

Federal Court



Cour fédérale

Date: 20231208

Docket: T-535-21

Citation: 2023 FC 1663

Vancouver, British Columbia, December 8, 2023

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

ATTORNEY GENERAL OF CANADA

Plaintiff

and

JAN KOESTEL

Defendant

JUDGMENT AND REASONS

I. Overview

[1] On February 19, 2020, the Canada Border Services Agency (CBSA) intercepted two objects, a brass and glass medallion and a double cylinder glass tube, imported by the Defendant, Jan Koestel, from the Republic of Italy (Italy). The objects were intercepted as there were reasons to believe that Italy might consider them to be religious reliquaries and controlled cultural property. Four months later, the CBSA intercepted a third object, a wood statuette.

[2] On March 25, 2021, the Plaintiff, the Attorney General of Canada (hereinafter referred to as the AGC or Canada), brought an action against the Defendant seeking an order pursuant to subsection 37(5) of the *Cultural Property Export and Import Act*, RSC 1985, c C-51 (CPEIA) for the recovery and return of the three objects to Italy. Canada now moves for summary judgment pursuant to Rule 213(1) of the *Federal Courts Rules*, SOR/98-106 (FCR).

[3] In support of the motion, Canada relies on the evidence of two lay witnesses and two experts. None of these deponents were cross-examined. As a result, there is uncontroverted expert opinion before me on the authentic nature of the reliquaries, undisputed evidence that the Defendant did not have export permits issued by Italy for the reliquaries, and expert opinion on the unlawful export of the relics from Italy.

[4] In response to the motion, the self-represented Defendant filed a brief affidavit attaching 61 documents as exhibits. At paragraph 4 of his affidavit, the Defendant states that the exhibits prove that the three reliquaries “are, in fact, forgeries and not national treasures and were bought by [him] so that [he] could donate them to [his] church”.

[5] As explained further below, there is no actual credibility issue suggested that would impact the finding that the objects at issue are more likely than not authentic. While I have no doubt that the Defendant truly and sincerely believes that the three objects are forgeries, he is neither an expert qualified to express opinions regarding their authenticity, nor in a position to question the experts’ evidence given that he chose not to cross-examine them.

[6] As explained below, on the record before me, I find that this is an appropriate case for summary judgment.

II. Legislative Background

[7] There are two legislative schemes at play here which stipulate the rules that apply to import and export of cultural property: (1) the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural property* the 1970 UNESCO Convention (1970 Convention) and (2) the CPEIA.

[8] The 1970 Convention provides that at the request of the State Party of origin, State Parties undertake to recover and return any foreign cultural property illegally imported. Canada accepted the 1970 Convention on March 28, 1978. Italy ratified the 1970 Convention in October 1978. Accordingly, Canada and Italy have mutual obligations to provide assistance to one another for the recovery and return of cultural property that has been illegally imported.

[9] Canada's obligations pursuant to the 1970 Convention is implemented through the CPEIA. The Minister of Canadian Heritage shares responsibility for carrying out provisions of the CPEIA with organizations such as the CBSA, who are responsible for enforcing specific provisions of the legislation.

[10] Section 37 of the CPEIA, reproduced at Appendix A, provides the legislative framework for foreign cultural property.

[11] Subsection 37(2) of the CPEIA stipulates from the coming into force of a cultural property agreement in Canada and a reciprocating State, it is illegal to import into Canada any foreign cultural property that has been illegally exported from that reciprocating State. “Foreign cultural property” is defined as “any object that is specifically designated by that State as being of importance for archaeology, prehistory, history, literature, art or science” (section 37).

[12] When the government of a reciprocating State submits a written request to the Minister for the recovery and return of any foreign cultural property that has been imported into Canada illegally under subsection 37(2), and the property is in the possession of or under the control of any person in Canada, the Attorney General of Canada may institute a court action for the recovery of the property and return to the reciprocating State (subsection 37(3)).

III. Fact Evidence

[13] The facts in this case are not in dispute and are summarized below.

[14] The three objects detained by CBSA (objects at issue) were purchased by the Defendant on eBay for \$1,495 USD, \$1,600 USD and \$200 USD respectively and imported from Italy.

[15] CBSA requested assistance from the Department of Canadian Heritage (Canadian Heritage) to assess whether the objects at issue were subject to import controls under the CPEIA.

