertise in these areas.

Catherine Bell and Val Napoleon note that "[the] very terms "culture," "property," and "ownership" are Western legal, social, economic and political constructs".[16] Even the term "heritage" itself can be a contentious one in Indigenous communities because of its association with colonialism. Although not a central focus of my inquiry, it is helpful to note the implicit conceptual distinction between "culture" and "law" that exists in Canadian legislation and academic and political discussions about cultural property, which largely incorporates Western or settler definitions of those terms. For the purposes of this thesis, I have outlined my understanding of "culture", "cultural heritage", and "law" below, although my understanding of these concepts is admittedly significantly influenced by and borrows from the very systems that I intend to critique, particularly that of the Authorized Heritage Discourse ("AHD"), a discourse that I will discuss in further detail throughout this thesis.

Following the work of Naomi Mezey and Raymond Williams, I interpret culture as "signifying or symbolic systems,"[17] which are informed by the matrix of shared experiences,

[16] Catherine Bell & Val Napoleon, "Introduction, Methodology and Thematic Overview" in *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) at 6 [Bell & Napoleon].
[17] Naomi Mezey, "Law as Culture" (2001) 13:1 Yale J Law Humanit 35–67 at 41 [Mezey].

relationships, practices, and expressions (both tangible and intangible) among a group of people or community through which members of the community organize themselves and define meaning and identities. Culture can be both descriptive and procedural,[18] and it has a horizontal dimension – the application or experience of culture across a group of different people over the same period of time – and a vertical dimension – the application or experience of culture through generations over different periods of time.[19] Culture is not static and neither culture nor communities have hard boundaries. Indeed, communities and cultures are quite often internally inconsistent and dynamic.

Throughout this thesis, I use the terms heritage and cultural heritage largely interchangeably. For the purposes of this thesis, these terms have a corresponding definition to culture. The 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* ("2003 UNESCO Convention") includes a definition of "intangible cultural heritage" that provides a helpful starting point for this discussion, though this definition also has its limitations and is itself arguably informed by the AHD. In that Convention, intangible cultural heritage is defined as:

> the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.[20]

While this definition expressly applies to "intangible cultural heritage," in my view, it also aligns with a definition of the broader concept of "culture" generally that is helpful in grounding my discussion later in this thesis of culture and its relation to cultural heritage. Throughout this thesis

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[18] *Ibid* at 44.
[19] *Ibid*.
[20] *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2006, 2368 UNTS 1 (entered into force 20 April 2006) at Art. 2 [2003 UNESCO Convention].

I generally use the terms "cultural property" or "cultural objects" interchangeably to address tangible cultural outputs, and "cultural heritage" to refer to a broader idea that includes both the tangible and intangible aspects of culture. While I believe these distinctions are necessary to discuss cultural heritage laws in Canada, I want to take this opportunity to emphasize that such distinctions, in reality, are the product of the settler laws and systems and the interactions they have with cultural heritage.

I primarily engage with the European/settler discourse and definition of heritage, as this is the understanding of heritage as contemplated in the CPEIA and most other cultural heritage legal instruments. With that being said, there are many different heritage discourses and definitions within Canada including discourses that differ between Indigenous peoples and communities. For example, Karen Aird, a member of the Saulteau First Nation and the founding president of Indigenous Heritage Circle, describes "heritage" in Indigenous communities as being all-encompassing.[21] While settler understanding of heritage largely focus on the vertical dimension of culture and heritage, Aird and Gretchen Fox argue:

> Indigenous Peoples understand and describe cultural heritage according to their perspectives, traditions and languages. While creating one definition of Indigenous heritage is difficult, generally this would include ideas, experiences, worldviews, objects, forms of expression, practices, knowledge, spirituality, kinship ties, places and land valued by Indigenous Peoples. Each of these concepts is inextricably interconnected, holds intrinsic value to the well-being of Indigenous Peoples and affects all generations.[22]

Another idea that Aird and Fox explore is the idea of "living heritage", which they describe as: "the intangible elements [of cultural heritage], such as songs, stories, dance, teachings,

[21] Emily Boulet, "*Webinar: Indigenous Heritage Places and Perspectives*" online (video): *Youtube* , https://www.youtube.com/watch?v=mxzkRDoeI5c> [Boulet].
[22] Aird & Fox, *supra* note 8 at 4.

memories, knowledge and ceremonies – called living heritage – that give meaning to tangible heritage and which stand alone as heritage values".[23] They further argue:

> Indigenous cultures are primarily oral cultures, and as such, living or intangible heritage are the foundations of governance structures, legal traditions, important protocols and ceremonies, social structures, and specialized knowledge systems. These living traditions are unequivocally linked to the land and often cannot truly be understood outside that context.[24]

In describing heritage as "living", there is an inherent implication that heritage may change and grow over time. This understanding of cultural heritage, and heritage as espoused in the excerpt above, is fundamentally different than a European/settler understanding of heritage, and only the settler understanding of heritage is expressly incorporated into the CPEIA. To even engage with the system, in many cases Indigenous Peoples will have to flatten their understanding of heritage and culture to fit into a very rigid and narrow system.

The *Tr'ondëk Hwëch'in Heritage Act* (the THA) also discusses the idea of living heritage, and posits that traditional knowledge cannot be known but is rather lived and that "[y]ou have to be a First Nations person to understand".[25] The Act also explores the ideas of storytelling, living in a "good way", being part of the land and part of the water, place and identity, responsibility and survival, and relatedness.[26] There are no real corresponding ideas within the European/settler definition of heritage (or law) that can be found in heritage laws in Canada but especially the CPEIA.

"Law" is arguably a facet of "culture" in and of itself, in that it is a system of meaning-making and social organization that reinforces and reproduces intangible values. Much work has

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[23] *Ibid*.
[24] *Ibid*.
[25] *Tr'ondëk Hwëch'in Heritage Act*, Tr'ondëk Hwëch'in Generally Assembly Resolution 2016-08-28-01, proclaimed into force 28 August 2016 at 1 [THA].
[26] *Ibid*, at 1-2.

been written on the idea of law as culture[27] and while this is not a central focus of my thesis, it is the undercurrent over which I have organized my discourse analysis and argument. For the purposes of this project, I define "settler laws" to be those legal instruments and institutions that colonial powers develop(ed) and adopt(ed) in Canada. Following a long period of colonial domination over Indigenous peoples, modern settler laws still typically privilege the experiences, interests, and values of settlers over those of Indigenous peoples. These laws either actively or implicitly subordinate Indigenous peoples and their laws, culture, customs and traditions. In outlining this definition, I have relied on works by John Borrows, Mary Eberts, and Jonathan Paquette *et al*.[28] The settler laws with which I will engage in this project are the system or systems of rules and practices adopted by states and international organizations of states that regulate and/or protect "culture". These systems are also often concerned with ownership and property rights, as well as the ability to market and trade cultural objects. The CPEIA and the 1970 UNESCO Convention which are largely concerned with the international movement of tangible or moveable cultural property, are examples of "law" in this context. Other examples of law with which I engage are the application of the CPEIA as found in decisions from the Federal Court of Appeal and the CCPERB.

Methodology

In this thesis, I conduct a discourse analysis of the CPEIA and the legal documents that came before it to trace the existence and influence of colonial discourses in the application of the legislation. In doing so, I rely on Mathilde Pavis, Laurajane Smith and Emma Waterton's definition

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[27] Mezey, *supra* note 17.

[28] Jonathan Paquette, Devin Beauregard & Christopher Gunter, "Settler colonialism and cultural policy: the colonial foundations and refoundations of Canadian cultural policy" (2017) 23:3 Int J Cult Policy 269–284; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Mary Eberts, "Not Empty of Laws: Indigenous Legal Orders and the Canadian State" in *Decolonizing Law: Indigenous, Third World and Settler Perspectives* (London: Routledge, 2021).

of discourse. Pavis argues "that 'what goes on *textually*, or within any act of communication, can tell us something about what is going on *socially*', how 'the negotiation of social relationships and relations of power' take place".[29] This thesis is premised on the idea that prevailing ideas about heritage, and the discourses that take place around the formation of cultural heritage laws are reflective of power dynamics be settler states and their governments and subaltern communities within those settler states. In every case that I have examined, former colonial powers and settler governments actively subordinate alternative conceptions of heritage by limiting the individuals and institutions that are permitted to participate in law making and by limiting the discourses that they accept as valid. The CPEIA regime, for example, assigns power to the legislation itself and especially to the *Cultural Property Export Control List*, CRC, c 448 (Control List) to define what elements of culture warrant protection. Most especially, the CPEIA regime assigns power to cultural heritage experts, who through this regime become legal actors empowered to make legal pronouncements over culture, its meaning, and its value.

As noted above, in this thesis, I have conducted a discourse analysis of the CPEIA and its predecessors with a view to understanding how colonial and capitalist interests concerning heritage and property ownership were incorporated into and continue to animate the application of the legislation. In Chapter 2, I engage with academics that have written extensively about cultural heritage and trade in cultural objects. These academics largely fall into two camps, although there are significant outliers with whom I also engage. The first camp argues that there is something inherently special or unique about cultural heritage (or, more precisely, cultural property) that warrants protection but that protection should be limited with a view to minimally impairing trade

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[29] Mathilde Pavis, "ICH and safeguarding: uncovering the cultural heritage discourse of copyright" in Charlotte Waelde et al, eds, *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Cultural Heritage* (Edward Elgar Publishing, 2018) 296 at 305 [Pavis].

activities of the art and antiquities market. The second major camp argues that culture and cultural heritage are an ongoing process of identity creation where present interpretations are a significant component, and that tangible cultural heritage is an integral component of and inseparable from intangible heritage. As such, cultural heritage protection, where necessary, should be crafted with an understanding that the tangible and the intangible should not be separated. From this second camp, I have relied heavily on the works of Smith and Macmillan to establish my theoretical framework for this thesis, particularly with respect to their work with the AHD, which I discuss in detail in Chapter 2.

In Chapter 3, I chart the development of the concept of heritage and the AHD in Europe during the colonial period and plot key elements of the AHD through historic legal documents that deal with cultural objects. Chapter 3 culminates in an examination of how strands of the AHD and the colonial discourses that underpin it find their way into the CPEIA in its current form. I place a specific emphasis on the development of heritage and heritage discourses in the United Kingdom and canvass the rise in public museums and their use in the United Kingdom to perpetuate colonial and imperialist narratives about the British Empire and British colonies in the British colonial imagination. Throughout this chapter, I aim to show how museums and other cultural institutions were leveraged by political actors and themselves became part of the political act of interpreting and presenting heritage as a means of justifying new ideas about race, civilization and colonialism. I then turn to the Waverley Report, which later formed the basis of Canada's CPEIA. I argue that the conclusions drawn in the Waverley Report are the result of a period of postcolonial anxiety towards waning British hegemony and that the Report, the people and institutions with whom the committee sought to engage, and the Waverley Report's conclusions are a reflection of the AHD. Later in Chapter 3, I chart the development of the the 1970 UNESCO Convention and the

discussions surrounding cultural property that were taking place in international law in the 1960s and 1970s. I highlight that although postcolonial countries raised repatriation as a primary concern during the drafting of the 1970 UNESCO Convention, the concerns and desires of former colonial powers to keep the cultural objects they purchased and plundered during colonialism were given precedence over the postcolonial states' desire to reclaim their own cultural objects and renew their cultural identities.

The discussion of the rise of European heritage discourses, the Waverley Report and the 1970 UNESCO Convention leads into a discussion of the parliamentary debates surrounding the adoption of the CPEIA in the 1970s and subsequent amendments to the legislation and the guidelines for applying it in the 1990s. Here, I argue that the fundamental interests of colonial Britain that are reflected in the European heritage discourses, coupled with Britain's post-WWII heritage interests are not only repeated, but adopted almost entirely during the discussions surrounding and the drafting of the CPEIA. These discourses and interests still find themselves in the Canadian legislation to this day and I argue are reproduced each time the CPEIA is applied.

After tracing the historical developments of the CPEIA and its predecessors in Chapter 3, in Chapter 4 I examine the text of the CPEIA to demonstrate how the concerns espoused by the AHD and incorporated into the Waverley Report, the Waverley Criteria, the 1970 UNESCO Convention and the early debates surrounding the CPEIA continue to animate the modern CPEIA's application and Canadian heritage concerns more broadly. Here, I argue that the way that legal and political actors conceive of and debate concepts such as heritage have a material impact on subaltern communities and particularly Indigenous peoples in Canada when only certain voices are permitted to contribute to lawmaking. More specifically, I argue (and Chapter 4 will show) that the colonial discourses about heritage and property form the basis of the CPEIA to the

exclusion of other heritage discourses in such a way that the legislation itself contributes to the artificial division of a tangible cultural object from the intangible relationships and practices that give it meaning in the first place.

Chapter 2: Literature Review

This thesis examines the prevalence of the colonial discourses that underpin the CPEIA. In doing so, I have engaged with authors with a broad spectrum of views about cultural heritage and cultural property. Paola Fillippucci argues that modern narratives about "heritage" and "the related idea that the past reflects and sustains the unique identity of collectivities and places emerged with the idea of nation in Europe between the eighteenth and nineteenth century".[30] Throughout this thesis, I argue that Euro-centric ideas about heritage and Western conceptions of property underpin not only the international instruments that the United Nations has adopted for the purposes of safeguarding tangible and intangible cultural heritage, but also that it underpins legislation closer to home and, in particular, the CPEIA. Because the CPEIA is the primary source of cultural heritage protection in the law at the federal level for moveable objects, the privileging of these colonial discourses forces Indigenous peoples to conceptualize their own heritage through a colonial lens when they encounter the CPEIA.

Cultural property law in Canada is dominated by colonial and neo-liberal discourses that create divisions between tangible and intangible cultural expression, and the contexts in which they were initially created. At the federal level, the CPEIA is the primary cultural property protection statute, and it sets the parameters for when cultural objects may be exported from Canada and when such export should be suspended (although not indefinitely). The CPEIA's starting point is what Laurajane Smith refers to as the Authorized Heritage Discourse. Smith's contention that the AHD has become the dominant heritage discourse in Western society and privileges a notion of heritage that divides intangible heritage from tangible heritage and treats tangible heritage like property is applicable in Canadian society and Canadian heritage lawmaking

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[30] Paola Filippucci, "A French place without a cheese: problems with heritage and identity in northeastern France" (2004) 44 Focaal 72–87 at 83 [Filippucci].

as well. The AHD informs the CPEIA's conception of heritage and the past, which in turn determines how the Act interacts with cultural objects by making normative judgments about what kinds of objects require protection, and what type of protection is required. The CPEIA takes for granted certain ideas about heritage and property, principally that cultural objects *are* a form of property and that as a form of property, cultural objects are alienable. This is, in turn, informed by a broader private property discourse that is the product of European, colonial and capitalist ideologies.

In the chapters that follow, I will examine the CPEIA in its historical context and trace the evolution of the dominant heritage discourses that were happening alongside the development of CPEIA and how those discourses are reproduced each time the CPEIA is applied to an export application. In this chapter, I focus on the dominant ideas about heritage and cultural property in legal scholarship. While there are many positions within the field, I have identified two prevailing positions of interest for the purpose of this thesis. The first position embraces many elements of the AHD without criticism and is represented in the work of John Merryman, Robert Paterson and Dennis Karjala. These academics acknowledge that there is something inherently special about cultural property that warrants additional protection in law, but also privilege Eurocentric notions of property ownership. They argue that collectors, dealers, and owners of cultural objects (in the broad Western private property law sense of the term) must still have access to markets where they can sell and purchase cultural objects. Their view contains obvious strands of the AHD, as discussed more below, and in particular, they explicitly and implicitly structure their arguments around differential treatment between tangible cultural heritage and intangible cultural heritage. Representing the second prevailing view, scholars such as Laurajane Smith, Fiona Macmillan, Rosemary Coombe, Rebecca Tsosie, and Dorothy Lippert argue that, rather than being a vestige

of a time past, cultural heritage is an ongoing process of identity creation that encompasses tangible and intangible aspects of heritage, which are inseparable. These authors take a critical approach to heritage discourses and work at once within and outside the AHD. Coombe and Tsosie in particular highlight the protection of and control over cultural heritage as being part of a set of cultural rights, rather than economic rights, based on the principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[31] They further argue that the principle of Indigenous self-determination requires that Indigenous peoples be allowed to determine how they protect and use their own cultural heritage. This argument is also echoed in the work of Indigenous activists in Canada, such as Aird, who argues that denying Indigenous peoples the ability "to interpret and caretake their cultural heritage"[32] impacts Indigenous peoples' human rights.

Much of the existing scholarship on cultural property law and policy in the international context can trace its origins to discussions about the Elgin/Parthenon marbles in the late 1980s and into the 1990s and 2000s. Merryman was prolific during this time and influential in the development of the concept of "cultural property internationalism". Merryman and other cultural property internationalism scholars support the idea that all cultural property is important to the culture and history of all humankind, regardless of its place of origin and, arguably, regardless of the context in which it was created. To these scholars, "everyone has an interest in the preservation and enjoyment of cultural property."[33] In Merryman's case, this concept served as the grounding of an argument in favour of the Parthenon Marbles remaining in the British Museum, where they have been housed since the British Lord Elgin took them from Greece in the early nineteenth

[31] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007) [UNDRIP].
[32] Aird & Fox, *supra* note 8 at 9.
[33] John Henry Merryman, "Cultural Property Internationalism" (2005) Int J Cult Prop, online: <https://www.proquest.com/docview/232048061/abstract/62D2C2873BA9425CPQ/1> [Merryman].

century while Greece was under the control of the Ottoman Empire. This type of argument also underpins the *British Museum Act* of 1963, and Britain's staunch refusal to return not only the Parthenon Marbles, but a host of other cultural objects taken from colonies and former colonies (whether purchased or plundered) during the colonial period and beyond.[34]

Merryman's views not only reflect central concerns of the AHD – such as the discourse surrounding the need to preserve the old and the grand and to pass these objects on to future generations in their present form – but they also reflect the values incorporated into earlier international instruments adopted for the purposes of "safeguarding" cultural property, including the CPEIA. Of particular note, while Merryman acknowledges that there is *some* inherent quality of or associated with cultural property that makes it special or different from other forms of property, he also favours neoliberal and Western ideas about private individual property ownership, and a right to trade such property. Merryman argues that the trade of tangible cultural objects should be regulated, but that such regulation should be narrowly applied to promote the "proper international circulation" of tangible cultural property. This view is dismissive of the notion that tangible cultural heritage is inextricably linked to the culture from which it originated if it considers such an idea at all. The argument also supports the notion that a cultural object may have a sacred, special or otherwise significant meaning to the creator(s) of the object, or to a group

[34] This position recently appears to be softening among some museums in the UK. Notably, the Horniman Museum of Anthropology recently announced its decision to return the Benin Bronzes to Nigeria, Additionally, a "collection of regalia taken from the Ethiopian empire by the British in 1868 was returned in 2021" (see Frum, *supra* note 14). With that being said, Prime Minister Liz Truss, as she was then, rejected a suggestion by the chairman of the British Museum, George Osborne to enter into a long-term loan agreement with Greece that would see the Parthenon Marbles physically repatriated to Athens. (see: Taylor Dafoe, "New U.K. Prime Minister Liz Truss Says She Does Not Support Repatriating the Parthenon Marbles to Greece" Artnet News, October 2022). At the time of writing, a spokesperson for the current British Prime Minister Rishi Sunak also recently confirmed that there are no current plans to amend the *British Museums Act*, which is necessary to facilitate a return of the Marbles to Greece (see Seymour, *supra* note 12).

in which the object originated, but the interest of all humankind in such an object is at least equal to if not greater than the interest of that particular group.

Although Paterson is at times critical of Merryman, his views largely align with the trade or market-focused rhetoric that Merryman espouses, particularly with respect to what Paterson deems to be intangible cultural property. Paterson has written extensively on cultural property as a facet of trade and as it intersects with Canada's trade obligations under the World Trade Organization regime. He is often overtly critical of increased trade restrictions on tangible cultural property, and/or the recognition of a set of rights or obligations that would grant Indigenous peoples some measure of control over how their culture is used by non-Indigenous peoples. Paterson is particularly critical of proposals to recognize any form of property or legal protection of intangible cultural heritage where it may have the effect of taking material or knowledge out of the public domain, or limiting its permitted uses within the public domain.

