

**IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE ARBITRATION ACT, S.N.B. 1992, c. A-10.1
AND IN THE MATTER OF AN ARBITRATION CONDUCTED
PURSUANT TO AN AGREEMENT BETWEEN LORD BEAVERBROOK,
LADY BEAVERBROOK, LADY AITKEN, MAX AITKEN,
TIM AITKEN, JOHN KIDD, LAURA LEVI
(TOGETHER THE "TRUSTEES OF THE BEAVERBROOK FOUNDATION")
AND THE BEAVERBROOK ART GALLERY
DATED JULY 23, 2004**

B E T W E E N:

**(1) LORD BEAVERBROOK, (2) LADY BEAVERBROOK,
(3) LADY AITKEN, (4) MAX AITKEN, (5) TIM AITKEN,
(6) JOHN KIDD, (7) LAURA LEVI
(TOGETHER THE "TRUSTEES OF THE BEAVERBROOK FOUNDATION")**

Claimants

- and -

THE BEAVERBROOK ART GALLERY

Respondent

A N D B E T W E E N:

THE BEAVERBROOK ART GALLERY

Claimant

- and -

**(1) LORD BEAVERBROOK, (2) LADY BEAVERBROOK,
(3) LADY AITKEN, (4) MAX AITKEN, (5) TIM AITKEN,
(6) JOHN KIDD, (7) LAURA LEVI
(TOGETHER THE "TRUSTEES OF THE BEAVERBROOK FOUNDATION")**

Respondents

Counsel: Larry P. Lowenstein, Jean-Marc Leclerc, Jennifer Fairfax, David Duncan
Young, Patrick Windle, and Leanne Murray for The Beaverbrook Art
Gallery

Kent E. Thomson, H. Lorne Morphy Q.C., Sandra A. Forbes and Matthew
Milne-Smith for The Beaverbrook Foundation

Heard: October 3-6, 10-13, 17-20, 23-27, 30-31, 2006; November 1, 7-8, 27-30, 2006; December 1, 4-8, 2006

AWARD

At the very outset of this report I would like to extend my thanks to counsel for the parties in this arbitration. Their work has been excellent. The research has been done diligently and thoroughly. The case has been presented forcefully in a careful and detailed manner. Their submissions have been helpful and the interrogation of witnesses probing. Both sides have been well served by the dedicated work of their counsel. Further, counsel have co-operated in every situation where it would save their clients time and money, without jeopardizing their position. In effect, they have done everything to ensure that their clients have had a very good and complete hearing and that all relevant and discoverable evidence has been put forward.

OVERVIEW OF THE FACTS

Lord Beaverbrook was a Canadian with a great love of New Brunswick. He had been successful in Canada, and achieved still greater success in England. He had made major donations of public facilities to New Brunswick. In 1954 he proposed his greatest gift: an Art Gallery and a collection of paintings. The Province gratefully accepted the proposed donation and agreed to provide a choice and beautiful site for the Gallery, across from the provincial legislative building.

The Gallery was formally established by legislation in 1957. The Act provided for a Board of Governors to manage the Gallery's affairs, and established the special position of

Custodian, to be held first by Lord Beaverbrook and subsequently by his son. Thereafter, the powers of the Custodian were to be exercised by the Board. In the capacities of donor and Custodian, Lord Beaverbrook was closely involved with all aspects of the Gallery.

Lord Beaverbrook began sending works of art to New Brunswick in 1954. Initially, they were stored for Lord Beaverbrook at the University of New Brunswick. He held title to some of the paintings personally, but in 1954 he established the First Beaverbrook Foundation and the Second Beaverbrook Foundation, subsequently combined into one Foundation, with power to purchase works of art for the Gallery, and engage in other charitable purposes in New Brunswick and the United Kingdom.

The Foundation acquired paintings for the proposed Gallery, and in some instances Lord Beaverbrook gave or sold paintings from his personal collection to the Foundation for the benefit of the Gallery. Lord Beaverbrook was as much in control of every aspect of the Foundation as he was of the Beaverbrook Gallery.