[16] In response to CBSA’s request for assistance, Canadian Heritage requested that the objects at issue be further detained. Canadian Heritage then undertook steps to verify whether the

importation of the objects at issue by the Defendant complied with the requirements of the CPEIA. In particular, Canadian Heritage requested that the Defendant provide receipts, documentation and export permits for the objects at issue; sought the opinion of an expert as to the origin and authenticity of the goods at issue; and conducted research on Italy's cultural property legislation, and contacted appropriate Italian authorities on this issue.

[17] Canadian Heritage ascertained that the Defendant did not have any export permits for the goods at issue.

[18] Canadian Heritage was also able to determine that, from an administrative viewpoint, there were reasons to believe that Italy might consider the three objects at issue as controlled cultural property.

[19] On the basis of this information, Canadian Heritage contacted the Embassy of Italy to Canada to inform the Government of Italy that the objects at issue had been intercepted and detained by the CBSA. Canadian Heritage also provided it with an opportunity to request the return of the objects at issue.

[20] On July 9, 2020, the General Commander of the Carabinieri Command for Cultural Heritage Protection at the Italian Ministry for Cultural Heritage and Activities and Tourism (the General Commander) confirmed that the first two objects at issue – the medallion and glass tube – were subject to the protection of Italy's cultural property legislation. The General Commander requested that, in the absence of any export permit, these two objects be returned to Italy.

[21] On October 17, 2020, the General Commander confirmed to Canadian Heritage that the third object at issue – the wooden statuette – was also subject to the protection of Italy’s cultural property legislation. The General Commander once more requested that, in the absence of any export permit, this object be returned to Italy.

[22] Canadian Heritage subsequently requested the AGC to commence a formal action for recovery of the objects at issue.

IV. Expert Evidence

[23] Canada relies on the reports of Dr. Emma Anderson and the statement of Dr. Stefania Bisaglia, both tendered as expert witnesses. As stated earlier, the Defendant did not cross-examine the experts.

[24] At the hearing of the application, the Defendant sought to attack the qualification of Dr. Anderson to opine on religious matters after playing extracts of a Zoom video showing her examining the objects and expressing her preliminary views about their authenticity to a CBSA. The Defendant tried to poke holes in her evidence; however, any challenges he wished to make about the qualifications or opinions of Dr. Anderson should have been made in cross-examination and not at the hearing, when the witness has no opportunity to defend herself. Based on the nature of her training, qualifications, and professional experience, I am satisfied that Dr. Anderson is qualified to provide expert opinion on the history of Catholic veneration of relics of the saints, reliquaries, the rites and rituals associated with Catholic relics, how Catholic relics are

preserved and displayed, and notions of “authenticity” as they relate to Catholic relics, and I unreservedly accept her opinion.

[25] Dr. Anderson opines in her affidavit that the objects at issue are authentic religious relics, noting as follows:

- Reliquaries are containers in which relics are displayed for public veneration.
- Relic refers to the earthly remains of those individuals who are deemed to be saints in the Christian tradition.
- The objects at issue are reliquaries containing the relics of St-Nicholas de Myra.
- The authenticity of relics can be attested to by the manner in which the Church displays, secures and certifies bones believed to be relics of the saints. A relic is authentic if the Catholic Church believes it to be genuine and treats it as such; it is not predicated on scientific evidence about who the bones belonged to.
- The aesthetic qualities of reliquaries, effort put into security and anti-tampering devices and certificates are indicators that the Catholic Church believes that the relics are genuine remains of a saint. The reliquaries contain what appear to be human bone fragments and conform to the traditional aesthetic, certification and protection conventions developed by the Catholic Church.
- These reliquaries were created to house relics that Catholic authorities fully believe to be authentic.

[26] I am equally satisfied that Dr. Bisaglia is qualified to provide expert opinion on the Italian legislative and administrative schemes concerning the identification, designation, protection, circulation, import and export of Italian cultural assets and property and I accept her evidence. In fact, her qualifications and opinions were not disputed by the Defendant.

[27] Dr. Bisaglia opined that the objects at issue are Italian cultural property. She describes the Italian laws and the framework for their treatment of cultural property, as follows:

- *The Code of Cultural and Landscape Heritage (the Code)*, pursuant to Article 10 of Law no. 137 of 6 July 2022 is Italy's domestic legislation on cultural heritage.
- Cultural property is defined in article 10 of the *Code* as “immovable and movable things which, pursuant to articles 10 and 11, are of artistic, historical, archaeological, ethno-anthropological, archival and bibliographic interest and other things identified by law or on the basis of the law as evidence having value of civilization”.
- Pursuant to articles 10 and 11, some objects do not require particular administrative measures to be considered cultural property, while others do. The *Code* provides for an administrative measure which allows for certain goods not specifically listed in article 10 to be designated as cultural property.
- The Ministry of Culture has authority to take administrative measures concerning cultural property belonging to ecclesiastical bodies and institutions pursuant to the Agreement between Italy and the Holy See (signed on February 18, 1984 and made executive by law no. 121) and the sector agreement signed in 1996 between the Minister of Culture and the President of the Italian Bishops' Conference.
- Article 65 of the *Code* provides the framework for the exit of cultural property from Italian territory. Certain categories of cultural property are subject to an absolute prohibition from exit, while others (owned by either public entities or private non-profit entities) are also banned from existing Italian territory pending the completion of the administrative verification of their cultural interest.
- Administrative procedures must be completed to export designated cultural property from the Italian territory. Prior to December 1, 2020, the exit from Italy of objects with an economic value lower than 13,550 euros was subject to the issuance of a Certificate of Free Circulation, supplemented by an export licence for exit from EU territory.
- According to article 10, paragraph 1 and article 65, paragraph 2(a) of the *Code*, the relics at issue were subject to the

prohibition of the definitive exit from Italian territory pending the conclusion of the administrative assessment of their cultural value. This is because the relics are objects of historical-artistic, religious and anthropological interest produced more than seventy years. They come from the Italian territory and their definitive exit is subject to the control of the export offices of the Ministry of Culture.

- Therefore, in the absence of documents certifying the completion of the proper administrative measures, the relics in question were illegally removed from Italy.

V. Issue

[28] The only issue to be determined is whether summary judgment should be granted on the record before the Court.

VI. Test to be Applied

[29] Rule 215(1) of the FCR provides that on a motion for summary judgment, the Court shall grant judgment if it is satisfied there is no genuine issue for trial with respect to a claim. Rule 215 must be interpreted and applied in a manner consistent with the objectives of fairness, expeditiousness, and cost-effectiveness as outlined in Rule 3 (*Manitoba v Canada*, 2015 FCA 57 [*Manitoba*] at para 15). There is no genuine issue if the judge has “the evidence required to fairly and justly adjudicate the dispute” (*Manitoba* at para 15 citing *Hryniak v Mauldin*, 2014 SCC 7 at para 66).

[30] The initial evidentiary burden is on the moving party to demonstrate that there is no genuine issue for trial; it must establish the facts necessary to justify summary judgement. This is a high bar to meet (*Saskatchewan (Attorney General) v Witchehan Lake First Nation*, 2023 FCA

105 [*Witchehan Lake First Nation*] at para 23). If the moving party has discharged that burden, the onus shifts to the responding party. The responding party must outline specific facts in their response to the motion and adduce evidence demonstrating there is a genuine issue for trial (*Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 [*Milano Pizza*] at para 35).

VII. Analysis

[31] There are five requirements that must be met before a Court may grant an order for the recovery of designated property under section 37 of the CPEIA: (1) the existence of a cultural property agreement, (2) the object at issue be specifically designated by the reciprocating State as being of importance for archaeology, prehistory, history, literature, art or science, (3) the cultural property was illegally exported, (4) the government of a reciprocating state requests the recovery and return of the foreign cultural property that has been imported into Canada illegally; and (5) compensation be paid, if any.

[32] In the case at bar, Canada met its burden by adducing evidence to establish that all five requirements have been met, including expert evidence regarding the authenticity of the objects at issue and the applicable foreign law.

[33] First, there is a cultural property agreement in place, namely the 1970 UNESCO Convention, which both Canada and Italy are party to.

[34] Second, Italy contacted Canada Heritage pursuant to subsection 37(3) of the CPEIA, confirming the objects at issue are subject to Italy's cultural property legislation under article 10, paragraph 1 and article 65, paragraph 2(a) of the *Code*.

[35] Third, the evidence demonstrates the reliquaries were illegally exported from a foreign state. A review of Italy's *Code* shows the objects at issue fall under protection of the *Code* and their exit from Italy was prohibited pursuant to article 65 until the verification of cultural interest provided for in article 12 had been completed. This is because the objects at issue are movable objects that possess artistic, historical, archaeological or ethno-anthropological interest and whose production goes back more than 70 years.

[36] Fourth, Italy submitted requests in writing on July 9, 2020 and October 17, 2020 for the recovery and return of the foreign cultural property.

[37] Fifth, the Defendant made no submissions as to whether compensation is required in the circumstances.

[38] The burden of proof then shifted to the Defendant. It is well-established that, on a motion for summary judgment, the responding party is required to put their best foot forward and show that there is a genuine issue for trial. The Defendant failed to do so.