In their 2003 article "Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples", Paterson and Karjala argue that a "broad and growing"[35] public domain must be maintained, which includes the intangible culture of Indigenous peoples. Their argument(s) echo some of the rationales that Merryman has espoused which, in his view, justify the adoption of cultural property internationalism with respect to tangible cultural heritage. On their view of the public domain, Paterson and Karjala write:

> We must […] be cautious in too rapidly seizing on the notion of intellectual property rights as a general mode of protection for intangible knowledge arising out of a given cultural heritage. It is important that our economically dominant Western culture not take by stealth or deception that which a particular indigenous group wishes and has sought to keep secret. However, it is also

[35] Robert K Paterson & Dennis S Karjala, "Looking beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples Symposium: Traditional Knowledge, Intellectual Property, and Indigenous Culture" (2003) 11:2 Cardozo J Int Comp Law 633–670 at 649 [Paterson & Karjala, "Looking beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples Symposium"].

> important that indigenous groups recognize the fundamental role of individual freedom (from government regulation) in modern democratic societies. The emphasis on a broad and growing public domain is not simply utilitarianism, unless that term is defined in the broadest sense to include the utility of a growing and diverse cultural environment. Our culture greatly benefits when Picasso brings elements of African art into his own or Van Gogh does the same with Japanese art. Indigenous cultures also benefit from the broad and vibrant public domain that has resulted from the time-limited nature of our intellectual property rights. Many drugs, tools, and industrial processes were once patented and are now free all over the world for use or further adaptation by others, including indigenous peoples. A whole canon of cultural works from the Greek playwrights to early 20th century composers remains free for the taking by anybody. People all over the world, from nearly every culture, benefit from this rich public domain of intellectual property. We must at least pause before reducing the public domain solely on the ground that some of it belongs to a specifically identifiable cultural heritage.[36]

Notwithstanding their recognition that a "dominant Western culture" should not "take by stealth or deception that which a particular indigenous group wishes and has sought to keep secret,"[37] Paterson and Karjala take an exceedingly Western/Eurocentric approach to intellectual property, cultural property, and the public domain. Elsewhere in the article, they seem to acknowledge that some level of protection over the physical is necessary, whether that is geographic areas or cultural objects, but they argue strongly against treating tangible and intangible cultural heritage as being inextricably linked. In fact, when revisiting their original 2003 article in 2017, Paterson and Karjala conclude:

> that a regime of perpetual rights in the indigenous group from which the work [intangible cultural heritage in the public domain] is derived is both practically impossible and theoretically unsound. Indigenous cultural tradition must in certain respects give way to the modern creative spirit.[38]

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[36] *Ibid* at 648-649.
[37] *Ibid*.
[38] Dennis S Karjala & Robert K Paterson, "The Case Against Property Rights in Old Intangible Indigenous Cultural Property" (2017) 15:2 Northwest J Technol Intellect Prop 1–33 at 3 [Karjala & Paterson].

The modern creative spirit in this context is almost certainly the modern creative spirit as understood through a lens of Western culture.

Paterson and Karjala's position represents a very Merryman-esque stance, whereby they are reluctant to remove information or material from the public domain on the basis that it *may* benefit all humankind. It should not escape notice that two examples Paterson and Karjala have used to demonstrate how humanity benefits from a "broad and growing public domain" include two European artists, Picasso and Van Gogh, appropriating cultural heritage from non-Western societies and, in the case of Picasso, appropriating cultural heritage from peoples that were historically subject to European colonialism in a movement that was called "primitivism". Modern critics of Picasso's primitivism and subsequent cubism movement have highlighted that Picasso and other primitivist artists' admiration of traditional forms of art from Africa, the South Pacific and Southeast Asia "was not synonymous with respectful appreciation. cultural inspirations were flattened to fit the rigid colonial lens".[39] The relationships between the artists and their human models could also be exploitative in ways that mirrored the colonial relationships throughout the world that allowed these artists to travel and take inspiration from colonies. Paul Gauguin, for example, moved to Tahiti at the end of the nineteenth century and produced works that were inspired by Tahitian culture but also "oversimplified and eroticized, often depicting Polynesian women in the nude".[40] He also engaged in sexually exploitative relationships with young Tahitian girls.[41] This type of artistic and physical exploitation should not go unacknowledged in a

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[39] Dhriti Gupta, "Primitivism: Cultural Appropriation in the Art World", online: *Partial* <https://blog.partial.gallery/primitivism-cultural-appropriation-in-the-art-world/> [Gupta].
[40] *Ibid*.
[41] Javier Pes, "How Curators Are Addressing Gauguin's Dark Side in a New Show at the National Gallery in London" *Artnet News* (10 October 2019), online: <https://news.artnet.com/art-world/gauguin-metoo-national-gallery-1672810> [Pes].

discussion of European and settler artists borrowing from other cultures to create new forms of art, though it is notably absent from either of Paterson and Karjala's 2003 or 2017 articles.

Paterson and Karjala also fail to meaningfully grapple with the history of colonial violence that allowed much of Indigenous cultural heritage to end up in the public domain in the first place, not least of which is the treatment of intangible cultural heritage as a form of property capable of commodification. In fact, the only acknowledgement of the systemic disadvantages that continue to face Indigenous communities in Canada is an implicit acknowledgement that Indigenous communities are often "poor" in response to Kristen Carpenter *et al*'s work, who, according to Paterson and Karjala:

> offer the notion of "stewardship" as a limitation on ownership rights in cultural property, both tangible and intangible, so that an "owner" of property might not necessarily be able to use it to the full extent otherwise allowed, but would negotiate with relevant cultural groups or their representatives over uses that impinge on aspects of the group's cultural heritage that the group has an obligation to maintain.[42]

Carpenter *et al* highlight that "[t]he harsh reality is that the vast majority of the world's indigenous peoples reside in the developing world and are among the world's poorest"[43] and present their stewardship position in part as a way to economically empower Indigenous communities to be able to benefit financially from their own cultural outputs. Paterson and Karjala argue that "[i]t is insufficient to simply say that the descendants of knowledge creators are poor so we should give them permanent exclusive rights to commercialize such knowledge"[44] and that "the problem of poverty […] cannot be meaningfully addressed through, ad hoc recognition of intellectual property rights in what is otherwise public-domain information".[45] Interestingly,

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[42] Karjala & Paterson, *supra* note 38 at 4.
[43] Kristen A Carpenter, Sonia K Katyal & Angela R Riley, "In Defense of Property" (2009) 118:6 Yale Law J 1022–1125 at 1103 [Carpenter *et al*].
[44] Karjala & Paterson, *supra* note 38 at 13.
[45] *Ibid* at 14.

despite advancing this argument, Paterson and Karjala do not propose an alternative means for settler societies or Indigenous societies to address historic wrongs that might help to lift many Indigenous peoples out of poverty. They also fail to meaningfully grapple with the fact that a history of colonial oppression that continues through legal institutions that privilege settler legal concepts, such as the public domain, are exactly the structures that force Indigenous peoples into the social and economic margins.

In both their 2003 and 2017 articles, Paterson and Karjala argue that, rather than recognizing a right of Indigenous peoples to have control over the use of their cultural heritage, "legitimate concerns of indigenous people can be accommodated without going to the extreme of recognizing new intellectual property rights, either through modest reinterpretation of existing legal regimes concerning contract, privacy and unfair competition law".[46] Alternatively, they propose "carefully tailored by general statutory amendment or incrementally developed common law principles aimed at leveling what might otherwise be seen as an unfair playing field".[47] In my view, both of these suggestions are problematic in that they still force Indigenous peoples to effectively accept a legal regime imposed upon them by settler governments and essentially bargain for their own cultural heritage within a system that fails to recognize or even really comprehend alternative legal orders that might have different views of heritage, property and culture.

On this type of issue and citing Coombe and Joseph Turcotte, Tsosie notes:

> there is a perceived overlap between intangible cultural heritage and intellectual property, which emphasizes proprietary models for protection. Not only is this understanding antithetical to many of the cultural interests that indigenous peoples have, but it inspires resistance on the part of states to adopt enforceable

[46] Paterson & Karjala, "Looking beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples Symposium", *supra* note 35 at 635.
[47] *Ibid*.

> protections for intangible cultural heritage. The nation states are unwilling to impair the dominant economic model for intellectual property protection. As a result, the nation states have treated indigenous peoples' interests as a form of moral claim, which can be protected by soft law in the form of recommendations for the conservation and protection of diverse forms of cultural expression.[48]

In my view, Paterson and Karjala's work represents exactly the type of resistance to adopting protections for cultural heritage that Tsosie highlights in the excerpt above. Paterson and Karjala over-emphasize the dangers of removing material from the public domain, and thus negatively impacting the economy, and under-emphasize the importance of meaningfully recognizing the interests of Indigenous peoples in their own culture. Paterson and Karjala largely ignore or dismiss arguments in favour of Indigenous self-determination with respect to cultural heritage. They are seemingly only willing to accept that Indigenous peoples may have an interest in their own cultural heritage, and such interest should be protected only to the point where the protection begins to impact the continuing operation of the capitalist economy. This is evident not only in Paterson and Karjala's discussions of the importance of the public domain and the principles underlying a "free and democratic society", but also their advocacy that intangible cultural heritage and tangible cultural heritage remain strictly separate. Paterson and Karjala seem to be operating under the premise that restrictions on the use of intangible cultural property, specifically that of Indigenous peoples, will have a far greater disruptive impact on the capitalist economy through its encroachment on the public domain. It is also worth noting, as Tsosie points out, "according to UNDRIP, it is unjust to refuse to recognize indigenous norms purely because they might conflict with the interests of the dominant society."[49]

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[48] Rebecca Tsosie, "International trade in indigenous cultural heritage: an argument for indigenous governance of cultural property" in Christoph Beat Graber, Karolina Kuprecht & Jessica Christine Lai, eds, *International Trade in Indigenous Cultural Heritage Legal and Policy Issues* (Edward Elgar Publishing, 2012) 221 at 233 [Tsosie].
[49] *Ibid* at 228.

Existing at once inside and outside the debates I have outlined above, Catherine Bell has written extensively on the cultural heritage of different Indigenous peoples in Canada and the encounters of cultural heritage with Canadian law. Bell is particularly interesting because she often acknowledges the issues inherent with viewing cultural property through a Western property ownership lens, particularly when it comes to Indigenous peoples' cultural property. However, Bell also takes a *de facto* reconciliation approach to cultural property in that she generally proposes working within the current settler legal system that exists in Canada to facilitate Indigenous peoples' claims for the restitution or repatriation of certain cultural objects. In "International Movement of First Nations Cultural Heritage in Canadian Law," for example, Bell and Paterson canvass a number of case studies whereby First Nations engaged in negotiations with third parties to facilitate the return of cultural objects. Notwithstanding some successes in this process, Bell notes that:

> Some First Nations find it offensive that they have to purchase items that they consider to belong to them, particularly in the case of "sacred" material, material originally acquired in violation of Canadian or First Nations law, and items "found" and wrongfully removed from their traditional territories. Limitations legislation and other features of Canadian property law may recognize title in a vendor, but such title may be disputed by originating communities. Although sometimes a difficult choice in principle, partnering with Canadian institutions to obtain grants (and thereby enabling First Nations to maintain the position that they will not "buy back" their own property with their own funds) can prevent export and facilitate creative custodial agreements.[50]

Rather than proposing broad changes to legal regimes, or a recognition of Indigenous self-determination, Bell and Paterson instead (and for Paterson, again) recommend modest changes to the existing CPEIA that include a requirement to notify First Nations when their cultural property is subject to an export permit application, but no corresponding rights to veto the export or acquire

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[50] Catherine Bell & Robert K Paterson, "International Movement of First Nations Cultural Heritage in Canadian Law" in *Protection of First Nations Cultural Heritage: Laws Policy Reform* (Vancouver: UBC Press, 2009) at 82 [Bell & Paterson].

the object without further federal government intervention through the approval of grants, for example. They also make no meaningful proposal to change the composition of the CCPERB to better include Indigenous voices. In finding solutions to complex problems, Bell and Paterson argue that "the potential for a solution regarding the return of historically removed property is that the solution must necessarily take into consideration the diverse interests of the wide range of people affected, including collectors, dealers, indigenous peoples, scientists, artists, the general public, and nation-states".[51] This argument is in line with Paterson's earlier and later works, including with Karjala and again involves the balancing of interests of Indigenous peoples within a system that they did not necessarily agree to fall under.

Taking something of a middle ground approach between Merryman, Paterson and Karjala, on the one hand, and Macmillan, Coombe and Tsosie on the other hand, in "The Parthenon Marbles Revisited: A New Strategy for Greece," Nadia Banteka constructs an argument against broad forms of cultural property internationalism by building on Margaret Radin's theory of market inalienability and personhood. Banteka argues that "the history of a nation is intrinsically connected to the legacy of its ancestors. This legacy attaches to pieces of cultural heritage that survive at any given point in time, which constitutes the present."[52] With this as her starting point, Banteka proposes an "inalienability argument"[53] that "gives the country of origin a normative argument proposing a link between property and personhood against typical commensurate perceptions of property."[54]

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[51] *Ibid* at 99.
[52] Nadia Banteka, "The Parthenon Marbles Revisited: A New Strategy for Greece" (2015) 37:4 Univ Pa J Int Law 1231–1272 at 1234 [Banteka].
[53] *Ibid* at 1236.
[54] *Ibid*.

According to Banteka, “cultural property has acquired a unique status as a form of property – one that is real property enough in order to constitute tangible objects, and personal property enough to receive special protection status.”[55] This special protection status is wrapped up in the idea that cultural property becomes an extension of a group of people and their identity. Banteka’s argument hinges on the existence of a cohesive group of people with an interest in the cultural objects and practices that the group produces. The existence of the group is generally contingent on a shared past and shared experiences, with distinct group members who identify themselves as being part of the group and acknowledge the identity of other people as part of the group as well. Although Banteka notes that there may be “multiple layers of groups, and of groups within groups, interacting among one another in a plethora of social systems,”[56] the group that receives the most attention in her article is the nation state and she spends a significant portion of the article discussing a way forward for the coexistence of cultural nationalism and cultural internationalism.

Once a group has been established, Banteka argues that where certain categories of objects, or real property, become so integral to the fabric of the identity of that group, the loss of that object would give rise to a “type of pain […] ‘that cannot be relieved by the object’s replacement’”.[57] Further, the group cannot consent to “transactions that would alienate” a cultural object because “future generations would, by default, be unable to consent to transactions that could affect their own identity and culture”[58] Banteka highlights that this line of reasoning could be applied in the context of significant cultural objects, such as the Parthenon Marbles, that have allegedly been traded or sold legally in the past (albeit under dubious circumstances) to support calls for the return of those objects.

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[55] *Ibid* at 1235.
[56] *Ibid* at 1247-1248.
[57] *Ibid* at 1242.
[58] *Ibid* at 1243.

While Banteka's work presents some interesting proposals for a way forward, its limitations are substantial. First, while she acknowledges the possible existence of "groups within groups" (or communities within countries), she fails to meaningfully engage with the issues that such a reality presents. Banteka's approach overall is still a very statist one, and her proposal to leverage cultural nationalism with cultural internationalism fails to recognize, as Macmillan and Coombe note, that a smaller community within a state's borders may have no recourse or official claim to its own cultural property where the state or state's government determines that such a claim does not align with or is contrary to the state or government's perception of state interests.[59] Furthermore, whether an object is determined to be alienable or inalienable, the entire theory still hinges on a conventional Western understanding of property and Western property norms.

Tsosie and other scholars such as Coombe and Macmillan have written on cultural heritage as a facet of human rights, community and, to a lesser extent, personhood. In "International Trade in Indigenous Cultural Heritage: an Argument for Indigenous Governance of Cultural Property," Tsosie examines the concept of Indigenous self-determination as articulated in UNDRIP. Article 3 of UNDRIP recognizes that Indigenous peoples have a right to self-determination and that "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[60] Article 4 recognizes that Indigenous peoples "have the right to autonomy or self-government in matters relating to their international and local affairs, as well as ways and means for financing their autonomous functions"[61] in exercising their right to self-determination. Following the linguistic precedent as set out in UNDRIP, Tsosie argues for the recognition of "the rights of Indigenous peoples to their cultural heritage, including the right to

[59] Macmillan, *supra* note 8 at 69.
[60] UNDRIP *supra* note 31 at Art 3
[61] *Ibid* at Art. 4.

govern their cultural property and engage in trade with respect to aspects of their cultural heritage that they deem capable of alienation."[62] Her argument also echoes the argument in "Aboriginal Rights, Aboriginal Culture, and Protection," where Gordon Christie argues that cultural property protection measures regarding Indigenous cultural heritage should come from within the Indigenous communities.

Merryman's cultural property internationalism and Paterson and Karjala's views on the importance of maintaining a separation between tangible and intangible cultural heritage for market purposes, as I've already proposed, form part of Laurajane Smith's AHD. Smith defines the AHD as a discourse that:

> defines heritage as aesthetically pleasing material objects, sites, places and/or landscapes that are non-renewable. Their fragility requires that current generations must care for, protect and venerate these things so that they may be inherited by the future. The AHD assumes that heritage is something that is 'found', that its innate value – its essence – is something that will 'speak to' present and future generations and ensure their understanding of their 'place' in the world. The inheritance offered by cultural patrimony is the creation of a common and shared sense of human identity.[63]

According to Smith, there are certain hallmarks of the authorized heritage discourse that are central to its operation and show up in legal and policy instruments enacted to protect cultural heritage. First, the authorized heritage discourse appoints certain experts, such as archaeologists, as intellectual stewards of heritage for future generations, and the opinion of those experts supersedes the opinion of others with respect to the meaning of tangible cultural heritage.[64] Second, under the AHD, heritage is static and it "must be passed on to the future unchanged, so that the assumed meaning in inherent heritage, and the past and culture it represents, will not be

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[62] Tsosie, *supra* note 48 at 223.
[63] Smith, "Discourses of heritage", *supra* note 11.
[64] Macmillan, *supra* note 8 at 137. See also: Fiona Macmillan, "Heritage, Imperialism and Commodification: How the West Can Always Do It Best" (2017) 74:3/4 Eur Ethn 114–124 [Macmillan, "Heritage, Imperialism and Commodification"].

changed or challenged."[65] Finally, "heritage is about the construction of identity, specifically national identity."[66]

Although Smith notes that the AHD is not the *only* heritage discourse, she argues that it is the *dominant* discourse. Its influence can be found in legal cultural property instruments adopted by international heritage institutions, such as UNESCO and domestic state legislation. Like Fillippucci, Smith locates the origin of the authorized heritage discourse in Europe. She argues that it "originated in nineteenth and twentieth century European architectural and archaeological debates over the need to preserve the 'fragile' and 'non-renewable' past for 'future generations'".[67] Perhaps most importantly, Smith argues that the AHD "advocates a 'conserve as found' conservation ethic"[68] that places the value of a heritage object in the object itself, rather than the entire network of intangible practices and meanings. In effect, heritage value is innate within a heritage site or heritage object, and the object is the most significant part of the heritage. As a result, the AHD privileges tangible heritage objects over intangible heritage more broadly, and emphasizes "monumentality and the grand, the old and the aesthetically pleasing."[69] As noted, it grounds its authority in the experience and opinions of experts (specifically archaeologists and scholars from similar fields), and the experience and opinions of these experts are privileged over the communities within which the cultural objects originated.

Such a focus on what is visible and tangible is present throughout Merryman, Paterson and even Banteka's work. Merryman and Paterson in particular focus on "heritage" (whether tangible or intangible) as a noun, rather than a verb, and discuss how that noun fits within a Western market

[65] Smith, "Discourses of heritage", *supra* note 11.
[66] *Ibid*.
[67] *Ibid*.
[68] *Ibid*.
[69] *Ibid*.

economy. By contrast, scholars such as Macmillan build on Smith's AHD to evaluate and dispute the appropriateness of the current cultural heritage regime. In a series of works,[70] Macmillan traces the influence of the authorized heritage discourse through UNESCO and WIPO and the instruments they adopt that deal with cultural heritage. Building on Smith's contention that heritage is a verb, not a noun, Macmillan argues that there is a "mutually constitutive relationship between heritage and community,"[71] which "tends to reinforce the essentially intangible nature of all heritage"[72] and which the AHD largely ignores. Under the authorized heritage discourse, the only "community" that is recognized is the nation. Further, because it is a creation of Western imperial powers, the AHD is replete with "Cartesian dualisms – including those of nature and culture, tangible and intangible, moveable and immovable – which also locate heritage as always being in the past."[73] According to Macmillan, because international law is a reflection of the interests of former imperial powers in the post-World War II period, these principles found their way into the international law regime put in place for the protection of cultural property. I have argued that these principles have also found their way into Merryman, Paterson and Karjala's academic scholarship, and the CPEIA.