The Gallery contends that Lord Beaverbrook expressed his intention to make a gift to the people of New Brunswick of the Works in Issue that were located in the Gallery prior to or at the time of its opening in 1959, and that the gift was completed and perfected.

In 1960, the objects of the Foundation were amended to explicitly authorize the Foundation to retain ownership of works of art that would be exhibited in New Brunswick and Nova Scotia.

In October 1960, Lord Beaverbrook's assistant, Mrs. Ince, attended at the Gallery to replace the old accession records and to place labels on paintings, now identifying them as the

property of the Beaverbrook Foundation. New works contributed to the Gallery were also now identified as the "Property of the Beaverbrook Foundation".

After the death of Lord Beaverbrook in 1964, his son Sir Maxwell Aitken succeeded him as Custodian of the Gallery.

By 2002, the relationship between the Gallery and the Foundation had deteriorated to a significant degree. It appeared to members of the Gallery Board of Governors that the continued exhibition of the central and most valuable paintings in the collection was at risk. The Gallery Board began to exercise due diligence to determine the ownership of the Works in Issue. Their initiative elicited a threatening letter from Timothy Aitken, a Trustee of the Foundation and a member of the Board of Governors of the Gallery. The Foundation subsequently notified the Gallery that, in ten years time, it would terminate the loan and recall all the Works in Issue.

Litigation was commenced in England and in Canada. Some of the issues raised in the litigation were, with the agreement of the parties, made the subject of this arbitration.

ISSUES

The issue to be resolved in this matter is the ownership of paintings referred to by counsel and witnesses as the "Works in Issue". The Gallery contends that the Works in Issue were either given to the Gallery or were to remain on permanent loan as long as the paintings were exhibited to members of the public in the province. The present Lord Beaverbrook testified that the Works in Issue were the central part of the collection and the most valuable paintings in it.

The Foundation argues that the Works in Issue were not given to the Gallery or, if they were, that the Foundation has valid defences to the Gallery's claim. It alleges that the Gallery, on

numerous occasions from 1961 until this litigation began, acknowledged and confirmed that the Foundation was the owner of the Works in Issue. It relies on estoppel, delay and the expiry of limitation periods.

There are two categories of Works in Issue:

1. Works in Issue that were located in the Gallery prior to or at the time of the Opening:

Prior to or at the time of the formal opening in September 1959, 88 of the Works in Issue had been delivered to the Gallery. The Foundation claims that the 88 paintings are the property of the Foundation. These paintings will be described as the "Opening Works in Issue". The issues to be determined are whether, in relation to these paintings, Lord Beaverbrook and the Foundation expressed the intention to make a gift, whether that gift was perfected, and, if so, whether Lord Beaverbrook was entitled subsequently to reassert the Foundation's ownership of these paintings.

The Opening Works in Issue include several paintings that have been retaken by the Foundation. The Foundation has sold some of these paintings and retained others without providing compensation to the Gallery. These works are described as the "Converted Works".

2. Works in Issue Subsequent to the Opening:

After the opening of the Gallery, the Foundation continued to purchase paintings for exhibit at the Gallery, and in each case it designated the paintings as "Property of the Foundation". The issue to be determined is whether the Foundation made a gift to the Gallery of these works by way of a loan whereby the Gallery would retain possession of the works as long

as they were exhibited to the public. The Foundation's position is that it is entitled to their return on demand. These paintings will be described as the "Post-Opening Works in Issue".

In order to resolve the issues in this matter, I have listened attentively to and assessed the evidence given by every witness. I have reviewed all the documents referred to by counsel for the parties. I have considered these documents as a whole and in the context of the other relevant documents and the events that occurred and were occurring at the time of their creation. I have more than once reviewed and studied the submissions of counsel.

Summary of Conclusions

It may be helpful at the outset to set out my conclusions and thereafter review the evidence and authorities which I considered relevant and helpful in reaching my decision.