[39] As stated earlier, the Defendant did not adduce any expert evidence or cross-examine Canada's deponents. His evidence essentially consists of a bald statement that the objects at issue

are forgeries. While the Defendant seeks to rely on various documents attached exhibits to counter Dr. Anderson's evidence, they are nothing more than hearsay.

[40] As for the matter of compensation, the onus was on the Defendant to establish that he was entitled to it. The Plaintiff correctly points out that the Defendant provided no evidence that he exercised due diligence when he purchased the objects at issue. The evidence supports a finding that the objects at issue were illegally exported from Italy, and that no compensation is due to the Defendant.

VIII. Conclusion

[41] All of the evidence needed to resolve this matter by way of summary judgment has been adduced by Canada, namely an expert opinion on the authentic nature of the reliquaries, evidence that the Defendant did not have export permits issued by Italy for the reliquaries, and an expert opinion on the unlawful export of the relics from Italy. I conclude that Canada's motion for summary judgment should be granted in its favor to allow it to comply with its international obligations and meet the Italy's request for the return of its cultural property.

[42] As for the matter of costs, Canada seeks \$2,210.00, roughly based on column III of Tariff B. The general rule is that a successful party is entitled to their costs on a motion. Taking into account the factors set out in Rule 400(3), and in particular paragraphs (a), (c), (g) and (n.1), I consider the amount requested by Canada to be more than reasonable and fully justified.

JUDGMENT in T-535-21

THIS COURT'S JUDGMENT is that:

1. The motion for summary judgment is granted.
2. Pursuant to subsection 37(5) of the *Cultural Property Export and Import Act*, the three objects intercepted by the Canada Border Services Agency shall be returned to the Republic of Italy.
3. There shall be no compensation paid to the Defendant under subsection 37(6).
4. Costs of the motion, hereby fixed in the amount of \$2,210.00, inclusive of disbursements and taxes, shall be paid by the Defendant to the Plaintiff.

“Roger R. Lafrenière”

Judge

APPENDIX A

*Cultural Property Export and Import Act, RSC 1985, c C-51**Loi sur l'exportation et l'importation de biens culturels (L.R.C. (1985), ch. C-51)*

<p>Foreign Cultural Property</p> <p>Definitions</p> <p>37 (1) In this section</p> <p><i>cultural property agreement</i>, in relation to a foreign State, means an agreement between Canada and the foreign State or an international agreement to which Canada and the foreign State are both parties, relating to the prevention of illicit international traffic in cultural property; (<i>accord</i>)</p> <p><i>foreign cultural property</i>, in relation to a reciprocating State, means any object that is specifically designated by that State as being of importance for archaeology, prehistory, history, literature, art or science; (<i>biens culturels étrangers</i>)</p> <p><i>reciprocating State</i> means a foreign State that is a party to a cultural property agreement. (<i>État contractant</i>)</p> <p>Illegal imports</p> <p>(2) From and after the coming into force of a cultural property agreement in Canada and a reciprocating State, it is illegal to import into Canada any foreign cultural property that has been illegally</p>	<p>Biens culturels étrangers</p> <p>Définitions</p> <p>37 (1) Les définitions qui suivent s'appliquent au présent article.</p> <p><i>accord</i> Accord bilatéral ou multilatéral tendant à prévenir le commerce international illicite des biens culturels, auquel est partie le Canada. (<i>cultural property agreement</i>)</p> <p><i>biens culturels étrangers</i> Tout objet qu'un État contractant désigne expressément comme étant d'importance pour l'archéologie, la préhistoire, l'histoire, la littérature, l'art ou la science. (<i>foreign cultural property</i>)</p> <p><i>État contractant</i> État étranger partie à un accord. (<i>reciprocating State</i>)</p> <p>Importations illégales</p> <p>(2) L'importation au Canada de biens culturels étrangers illégalement exportés d'un État contractant est illégale dès l'entrée en vigueur dans ces deux pays de l'accord conclu entre eux.</p>
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exported from that reciprocating State.

Action for recovery of foreign cultural property

(3) Where the government of a reciprocating State submits a request in writing to the Minister for the recovery and return of any foreign cultural property that has been imported into Canada illegally by virtue of subsection (2) and that is in Canada in the possession of or under the control of any person, institution or public authority, the Attorney General of Canada may institute an action in the Federal Court or in a superior court of a province for the recovery of the property by the reciprocating State.

Notice

(4) Notice of the commencement of an action under this section shall be served by the Attorney General of Canada on such persons and given in such manner as is provided by the rules of the court in which the action is taken, or, where the rules do not so provide, served on such persons and given in such manner as is directed by a judge of the court.