Similar to Macmillan's Cartesian dualisms, Genvieve Renard Painter argues that colonialism and settler laws rely on processes of categorization to: "'[…] name, locate and order the body of law' and, in doing so, fabricate the differentiation of law".[74] I discuss the concept of categorization and its presence in the CPEIA in more detail in Chapter 3 and Chapter 4, but it

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[70] Macmillan, *supra* note 8; Macmillan, "Heritage, Imperialism and Commodification", *supra* note 64; Fiona Macmillan, *Human Rights, Cultural Property and Intellectual Property: Three Concepts in Search of a Relationship* (Edward Elgar Publishing, 2008).
[71] Macmillan, *supra* note 8 at 75.
[72] *Ibid*.
[73] *Ibid* at 92.
[74] Genevieve Renard Painter, "When Is a Haida Sphinx: Thinking about Law with Things Special Issue: The Pop-up Museum of Legal Objects" (2017) 68:3 North Irel Leg Q 391–402 at 398 [Renard Painter].

should be noted at this stage that the Cartesian dualisms that Macmillan identifies throughout the AHD find their way into Canadian cultural heritage law and form the basis of the many categories of heritage and property that the CPEIA and the Control List incorporate and are concerned with. The CPEIA regime consistently takes cultural objects and categorizes them to differentiate between objects that require protection and those that do not, and further to determine what specific type of heritage a cultural object is, based on a rigid set of criteria as set out in both the CPEIA and the Control List.[75]

Macmillan further argues that because of its mutually constitutive relationship, cultural heritage is destroyed not just when physical objects are destroyed, but also when the vital link between heritage and community are severed.[76] Macmillan posits:

> When we talk about the destruction of cultural heritage today, there is a tendency in at least some parts of the discourse to identify this as an East/West, us and them phenomenon. The famous cases of the *Taliban* dynamiting the sixth century sites in Syria, especially but not only in Palmyra, are often analyzed in these terms. By thinking of the destruction of cultural heritage/property in this way, we, of course, betray the Western obsession with monumentality and tangibility, which has nurtured at the expense of a concept of cultural heritage/property as "a constitutive social process." However, if cultural heritage/property is understood as being such a process – and not just a collection of static material artefacts – then Western responsibility for its destruction, and not only in the post-colonial world, is breathtaking.[77]

Macmillan's criticism of the discourse about cultural heritage/property and its destruction is significant because it implicates almost all "Western" social, political, and legal instruments and institutions that engage in practices of separating physical cultural objects from their communities of origins and history.[78] While an immediate example that may come to mind is the practice of

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[75] McCartney, *supra* note 2 at 83.
[76] Macmillan, *supra* note 8 at 140; Smith, *supra* note 8 at 82.
[77] Macmillan, *supra* note 8 at 140.
[78] *Ibid* at 139.

displaying cultural objects behind a glass pane in a museum, Macmillan's critique applies equally to legal instruments and specifically the CPEIA that treat cultural objects as a potential commodity for sale or trade. This is a significant and major overarching flaw of the CPEIA. Rather than focusing on a wholistic concept of heritage as a continuous process wherein its tangible and intangible components are inseparable and provide meaning to each other, the CPEIA frames tangible cultural heritage within Western property and market concerns that allow for the differential treatment between the tangible and intangible. An object maintains its physical characteristics, but as it moves through the CPEIA regime layers of identities and hierarchies of interests are applied to the object such that it becomes further and further removed from its original context and culture. As an object moves through the CPEIA process, it ultimately reaches a point where it is viewed as an object of outstanding significance and national importance (as determined by the CPEIA), a commodity that can be used for tax benefits should the owner of the object decide to donate it to a museum, or a commodity that can be freely exported and sold. As these identities are privileged over its original cultural context, the link between the object and its community of origin is weakened or severed.

In a similar way to the UNESCO regime in Macmillan's analysis, I argue that the CPEIA is also a statist instrument and its conception of intangible cultural heritage largely only recognizes an object as being important to Canada, as a state, for nationalist purposes. This is evident in the threshold questions set out in the process of determining whether a cultural object will be approved for export, which are largely concerned with determining the object's "fair market value". In allowing the fair market value to play a part in dictating what deserves some form of protection, the CPEIA inherently incorporates neoliberal and capitalist values and imposes a market identity

onto cultural objects. The market identity, wrapped up in the object's estimated monetary value minimizes the connection between heritage and its community of origin.

As highlighted above, by creating a new market identity, the CPEIA regime finds a pre-existing object with its own history and cultural contexts/meaning already baked in and adds a new identity or identities to the object, which did not necessarily exist before. The CPEIA then engages with the object primarily through the lens of this manufactured identity. Though not writing about heritage legislation, specifically, Dorothy Lippert's work on heterotopias in archaeology provides helpful guidance on how this process works. Lippert notes that "[t]he practice of archaeology includes a series of events in which a group of objects is transformed from their initial identities as household goods, religious objects, or detritus of everyday life into artifacts"[79] and that by the time an object enters a collection, whether public or private, "it has gone through many different identities."[80] A similar process happens as an object makes its way through the CPEIA regime and is placed into categories by heritage experts and legal actors. Throughout the CPEIA process, different identities are layered upon the tangible object. It is no longer the object as it was originally intended, but also an object in a collection that is owned by an individual, a potential article that may be exported or traded, a tax write-off and, in the case that an export permit is denied, an object of outstanding significance and national importance. In its current form, the CPEIA uses the object's original context as a framing device or justification to keep the object in Canada, but only insofar as it can be placed in a public institution for the benefit of Canadians as a whole. Further, there are provisions in the CPEIA that ensure the economic interests of the individual applying for the permit are placed at the top of the hierarchy. The problems inherent with this process are

[79] Dorothy Lippert, "Building a Bridge to Cross a Thousand Years" (2006) 30:3/4 Am Indian Q 431–440 at 431 [Lippert].
[80] *Ibid* at 432.

discussed in more detail in Chapter 3 and Chapter 4 of this thesis but suffice it to note at this point that prioritizing the economic interests of the owners of cultural objects have created barriers for Indigenous peoples seeking to have their cultural heritage restored.

The hierarchy of identities of a cultural object and the priority treatment given to the economic interests of the owners of a tangible object is also a central part of Macmillan's work on UNESCO. Like the CPEIA, the UNESCO regime takes a strongly statist approach to the protection of cultural property and the parties the international regime is willing to acknowledge have standing to make claims to cultural objects. However, the statist approach also butts up against free trade ideologies as they relate to the circulation and trade of cultural objects:

> arguably running counter to this strongly statist approach, the ambit of the UNESCO regime is circumscribed by the dominance of free trade ideology and the associated importance of private ownership rights. One classic example of this is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property, which makes its provisions on the return of moveable cultural property subject to ensuring compensation for "innocent" purchasers and persons "who have valid titles" to the relevant artefacts.[81]

As noted, the existing CPEIA regime is very concerned with accommodating the needs/interests of people who are in possession of cultural objects – even those that were taken under dubious circumstances – so much so that it is content to let the interests of those people become a barrier to the return of cultural objects. This concern is reflected in the above quote from Paterson and Bell.

Outside the cultural property debate though still relevant for the discourse analysis that I propose in this thesis, Val Napoleon and Emily Snyder have written on the private property discourse. As a starting point, they propose that private property discourse looks at a system that

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[81] Macmillan, *supra* note 8 at 65.

actively subordinates Indigenous legal systems and worldviews and presents itself as a solution to the very problems that this creates, specifically with respect to the vast wealth inequality between Indigenous peoples and settler Canadians.[82] "Contemporary property discourse […] works to assert state property laws and Western private property regimes as superior and natural, thus perpetuating colonial narratives about the inferiority of Indigenous peoples, their laws and ideas regarding land and property ownership".[83] Napoleon and Snyder argue that although private property is likely here to stay, problematizing the discursive foundation of private property is a valuable exercise because doing so helps to illuminate how Western societies (including Canada) construct and structure private property norms. Once the foundation of these norms is better understood, it becomes possible to unravel the real, material consequences that these constructs and norms have on Indigenous peoples. They note: "Carol Rose argues that too often dominant notions of property are treated as natural – questions are asked about those who deviate from the norm (for example, by imagining property in different ways) and why they do so, but the norm itself remains unexplained."[84]

Paterson and Karjala do exactly this in their work – they take as a given that a broad public domain is a legal norm that benefits everyone but fail to dig into their own starting position to explain why that is the case, or to even highlight how Indigenous peoples, specifically, might benefit from a broad public domain if it is indeed such a beneficial construct.

Similarly, this thesis aims to uncover the norms that the CPEIA takes as a given to examine how those norms impact the treatment of physical manifestations of culture that the CPEIA

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[82] Val Napoleon & Emily Snyder, "Housing on Reserve: Developing a Critical Indigenous Feminist Property Theory" in Angela Cameron, Sari Graben & Val Napoleon, eds, *Creating Indigenous Property: Power, Rights, and Relationships* (Toronto: University of Toronto Press, 2020) at 42 [Napoleon & Snyder].
[83] *Ibid* at 43.
[84] *Ibid* at 85.

encounters. One such norm that Napoleon and Snyder highlight is that "Western property relations are very much about exclusion."[85] The CPEIA is also built on this exclusionary norm. For example, the CPEIA and its administrative mechanisms delineates who can and, perhaps more importantly, who cannot participate in the dispute process. It delineates what type of institution may make an offer to purchase a cultural object once it has been deemed an object of outstanding significance and national importance. It also implicitly endorses the exclusionary nature of museum, archive, library or gallery ownership of an object in that once the object enters the museum, whether it is on display for the public or placed in storage, there are a limited number of people (experts) who can interact with the object and the cultural institution sets the parameters of that interaction.

As noted above, Bell and Paterson propose that Indigenous peoples should do their best to work within the current settler legal system that exists in Canada to facilitate their claims for the restitution or repatriation of certain cultural objects. On a similar point with respect to land ownership, Napoleon and Snyder argue:

> The suggestion that Indigenous peoples' best option is to work within the Western private property regime rather than reject that very system implicitly suggests that Indigenous societies have a serious societal and intellectual deficit that can be dealt with only by importing constructs from another society. Also implicit is the idea that Western property constructs are universal and culture-free and so are harmlessly and easily transportable across societal and culture bounds without consequence.[86]

As Lippert's work on heterotopias suggests, cultural objects can have many concurrent identities including the identities that Indigenous peoples ascribe to them, and while this is true under the CPEIA regime the identities that best align with Canadian settler law ideas about heritage and property are the ones currently privileged in the hierarchy of these identities. To echo my earlier

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[85] *Ibid* at 86.
[86] *Ibid*.

criticism of Bell and Paterson's position above, there is a real unanswered question whether working within a settler Canadian system would actually address why it is important that these cultural objects be repatriated in the first place. This is particularly pressing where working within the system may require Indigenous communities to *purchase* their own cultural objects, to the benefit of the individual who purports to own it, and perhaps agreeing to a certain level of preservation and display of the object based on Western-inspired museum practices.

Taking this work as a starting point, in the next chapter I analyze the historical development of the concept of heritage in Europe and examine how European heritage discourses and the AHD especially are visible in the post-WWII legal developments regarding the protection of cultural objects through export restrictions and trade agreements. I specifically examine the process and debates behind the creation of the Waverley Report, the 1970 UNESCO Convention, and early versions of the CPEIA.

Chapter 3: History and Historiography – Heritage Discourses, the Use of Cultural Objects and Changing Societies

Introduction

To understand the colonial underpinnings of the CPEIA, it is necessary to grapple with the development of Western conceptions of heritage and their interface with colonialism and property discourse, and how these concerns made their way into the legal predecessors of the CPEIA. In this chapter I chart the rise of "heritage" through the nineteenth and twentieth centuries using Smith's AHD. I then apply the discourse analysis identified in Chapter 1 and Chapter 2 of this thesis to two historical documents: the 1952 Waverley Report and the 1970 UNESCO Convention. I analyze each of these documents through the lens of the AHD and highlight how significant concerns and components of the discourse are implicitly baked into both documents. Following an analysis of the development of these documents, I explore the parliamentary debates in Canada in the 1970s surrounding the adoption of the CPEIA and subsequent government discussions and debates about later amendments to the Act in the 1990s. As with my analysis of the Waverley Report and the 1970 UNESCO Convention, I analyze these discussions through the lens of the AHD.

This chapter aims to expose how the threads of colonial discourse through the AHD came to be incorporated into the CPEIA. I argue that the AHD and the modern definition of heritage were developed in Europe during the colonial period,[87] and heritage and the AHD became tools used to justify and reinforce European sovereignty over colonies.[88] This was made visible through cultural institutions, such as museums and galleries, which displayed cultural objects from colonies

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[87] Smith, *supra* note 8 at 17; Rodney Harrison, *Heritage: Critical Approaches* (London: Routledge, 2012) at 11, 43 [Harrison].

[88] Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2007) at 53 [Vrdoljak].

in European metropoles.[89] In this chapter, I also argue that the definitions of heritage that were developed through the AHD during the colonial period persisted in the post-World War II period and were expressly incorporated into the Waverley Report and its export control criteria. Those same colonial definitions of heritage were also a central concern of European states, Canada, and the United States during the negotiations leading up to and the drafting of the 1970 UNESCO Convention. Because these documents, and particularly the Waverley Report, ultimately became the basis of the CPEIA, those same colonial definitions of heritage, and colonial heritage concerns were also implicitly incorporated into the CPEIA itself. In that case, arguably each encounter that an object has with the CPEIA regime is an encounter based in colonial principles.

In the next chapter, I will assess the text of the CPEIA itself, its associated institutions, and recent applications of the CPEIA to export permit applications to show that the concerns and interests of Britain in the post-World War II period, the international law community in the 1970s, and a group of largely white, male politicians, collectors and dealers in Canada became incorporated into the CPEIA, which continues to be applied to this day.

The Rise of Heritage

The modern Western notion of heritage that informs Canadian and international cultural property/heritage law emerged in Europe in the nineteenth century among nations that were actively expanding their colonial empires – particularly in France, Britain, and Germany.[90] Smith highlights the mutual influence that colonial expansion, progress narratives and heritage and culture discourses had on each other during this period:

> The idea of progress took on a particular force at this time and both legitimized and reinforced European colonial and imperial expansions and acquisitions in the modern era. Through colonial expansion new dialogues about race

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[89] *Ibid*.
[90] Smith, *supra* note 8 at 17; Harrison, *supra* note 87 at 43.

> developed, and ethnic and cultural identity became firmly linked with concepts of biology or 'blood', and Europeans believed themselves to be representatives of the highest achievements of human technical, cultural and intellectual progress.[91]

At the same time that the idea of progress and these new dialogues about race and ethnic and cultural identity began to emerge, the idea that heritage is embodied in physical places and things also began to emerge and became incorporated into heritage discourses. This period also saw a rise in a desire by states to control their heritage narrative(s), which they did by controlling heritage sites and heritage objects.[92] Imperial states began to use public museums to display artifacts and cultural objects that were either purchased in or plundered from their and other colonies to craft visual narratives about the metropole's own heritage and the progress of humanity within the public colonial imagination.[93] By the mid-nineteenth century "the idea of the conservation of objects, buildings and landscapes became closely connected with that of the preservation of intellectual and cultural traditions".[94] Museums in particular crafted narratives of progress in the ways that they grouped cultural objects together (for example, fine art from Europe versus anthropological or ethnographic objects from the colonies), and how these objects were presented in conversation with each other, as being opposite ends of a progress spectrum.[95]

The rise in public cultural institutions in Europe and the placement of collections of cultural objects from colonies in those institutions created a corresponding need for professionals who could oversee these objects and their display. As Harrison notes, this period:

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[91] Smith, *supra* note 8 at 17.
[92] Harrison, *supra* note 87 at 43-44.
[93] Vrdoljak, *supra* note 88 at 11, 12, 53; Sonia Smallacombe, "On Display for its Aesthetic Beauty: How Western Institutions Fabricate Knowledge about Aboriginal Cultural Heritage" in Duncan Ivison, Paul Patton & Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) at 153 [Smallacombe].
[94] Harrison, *supra* note 87 at 44.
[95] Miriam Kahn, "Heterotopic Dissonance in the Museum Representation of Pacific Island Cultures" (1995) 97:2 Am Anthropol 324–338 at 335 [Kahn]; Lippert, *supra* note 79 at 433.

> saw the increasing professionalization of heritage practices through the widespread passing of property from private ownership to be held in trust in public institutions (such as public museums and organisations such as the National Trust) and the development of legislation to regulate both this process and the broader conservation of the material remains of the past in the form of objects, buildings and landscapes.[96]

The plunder and purchase of cultural objects from different colonies and their placement in visual conversation with European cultural objects left open a space and corresponding need for professionals to explain the significance of these objects and to create the visual conversations. Archaeologists, art and antiquities collectors, and museum curators became professional heritage spokespersons deemed to be equipped to tell the public what these objects were, where they came from and, perhaps most importantly, what they represented for the empire. As such, the heritage professionals appointed to oversee these institutions took on a central role in curating collections to craft a narrative about colonialism that took cues from the progress narratives noted above and helped to incorporate a state's colonial aspirations into its national identity.[97]

The professionalization of heritage and the emergence of heritage experts is a central concern of Smith's AHD and, as I discuss in more detail in the next chapter, is explicitly baked into the CPEIA through the incorporation and appointment of expert examiners and the CCPERB to oversee disputes over the export of cultural objects. As Smith notes, "one of the consequences of the AHD is that it defines who the legitimate spokespersons of the past are".[98] The AHD takes heritage and the past outside the realm of the general public and communities, which it deems to be far too amateurish to understand the *real* meaning of the past, and places it within the realm of who it deems are legitimate spokespersons: heritage experts. The AHD relies on the opinions of these heritage experts such as historians, anthropologists, architects and archaeologists to make

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[96] Harrison, *supra* note 87 at 44.
[97] Vrdoljak, *supra* note 88 at 42, 44.
[98] Smith, *supra* note 8 at 29.

official-sounding claims about what really happened in the past and what that means for the present and the future.[99] In relying on experts, the AHD and the laws that it influences diminish the ability of communities, and especially subaltern communities, to define their own understandings of and experiences with the past. Smith highlights this point when she notes that the AHD's preoccupation with expert opinions and the idea that experts in the present are stewards of heritage for future generations effectively gatekeeps communities from being able to meaningfully engage with the tangible components of their cultural heritage in the present:

> One of the other ways the AHD maps the authority of expertise is through the idea of 'inheritance' and patrimony. The current generation, best represented by 'experts', are seen as stewards or caretakers of the past, thus working to disengage the present (or at least certain social actors in the present) from an active use of heritage. Heritage, according to the AHD, is inevitably saved 'for future generations' a rhetoric that undermines the ability of the present, unless under the professional guidance of heritage professionals, to alter or change the meaning and value of heritage [objects,] sites or places. In disempowering the present from actively rewriting the meaning of the past, the use of the past to challenge and rewrite cultural and social meaning in the present becomes more difficult.[100]

The version of heritage that is espoused by the AHD is most concerned with the vertical dimension of heritage that applies through generations. It conceptualizes heritage as the "passing down" of cultural practices (intangible) and cultural objects (tangible), but the tangible and intangible are distinctly separate. The AHD and the legal instruments that it influences, such as the Waverley Report and the CPEIA, empower experts to become legal actors and make *de facto* indisputable pronouncements about cultural heritage under the guise of preserving heritage for the public and the future. I will discuss this point in greater detail in Chapter 4, but at this point, it should be noted that the rigidity of who can speak about heritage and the past with authority

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[99] *Ibid*.
[100] *Ibid*.

necessarily precludes heritage as being conceptualized as living heritage.[101] By limiting who can contribute to discussions about heritage (and cultural objects) these legal instruments effectively limit what officially constitutes heritage.[102]

As I discussed in Chapter 2, Macmillan argues that the AHD creates Cartesian dualisms that distinguish between "nature and culture, moveable and immoveable, tangible and intangible".[103] Cultural heritage must be fit within one of these categories, even where the fit is imperfect.[104] Where Smith and Macmillan argue that all heritage is intangible, the AHD creates systems such as the CPEIA where physical manifestations of heritage can be alienated from the network of intangible meanings, values, and relations in which the tangible object is embedded. It achieves this in part by relying on the opinions of cultural experts to determine what tangible objects are worth preserving. In the case of the CPEIA, experts are empowered to determine when an object is of outstanding significance and national importance such that it should be afforded some level of protection or preservation.[105] Their expertise also extends to market-focused determinations, such as determining the fair market value or what a fair cash offer for the object would be.[106] Cultural heritage experts may also participate in determining what category cultural objects fall into under the legislation, for example: distinguishing between an object of applied and decorative art from an object of fine art.[107] These distinctions thus reinforce a dominant mode of Western colonial thinking about the past, culture, heritage, and property.[108]

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[101] See: Aird & Fox, *supra* note 8 at 4.
[102] McCartney, *supra* note 2 at 84.
[103] Macmillan, *supra* note 8 at 91.
[104] Tsosie, *supra* note 48 at 233.
[105] *Cultural Property Export and Import Act*, RSC, 1985, c C-51 [CPEIA], at s. 11
[106] *Ibid* at s. 18, s. 30(3)
[107] *Canadian Cultural Property Export Control List*, CRC, c 448 [Control List], at Group IV, Group V.
[108] McCartney, *supra* note 2 at 68-69.