1. Opening Works in Issue

I have concluded that there was a perfected gift made to the Gallery of the 88 Opening Works in Issue. The gift was irrevocable.

The newspaper and media articles commissioned, authorized, adopted and disseminated by Lord Beaverbrook clearly demonstrated his intention to make a gift to the Gallery of the Opening Works in Issue. The gift was perfected and became irrevocable when the paintings were delivered to the Gallery. The gift was made crystal clear and emphasized in the speeches made by Dr. Constable (acting with Lord Beaverbrook's authority) prior to and at the opening of the Gallery, and as well by the words of Lord Beaverbrook at the dinner on the evening of the opening.

The intention of Lord Beaverbrook to make the gift also constitutes the intention of the Foundation, which he dominated.

The intention was confirmed and supported by export documents which referred to Opening Works in Issue as gifts to the Gallery. It was, as well, confirmed by correspondence from and to Lord Beaverbrook. The express intention of Lord Beaverbrook to make the gift is also apparent from the evidence of Claire Watson Fisher, K.C. Irving, Thomas Forrestall and Josephine Yorke.

No matter how heavy or strict the onus may be on those arguing that a gift was made, the Gallery has more than satisfied it. The evidence taken together has a cumulative effect and irrefutably establishes that a gift was made.

The gift was irrevocable. Accordingly, subsequent attempts to assert that the works remained the property of the Foundation were of no force and effect.

The Converted Works form part of the Opening Works in Issue. They were returned to the Foundation at the request of the Custodian or the Foundation, but they remained the property of the Gallery.

In some instances, the Gallery did not consent to the Foundation's taking, sale or retention of the Converted Works. In other instances, the Gallery's apparent consent was not an effective and informed consent as a result of Lord Beaverbrook's breaches of the fiduciary duty he owed to the Gallery.

2. Post-Opening Works in Issue

The Gallery's claim to the Post-Opening Works in Issue must be dismissed. No intention was expressed to make a gift of these paintings to the Gallery. No commitment was made to leave the paintings with the Gallery for as long as the Gallery continued to exhibit them.

3. Waiver, Estoppel and Delay

The Foundation contends that the Gallery's apparent acquiescence to the assertion of the Foundation's ownership of the Works in Issue constitutes a waiver of its claim. The Foundation further contends that the waiver and subsequent delay estops the Gallery from asserting its claim. I cannot accept this argument. Lord Beaverbrook owed to the Gallery a fiduciary duty to act in its best interests and to make full disclosure of matters that affected those interests. His failure to make full disclosure relating to issues of ownership led to the Board's acquiescence. I have determined that the acquiescence and delay cannot now be put forward to foreclose the Gallery's claim.

It is now appropriate to review the relevant evidence. Although it will be helpful to do so, it is difficult to consider the evidence in neat, separate compartments. This is because of the need to consider the chronology of events which provides the necessary contextual background for the evidence. I will do my best to consider evidence together under distinct headings in some reasonable chronology. Like promises made at the outset of election campaigns, this one may not be honoured as strictly as it should be. It will lead to some repetitious comments but I trust this way of proceeding will be of assistance.

LORD BEAVERBROOK

This case is concerned with the actions of Lord Beaverbrook. Lord Beaverbrook established a reputation as an energetic, successful and aggressive businessman in Canada. When he left Canada in 1912, some may have been unhappy with his methods of doing business but no one could question his success. In the United Kingdom he purchased and operated newspapers and became one of the foremost newspaper publishers. Lord Beaverbrook liked the publishing business for it gave him opportunity to express his opinions and he was well aware of the power of the press and its ability to influence public opinion.

There is as well little doubt that Lord Beaverbrook liked to control – and did control – the actions of not only his corporations and Foundations but also the Beaverbrook Art Gallery.

In addition to his work in publishing, he was engaged in public service in the United Kingdom. He served as a Cabinet Minister during both the First World War and the Second World War. His wartime contributions reflected his dedication to the United Kingdom and his desire to serve.