Order for recovery of designated property

(5) A court in which an action has been taken under this section on behalf of a reciprocating State may, after affording all persons that it

Action en restitution de biens culturels étrangers

(3) Sur requête, adressée par écrit au ministre par le gouvernement d'un État contractant, en vue de la restitution de biens culturels étrangers qui se trouvent, à la suite d'une importation illégale au sens du paragraphe (2), au Canada en la possession ou sous l'autorité d'une personne, d'un établissement ou d'une administration, le procureur général du Canada peut intenter, en vue de cette restitution, une action devant la Cour fédérale ou une cour supérieure provinciale.

Avis

(4) Avis qu'une action est intentée en vertu du présent article est signifié ou donné par le procureur général du Canada aux personnes et de la manière que prévoient les règles du tribunal saisi ou qu'indique un juge de ce tribunal en l'absence de dispositions à cet effet dans les règles.

Ordonnance de restitution

(5) Le tribunal saisi en vertu du présent article d'une action intentée pour le compte d'un État contractant peut, après avoir donné à toutes les

considers to have an interest in the action a reasonable opportunity to be heard, make an order for the recovery of the property in respect of which the action has been taken or any other order sufficient to ensure the return of the property to the reciprocating State, where the court is satisfied that the property has been illegally imported into Canada by virtue of subsection (2) and that the amount fixed under subsection (6), if any, has been paid to or for the benefit of the person, institution or public authority referred to in that subsection.

Compensation

(6) Where any person, institution or public authority establishes to the satisfaction of the court in which an action under this section is being considered that the person, institution or public authority

(a) is a bona fide purchaser for value of the property in respect of which the action has been taken and had no knowledge at the time the property was purchased by him or it that the property had been illegally exported from the reciprocating State on whose behalf the action has been taken, or

(b) has a valid title to the property in respect of which the action has been taken and

personnes qu'il estime intéressées par l'action la possibilité d'être entendues, rendre une ordonnance visant le recouvrement du bien en cause ou toute autre ordonnance garantissant sa restitution à l'État contractant après constat de son importation illégale au Canada, au sens du paragraphe (2), et, le cas échéant, du versement de l'indemnité prévue au paragraphe (6).

Indemnité

(6) Le tribunal saisi d'une action intentée en vertu du présent article peut fixer l'indemnité qu'il estime juste, compte tenu des circonstances, à verser par l'État contractant à la personne, l'établissement ou l'administration qui le convainc, selon le cas :

a) de sa qualité d'acheteur de bonne foi du bien en cause et de son ignorance, au moment de l'achat, du fait que le bien avait été exporté illégalement de l'État contractant;

b) de la validité de son titre de propriété sur le bien en cause et de son ignorance, au

had no knowledge at the time such title was acquired that the property had been illegally exported from the reciprocating State on whose behalf the action has been taken, the court may fix such amount to be paid as compensation by the reciprocating State to that person, institution or public authority as the court considers just in the circumstances.

Safe-keeping

(7) The court may, at any time in the course of an action under this section, order that the property in respect of which the action has been taken be turned over to the Minister for safe-keeping and conservation pending final disposition of the action.

Permit to export

(8) The Minister shall, on receipt of a copy of an order of a court made under subsection (5), issue a permit authorizing any person authorized by the reciprocating State on behalf of which the action was taken to export the property in respect of which the order was made to that State.

Limitations inapplicable

(9) Section 39 of the Federal Courts Act does not apply in respect of any action taken under this section.

moment de l'acquisition de ce titre, du fait que le bien avait été exporté illégalement de l'État contractant.

Garde

(7) En tout état de cause, le tribunal peut, par ordonnance, confier au ministre la garde et la conservation du bien en cause.

Permis

(8) Dès réception de l'ordonnance rendue par le tribunal en vertu du paragraphe (5), le ministre délivre un permis habilitant toute personne qui y est autorisée par l'État contractant pour le compte duquel l'action a été intentée à y exporter le bien en cause.

Prescription

(9) L'article 39 de la Loi sur les Cours fédérales ne s'applique pas aux actions intentées en vertu du présent article.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-535-21

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v JAN
KOESTEL

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 22, 2023

JUDGMENT AND REASONS: LAFRENIÈRE J.

DATED: DECEMBER 8, 2023

APPEARANCES:

Dylan Smith FOR THE PLAINTIFF

Jan Koestel THE DEFENDANT ON HIS OWN BEHALF

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