Macmillan's Cartesian dualisms are reflective of the process of categorization that Genvieve Renard Painter argues is fundamental to the creation and operation of Western/settler laws broadly. This way of thinking about the law as a process of categorization is also more narrowly applicable to Canadian cultural heritage laws as well.[109] For example, Canadian law distinguishes between moveable cultural property, which falls under the CPEIA regime and immoveable property, which falls under the *Historic Sites and Monuments Act*.[110] Further, the law implicitly places tangible and intangible cultural heritage into separate categories by virtue of the fact that tangible cultural heritage receives legislative protection (however imperfect, as this thesis aims to show), while intangible cultural heritage will only receive protection if it falls into an existing (additional) category of intellectual property. In Chapter 4 of this thesis, I drill further into the categories specific to the CPEIA to identify the legal categories and categorization processes that underpin its operation.

A significant feature of the AHD that has found its way into many international and domestic Western/European legal instruments that address cultural heritage/property is the treatment of tangible or material cultural heritage as private property and therefore alienable from its community and culture of origin.[111] According to Macmillan, in the post-World War II period, "the international legal regime for the protection of cultural heritage came to reflect occidental property law distinctions".[112] In more recent years, there have been attempts in international law to recognize cultural heritage as something that exists outside of these distinctions. For example, in UNESCO's adoption of the 2003 UNESCO Convention that addresses the safeguarding of intangible cultural property and the United Nations' adoption of UNDRIP, which includes a right

[109] Renard Painter, *supra* note 74 at 393.
[110] RSC 1985, c H-4.
[111] Macmillan, *supra* note 8 at 26, 32, 64.
[112] *Ibid* at 64.

to heritage. Macmillan undertakes a substantial analysis of the application of the 2003 UNESCO Convention and UNDRIP in in *Between Market and Community*. A similar analysis is outside the scope of this thesis; however, it should be noted (as Macmillan points out) the application of the 2003 UNESCO Convention and UNDRIP is imperfect and problematic, but their adoption at least represents some level of acknowledgement or recognition that heritage and its discursive implications have meaning outside of their European origin and context. More important to note for the purposes of this thesis is that Canada did not pass *The United Nations Declaration on the Rights of Indigenous Peoples Act*[113] until 2021, almost 15 years after UNDRIP's adoption at the UN and, to date, Canada has never become a party to the 2003 UNESCO Convention. Canada's main piece of federal legislation dealing with cultural property, the CPEIA, is still in effect a trade and tax act that relies on private property concepts and reinforces Macmillan's Cartesian dualisms, particularly with respect to tangible and intangible cultural heritage.

As noted above, the widescale removal of cultural objects from colonies and their subsequent display in museums in metropoles increased in tandem with the rise of the AHD. According to Ana Filipa Vrdoljak, European colonialism, but especially Anglo-American colonialism, "played an aggressive role in the collection and commercialisation of non-European cultural heritage".[114] In the Canadian context, specifically, Jennifer Kramer notes that "[p]ressures from Canada's Indian act, missionization, residential schools, and other assimilative techniques enables Native material culture to be collected as artifact or art and owned within a Western legal definition by institutions or private collectors."[115] Similarly, writing of Inuit in what is now

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[113] SC 2021, c 14.
[114] Vrdoljak, *supra* note 88 at 1.
[115] Jennifer Kramer, "Betting on the Raven: Ethical responsibility and Nexalk cultural property" in Jane Anderson, ed, *The Rutledge Companion to Cultural Property* (London and New York: Routledge Taylor & Francis Group, 2017) 152 at 155 [Kramer].

Northern Canada, Violet Ford notes "part of the colonization process was the loss of control over [Inuit] cultural heritage."[116] The corresponding collection by Europeans of cultural heritage and the loss of control over their cultural heritage that Indigenous peoples experienced under colonialism served a number of purposes. One of the most significant purposes was to place Britain and other European colonial powers on a spectrum of civilization where Western European societies occupied and represented the most advanced, most civilized end of that spectrum.[117] Displays of cultural objects from colonies also served to establish a national identity narrative whose reach incorporated imperial aspirations and colonial acquisitions among the populace in Britain. The cultural objects, displayed in museums and "drained of their context […] became vessels for the mythologizing of the dominant (imperial, national) culture. Central to such mythologizing was the (Western) standard of civilisation, and the assumed inevitability of European domination".[118]

The collection and display of cultural objects during the colonial period in the United Kingdom was a tangible and visible demonstration of Britain's imperial domination and sovereignty over the objects on display and over the colonized territories from which the objects were removed and the peoples who had created them. Collection and display practices also played an important role in the "promotion and representation of race, difference and power within the colonial project".[119] The colonial period also saw the rise of private collections, particularly among collectors in the United Kingdom, and a corresponding rise in movements to make the collections publicly accessible.[120] These collections of cultural objects, both private and public, served many

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[116] Violet Ford, "The Self-governing of Inuit Cultural Heritage in Canada: The Path so Far" in Alexandra Xanthaki et al, eds, *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges* (Brill, 2017) at 215 [Ford].
[117] Vrdoljak, *supra* note 88 at 53-54.
[118] *Ibid* at 8.
[119] *Ibid* at 7.
[120] *Ibid* at 6, 29; *Report of the Committee on the Export of Works of Art etc.* (UK: Committee on the Export of Works of Art, etc., 1952) [Waverley Report].

purposes. Vast collections of cultural objects, particularly those from non-European cultures and British colonies, served to demonstrate the power of the British empire. "[T]he physical possession of exemplary objects was a source of national wealth".[121] The displays in public museums and especially in the South Kensington Museum in London (now the Victoria and Albert Museum) "provided an opportunity for British writers and politicians to assert and reaffirm those elements they considered intrinsic to British national identity".[122] These displays and their supporters among government and other British elites in the colonial metropole served an educational purpose for the masses in Britain, where British elites and museum curators could educate the British public about the British empire, incorporate ideas about imperialism into the national consciousness and narratives about British nationalism, and effectively justify imperialism to the public.[123]

The Waverley Report

As outlined above, Britain's acquisition and display of cultural objects in both private and public collections helped inform its national image and represented Britain's imperial sovereignty over its colonies.[124] By the twentieth century, however, and especially after the end of the Second World War, British hegemony was waning, and new international superpowers were emerging. The United States and the private collections of wealthy American collectors had long been a destination for a significant number of cultural object exports from Britain, which many British observers viewed as a threat. Ironically, some went so far as to compare the American acquisition of British "treasures" to being looted, and to Napoleon Bonaparte's treatment of Italy and Spain

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[121] Vrdoljak, *supra* note 88 at 42-43.
[122] *Ibid* at 40.
[123] *Ibid* at 9.
[124] *Ibid* at 8, 12, 44, 53.

during the Napoleonic wars.[125] Accordingly, Vivian Wang argues that "the threat from America […] must be understood as the context for British movements to save its national treasures".[126]

Following the "long period of anxiety"[127] regarding the export and loss of cultural objects to overseas trade, in 1950 Britain's Chancellor of the Exchequer appointed the Committee on the Export of Works of Art, etc. (the Waverley Committee or the Committee). The Committee was appointed "to consider and advise on the policy to be adopted by His Majesty's Government in controlling the export of works of art, books, manuscripts, armour and antiques and to recommend what arrangements should be made for the practical operation of the policy".[128]

The interests of the Waverley Committee are clearly visible in the composition of its membership and the parties from whom it received evidence. The Waverley Committee's members included members of the British aristocracy (John Anderson, first Viscount Waverley and chairman of the Committee; David Lindsay, Earl of Crawford and Balcarres; Baroness Ruth Dalton, Member of Parliament and wife of the Baron Dalton),[129] heritage professionals (Professor Anthony F. Blunt, then the director of the Courtauld Institute; Professor Vivian Galbraith, a professor of history at Oxford; and Christopher E. C. Hussey, an architectural historian)[130] and an economist (Professor Lionel C. Robbins, an economist associated with the London School of Economics).[131] The Committee itself is the first layer of spokespersons whom the British government recognized for their expertise and ability to understand Britain's heritage interests with respect to the retention of some cultural objects and the permission to trade others. Given the

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[125] Vivian F Wang, "Whose Responsibility? The Waverley System, Past and Present" (2008) Int J Cult Prop, online: <https://www.proquest.com/docview/232049895/abstract/A85AD3A79121414CPQ/1> [Wang].
[126] *Ibid*.
[127] Waverley Report, *supra* note 120 at 2.
[128] *Ibid* at 1.
[129] *Ibid* at ii; Wang, *supra* note 125.
[130] Waverley Report, *supra* note 120 at ii; Wang, *supra* note 125.
[131] Waverley Report, *supra* note 120 at ii; Wang, *supra* note 125.

composition of the committee, it is fair to conclude that the British government was primarily concerned with the voices and expertise of members of the aristocracy and heritage professionals when determining how to address the export of cultural heritage.

The vast majority of "bodies or individuals" who gave evidence before the Committee were also heritage experts or institutions. These included museums such as the British Museum, the Victoria and Albert Museum (formerly the South Kensington Museum), the National Museum of Antiquities of Scotland, the Royal Scottish Museum, and the National Portrait Gallery; galleries such as the National Gallery in London, the Aberdeen Art Gallery, and the Walker Art Gallery; libraries such as the National Library of Wales, and the National Library of Scotland; as well as societies and associations such as the Antique and Art Dealers' Export Group, the British Antique Dealer' Association, and the Royal Numismatic Society.[132]

While the vast majority of contributors that the committee heard from were based in the United Kingdom, the committee also received evidence from a number of institutions outside of the UK, including: the William Rockhill Nelson Gallery of Art, Kansas City (United States), the Toledo Museum of Art (United States), the Philadelphia Museum of Art (United States), the Cleveland Museum of Art (United States), the Art Institute of Chicago (United States), the San Francisco Museum of Art (United States), the Metropolitan Museum of Modern Art, New York (United States), and Public Records (Canada). Notably absent from the list of contributors are any non-settler representatives from former British colonies or postcolonial states, despite the fact that many if not most of the cultural objects that would fall under this export regime would have originated in those places.

[132] Waverley Report, *supra* note 120 at 66-68.

After receiving evidence from interested parties and reviewing Britain's system of export controls, and the export control systems in countries including Italy, Austria, Greece, Egypt, France, Germany, the Netherlands, Spain, and Denmark, the Committee came to the following three conclusions:

> 96. The conclusions we draw are: —
>
> (i) That export control is best applied to a small number of objects of high importance, and becomes progressively less effective and more irksome the larger the number of objects it sought to control
>
> (ii) That great uncertainty and unfairness can result unless it is accompanied by a clear statement of policy and adequate safeguards
>
> (iii) But that, even then, the fact that it operates at so large a stage is bound to cause frustration and disappointment
>
> 97. For these reasons it seems clear that it ought only to be applied to limited categories of objects of high importance.[133]

The Waverley Report found near unanimity among its members and the parties who gave evidence in the position that "there were certain national treasures which should not leave the country".[134] Accordingly, the Waverley Committee found that some form of export control/protection over its national treasures was a necessity with the caveat that "in every case in which export is prevented, the owner must be assured of an offer to purchase at a fair price".[135] As in Canada's model, it is evident that the concerns of dealers and collectors, especially regarding monetary compensation, played a large role in crafting the Report and its recommendations. In fact, when canvassing what institutions may need financial support from the government to ensure

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[133] *Ibid* at 19.

[134] Interestingly, Canadian parliament experienced similar unanimous support when it introduced export legislation in the 1970s.

[135] Waverley Report, *supra* note 120 at 24.

they could purchase cultural objects, the Waverley Report expressly considers private collectors.[136] Notably, the Report credits private collectors for their vast collections and highlights that "it was the great *cognoscenti* [experts] of the past who brought to this country the works which we are now concerned to keep here".[137] The Report goes on to highlight that there were a number of private collectors in Britain at the time the Waverley Report was prepared, and they perform a sort of public conservation good by holding great works of art in their collections until such time as the government may make an appropriate offer to purchase them:

> Such collectors — and they still exist today — play and important part in keeping works of art in this country. They also help to spread a sound appreciation and understanding of the arts. In many cases, as in those mentioned above, their collections pass into public ownership, but even when this is not the case, they form a sort of reservoir which allows the State the opportunity of acquiring paintings gradually over a period of years, instead of being forced to do so on the first occasion when they come on the market.[138]

The Report thus concluded that "it is as most important to give the *bona fide* private collector as much help as possible".[139]

The Committee then highlighted its recommendations for the scope and extent of control, here it becomes clear that Britain was still interested in maintaining a broad and lively international trade in cultural objects. First, the Committee notes that the export regulations should be drafted and applied as narrowly as possible, using both the age of an object and its monetary value as threshold questions to determine whether an object should be subject to some form of export control. Second, the committee expressly found that the "notion of "national importance" in this

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[136] Waverley Report, *supra* note 120 at 28-29.
[137] *Ibid* at 29.
[138] *Ibid*.
[139] *Ibid*.

context is in fact a synthesis of aesthetic and cultural qualities, historical or sentimental associations with Great Britain or the Commonwealth, and rarity."[140]

Ultimately, the Committee recommended the following criteria that "those responsible should ask themselves in seeking to determine whether an object is of such national importance that its export ought if necessary to be prevented":[141]

1. Is the object so closely associated with our [Britain's] history and national life that its departure would be a misfortune?[142]
2. Is the object of outstanding aesthetic importance?[143]
3. Is the object of outstanding significance for the study of some particular branch of art, learning or history?[144]

Strands of the AHD are visible throughout the report, but especially in these criteria. The first criteria expressly refers to a community of interest, that being the nation state of Britain. The second criteria expressly privileges the aesthetic appearance of the tangible object and is not limited to those objects that originate in Britain. This criteria legitimizes what Jennifer Kramer describes as "looking relations" between the public and a cultural object. In this context, the public can appreciate an object as a curio, or something that is aesthetically nice to look at, without further engaging with the range of circumstances and contexts that gave rise to its creation or the colonial history that facilitated its presence in a British collection.[145] The public interest in accessing an object for its aesthetic appearance is thus privileged over claims that the community that created the object may have to it. Further public access to the object is also privileged over the context and

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[140] *Ibid* at 36.
[141] *Ibid* at 36.
[142] *Ibid* at 36.
[143] *Ibid* at 37.
[144] *Ibid* 38.
[145] Jennifer Kramer, *supra* note 115 at 155.

meaning that the community of origin ascribes to the object. Indeed, examples given of objects with "outstanding aesthetic importance" within the Waverley Report include the Greek Elgin (Parthenon) Marbles and the Assyrian Reliefs taken from what is now Northern Iraq.

Lord Elgin famously purchased the Elgin (Parthenon) Marbles from the colonial Ottoman Government in Greece during the nineteenth century. Similarly, the Assyrian Reliefs "were acquired by the [British] Museum in the late 1840s and 1850s as a result of the Treasury-sponsored archaeological expeditions of Sir Austen Henry Layard".[146] At the time of their acquisition, neither Greece nor Northern Iraq were part of the British Empire, but arguably imperialism and the relationship between two imperial powers – in both of these cases the British Empire and the Ottoman Empire – made the acquisition of both the Elgin Marbles and the Assyrian Reliefs possible. Shifting attitudes in the post-Napoleonic period changed how Europeans felt about overtly plundering cultural artifacts. According to Vrdoljak, "to purchase was condoned but to plunder was condemned, even though both opportunities were afforded by the same circumstances: civil unrest and foreign occupation."[147] Interestingly, such attitudes do not appear to have extended to Britain's treatment of cultural objects in its existing colonies, or regions over which Britain had colonial aspirations. Sonia Smallacombe notes "[d]uring the nineteenth and early twentieth centuries, Aboriginal and Torres Straight Islander cultural products and ancestral remains were robbed from Aboriginal graves and left the colonies in large quantities"[148] These objects subsequently "found their way into private collections or are used as government gifts or museum exchanges."[149] Similarly, the Benin Bronzes were brutally looted from the Benin kingdom in what

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[146] "3D-imaging the Assyrian reliefs at the British Museum: from the 1850s to today - British Museum Blog", online: *Br Mus Blog - Explore Stories Mus* <https://blog.britishmuseum.org/3d-imaging-the-assyrian-reliefs-at-the-british-museum-from-the-1850s-to-today/>.
[147] Vrdoljak, *supra* note 88 at 29.
[148] Smallacombe, *supra* note 93 at 153.
[149] *Ibid*.

is now Nigeria during a military attack on the Benin kingdom by British forces in 1897, shortly before the kingdom was annexed by Britain.[150] The vast majority of the cultural objects looted from Benin remain in the British Museum, many of which are still on public display, but there are also significant collections in Germany, the United States, and other museum collections in Britain.[151] Regardless of Britain's fluid attitude towards purchasing or plundering cultural objects, the export provisions were part of a concerted effort by the British government to maximize its internal, national collection of world treasures through export regulation, even where it had obtained those objects under morally objectionable circumstances at best and brutal violence at worst. Even as the British Empire was transitioning to a commonwealth, Britain clearly placed significant emphasis and value on the continued retention of the cultural objects it plundered and purchased during the colonial period and, in many cases, continues to display these objects to this day.

The 1970 UNESCO Convention

Turning to the broader international stage, after the Second World War the international art market grew and there was an increase in demand for the trade of "archaeological objects".[152] In 1969 Clemency Coggins noted that in the ten preceding years, "there [had] been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market."[153] Patty Gerstenblith, writing in 2017, credits the work of Clemency Coggins and Karl E. Meyer for bringing attention to the

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[150] Frum, *supra* note 14.
[151] *Ibid*; Oltermann, *supra* note 13; "Benin Bronzes", online: *British Museum* <https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/benin-bronzes>.
[152] Patty Gerstenblith, "Implementation of the 1970 UNESCO Convention by the United States and Other Market Nations" in Jane Anderson & Haidy Geismar, eds, *The Routelege Companion to Cultural Property* (London and New York: Routledge Taylor & Francis Group, 2017) at 70 [Gerstenblith].
[153] Clemency Coggins, "Illicit Traffic of Pre-Columbian Antiquities" (1969) 29:1 Art J 94–114 at 114.

widescale destruction of archaeological sites,[154] although in the years before 1969, countries that were once the colonies of European and the Ottoman empires had already begun to advocate for some kind of international legal intervention to help protect their cultural property.

By 1960 UNESCO had over 120 member states including a large number of postcolonial nations; these postcolonial states "expressed their resentment at the refusal of the colonial States to return cultural items which had been taken to those states, mainly for their museums, but also those acquired by individual citizens."[155] The adoption of some form of international legal instrument prohibiting the illicit trade of tangible cultural heritage was initially at the behest of countries in the Global South who were the "most victimized"[156] by illicit export and trafficking of cultural objects, including Mexico, Peru, Argentina, Brazil, Costa Rica, El Salvador, Guatemala, Guinea, India, and Peru.[157] Mexico and Peru, in particular, pushed hard for a cultural property convention at UNESCO. Like Britain, Mexico viewed the large art and antiquities market in the United States as a threat to its tangible cultural heritage and Mexico's (often Indigenous) cultural objects. However, while Britain was largely concerned with the export of treasures it held from around the globe to the United States, Mexico was concerned with the vast and increasing amounts of illegal excavations that removed artworks and antiques from historic sites in Mexico, which then made their way to the massive US art trade.[158]

In 1962, the International Council of Museums submitted its report *Technical and Legal Aspects of the Preparation of International Regulations to Prevent the Illicit Export, Import and Sale of Cultural Property* (the ICOM Report) at the request of the Director-General of

[154] Gerstenblith, *supra* note 152 at 70.
[155] Patrick J O'Keefe, *Protecting Cultural Objects: Before and After 1970* (United Kingdom: Institute of Art and Law Ltd., 2017) at 16 [O'Keefe].
[156] Sharon A Williams, *The International and National Protection of Movable Cultural Property A Comparative Study* (Dobbs Ferry, New York: Oceana Publications Inc, 1978) at 179.
[157] *Ibid* at 179; O'Keefe, *supra* note 155 at 16.
[158] O'Keefe, *supra* note 155 at 18.