His commitment to public service was shared by his son, Sir Maxwell Aitken, who served as a pilot with great distinction in the Royal Air Force during the Second World War. He was awarded the Distinguished Service Order and the Distinguished Flying Cross. He refused promotions in order to keep on flying throughout the War. He epitomized the dedication, courage and sacrifices of those who fought to preserve our cherished principles of democracy and the rule of law which guides and binds us all.

As well as serving the United Kingdom, Lord Beaverbrook retained an affection for Canada and particularly the province of New Brunswick. He was extremely generous to that

Province and its people and to the University of New Brunswick. In 1954, Lord Beaverbrook determined to extend his generosity by building an art gallery and by donating paintings to it.

At issue in this arbitration is whether the Works in Issue were gifts to the Beaverbrook Art Gallery for the benefit of the people of New Brunswick or whether they were simply loaned to the Art Gallery and could be recalled at any time.

In order to resolve this issue it will be necessary to review the history of the Art Gallery and the words and actions of Lord Beaverbrook from 1954 until his death in June of 1964, with particular reference to the period from 1954 through the opening of the gallery in September of 1959.

OCTOBER 28, 1954 -- LORD BEAVERBROOK'S PROPOSAL TO BUILD AN ART GALLERY

On October 28, 1954, Lord Beaverbrook wrote to the Premier of New Brunswick, proposing to build an art gallery in Fredericton. The letter provided:

“Dear Prime Minister,

The Province may be willing to offer me a site for an art gallery.

The building would be of modern fire-proof construction with capacity for holding more than 100 paintings which I would propose to give to the gallery.

There would be a collection of more than 200 prints.

Facilities would be provided for the housing and exhibiting of art available on loan.

The New Brunswick Universities would be given ample space for carrying on studies and courses of instruction.

You may wish to show this letter to the Mayor of the City of Fredericton.”

Premier Flemming agreed to provide a site for an art gallery and he expressed his gratitude in these terms: “The Government is most grateful for such a generous suggestion as you have made. I feel that the people of the whole Province will be most grateful to learn of this wonderful boost to cultural development”.

At this point I would emphasize that the letter to the Premier must be interpreted in appropriate context. It must be reviewed together with all the other documents, letters and articles which pertain to the proposed gift. They must be looked at as a whole without giving undue attention to any one word or phrase of any individual document. See, for example, *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259.

MEMORANDUM OF JULY 15, 1955 FROM LORD BEAVERBROOK TO THE TRUSTEES OF THE SECOND FOUNDATION

On July 15, 1955 Lord Beaverbrook wrote to the Trustees of the Second Foundation. He stated,

“You are engaged upon a scheme to equip an Art Gallery in Fredericton, New Brunswick, and you have already acquired a number of pictures.

I too have been buying pictures and a list of these is attached, hereto, showing their total cost to be £12,108.7.0.

These, with the exception of the last three, are in store at the University of New Brunswick in Fredericton. The three are still here but will shortly be shipped to the University to join the others.

It was my intention to offer them to you to add to your collection for the Art Gallery, and to invite you to pay me for them.

But, realizing the limitations on your resources, and the demands of other schemes on which you are engaged, I now ask you to accept these pictures as listed, costing £12,108.7.0 as a donation, this day, to your Trust Fund.

You are still indebted to me in the sum of £3,544.3.8 for the balance of the cost of the Turner painting which you recently bought from Spink & Son Ltd.

This sum I now donate to your Trust Fund.

Beaverbrook”

Attached to the memorandum was a list of works of art. They were as follows:

- a) Matthew Smith *Pears with a Red Background*;
- b) Matthew Smith *Nude*;
- c) Charles Conder *Landscape*;
- d) Ben Nicholson *Still Life*;
- e) J.S. Sargent *Wine Cellar*;
- f) George Lambert *Portrait of Lady Beaverbrook*; and
- g) George Lambert *Drawing for Portrait of Lady Beaverbrook*.

THE FORMAL OFFER OF A GALLERY “FULLY EQUIPPED” MADE TO PREMIER FLEMMING DECEMBER 4, 1956

On December 4, 1956 Lord Beaverbrook formally offered to convey to the Province a “fully equipped” Art Gallery. His letter read in part:

“Dear Premier Flemming,

I offer to convey to the Province of New Brunswick, subject to the following terms and conditions, an Art Gallery to be erected on the ground known as “The Green”. The Gallery will be fully equipped and will contain a collection of paintings, prints, books, sculpture and other works of art. ...”

Lord Beaverbrook specified conditions regarding the Board of Governors for the proposed Gallery and his role as Custodian. He asked Premier Flemming to consult with his colleagues and to let him know whether they approved. Premier Flemming, as might be expected, replied by telegram with alacrity and enthusiasm. He wrote, "Your generous offer of Art Gallery received and on behalf of the people and government of New Brunswick I express our sincere thanks and appreciation".

Lord Beaverbrook's letter of October 28, 1954 referred to a "building ... and more than 100 paintings which I would propose to give to the Gallery". His letter of December 4, 1956 referred to a Gallery "fully equipped" and containing a collection of works of art.

The Foundation takes the position that this letter should not be considered as evidence of an intention to make a gift of the Works in Issue because it does not refer to any particular artists or any particular paintings owned by the Foundation. Further, it is said that the Gallery was indeed fully equipped because it had washrooms, furniture, offices, heating equipment, air conditioning and vault.

I cannot accept the position put forward by the Foundation. The letter of December 4, 1956, read in the context of subsequent statements made by or on behalf of Lord Beaverbrook, referred to later, and the memorandum of July 15, envisioned a gift of a Gallery "fully equipped" with paintings. It is important to remember that Lord Beaverbrook had used the term "fully equipped" in other instances. On August 12, 1954, Lord Beaverbrook had written to Frank Gannett, a colleague who owned the Gannett Newspapers' holding company, and explained that his Foundations had the power to "equip" libraries and art galleries in New Brunswick with manuscripts, works of art, etc. It is noteworthy that also in 1954 a Bank of England memorandum described clause 2(e) of the Trust Deed as a power "for equipping museums and

libraries". This is particularly significant because "equipping" is not a word that is expressly used in the Trust Deed. In my view, the letter indicates a gift of paintings. It certainly does not make any reference to a loan of paintings.

THE INTENTION TO MAKE A GIFT OF PAINTINGS TO THE GALLERY

The Magazine and Newspaper Articles

The 1955 Article in *TIME Magazine*

An article was published about the Beaverbrook gift in *TIME* magazine of October 1955. It read, "Last week Canadians got their first look at the Beaver's latest gift: 80 paintings from the collection that will be turned over to New Brunswick next year, along with a new museum to house it".

In response, Lord Beaverbrook wrote to the publisher of *TIME* magazine. His complaint was not as to the accuracy of the article. Rather, it was with regard to the manner in which Sutherland's pictures of Churchill were described. He also said that the *TIME* magazine people had led him to believe that they were going to do "a big thing for us. ... Now the Time people kick us in the bottom". What is significant is that he did not suggest or request a correction to the statement that the paintings were to be a gift and would be turned over to New Brunswick.

Many of the paintings listed in the catalogue prepared for the 1955 exhibition and referred to in the *TIME* article, are Opening Works in Issue. The failure to correct the report in *TIME* magazine that the paintings would be turned over to the Province confirms Lord Beaverbrook's intention to give the paintings to the Gallery.

First Meeting of the Board of Governors of the Gallery and the Exhibition of Works in Issue in the Bonar Law-Bennett Library

The Board of Governors of the Gallery met for the first time on September 17, 1957, some two years before the Gallery's official opening. Among those in attendance were Premier Flemming, Colin Mackay (President of the University of New Brunswick), K.C. Irving and Michael Wardell. The minutes of the meeting note that Lord Beaverbrook asked for and received authority to invite Dr. William Constable (one-time Curator of the Boston Museum of Fine Arts and an advisor to Lord Beaverbrook) to officially open the Gallery. The meeting concluded with Premier Flemming formally thanking Lord Beaverbrook for his "magnificent gift from the Province's greatest friend".