UNESCO.[159] At the 12th General Conference that year, the Working Party on International Regulations Designed to Prohibit and Prevent the Illicit Export, Import and Sale of Cultural Property (the Working Party) met and discussed recommendations in the ICOM Report, particularly the issue of retroactive application of a proposed cultural property convention:

> The Greek delegate also pointed out that [the ICOM Report] was concerned primarily with the measures to be taken to prevent future illicit export, import and sale, whether commercially or privately; it also referred, however, to the question of the return of masterpieces carried off in the past, a question which would one day have to be studied so as to enable certain countries to regain possession of masterpieces which had not been adequately protected in the past.[160]

Despite their awareness that the return of cultural objects historically bought, sold, or stolen from various countries was a significant concern, market countries opposed any proposal that would apply retroactively and were "adamant that they would not agree to return objects taken in the past."[161]

The discussions and negotiations surrounding the adoption of the 1970 UNESCO convention were difficult. After the first and second drafts of the Convention was circulated in 1968 and 1969 respectively, Canada, by this point an established European settler state, expressed reservations about the Convention and proposed that it would have a detrimental impact on the trade of art and antiquities.[162] Meanwhile France, a former European colonial power, "was adamant that the convention should not operate retroactively".[163] Britain and the United States also expressed concerns with the drafts, with both countries generally arguing that "cultural matters

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[159] *Ibid* at 20.
[160] *Ibid* at 17.
[161] *Ibid*; See also: John H Sprinkle, "Viewpoint: 'History Is as History Was, and Cannot Be Changed': Origins of the National Register Criteria Consideration for Religious Properties" (2009) 16:2 Build Landsc J Vernac Archit Forum 1–15.
[162] O'Keefe, *supra* note 155 at 20.
[163] *Ibid* at 21.

should be dealt with by the professionals and not be dictated by the government."[164] For Britain in particular, this argument is demonstrative of how much power and prestige the government placed in its heritage experts who, as discussed above, played an integral role in creating Britain's heritage narratives during its time as an imperial power. Despite these difficulties, UNESCO eventually produced a "watered down" Convention that member states of UNESCO voted to adopt in 1970.

While Merryman criticized the 1970 UNESCO Convention for being too nationally focused, there are, in fact, strands of both the AHD and Merryman's cultural property internationalism throughout. The preamble of the Convention states: "cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting."[165] Additionally, Article 2 of the Convention states:

> 1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that the international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.
> 2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

Despite including such a broad and strong condemnation of the practice of illicitly importing, exporting, trafficking and transferring cultural property, the 1970 UNESCO Convention has no retroactive effect, nor does it overtly request that parties to the Convention consider returning cultural objects that were looted or improperly purchased during the European

[164] *Ibid* at 31.
[165] *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, 1970 823 UNTS 231 (entered into force 24 April 1972) at Art. 2 [1970 UNESCO Convention].

expansion and European colonial periods.[166] This omission is significant. Clearly the idea of addressing historic theft and transfer of tangible cultural heritage from former colonies to their colonizers had been on the radar of the drafters of the Convention. Indeed, it had been a major sticking point throughout the negotiations. Although the drafting and adoption of the Convention was initiated at the behest of a handful of nations whose cultural property was heavily looted, bought and sold during the colonial period, the interests of European settler states such as the United States and Canada, and former European colonial powers such as France and Great Britain to *not* return cultural objects to their place(s) of origin are implicitly incorporated into the Convention through this major omission.

The statist nature of the 1970 Convention is also apparent throughout the text of the Convention, but especially so in Article 7. With respect to the return of objects to their country of origin, Article 7(b)(ii) of the convention provides that States Parties to the 1970 UNESCO convention undertake:

> at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting state shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return.[167]

As with the Waverley Report, there is a clear concern in this Article with the interests of collectors and dealers. The Article also seems to acknowledge that under this regime, a cultural object may have been stolen or illicitly transferred, but that a person may nonetheless have valid title in the property. Before the vote, Burkina Faso (at the time Upper Volta) indicated "that it would vote

[166] Macmillan, *supra* note 8 at 84.
[167] 1970 UNESCO Convention, *supra* note 165 at Art. 7(b)(ii).

against [the adoption of the Convention] on the basis that, when Article 7 required States requesting return of cultural property to pay compensation to an acquirer, it deprived the text of all its value".[168]

Cultural Property Debates in Canada in the 1970s

On October 30, 1974, Bill C-33, *An Act Respecting the Export from Canada of Cultural Property and the Import into Canada of Cultural Property Illegally Exported from Foreign States* (Bill C-33) was introduced at parliament for its first reading.[169] Bill C-33 contained many elements that still form part of the CPEIA today, including the introduction of a cultural property control list, export examiners, and a cultural property export review board. Section 3 of Bill C-33 holds that the Governor in Council may create a Control List and includes any of the following objects, provided those objects are more than fifty years old and were made by a natural person who is no longer living:

> […] the Governor in Council may include in the Control List, regardless of their places of origin, any objects or classes of objects hereinafter described in this subsection, the export of which he deems is necessary to control in order to preserve the national heritage in Canada.
>
> (a) Objects of any value that are of archaeological, prehistorical, historical, artistic or scientific interest and that have been recovered from the soil of Canada, the territorial sea of Canada or the inland or other internal waters of Canada;
>
> (b) Objects that were made by, or objects referred to in paragraph (d) that relate to the aboriginal peoples of Canada and that have a fair market value in Canada of more than five hundred dollars
>
> (c) Objects of decorative arts, hereinafter described in this paragraph, that were made in the territory that is now Canada and are more than one hundred years old:

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[168] O'Keefe, *supra* note 155 at 32.

[169] ""Bill C-33, An Act Respecting the Export from Canada of Cultural Property and the Import into Canada of Cultural Property Illegally Exported from Foreign States", 1st Reading, *House of Commons Debates*, 30-1 No 1 (Hon Hugh Faulkner) at 871 [Bill C-33 First Reading].

(i) Glassware, ceramics, textiles, woodenware and works in base metals that have a fair market value in Canada of more than five hundred dollars; and

(ii) Furniture, sculptured works in wood, works in precious metals and other objects of decorative art that have a fair market value in Canada of more than two thousand dollars;

(d) Books, records, documents, photographic positives and negatives, sound recordings, and collections of any of those objects that hair a fair market value in Canada of more than one thousand dollars

(e) Drawings, engravings, original prints and watercolours that have a fair market value in Canada of more than one thousand dollars; and

(f) Any other objects that have a fair market value in Canada of more than three thousand dollars.[170]

This section 3 of Bill C-33 is currently included in a near-identical provision in section 4(2) of the existing CPEIA, except for the monetary threshold in paragraph 4(2)(d), which was decreased from one thousand dollars to five hundred dollars. With the exception of the archaeological objects outlined in paragraph (a), a significant feature of section 3 of Bill C-33 (and section 4(2) of the current CPEIA) is that each of the objects subject to protection under the legislation must meet a monetary threshold based on fair market value before any export restrictions will be triggered. Again, this is reflective of colonial and capitalist conceptions of cultural heritage as a form of property above all else. Further, it must be deemed to be *valuable* property before any form of protection is extended to the object.

Before Bill C-33 was debated in parliament, Secretary of State Hugh Faulkner and his department undertook public consultations regarding the proposed legislation. Like the Waverley Report and the 1970 UNESCO Convention, from the outset those involved in the discussions and debates surrounding the adoption of the CPEIA felt that there was a critical "need to enlist the

[170] "Bill C-33, An Act Respecting the Export from Canada of Cultural Property and the Import into Canada of Cultural Property Illegally Exported from Foreign States", 1st Reading, *House of Commons Debates*, 30-1 No C32-C48 s. 3 (Hon Hugh Faulkner) at 871 [Bill C-33].

co-operation of collectors and dealers".[171] On February 7, 1975, Hugh Faulkner addressed the House of Commons regarding Bill C-33. During his address, Faulkner cited specific cultural institutions whose interests he considered when proposing the Bill. These included the Montreal Museum of Fine Arts, the National Gallery, the Royal Ontario Museum, the Art Gallery of Ontario, the Norman Mackenzie Art Gallery, the Mendel Art Gallery, and the Glenbow Museum.[172] With the exception of the Norman Mackenzie Art Gallery and the Mendel Art Gallery, all of these institutions are currently designated as expert examiners for the purposes of section 6 of the CPEIA and each of these designated institutions has been so since September 6, 1977.[173] Further, Faulkner turns his attention to the concerns of collectors, and states:

> I would like to take a moment, Madame Speaker, to point out the important relationship that exists between dealer, collector and public institutions. The dealers sell objects to collectors. Some collectors, either following professional advice or with a well developed innate sensibility, build up collections which by their very nature and quality are of interest to our custodial institutions. I have only to cite some great Canadian benefactors to demonstrate how important their generosity has been for establishing the very foundations of the collections of many of our great public institutions. Objects formerly from these private collections are now preserved so that they can be shared and appreciated by future generations of Canadians as they appear in exhibitions and are made available for research.
>
> […]
>
> In my statement in January, 1974, I mentioned that I wanted to assure the art and antique trade in Canada as well as collectors, that the system of control I intend to introduce in the House would be reasonable and fair; that it would be designed to secure their active co-operation and support. Experience in other countries has shown that no system of export control can be effective without the active co-operation of dealers and collectors who are in a position to frustrate even the

[171] Anne E Price, *Changing meanings of native cultural objects: Taste, politics and processes of culture* (M.A., University of Calgary (Canada), 1992) [unpublished] at 92 [Price].
[172] "Bill C-33, An Act Respecting the Export from Canada of Cultural Property and the Import into Canada of Cultural Property Illegally Exported from Foreign States", 2nd Reading, *House of Commons Debates*, 30-1, No 3 (7 February 1975) at 3028 (Hon Hugh Faulkner) [Bill C-33 Second Reading].
[173] Canadian Heritage, "Designated organizations - Movable Cultural Property", (24 August 2017), online: <https://www.canada.ca/en/canadian-heritage/services/funding/movable-cultural-property/designated-organizations.html> [Designated Organizations].

> most stringent export controls unless they are persuaded that the system is reasonable.[174]

Faulkner's express concern with these institutions and collectors demonstrates how the parties that participated in these consultations were similar to those who gave evidence to the Waverley Committee almost twenty-five years earlier and included cultural property institutions, collectors and dealers.[175] Furthermore, Faulkner's apparent reverence towards "great Canadian benefactors"[176] echoes the sentiments expressed in the Waverly Report towards the "great *cognoscenti*"[177] who amassed large collections of cultural treasures in Britain that found their way into public institutions. According to Anne Price, neither artists nor any representatives from any Indigenous community within Canada were consulted leading up to the introduction of Bill C-33, despite "objects that were made by, or objects that referred to in paragraph (d) that relate to, the aboriginal peoples of Canada"[178] being clearly contemplated and included in the proposed legislation. In an interview with Price in 1992, Ian Clark, formerly a Special Advisor to the Arts and Culture Branch of the Secretary of State acknowledged this lack of public consultation and stated:

> The thought of consulting [native people] didn't occur to me at all as it would now … it was almost as if you were the grandfather saying: "we've got to do this for them," rather than answering a voice from the native people saying "please get our [material culture] back (Clark, 16) [*sic*].[179]

Regardless of later growth or hindsight wisdom, Clark's view is reflective of longstanding, paternalist attitudes towards Indigenous peoples and was likely informed by "discriminatory views

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[174] Bill C-33 Second Reading, *supra* note 172 at 3028.
[175] *Ibid*.
[176] *Ibid*.
[177] Waverley Report, *supra* note 120 at 29.
[178] Bill C-33, *supra* note 170 at s. 3; Price *supra* note 171 at 69.
[179] Price, *supra* note 171 at 117.

about the governance systems and legal orders of Indigenous peoples".[180] Further, although Clark acknowledged that consultations with Indigenous peoples should have taken place in the 1970s, public consultations for a discussion paper relating to the CPEIA that took place in 1992 and 1993 also lacked participation by any Indigenous peoples or nations.[181] The vast majority of participants in these consultations included representatives from cultural heritage institutions across Canada.[182]

Because the cultural property export regimes in Britain and Canada are based on Western property law distinctions, analyzing property discourses can help our understanding of the implications the CPEIA has on communities within Canada who do not necessarily subscribe to the same Western property law systems. As noted, parliamentary discourse surrounding the adoption of the CPEIA largely ignored perspectives from subaltern communities, especially Indigenous peoples. As Val Napoleon and Emily Snyder write, "Nicholas Blomley rightfully observes, "Property discourse offers a dense and pungent set of social symbols, stories, and meanings" tied to judgments about worth, morality, and nationhood".[183] By failing to engage with any of the Indigenous legal orders within Canada when debating and crafting the CPEIA, parliament implicitly (and at times explicitly) endorsed a Western view of property law and its applicability to tangible cultural heritage. In the same way that "[c]ontemporary property discourse […] works to assert state property laws and Western private property regimes as superior and natural"[184] the CPEIA discussions ignoring Indigenous perspectives on the export regime implicitly perpetuated "colonial narratives about the inferiority of Indigenous peoples, their laws

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[180] Jamie Baxter, "Indigenous Land Rights and the Politics of Property" in Angela Cameron, Sari Graben & Val Napoleon, eds, *Creating Indigenous property: Power, Rights, and Relationships* (Toronto: University of Toronto Press, 2020) at 215.
[181] Canada, Canadian Cultural Property Export Review Board *Discussion Paper and Draft Guidelines Concerning Outstanding Significance and National Importance* (Discussion Paper and Draft Guidelines) (Ottawa: Canadian Cultural Property Export Review Board, 1993) at 11-14.
[182] *Ibid*.
[183] Napoleon & Snyder, *supra* note 82 at 42-43.
[184] *Ibid* at 43.

and ideas"[185] regarding their cultural heritage and especially the tangible aspects of that cultural heritage. Further, as highlighted above, Canada was expressly concerned during the discussions of the 1970 UNESCO Convention with maintaining a vibrant trade in cultural objects, and these concerns are clearly included in the debates surrounding the CPEIA.

Later Changes to the CPEIA

Subsequent changes made to the CPEIA and guidelines on its application in the 1990s demonstrate that the AHD and its values continued to permeate the shaping of the legislation. For example, on October 23, 1995, Bill C-93, *An act to amend the Cultural Property Export and Import Act, the Income Tax Act, and the Tax Court of Canada Act* (Bill C-93) received its third reading at the House of Commons. The Bill included proposed changes to redeterminations of "fair market value of gifts and proposed gifts of cultural property" and the addition of a right to appeal some determinations and redeterminations by the CCPERB to the Tax Court of Canada. The proposed amendments to the CPEIA did not relate to the export provisions, but like the 1993 Discussion Paper, the parliamentary discussion surrounding Bill C-93 provides insight into the federal government's priorities with respect to heritage preservation in the 1990s. Notably, rationale proposed for the changes to the legislation were largely the same as they had been in Canada in the 1970s, and in Britain in the 1950s and in this case focused especially on the contributions of private collectors of cultural property.

Ms. Albina Guarnieri, in discussing Bill C-93, raised several points that not only mirror earlier debates surrounding the introduction of the CPEIA, but also mirror the values that the AHD espouses. Ms. Guarnieri notes that "[t]he Minister of Canadian Heritage is responsible for a department where the concept of heritage is given its broadest possible meaning" and that, per the

[185] *Ibid*.

Ministry, "heritage means the set of values we share and the signs by which we recognize ourselves as being members of a group and, indeed, a country".[186] Despite this seemingly broad definition of heritage, Ms. Guarnieri's discussion of heritage is framed through a statist, nationalist lens that overtly references the heritage of "Canadians" seemingly as one homogenous group. She also proposes that cultural institutions are a repository for Canadian history, culture, and heritage in which Canadians can find inspiration and meaning, and makes a sweeping statement that these institutions are beneficial to all Canadians:

> Clearly museums, galleries and libraries are not elitist shrines or ivory tower domains for the happy few. They are democratic, diverse institutions open to all citizens. They make a vital contribution to the cultural and scientific life of the community. In Canada, museums, galleries, archives and libraries are resources and inspiration to people of all communities, backgrounds, ages and abilities.
>
> To all Canadians our museums, galleries and libraries represent our authentic and irreplaceable link with our history, culture and heritage. Successful passage of Bill C-93 will help to ensure that these institutions remain vibrant temples of the human spirit, a strong presence for all Canadians to inspire and reflect who we are.[187]

Ms. Guarnieri's uncritical view of museums and other cultural institutions is largely reflective of the views of supporters of the changes to the CPEIA, and to the opinions expressed in the earlier 1993 Discussion Paper. The debate includes no reference to the colonial history and foundations of museums broadly, which could have been another opportunity for parliament to critically engage with the foundation of the CPEIA and question the motivations for adopting the British cultural property regime, if not exactly word for word but certainly in spirit. Instead, supporters of Bill C-93 during this debate pointed out the role that collectors played in the nineteenth century and beyond, going so far as to argue that "[c]ollectors are the seers, the wise

[186] "Bill C-93, An act to amend the Cultural Property Export and Import Act, the Income Tax Act, and the Tax Court of Canada Act", 3rd reading, *House of Commons Debates*, 35-1, No 14 (23 October 1995) at 15725 (Hom Albina Guarieri) [Bill C-93].
[187] *Ibid* at 15734.

men of our times. They are the individuals who have foresight enough to recognize what is and what will continue to be of outstanding significance and national importance for generations to come".[188] Here again are visible strands of the AHD, where members of parliament are incorporating both the "conserve as found" mentality with the idea that the past must be preserved and passed down to future generations through parameters established by experts, in this case cultural institutions.

Notably, the proposed changes did not receive unanimous support from members of parliament. Mr. Monte Solberg went so far as to describe the CPEIA generally as flawed and argued that the CPEIA as a whole was unnecessary. His criticism, however, was largely directed at individuals who he argued tried to "take advantage of [the] legislation"[189] and he took issue with the tax incentives within the Act and their potential impact on Canadian taxpayers. At no point during the debate was there a serious discussion of how the CPEIA impacts marginalized communities within Canada and no serious discussion of how the CPEIA impacts Indigenous communities, specifically. This is, again, a significant omission. These discussions are important to examine and re-examine because they demonstrate whose voices, whose opinions, continued to be seriously considered and enshrined into law and whose were omitted. Throughout the process of crafting and updating the CPEIA, the same type of people and the same types of interests are represented and incorporated over and over.

Conclusion

In this chapter, I have sought to follow the strands of the AHD through the development of a series of historical documents leading up to the debates surrounding and ultimate adoption of the CPEIA in 1977 and amendments to it in the 1990s. In doing so, I have highlighted both the content

[188] *Ibid* at 15740.
[189] *Ibid* at 15735.

of the documents and the debates, but also the parties who were central during the consultation process. A number of distinct trends emerge in the case of each document. First, cultural objects are treated as a form of private property that are alienable from their community of origin. Second, the interests of collectors and a continued trade in cultural objects are consistently privileged over incorporating real mechanisms for subaltern communities to protect their own cultural property over postcolonial states, former colonies of European empires, and with respect to the CPEIA specifically, Indigenous peoples in Canada.

In Chapter 4, I examine the CPEIA in its current form and argue that the trends that I have highlighted in this chapter persist in the current form of the CPEIA, and in its application. As a result, the interests of colonial powers and settler governments established throughout the twentieth century are reproduced and continually renewed within the operation of the legislation.

Chapter 4: Analysis of Canada's Cultural Property Export Regime

Introduction

In Chapter 3 of this thesis, I discussed the development of the modern, European concept of heritage, the AHD, and how they were woven together with the British government's post-WWII concerns about Britain's position on the global stage to create the Waverley Report and the Waverley Criteria. I also argued that the 1970 UNESCO Convention, in trying to create an agreement that was desirable for all negotiating parties, ultimately still privileged the overarching desires and interests of former imperial powers to keep cultural objects taken during the colonial period. In my analysis, I traced how the AHD underpinned parliamentary discussions of cultural heritage legislation in Canada in the 1970s, through to the 1990s with subsequent amendments to the CPEIA and highlighted the institutions that Hugh Faulkner expressly considered during the drafting of the original CPEIA. Even with those subsequent amendments to the legislation, Canada has largely maintained its use of the Waverley Criteria in decisions under the CPEIA and particularly with the outstanding significance/national importance framework (OS/NI Framework), which I describe in more detail in the next section of this chapter.

In response to the ongoing trend of governments and international organizations trying to fit intangible cultural heritage into an intellectual property regime, Ford argues:

> [Copyright] legislation encourages the individual interests and individualistic values that are dominant in mainstream society. The existing intellectual property legislation, such as the *Copyright Act*, illuminates the relationship among knowledge, power, and authority in that it still represents the values and interests of the dominant society. The existing intellectual property regime remains grounded within a white, patriarchal, middle-class system of values that reflect the traditional image of legal liberalism, the rule of law, and, therefore, the status quo.[190]

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[190] Ford, *supra* note 116 at 216.

The perspective that Canadian copyright law reflects a mainstream set of values that are largely white and patriarchal is also applicable to the CPEIA, not just with respect to Inuit, but arguably with respect to all subaltern communities within Canada and especially Indigenous peoples. The stated policy goal of the CPEIA is to keep cultural property in Canada, and the legislation does this by treating cultural heritage as a form of property and by privileging the property interests of the owner seeking to export the object. The system is designed to ensure that the owner receives compensation no matter what. To the extent that the intangible (or living) components of cultural heritage/property are recognized within the CEPIA regime, it is largely circumscribed to how that intangible meaning can be translated into a national identity for Canadians as determined by political interests at any given time.

In this chapter, I start by describing the CPEIA export application process as set out in the legislation. I then analyze significant elements of the statute and its application to demonstrate that the AHD and the way that European and settler legal and political actors in the past conceived of and talked about heritage continues to impact the way that the CPEIA exists and is applied today. This is particularly evident, I argue, in the way that the CPEIA relies on heritage professionals and experts to make legal pronouncements about how an object fits into the OS/NI Framework. It is also visible in the way the Act emphasizes the aesthetic qualities of an object, that an object can be of national significance to Canada even where it did not originate here, and in the concern with objects that are rare, old, and grand. I also argue that it is visible in the continued attempt to balance a purported public interest in having cultural property in Canada available to the public and a private interest in a collector, dealer or institution's ability to sell and export cultural objects on the art and antiquities market(s).

The CPEIA Export Process

The export of cultural objects from Canada is governed by the CPEIA, which holds that "an export permit is required for any cultural property included in the [Control List]."[191] Obtaining an export permit requires that an applicant undergo a multi-step process, starting with bringing an application for an export permit to a Permit Office, where a permit officer will determine:

1. whether the object that is the subject of the application was imported into Canada within thirty-five years immediately preceding the date of the application and was not exported from Canada under a permit issued under [the CPEIA] prior to that importation;[192]
2. whether the object was lent to an institution or public authority in Canada by a person who was not a resident of Canada at the time the loan was made;[193] or
3. whether the object is to be removed from Canada for a purpose prescribed by regulation for a period of time not exceeding such period of time as may be prescribed by regulation.[194]

If any of these criteria are satisfied, the permit officer will issue an export permit. In the event that the criteria are *not* satisfied, the permit officer will not issue a permit and will then determine whether the object in question is on the Control List. If the object is or might be on the Control List, the permit officer refers the application to an expert examiner.

Expert examiners are designated by the Minister of Canadian Heritage and may be either a resident of Canada or a Canadian institution "with expertise in cultural property".[195] Once an application has been referred to the expert examiner, they are tasked with applying the OS/NI

[191] Canadian Heritage, "Cultural property export permits", (23 October 2017), online: <https://www.canada.ca/en/canadian-heritage/services/export-permits-cultural-property.html>.
[192] CPEIA, *supra* note 105 at s. 7(a).
[193] *Ibid* at s. 7(b).
[194] *Ibid*, at s. 7(c).
[195] About CCPERB, *supra* note 3.

Framework, which is outlined in section 11 of the Act. Under this framework, an expert examiner determines whether:

1. the object "is of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts and sciences";[196] and
2. "the object of is such a degree of national importance that its loss to Canada would significantly diminish the national heritage."[197]

If the expert examiner advises that the export permit application should be refused, an applicant may appeal the decision, at which point it will be considered by the CCPERB, which applies the same OS/NI Framework to the object.

The criteria under the OS/NI Framework are Canada's answer to the Waverley Criteria. As illustrated under the first point above, the Act includes loose guidelines for what constitutes "outstanding significance". By contrast, there is almost no statutory guidance regarding what constitutes "national importance" aside from the nebulous assertion that if an object is one of national importance, the loss of that object through export would diminish Canada's national heritage. In four decisions from 2021 and 2022, the CCPERB used identical language taken from the Federal Court of Appeal's decision in *Heffel*[198] to describe the breadth of its discretion to determine whether an object is of national importance for the purposes of the CPEIA:

> The Review Board is not confined to specific factors in its assessment of national importance. It has broad discretion to assess and determine whether a given object meets the degree of national importance set out in the Act.[199]

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[196] CPEIA, *supra* note 105 at s. 11(1)(a).
[197] *Ibid* at s. 11(1)(b).
[198] 2019 FCA 82 (CanLII) [*Heffel*].
[199] *Emile Nolde, Seascape with Steamer and Sailboat* (2 June 2021), Application No. 0809-21-04-22-073, online: Canadian Cultural Property Export Review Board <https://ccperb-cceebc.gc.ca/en/review-of-refused-export-permits/decisions/nolde.html>; *Paul Klee, Garten am Wasser,* (19 April 2022), Application No. 0395-22-03-18-001

In the Review Board decision concerning an application for a permit to export *Tête de Marguerite* by the French impressionist artist Henri Matisse, the CPERB further highlights that the expertise of its members and therefore the Board as a collective justifies this broad discretion:

> To this end, the Review Board is composed of members appointed for their expertise in the specialized context of cultural property, cultural heritage and cultural institutions [para 23].[200]

This position is also lifted directly from the Federal Court of Appeal reasons in *Heffel*. Notwithstanding the lack of legislative guidance, the CCPERB has published its own guidance regarding the process that it may follow when making determinations about an object's national importance:

> CCPERB determines national importance by considering one or a combination of the factors that speak to the degree of value and importance of the object, including its importance in the Canadian context. Factors considered may include the rarity of comparable objects by the same creator in public collections in Canada and the object's representativeness, contextual associations, provenance or research value. Depending on the object, other factors may be relevant to the determination as to the object's national importance.
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> Based on the analysis of the relevant factors, CCPERB will then make an assessment of whether those factors are of such a degree that the loss of the object to Canada would significantly diminish the national heritage.[201]

To determine an object's rarity, the Review Board "will consider the extent to which the object is represented in public collections in Canada by identifying any copies, versions, editions, or similar objects"[202] and then comparing the attributes of the impugned object against those other

online: <https://ccperb-cceebc.gc.ca/en/review-of-refused-export-permits/decisions/garten-am-wasser.html> [*Garten am Wasser*]; *Kadhim Hayder, Two Horses* (18 March 2022), Application No. 0495-22-03-04-001, online: Canadian Cultural Property Export Review Board <https://ccperb-cceebc.gc.ca/en/review-of-refused-export-permits/decisions/hayder-two-horses.html>; *Tête de Marguerite by Henri Matisse* (28 July 2021), Application No.: 0495-20-10-23-003, online: Canadian Cultural Property Export Review Board <https://ccperb-cceebc.gc.ca/en/review-of-refused-export-permits/review-board-decision.html> [*Tête de Marguerite*].

[200] *Heffel*, *supra* note 198 at para 33; *Tête de Marguerite*, *supra* note 199.

[201] "Outstanding Significance and National Importance for the Review of an Application for an Export Permit | CCPERB", online: <https://ccperb-cceebc.gc.ca/en/review-of-refused-export-permits/outstanding-significance.html>.

[202] *Ibid*.

objects in Canadian institutions. The significance of an object's provenance is vaguely explained on the Review Board's website, which simply notes that the Review Board will "consider the degree to which the object's provenance contributes to its meaning or cultural value".[203] With respect to the object's research value, the Review Board will "consider the degree to which the object, as a primary or secondary source, could advance research, a new interpretation, meaning, or understanding of Canada's cultural heritage, now or in the future".[204] Finally, with respect to an object's contextual association, the Review Board notes:

> CCPERB will consider the degree to which the object has a relationship with a group or community in Canada, or with other objects, or an emotive impact. This relationship should create an understanding of Canada's cultural diversity or enrich Canadian's understanding of different cultures, civilizations, time periods, and their own place in history and the world.[205]

Categories of Cultural Property

The CPEIA regime at its baseline creates a division between intangible cultural heritage and tangible cultural property, and then primarily addresses the tangible. A significant feature of the CPEIA regime is the Control List. This regulation sets out eight categories, or groups, of cultural objects that receive protection under the CPEIA:

Group I. Objects Recovered from the Soil or Waters of Canada;

Group II. Objects of Ethnographic Material Culture;

Group III. Military Objects;

Group IV. Objects of Applied and Decorative Art;

Group V. Objects of Fine Art;

Group VI. Scientific or Technological Objects;

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[203] *Ibid*.
[204] *Ibid*.
[205] *Ibid*.

Group VII. Textual Records, Graphic Records and Sound Recordings; and

Group VIII. Musical Instruments.

The Control List is a very obvious process of categorization and differentiation within the legal system regarding heritage wherein things can be categorized as one of eight types of cultural property and further as objects to be owned and traded or objects that belong in Canada's national heritage canon.[206] As the first substantive legal stage of the CPEIA process, objects enter the regime and are either accepted and categorized as Canadian heritage or rejected and allowed to enter the international cultural property market. Their meaning is defined by the legislation, which is informed by the historical and discursive developments that I outlined in Chapter 3.

Further, while the Act does not necessarily preclude Indigenous peoples' cultural heritage from being considered under any of the eight categories, Indigenous peoples' cultural heritage is only expressly contemplated as falling under Group I. Objects Recovered from the Soil or Waters of Canada (i.e. archaeological discoveries), or Group II. Objects of Ethnographic Material Culture, which the Control List defines as:

> ***Object of ethnographic material culture*** means an object that was made, reworked or adapted for use by a person who is an Aboriginal person of Canada, or an aboriginal person of a country other than Canada, that may:
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> (a) Incorporate features reflecting contact with non-aboriginal cultures; and
>
> (b) Be a single object or an object together with its component parts that form a single unit.[207]

Through the use of the word "may", the definition appears to be non-exhaustive. Nonetheless, it should not escape notice that the only definition that expressly contemplates Indigenous (or, to use the language of the Control List, Aboriginal) cultural heritage frames it as

[206] Renard Painter, *supra* note 74 at 398-399; McCartney, *supra* note 2 at 74, 83.
[207] Control List, *supra* note 107 at Group II, s. 1.

something that reflects contact with non-aboriginal, and therefore likely European settler cultures.[208] This is an obvious way where even when the CPEIA acknowledges Indigenous peoples' cultural heritage, it does so through the lens of the colonial interaction between Indigenous peoples and Canadian settlers.

Expertise and the Administration of the CPEIA

Under the Canadian administrative law system, many statutes, such as the CPEIA, are administered by individuals, boards and tribunals who are held out to have a specialized level of expertise or experience in interpreting their enabling (or home) statutes and are therefore best positioned to adjudicate disputes that arise thereunder.[209] In this section, I outline the similarities between the AHD's concern with designating experts as the legitimate spokespersons of heritage and the reliance that administrative law places on experts to make legal pronouncements, both through their initial appointment and day-to-day administration of their enabling statutes, but also through the deference that courts afford to administrative bodies when their decisions are subsequently called into question. There are broad similarities between heritage experts as conceived of under the AHD and expert administrative bodies under administrative law and these experts specifically overlap under the CPEIA regime.

While courts ostensibly exist as independent from the government, administrative boards and tribunals "are a part of government".[210] A hallmark of the administrative system are the statutory limitations placed around the decision-making activities of the various administrative decision-markers. As Sara Blake highlights: "[n]o tribunal has unlimited powers. Tribunal powers

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[208] See also: McCartney, *supra* note 2, where the author discusses the categories of the Control List as they existed in the 1990s and discusses the differentiation between fine art and objects of ethnographic origin.
[209] Sara Blake, *Administrative Law in Canada*, 7th ed (Toronto, Ontario: LexisNexis, 2022) at c 1.
[210] *Ibid*.

are granted by statute and defined and limited by statute".[211] In the case of the CPEIA, administrative decisionmakers are appointed or created under sections 6 and 18 of the Act, and their powers can be found in sections 11, 20, 29, 30 and 32.

Under section 6 of the CPEIA, the Minister of Heritage "may designate any resident of Canada or any institution in Canada as an expert examiner for the purposes of [the CPEIA]."[212] Interestingly, the legislation has so wholeheartedly embraced and incorporated the aspects of the AHD that discuss what kind of people and institutions constitute heritage experts that the vast majority of designated institutions are traditional museums, archives and/or galleries, with only a small handful of Indigenous organizations included.[213] Notably, there are currently no Indigenous peoples or nations listed as designated organizations and thus not only would they not be in consideration as expert examiners, but they also would not receive notice of an export permit refusal as designated museums and heritage institutions would.[214] Additionally, there does not appear to be any specific requirements for Indigenous communities to be notified when one of their cultural objects are the subject of an export permit application.[215]

Section 18 of the Act establishes the CCPERB and sets out how members are selected and appointed:

> **Review Board Established**
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> 18 (1) There is hereby established a board to be known as the Canadian Cultural Property Export Review Board, consisting of a Chairperson and not more than nine other members appointed by the Governor in Council on the recommendation of the Minister.
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> **Members**

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[211] *Ibid*.
[212] CPEIA, *supra* note 105 at s. 6(1)
[213] Designated Organizations, *supra* note 173.
[214] *Ibid*.
[215] Bell & Paterson, *supra* note 50 at 84.

> (2) The Chairperson and one other member shall be chosen generally from among residents of Canada, and
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> > (a) up to four other members shall be chosen from among residents of Canada who are or have been officers, members or employees of art galleries, museums, archives, libraries or other collecting institutions in Canada; and
> >
> > (b) up to four other members shall be chosen from among residents of Canada who are or have been dealers in or collectors of art, antiques or other objects that form part of the national heritage.
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> **Acting Chairperson**
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> (3) The Review Board may authorize one of its members to act as Chairperson in the event of the absence or incapacity of the Chairperson or if the office of Chairperson is vacant.
>
> **Quorum**
>
> (4) Three members, at least one of whom is a person described in paragraph (2)(a) and one of whom is a person described in paragraph (2)(b), constitute a quorum of the Review Board.[216]

As set out in the excerpt above, section 18(2) specifically provides that the Board may be composed of a majority of members of employees or former employees of cultural institutions and dealers or collectors of art, antiquities or other forms of cultural property. As is the case with the appointment of expert examiners, there is no specific provision that requires the CCPERB to hold space for members from Indigenous communities, even when it is clear that Indigenous peoples encounter the administrative regime under the CCPERB, which I discuss later in this chapter. At the time of writing, all eight members of the CCPERB, including those members who are purportedly representatives of the public at large, have strong connections to heritage, collecting and/or dealing institutions.[217] Four members either have been or are currently employed by cultural institutions such as museums and galleries in managerial or curatorial roles.[218] One member of the

[216] CPEIA, *supra* note 105 at s. 18.
[217] See also: McCartney, *supra* note 2 where the author notes a similar composition of the CCPERB in her 1994 Thesis.
[218] Sharilyn Ingram, the current chairperson, has had a long career in cultural management and worked in a number of cultural institutions in senior roles including, but not limited to: Executive Director of the Saskatchewan Western

CCPERB is a former head of the Vancouver and Burnaby Public libraries and is himself a collector. Two either currently occupy or previously occupied senior positions at art galleries, and the final member sits on a number of boards of directors for cultural institutions, including the Agnes Etherington Art Centre at Queen's University, the Ontario Association of Art Galleries, and the School of the Photographic Arts of Ottawa.[219]

Another hallmark of the administrative law system in Canada is the process by which the decisions of administrative bodies are reviewed if a party disagrees with the outcome of an administrative proceeding. The longstanding judicial and academic debates over the appropriate standard of review of administrative decisions is outside the scope of this thesis; however, it is worth noting that determining the appropriate standard of review for such decisions is a complex issue that has caused much consternation among judges and academics alike. Nevertheless, the Supreme Court of Canada decision *Canada (Minister of Citizenship and Immigration) v Vavilov*,[220] demonstrates "a recognition that the reasonableness standard should be at the starting point for a court's review of an administrative decision".[221] In *Dunsmuir v New Brunswick*,[222] the Supreme Court of Canada provided a comprehensive definition of the standard review of reasonableness. It held that reasonableness is:

> a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come

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Development Museums, Deputy Director of the Art Gallery of Ontario, and President and CEO of Royal Botanical Gardens (Canada). Dr. Tzu-I Chung, a representative of a collecting institution, is currently the Curator of History at the Royal BC Museum. Laurie Dalton, also a representative of a collecting institution, is the director/curator of the Acadia University Art Gallery and an adjunct professor in the Department of History and Classics. Jo-Ann Kane is a collection management consultant, but has also been the Curator of the National Bank Collection of Art for over 20 years (see: https://ccperb-cceebc.gc.ca/en/about-us/meet-the-board.html).

[219] "Meet the Board | CCPERB", online: *Canadian Cultural Property Export Review Board* <https://ccperb-cceebc.gc.ca/en/about-us/meet-the-board.html>.

[220] 2019 SCC 65 [*Vavilov*].

[221] *Ibid* at para 25.

[222] 2008, SCC 9 [*Dunsmuir*].

> before administrative tribunals do not lend themselves to one, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.[223]

In effect, an administrative body, such as the CCPERB, may come to a conclusion that is different than what a particular court or judge may conclude but the administrative body's conclusion is still valid provided it falls within the scope or range of what constitutes reasonable in the circumstances. Fundamentally important to the application of the reasonableness standard of review is idea that courts must have deference towards the decisions of administrative bodies, and that the need for such deference arises from the specialized expertise and experience of the administrative bodies. To that end, in *Dunsmuir* the Court noted:

> a policy of deference 'recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field of sensitivity to the imperatives and nuances of the legislative regime'.[224]

In the case of the administration of the CPEIA, the CCPERB's expertise arises not only from the "day to day" activities of the Board in interpreting and administering the Act, but also in the subject-matter expertise of the members of the Board. In *Heffel*, the Federal Court of Appeal was primarily concerned with whether the Federal Court had appropriately applied the standard of review to its review of an export permit application decision from the CCPERB. The Court of Appeal specifically emphasized the fact that in the impugned permit decision, the CCPERB was interpreting its home statute and, as such, was entitled to deference from the Federal Court.[225] Further to this point, the Court of Appeal noted:

> [48] It follows that in the present case, the Federal Court was required to defer to the Board who is best placed to provide an interpretation reflecting its statutory mandate and the context in which it operates. To put it another way, the Board, as the administrative decision maker, holds the "upper hand" with

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[223] *Ibid* at para 47.
[224] *Ibid* at para 49.
[225] *Heffel*, *supra* note 198 at para 46.

> regard to the interpretation of its home statute. In the words of the Supreme Court of Canada, "under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist" (emphasis in original) (*McLean* at paragraph 40).[226]

This finding is significant for a number of reasons. Members of the CCPERB (as well as expert examiners) are selected for their subject-matter expertise and, according to section 18 of the CPEIA, their connections to different communities of cultural property experts. The CPEIA itself and the standard of reasonableness within Canada's administrative law system adds a broader layer of legal knowledge to the types of expertise that the CCPERB or the members of the CCPERB are assumed to have. Earlier in the decision, the court also emphasizes the importance of the subject-matter expertise of the members of the CCPERB when making these legal decisions:

> [33] It is important to recall that paragraph 11(1)(b) requires an assessment of the extent and impact of the loss to Canada if a work is of <u>such a degree</u> of <u>national importance</u> that its loss to Canada would <u>significantly diminish</u> the <u>national heritage</u>" (emphasis added). The key words in paragraph 11(1)(b)—i.e., "national importance" and "national heritage", are not defined in the Act. On their face, these elements as worded do not confine the Board to specific factors in its assessment. Rather, the terms "national importance" and "national heritage" allow for a broad range of options based on the Board's expertise (*Schmidt v. Canada (Attorney General),* 2018 FCA 55 […]. The provision at issue also sets forth broad qualifiers—i.e., "of such a degree" and "significantly", which further signifies Parliament's intention to confer upon the Board broad discretion to assess and determine whether or not a given object is of "national importance". To this end, the Board is composed of members appointed for their expertise in the specialized context of cultural property, cultural heritage and cultural institutions.[227]

As noted above, in published decisions that the CCPERB has issued since *Heffel*, the CCPERB often specifically quotes this paragraph of *Heffel* as a means of explaining its own expertise and often uses this quote in lieu of actually providing comprehensive reasons.

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[226] *Ibid* at para 48.
[227] *Ibid* at para 33.

There is a shared tendency across the AHD, international law, and as highlighted in the discussion above, domestic Canadian administrative law to rely on experts and expertise to make legal pronouncements that are difficult to challenge once made. Holly Cullen, Joanna Harris and Catherine Renshaw argue that in international law, "experts become powerful, their power lying in their capacity to determine policy".[228] This is also the case with heritage experts and national heritage law and policy. As I outlined in Chapter 3, the rise in public museums in the eighteenth and nineteenth centuries created a corresponding need for experts with specialized knowledge and information about cultural objects who were equipped and empowered to craft narratives about national and imperial identity. Those experts then presented those narratives to the public as the authoritative truth. Heritage experts spread throughout the European colonies and were eventually empowered to consult on domestic heritage law and policy, as they did for the Waverley Report and the initial drafting of and later amendments to the CPEIA. In Canada, because of their specialized knowledge and information, heritage experts have also been empowered to actually carry out Canadian heritage policy goals by applying Canadian heritage law either as government-designated expert examiners under the CPEIA or as members of the CCPERB.

Cullen *et al* highlight a number of concerns with such reliance on experts in international law that are equally applicable to the CPEIA. First, the experts that the government designates under the CPEIA are selected from tight networks of epistemic communities and cultural institutions, as I have noted in my discussion of the composition of the current CCERB, above. In the case of expert examiners, designated organizations must be "located in Canada and

[228] Holly Cullen, Joanna Harrington & Catherine Renshaw, "Experts, Networks and International Law" in Holly Cullen, Joanna Harrington & Catherine Renshaw, eds, *Experts Netw Int Law* (Cambridge: Cambridge University Press, 2017) at 2. See: David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016).

demonstrate the ability to ensure the long-term preservation of cultural property".[229] With the exception of Nunavut, each province and territory in the country has a number of institutions that the Minister of Canadian Heritage has designated as expert under section 6 of the CPEIA.[230] As I have highlighted above, this list is primarily made up of public and private museums, art galleries, archives and libraries, some of which are housed in universities, and whose representatives may evaluate an object to determine whether it is of sufficient outstanding significance and national importance to trigger the export permit protections set out in the legislation. In the *Heffel* case, for example, the Court of Appeal noted that the initial expert examiner was the Chief Curator of the Art Gallery of Greater Victoria in British Columbia.

Cullen *et al* also highlight that experts lack democratic accountability, a criticism that applies equally in the case of expert examiners and the CCPERB alike, as they are not elected positions. Rather, expert examiners are designated by the Minister of Heritage,[231] while members of the CCPERB are appointed by the Governor in Council following a recommendation by the Minister of Heritage.[232] Additionally, there is a lack of transparency around the decisions made by these heritage experts and their rationales because the information upon which they rely, where it is so heavily influenced by their own expertise, knowledge, and professional experience is not necessarily accessible to the public.

Similarly, with respect to the international cultural heritage/property regime, Macmillan notes:

> there is an obvious problem here of working out who decides what is of relevant "outstanding universal value" according to a range of disciplines that have a

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[229] Designated Organizations, *supra* note 173.
[230] *Ibid*.
[231] CPEIA, *supra* note 105 at s. 6.
[232] *Ibid* at s. 18.

> strong whiff of European enlightenment thought and thus might be regarded as, in any case, suspect in the context of the "universal".[233]

The CPEIA incorporates the concern expressed in the AHD over who gets to decide, or who is a legitimate heritage spokesperson, by structuring its operation around the opinion of heritage experts directly into the legislation itself. These experts and the epistemic communities from which they are chosen are mandated in the CPEIA and are then specifically tasked with legitimizing and reinforcing claims that certain types of objects constitute Canada's national heritage. These provisions of the legislation and the actual composition of the CCPERB are significant because they clearly demonstrate whose interests are represented in decisions made under the CPEIA regime and what those interests are.[234] These are the same types of people, experts, and institutions that the Waverley Committee consulted in the 1950s, and the same types of people, experts, and institutions that the Canadian government consulted in the 1970s and 1990s, as I outlined in Chapter 3 of this thesis. The composition of the Board today demonstrates that Canada's approach to cultural property has not meaningfully evolved in roughly a half-century, as does the fact that many of the institutions that were designated as expert examiners in 1977 maintain that status today. The art market and the interests of maintaining an art market even with the introduction of export and import controls has created an environment where the Government of Canada and the CCPERB itself can be so sure of its expertise and composition that it is willing to explicitly label whose interests are represented in its decisions, and whose are not by omission.

In Chapter 1, I defined the term "law" as I interpret it in this thesis and noted that law is arguably a facet of culture in and of itself because it is a system of meaning-making and social organization that reinforces and reproduces intangible values.[235] Along those lines and as I have

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[233] Macmillan, *supra* note 8 at 69.
[234] Price, *supra* note 171; McCartney, *supra* note 2.
[235] Mezey, *supra* note 17 at 41.

discussed above, it is possible to find strands of the AHD in all specialized administrative boards and tribunals in Canada, not just the CCPERB, who owe their decision-making powers in some part to the purported specialized expertise of the decisionmakers.[236] Interpreting heritage and history are inherently political acts. According to Smith and Macmillan, under the AHD heritage is something that is objectively knowable and true about the past. Throughout history, politicians and academics alike have relied on the AHD and its central tenets to create national identities and ascribe meaning to the past. In so doing, the AHD intentionally ignores and in fact suppresses dissenting voices.[237] Similarly, within the tradition of administrative law in Canada to which the CPERB owes its existence, the idea of expertise giving rise to a deference requirement is baked into the system at large in a manner that does not easily invite questions or resistance.[238] As discussed above, the reasonableness standard of review that the Federal Court of Appeal applied in *Heffel* limits the ability of other (judicial) actors to intervene in the conclusions drawn by the CCPERB. The Federal Court of Appeal notes:

> Part of the justification for reasonableness review is the recognition that administrative decision makers operate in a policy laden environment and that policy may impact their decisions. With regard to statutory interpretation, reasonableness acknowledges that the administrative decision maker is "better situated to understand the policy concerns and context needed to resolve any ambiguities in the statutes" (*Canada 2018* at para 55).[239]

Not only does this make it harder to challenge the validity of the experts in question, but in the case of the CCPERB especially, it has the cyclical impact of reinforcing that the members of the Review Board are, in fact, experts. If the Federal Court of Appeal finds that courts should

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[236] Holly Cullen, Joanna Harrington & Catherine Renshaw, eds, *Experts, Networks and International Law* (Cambridge: Cambridge University Press, 2017) at 2.
[237] Smith, "Discourses of heritage", *supra* note 11; Smith, *supra* note 8; Macmillan, *supra* note 8; Macmillan, "Heritage, Imperialism and Commodification", *supra* note 64; see also: McCartney, *supra* note 2 at 68-69.
[238] See: Cheryl Laura Bowman, *Presumptive Deference and the Role of Expertise on Questions of Law in Canadian Administrative Law* York University (Canada), 2019) [unpublished].
[239] *Heffel*, *supra* note 198 at para 52.

not easily or readily question the findings of these cultural property experts, surely members of the public should not either. Thus, the Federal Court of Appeal itself has privileged the opinions of a certain type of expert (heritage professionals, representatives of collecting institutions, dealers in cultural property, and collectors of cultural property) and as a result, both the Court of Appeal and the broader system indirectly devalue and other the opinions of other individuals and communities.

Under the CPEIA's export permit regime, there are potentially three levels of review when an export permit is denied (not including applications for judicial review at the Federal Court and Federal Court of Appeal, which is how the *Heffel* decision came before the Federal Court of Appeal). These include an initial review by a permit officer, a second review by an expert examiner, and an appeal to the CCPERB. Under the CPEIA, expert examiners and the Review Board take on a role akin to those of heritage stewards, but rather than just crafting a narrative about the past for a public cultural heritage institution, expert examiners, who themselves may be representatives of a museum, archive, library or gallery, are empowered to make decisions about the heritage significance of an object and to actually apply the law to that object. In effect, these decisionmakers are tasked with determining whether an object will officially enter Canada's national heritage canon,[240] and whether they will be passed on to future Canadians to "enrich Canadian's understanding of different cultures, civilizations, time periods, and their own place in the world."[241]

Other Experts

Dorothy Lippert argues that archeologists, as a class of experts, define the identity of archaeological artifacts "through the process of the relationship that an archaeologist enters into

[240] McCartney, *supra* note 2 at 94-96.
[241] Canadian Heritage, "Guide to Exporting Cultural Property from Canada", (15 December 2017), online: <https://www.canada.ca/en/canadian-heritage/services/export-permits-cultural-property/guide-exporting.html>.

with them",[242] by which Lippert means "any object that was created by a human being may become an artifact, but it is the interaction between an archaeologist and the object that creates it as such".[243] This is also true of the parties that encounter cultural objects under the CPEIA regime. Dealers, collectors, expert examiners and the CCPERB all define the cultural worth and monetary value of cultural objects through "the process of the relationship" that these actors enter into with the objects. As noted above, the Review Board has provided a relatively vague explanation of how it may assess provenance as a factor when determining whether an object is one of such "national importance that its loss to Canada would significantly diminish"[244] Canada's national heritage. However, in the recent Review Board decision regarding an export permit for Matisse's *Tête de Marguerite*, the Review Board used the painting's provenance and ownership history as a means of introducing yet another layer expert opinions in its justification for why the painting was important:

> 31. The provenance of the Object is also important due to the fact that it was purchased directly from the artist by John Rewald, a prominent art historian and authority in French late nineteenth and early twentieth century art. Having once been in the collection of such a high profile scholar and contributor to the field of art history also increases the value of the Object with regards to its national importance.[245]

The object is lent credibility in this instance not because it is a Matisse original or that it stands on its own as being a significant piece of art and culture, but because of its association with yet another Western expert and scholar who determined that the piece was worth something when he purchased it. As in *Heffel*, there is a tendency to be deferential towards the opinion of a certain type of expert, in this case an art collector, when evaluating the inherent value of an object.

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[242] Lippert, *supra* note 79 at 431.
[243] *Ibid*.
[244] CPEIA, *supra* note 105 at s. 11(1)(b)
[245] *Tête de Marguerite*, *supra* note 199 at 31.

Aesthetic Qualities of Objects

In tracing the historical developments of the CPEIA and its legal predecessors I have tried to show that the way legal and political actors conceive of and talk about heritage shapes the laws that are adopted to address heritage. This is particularly visible in the treatment of an object's aesthetic qualities under the CPEIA. The Act expressly incorporates a concern for the aesthetic qualities of an object, so much so that section 11(a) of the Act establishes that an object may meet the threshold of outstanding significance seemingly by virtue of its aesthetic qualities alone.[246] This focus on the aesthetic and necessarily tangible elements of a cultural object can obfuscate the original cultural meaning of that object and its connection to a living community and a larger system of living heritage. The obscuring of these connections can lead to what Jennifer Kramer describes as "looking relations" where an overarching concern with the aesthetic qualities of an object "allow[s] spectators to see only a beautiful façade [and] hide[s] the real relations arising from settler-colonial injustices imposed on"[247] Indigenous peoples. Spectators in Kramer's sense can be the literal spectators of an object in a museum or gallery, but the CPEIA extends the spectator experience and the looking relationship to include parties either using or engaged in a dispute under the CPEIA. It allows cultural property exporters (and importers) to engage only with the literal surface-level qualities of an object to determine its value and to ignore the historical colonial relationships between settler laws, including the CPEIA, and Indigenous peoples. It specifically permits the current owners of cultural objects to distance themselves from the colonial history of an object where colonial relationships and encounters allowed settlers and settler

[246] See: McCartney, *supra* note 2 at 95-96.
[247] Jennifer Kramer, *supra* note 115 at 155.

institutions to take Indigenous peoples' cultural heritage whether through violence, coercion or simply finding an object and assuming it to be abandoned.[248]

Throughout history, museums and galleries have displayed the cultural objects of Indigenous peoples originating from Canada, the United States and Australia based on their aesthetic qualities. According to Dorothy Lippert, "[b]y the time an object comes to be in a museum collection, it has gone through many different identities, from cultural object intended for use of one kind to scholarly object intended for use of a very different kind".[249] Speaking of a visit to the Royal Museum of Scotland in Edinburgh, Sonia Smallacombe remarked that she was shocked and horrified to see that "an Aboriginal sacred item was on full public display"[250] and that:

> I was told the item was displayed for its 'aesthetic beauty'. This experience has led me to believe that the cultural significance of cultural products and their connections with the living communities from where they originate have little to no relevance to museum staff or people who visit them.[251]

Though it acknowledges that there is some quality about cultural property that makes it special and worth protecting, the text of the CPEIA appears to be largely concerned with the second identity of a cultural object as a piece demonstrating aesthetic achievement, as described by Lippert and Smallacombe. Further, in the imperial British tradition of owning and displaying cultural property, having vast collections of cultural objects to display is reflective of Canada as an advanced, wealthy nation and the very structure of the CPEIA is not intended to ensure that

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[248] Renard Painter, *supra* note 74 at 395.
[249] Lippert, *supra* note 79 at 432.
[250] Smallacombe, *supra* note 93 at 152.
[251] *Ibid*.

communities within Canada can claim their own cultural heritage, but to put pieces that are aesthetically significant in museums for public consumption.[252]

This is not just a vestige of a historic phenomenon, as the practice of museums co-opting an object for its aesthetic appearance and crafting narratives around those aesthetic qualities and thus obfuscating the object's original meaning is not uncommon even in recent history. For example, in 2014 as part of a social media bet between the Seattle Art Museum (SAM) and the Denver Art Museum (DAM), the SAM offered to loan a "forehead mask in the shape of a raven's head from the Nuxalk people of Bella Coola, British Columbia, Canada"[253] to the DAM should the Seattle Seahawks, a National Football League team, lose the Superbowl that year.[254] The SAM chose the mask, in part, because of its aesthetic resemblance to the Seahawks' logo and in part because of its aesthetic beauty. In describing the mask for the purposes of the wager, the SAM mischaracterized the cultural significance of the object and described its subject as being a man eater.[255]

Understandably, the SAM faced public backlash from people both within and outside the Nuxalk nation. Observers pointed to the history of "British colonialism and Canadian assimilation,"[256] highlighting the "successive, cumulative, and extensive history of appropriation (i.e. theft of land, resources, people, children, material culture and cultural knowledge)"[257] of settler governments in Canada over the Nuxalk nation. Critics also noted that the SAM had not even contacted anyone within the Nuxalk nation to discuss their wager with the DAM. Rather,

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[252] Harrison, *supra* note 87; Ana Filipa Vrdoljak, "Cultural Heritage, Transitional Justice, and Rule of Law" in Francesco Francioni & Ana Filipa Vrdoljak, eds, *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020).
[253] Jennifer Kramer, *supra* note 115 at 131.
[254] *Ibid.*
[255] *Ibid*.
[256] *Ibid* at 156.
[257] *Ibid*.

"since the SAM believed it had the prerogative as legal owner to decide the mask's use, it did not occur to staff that celebrating the mask for its aesthetic achievements could be perceive as a loss to, or even a derogation of, Nuxalk culture."[258]

The CPEIA's focus on the aesthetic qualities and value of cultural objects faces the same issues as evident in the SAM/Nuxalk raven face mask case. As discussed in more detail below, the aesthetic qualities of various cultural objects have been used to justify certain cultural property internationalist goals of keeping objects in Canada even where those objects did not originate in Canada and have no connection to Canada's historical or heritage self-narrative other than their current physical location. In a sense, if a designated expert examiner or the Review Board determines that an object is aesthetically significant enough, the government may claim entitlement to it on behalf of Canadians.

The CPEIA, and colonial and settler laws more broadly, rely on on categorization in much the same way that museums do. Genevieve Renard Painter posits:

> [t]hrough categorisation, 'we name, locate and order the body of law' and, in doing so, fabricate the differentiation of law. Categorisation is what Western law does in sorting persons from things and civil disputes from criminal ones. Categorisation also shapes the common law.[259]

Painter also notes that "[c]ategorising persons and things was integral to colonization".[260] The CPEIA also relies heavily on the process of categorization, in part through its preoccupation with aesthetics and looking relations. An object under the CPEIA regime is at the same time the cultural object as it was originally envisioned, and an object that may be one of outstanding significance and national importance justifying its retention in Canada and relation to a museum or cultural

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[258] *Ibid* at 158.
[259] Renard Painter, *supra* note 74 at 398.
[260] *Ibid*.

institution and in this context also becomes a tax incentive for the individual who initially sought to have it exported. The object is also a cultural commodity. Even where it is not ultimately deemed one of outstanding significance and national importance, the object is framed as alienable from its culture of origin and something that can be traded. While all these identities may coexist, there is a hierarchy of interests that are privileged in this regime that decontextualizes the object's original identity and its place within a broader intangible cultural heritage context.

As an instrument heavily influenced by the AHD, the CPEIA incorporates the premise that all moveable (and perhaps also immovable) tangible cultural property is alienable. Even where it determines that an object should not be exported, it is done so not on the basis that the object is so foundational to the identity of a culture that it cannot be removed from that culture or its original context but rather, that it would be beneficial for the public broadly to have access to the object.[261] This is reflected in the CCPERB's statement that the 1977 CPEIA sought "to balance the rights of cultural property owners with the public interest in cultural property"[262] with no reference to the significance that a cultural object may have to a community that exists within and simultaneously apart from Canada's national identity.

The Old, the Grand, and the Valuable

A cornerstone of the CPEIA, the Waverley Report and even the 1970 UNESCO convention are the provisions that expressly protect a person's monetary interests in a cultural object, even where it is determined that an object is of outstanding universal significance (1970 UNESCO Convention) a national treasure (the Waverley Report) or of outstanding significance and national importance (the CPEIA). In the CPEIA, this is especially apparent in two ways: first, even where

[261] See: Margaret Jane Radin, "Market-Inalienability" (1987) 100:8 Harv Law Rev 1849–1937; Banteka, *supra* note 52.
[262] About CCPERB, *supra* note 3.

an export permit is refused, it is done so for a limited amount of time and, if the delay period expires before an offer is made to purchase the object in Canada, the item may be exported. Second, the refusal of the export permit is premised on the idea that it will give Canadian institutions time to put together a *monetary* offer to purchase the object at a fair market value. If no such offer officially materializes from an institution within Canada, even if institutions have indicated that they *will* make an offer to purchase the object, the object can still be exported once the delay period expires.

This emphasis on minimally impacting the monetary interests of the individual who has sought to export the cultural object reflects the neoliberal, capitalist assumptions about private property ownership inherent within the CPEIA. Catherine Bell discusses two cases that reflect problems with the CPEIA's export system with objects whose history does not fit neatly into the categories of ownership within the Canadian cultural property export system. For example, in the case of the Chief Charles Nowell bead and button blanket (the Nowell Blanket), the Review Board notified the U'mista cultural centre (as one of the few Indigenous organizations that is designated as a Category A institution under the CPEIA)[263] of its decision to delay the export of the Nowell Blanket.[264] The U'mista Cultural Centre, a cultural institution founded by the U'Mista Cultural Society to preserve the cultural heritage of the Kwakwa̱ka̱'wakw, went through the process of applying for a grant under the CPEIA to purchase the Nowell Blanket, and notified both the Review Board and the dealer, Sotheby's in Toronto of its intent to purchase the object.[265] Sometime after the U'mista cultural centre applied for the grant but before the grant was approved and issued, the delay period as established by the Review Board expired and Sotheby's in Toronto

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[263] Designated Organizations, *supra* note 173; Bell & Paterson, *supra* note 50 at 81.
[264] Bell & Paterson, *supra* note 50 at 81.
[265] *Ibid* at 82; see also: "About Us" (2023), online: *U'Mista Cultural Centre* <https://www.umista.ca/pages/about-us>.

legally exported the Nowell Blanket to Sotheby's in New York for auction on the basis that no official offer to purchase the object in Canada had materialized.[266] The U'mista Cultural Centre was forced to bid for the blanket at auction, but lost to a gallery based in Ontario, who purchased the Nowell Blanket for US$24,500. Ultimately, the U'mista Cultural Centre purchased the blanket from the Ontario-based gallery for US$30,000 – US$18,200 more than the U'mista Cultural Centre had originally understood to be the monetary value of the blanket at the beginning of the process.[267]

While the Nowell Blanket was ultimately returned to the the U'mista Cultural Centre, it was an arduous journey for those involved and shows that at various steps along the way, Sotheby's capitalist and trade interests were privileged in the export system over the heritage/cultural interests of the Kwakwa̲ka̲'wakw.[268] In fact, as other parties entered the equation and asserted monetary interests over the Nowell Blanket, those interests were also privileged over the heritage/cultural interests of the Kwakwa̲ka̲'wakw. It should not escape notice that the Ontario-based gallery that had purchased the object at auction made a profit of US$5,500 when they sold it back to the U'Mista Cultural Centre.[269]

Bell and Paterson recount a similar situation in the case of the Echo Mask of the Nuxalk Nation. According to Bell and Paterson:

> [t]he mask represents Echo, a supernational being resident on earth, and the transformation of the supernatural into the natural world. It is capable of transforming into multiple identities and carries with it a web of rights and responsibilities including societal status, spirit powers, names, songs, legends, and dances[270]

[266] *Ibid*.
[267] *Ibid*.
[268] *Ibid*.
[269] *Ibid*.
[270] *Ibid* at 79.

The mask was in possession of an elderly woman, whom an art dealer befriended in the 1980s. The art dealer convinced the woman to sell the mask for CAN$35,000 in the mid-1990s, after which point the art dealer applied for an export permit with the intention of selling the mask outside of Canada for US$250,000.[271] The Nuxalk nation were notified indirectly of the permit application and acted swiftly to bring an injunction through the British Columbia court system to stop the export of the mask. The case eventually settled out of court, but the art dealer insisted throughout the dispute and settlement negotiations "that he had legitimate title"[272] to the Echo Mask and ultimately received CAN$200,000 to sell it back to the Nuxalk Nation. On the one hand, this outcome of this case is positive in that the Echo Mask was returned to the Nuxalk nation; however, it came at a steep monetary cost. Even without a decision from the Court, the structure of the Canadian legal system and the general desirability of settling matters out of court arguably worked to privilege the art dealer's property/monetary interest in the Mask over the legal and cultural interests that the Nuxalk Nation had in the Echo Mask.[273]

Canadian Nationalism and Cultural Property Internationalism

The CPEIA regime, like international cultural heritage instruments and policies, is a statist and nationalist one.[274] The OS/NI Framework, in particular, is expressly concerned with an object's meaning to Canada the nation state, which is visible in the text of the legislation but also manifests in the application of the CPEIA, and the designation of institutions as expert examiners.

First, even where the interests of subaltern communities within Canada are recognized, their claims to material culture under the CPEIA regime must fit into Canada's nationalist narrative in some regard. A 2013 resource published by Canadian Heritage notes that "national importance

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[271] *Ibid* at 79.
[272] *Ibid* at 81.
[273] *Ibid*.
[274] See: Macmillan, *supra* note 8.

includes local, regional, and community importance in that cultural property that is important to part of Canada is by extension important to Canada as a whole."[275] Even where the document acknowledges that community importance may satisfy the national importance requirement, it is still within the context, or under the umbrella, of importance to Canada, the nation. For example, for an object to be considered one of national importance, it must reach a threshold whereby its loss to Canada "would significantly diminish the national heritage"[276] of Canada. It may be problematic for subaltern communities within Canada whose culture and history predate and stand alone or apart from Canadian history to define their independent cultural heritage in terms that relate to Canada's.[277]

The 2013 resource provides Sample OS/NI Justifications in its Appendix A, one of which includes an application for the certification of textual records of a fictional John Smith who worked on education initiatives with First Nations Communities in Northern Manitoba. In arguing that the objects are of outstanding significance due to their close association with Canadian history, the government writes:

> Records relating to Smith's role as the Director of the ABC Education Task Force – including the final report and notes on public feedback from community consultations in several Northern Manitoba communities – offer insight into these First Nations communities and how they interact with the Canadian government.[278]

Though the hypothetical document was created by a fictional Canadian settler, its importance is justified in large part because of its value in connecting First Nations communities in Northern

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[275] *Outstanding Significance and National Importance (OS/NI): Writing an Effective OS/NI Justification for the Certification of Cultural Property by the Canadian Cultural Property Export Review Board* (Ottawa: Canadian Heritage: Her Majesty the Queen in Rights of Canada, 2013) [OS/NI Justification Guide].
[276] *Ibid*.
[277] Smith, "Discourses of heritage", *supra* note 11.
[278] OS/NI Justification Guide, *supra* note 275.

Manitoba with the Government of Canada. It is perhaps telling that even when using fictionalized documents as a resource, the Government of Canada seemingly had no qualms with framing First Nations history within the context of Canadian history.

Second, as Bell and Paterson highlighted in 2009, there are still no Indigenous nations designated as Category A institutions under the Act, so specific Indigenous communities may or may not become aware of the application for an export permit regarding of one of their cultural objects during the application process. At the time of writing, there are over 250 Category A institutions which, according to the federal government website "are located in Canada and demonstrate the ability to ensure the long-term preservation of cultural property".[279] The vast majority of these Category A organizations are traditional museums and galleries, then archives and libraries, some of which are housed on university campuses. Very few of the Category A organizations were created by and for Indigenous peoples and in many provinces and territories including Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Prince Edward Island, and Yukon there are no Category A institutions that were created by Indigenous peoples or that centre their voices.

Notably, the preoccupation with ensuring the long-term preservation of cultural property in Canada reflects the fact that certain ideas that circulate within the AHD have influenced and become incorporated into Canadian cultural heritage policy and law. For example, long-term preservation is closely aligned with the idea that cultural property should be conserved as it is found, and that its condition should remain static.[280] The moment that the cultural object enters Canada's heritage awareness and especially once it enters Canada's heritage canon, the object and its cultural context become static in time so that it can be preserved as it is for future generations

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[279] Designated Organizations, *supra* note 173.
[280] Smith, *supra* note 8 at 32, 36.

of Canadians. It further reinforces the idea that only certain kinds of experts and institutions can engage with and house cultural objects, for fear that the object will not be preserved according to rigorous traditional (European) museum standards.

In broad strokes, Canada has also incorporated aspects of the AHD into the CPEIA regime and has used the principles espoused by cultural property internationalism as a justification for keeping cultural objects within Canada. For example, section 4(2) of the CPEIA holds that:

> the Governor in Council may include in the Control List, regardless of their places of origin, any objects or classes of objects hereinafter described in this subsection, the export of which the Governor in Council deems it necessary to control in order to preserve the national heritage in Canada.[281]

In *Heffel*, the Federal Court of Canada confirmed that an object can be one of national significance to Canada even where that object did not originate in Canada, and its only connection to Canada is its physical location within the country. This finding is not new, but it was the first time that the principle was confirmed by an appellate court, and it is a finding that has been followed in the limited number of decisions published by the CCPERB since then.

In 2022, the Review Board refused an export permit for *Garten am Wasser*, a gouache and watercolour by the Swiss-born artist Paul Klee.[282] Though the decision was eight pages, the CCPERB provided scant reasoning for its finding that the object was one of outstanding significance and national importance. On the issue of whether the artwork was one of national importance, the Board held that there were a limited number "of drawings and paintings by Paul Klee held in Canadian public institutions"[283], and only two from the 1930s.[284] The only other reason provided for the finding was a statement that Paul Klee's oeuvre was of international

[281] CPEIA, *supra* note 105 at s. 4(2)
[282] *Garten am Wasser, supra* note 199.
[283] *Ibid* at para 33.
[284] *Ibid*.

importance.[285] The lack of discussion within the reasons is demonstrative of not only the internal reliance of the CCPERB on the individual members' expertise to make pronouncements about the significance about a piece of art without providing substantial reasons for those pronouncements. In this way, the decision becomes inherently opaque to individuals unfamiliar with Paul Klee's work.[286] Further, Paul Klee is not a Canadian artist, and the work itself was only present in Canada for a period of fifteen years; nonetheless, it was found to be an object of outstanding significance and national importance.[287]

Different Ways of Thinking About Heritage Laws

This thesis has sought to demonstrate how the concerns and conclusions of the AHD have come to be incorporated into Canada's cultural heritage laws and, as a result, the way that European and settler legal and political actors thought about and talked about heritage in the past has a continued material impact on subaltern communities seeking to protect tangible aspects of their cultural heritage under the CPEIA regime. The AHD informs the CPEIA's conception of heritage and the past, which in turn determines how it interacts with cultural objects and makes value judgments regarding what requires protection. The CPEIA takes for granted certain ideas about heritage and property, principally that cultural objects are a form of property and that as a form of property, it is inherently alienable. This is also informed by broader private property discourses which, as Napoleon and Snyder note, are the product of "Western, liberal, capitalist ideologies".[288]

The CPEIA automatically subordinates and pushes out any alternative forms of heritage discourse and legal worldviews, even though there are many alternative heritage discourses that

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[285] *Ibid* at para 34.
[286] See: Damiano Canale, "The Opacity of Law: On the Hidden Impact of Experts' Opinion on Legal Decision-making" (2021) 40:5 Law Philos 509–543.
[287] *Garten am Wasser*, *supra* note 199 at 43.
[288] Napoleon & Snyder, *supra* note 82 at 43.

may help to create proposals for changing the CPEIA. For example, the CPEIA is ill-equipped to address the THA and Aird and Fox's concept of living heritage because it cannot conceive of heritage as being all-encompassing or dynamic. Under the CPEIA, heritage is firmly rooted in the past and firmly tied to tangible objects, but the system permits those objects to take precedence over the network of practices and places that may give the objects their true cultural context. In fact, the foundation of the CPEIA begins to fall apart when it is confronted with alternative concepts of heritage informed by different heritage discourses. As highlighted, the preoccupation with expert opinions and preservation of cultural property cannot be reconciled with a version of heritage that is lived and renewed every day, as is the case with living heritage under the THA.

There is an assimilationist tendency in most settler laws, including the CPEIA.[289] Even if, as Bell and Paterson suggest, the CPEIA regime is amended to include consultation with Indigenous peoples when an application for the export of an aspect of their cultural heritage arises, the interested Indigenous peoples or organizations are faced with the choice of either refusing to participate in the process or accepting the foundational principles of the CPEIA and, therefore, the AHD. To do so, they must conceptualize (or reconceptualize) their cultural heritage within that settler law framework, even where that framework does not make sense within their own legal systems or worldviews. As highlighted elsewhere in this thesis, this requires a flattening and a narrowing of their understandings of heritage in many cases, but also requires them to attach their heritage to Canada's. This may be an undesirable outcome for Indigenous communities whose history pre-dates Canada's, or whose history is fundamentally distinct from Canada's.

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[289] Rebecca Tsosie, "Who Controls Native Cultural Heritage?: 'Art,' 'Artifacts,' And The Right To Cultural Survival in: Cultural Heritage Issues" in James A R Nafziger & Ann M Nicgorski, eds, *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce* (Leiden: Martinus Nijhoff Publishers, 2009) at 3.

While I believe there are many possible recommendations that may be reasonably made on how to evolve or improve the cultural property export and import regime in Canada, including the abolition of the CPEIA in its entirety, I have chosen a different route. One starting assumption with my proposed way forward is that Canada the state is unlikely to abolish the CPEIA if only because of its international obligations under the 1970 UNESCO Convention. Assuming then that the CPEIA is here to stay in some form or another for the foreseeable future, perhaps the most effective changes that can be made are inside the legislation itself. I take this opportunity to note that with this recommendation I am offering only changes on ways that the Canadian system can hold space for Indigenous legal orders but I have not made recommendations on what those Indigenous legal orders may choose to do with their cultural heritage. As a settler Canadian, it is neither appropriate nor warranted for me to do so.

Perhaps the first step in reforming the CPEIA regime is to acknowledge, as Lippert highlights, that an object may have many identities over the course of its existence. In some ways as I have highlighted above, the CPEIA already does this but in its present form the acknowledgement holds the most space for the economic interests of the individual seeking to export the object. Building from Bell and Paterson's recommendation, it is important to notify specific Indigenous peoples when their cultural property is the subject of an application for export, but rather than simply leaving the door open for consultation, once it is clear that the cultural heritage of Indigenous peoples is at issue, it should be left to the Indigenous community from whom the object originates to determine what context and identity is the most important.

Gordon Christie argues that "Aboriginal peoples are capable of providing the mechanisms called for, and they must be left to develop the same[290] in much the same way that Tsosie argues

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[290] Gordon Christie, "Aboriginal Rights, Aboriginal Culture, and Protection" (1998) 36 Osgoode Hall LJ 447-484 at para 6.

that, as part of Indigenous peoples' self-determination, Indigenous peoples and Indigenous societies should be entitled to determine how they govern their own cultural property. Any change that the legislation incorporates at least with respect to Indigenous cultural heritage should be at the behest of, and led by, Indigenous voices. This would be in line with the rights of Indigenous Peoples established under UNDRIP, and specifically those related to Indigenous peoples' right to "freely determine their political status and freely pursue their economic, social and cultural development",[291] their right to maintain and strengthen their cultural institutions,[292] and their right to "practice and revitalize their cultural traditions and customs".[293] It is also in line with the State's obligation, under UNDRIP, to provide redress for past actions and ongoing actions that had and have the impact of depriving Indigenous peoples in Canada "of their integrity as distinct peoples, or of their cultural values or ethnic identities"[294]

Another significant change that should be made to the CPEIA is with respect to the emphasis on the financial/economic interests that applicants for export permits have in cultural objects. As demonstrated in the Nowell Blanket case, the CPEIA's preoccupation with the cultural property market creates unfair outcomes in many circumstances where the cultural property in question is contested. Despite the apparent unfairness of the process in the Nowell Blanket case, the CPEIA operated exactly as it was intended to do and at the end of the day, the financial interests of a small handful of collectors and institutions was ultimately privileged over the interest the Kwakwa̲ka̲'wakw people had in their own cultural heritage at every step in the process. If the Kwakwa̲ka̲'wakw people's desire to repatriate the blanket had been the central focus in this case, even without removing other elements of the process, such as the emphasis on the fair market

[291] UNDRIP, *supra* note 31 at Art. 3.
[292] *Ibid* at Art. 5.
[293] *Ibid* at Art. 11.
[294] *Ibid* at Art. 8.

value of the Nowell Blanket, seemingly minor steps could have been taken to make the return easier. For example, the delay period could have been longer, allowing the Kwakwa̱ka̱'wakw and the U'Mista Cultural Centre to raise enough funds to purchase the Nowell Blanket directly. A more interventionist route could have been a government mandate that the Nowell Blanket must be sold to the Kwakwa̱ka̱'wakw. A better outcome, arguably, and one that would have at least partially honoured the intent of UNDRIP would have been the recognition that the Kwakwa̱ka̱'wakw should have been consulted from the outset regarding how they wanted to proceed, and that consultation would have dictated the process. The legislation, however, does not leave room for these possibilities to occur. The delay period is a strict one and cannot be more than six months.[295] Furthermore, there is no mechanism by which the Board can recognize or remediate a historical injustice by ordering the repatriation of a cultural object from an Indigenous community, for example. As with any other administrative body, the powers and mandate of the CCPERB are strictly set out in the legislation and, as such, the Board is not in a position to actually offer meaningful solutions to these types of claims.

Conclusion

In the last chapter, I proposed that colonial discourses were and are incorporated into Canada's cultural property export regime through its reliance on the Waverley Criteria and the 1970 UNESCO Convention as both intellectual and legislative starting points. I also sought to demonstrate that the interests of a limited number of people were considered in the historic development of the CPEIA and its predecessors, to show the exclusionary nature of the legislation and how those exclusions are repeated and reproduced over and over again. This chapter focused on how the central components of the AHD and cultural property internationalism, themselves

[295] CPEIA, *supra* note 105 at s. 29

heavily influenced by colonial discourses, further perpetuate those colonial discourses in practice through the application of the CPEIA and its associated institutions. The CPEIA continues to privilege a narrow, property-focused interpretation of that necessarily ignores the existence of other legal orders and interpretations of heritage and its connection with culture and cultural objects.

Chapter 5: Conclusion

Throughout this thesis I have argued that the CPEIA was built on a discursive foundation established during three key periods. First, in the colonial period, when European colonial powers had an interest in legitimizing their empires and presence in their colonies. I argued that they did this by crafting narratives about progress, culture, and race that placed European imperial powers on the most sophisticated, most developed end of the spectrum and Indigenous peoples in the colonies on the least developed, least civilized end of the spectrum. Cultural heritage experts and the display of cultural heritage objects in museums were instrumental to this process.

Second, as the colonial period and particularly the British colonial period came to an end, the narratives developed during colonialism shifted but did not disappear. In the post-WWII period, the art and antiquities market expanded and Britain saw a wave of anxiety towards what it viewed as the unfair, unchecked exodus of its national treasures to private collectors and institutions in the United States through trade in cultural property. Against this backdrop, the Waverley Committee crafted the Waverley Criteria to stem the flow of cultural objects out of the United Kingdom based on an understanding of heritage that privileged the idea that treasures from other cultures could become national treasures to Britain and that cultural objects were a source of cultural wealth in Britain. To facilitate this, it was necessary to separate an object's physical form from the matrix of intangible meanings, practices and stories associated with the object. Notably, tangible cultural heritage and intangible cultural heritage have continued to be considered as separate categories of heritage within Canadian heritage law even though other heritage discourses would hold that physical cultural objects are just one part of an overarching form of heritage that encompasses tangible and non-tangible components.

Finally, in the 1960s and 1970s, former colonies and postcolonial states made claims for the return of their cultural objects taken under colonialism, only to be met with ardent opposition from the former colonial powers and established settler states, such as Canada and the United States. Informed by a desire to maintain a thriving art and antiquities market, and to keep colonial treasures in the former imperial metropoles and in settler states, the 1970 UNESCO Convention contained no retroactive effect, and incorporated protection for the owners (in the Western sense) of cultural objects. Not long after, Canada adopted the CPEIA in its initial form, which was built on these earlier heritage instruments and discussions.

These developments are significant, I have argued, because they demonstrate a throughline from colonial discourses about cultural heritage and cultural property that can be traced from the modern CPEIA back to European colonialism. They demonstrate how different state, political, and legal actors came to conceive of and talk about heritage and different cultures, and the motivations for why a certain discourse about heritage came to be accepted over others, and how that discourse continues to influence and is reflected in modern laws such as the CPEIA. In particular, lining up these historical developments demonstrates a consistent division between tangible and intangible cultural heritage which underpins the creation of modern categories of heritage into which the law is now organized. They also demonstrate a consistent turn to heritage experts as first emerged during the nineteenth century and the consistent privileging of private property rights to own and sell cultural objects, particularly those of private collectors and dealers.

Canada, as a settler state, has endorsed colonial discourses as the official discourse through which it crafts heritage policy and legislation and, in doing so, has created legislation and a legal system that is more reflective of the concerns of imperial and post-WWII Britain than it is of Indigenous peoples who still experience the consequences of existing in a settler colonial state to

this day. This is particularly evident when the CPEIA and its implicit understanding of heritage is held up against heritage as described within different Indigenous communities. Different Indigenous peoples have encountered the CPEIA as previously lost cultural objects have come up for export permits. In each of these cases, they are faced with a choice of engaging with settler laws on settler terms because the legislation simply cannot conceive of another way to understand heritage, or not engaging at all and potentially losing access to a means of repatriation.

Understanding the boundaries that the CPEIA places around the concept of heritage and the barriers that it creates to Indigenous peoples being able to engage with and make claims for the repatriation of their own cultural heritage is an important exercise in identifying some of the ways that settler laws continue to subordinate Indigenous legal orders and worldviews. During a time when repatriation claims are receiving more and more media attention, this line of enquiry helps deconstruct some of those barriers insofar as it at least illuminates the persisting colonial power structures that underpin the legal systems that deal with cultural heritage.

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