At the conclusion of the meeting, the Board "adjourned to the Lloyd George Room in the University of New Brunswick to view works of art intended for the Beaverbrook Art Gallery".

There was a list of the Beaverbrook paintings that were stored at the University dated June 5, 1957. This is perhaps the best evidence of what was seen by the Board of Governors following its first meeting. The list includes a number of Opening Works in Issue including Conder's *Figures in a Landscape*, Freud's *Hotel Bedroom*, Hayman's *The Humanity of General Amherst*, Mercier's *Wine Party*, Nash's *Cros de Cagnes*, Nicholson's *Still Life on a Table*, Smith's *Pears with a Red Background* and *Nude*.

Lord Beaverbrook had invited a trusted art advisor, John Steegman, the Director of the Montreal Museum of Fine Arts, to attend the exhibition as an official guest. Lord Beaverbrook had consulted Mr. Steegman with regard to various purchases of art for the Gallery. Following the exhibition, Mr. Steegman wrote to Lord Beaverbrook thanking him for his kindness and

hospitality during his stay. His letter states that he was "most deeply impressed ... by the collection that you are giving to the City and the Province and, through that, to Canada". He stated that "the collection itself as it already stands gives a first-class impression of the contemporary paintings in England". There is no evidence of any reply from Lord Beaverbrook correcting Mr. Steegman's perception that Lord Beaverbrook intended to give the collection he had viewed in the Library to the Gallery.

The Article in *Newsweek* Magazine Entitled "Lord Beaverbrook's Museum"

In the *Newsweek* magazine of January 14, 1957, there appears an article pertaining to the Lord Beaverbrook "museum". Lord Beaverbrook could not possibly question its accuracy since it was sent to him before it was published with the request to provide any "factual corrections". Lord Beaverbrook replied stating "your story is accurate". In addition, he provided the prices he paid for the paintings that were pictured in the article. These included Gainsborough's *Lieutenant Colonel Edmund Nugent*, an Opening Work in Issue. When Lord Beaverbrook confirmed the accuracy of the article, he confirmed his intention to give the paintings in the collection to the Gallery. He took a natural and justified pride in emphasizing the value of the gift by referring to the amounts he had paid for paintings that formed part of the collection.

The article reads in part:

"Last week, workmen were driving concrete pilings into the soggy banks of the St. John River at Fredericton for The Beaver's biggest gift: A modern black marble and white sandstone, air conditioned art museum which will cost \$635,000. To fill its spacious halls, Beaverbrook plans to contribute a good part of his large collections of English and Canadian paintings. Among them will be works by such English artists as Hogarth, Augustus John, Thomas Gainsborough, Joshua Reynolds, Alfred Sisley, and Graham Sutherland."

The article went on to state “with its 150 English paintings and 100 Canadian works Lord Beaverbrook’s gift will total \$5 million” (*emphasis added*). There are several Opening Works in Issue that are pictured in the *Newsweek* article: Gainsborough’s *Lieutenant Colonel Edmund Nugent*, Reynolds’ *Mrs. Thrale* and Sutherland’s *Beaverbrook*. There are other Opening Works in Issue that are mentioned by the name of the artists including Hogarth, Augustus John, Thomas Gainsborough, Alfred Sisley and Graham Sutherland. It cannot be forgotten that this article was specifically approved as to accuracy by Lord Beaverbrook before its publication.

The *Daily Express* Article

Further, the *Daily Express* which was owned by the Beaverbrook Foundations reproduced portions of the *Newsweek* article, including the quotations that appear above. These articles very clearly and very publicly demonstrate Lord Beaverbrook’s intention to give the Opening Works in Issue to the Gallery. I note that the gift is, for reasons set out later, limited to those 88 Works in Issue that had been delivered to the Gallery before its opening in September 1959.

The *Atlantic Advocate* Article

The next article which should be considered appeared in the *Atlantic Advocate* in September 1959. It was written by Michael Wardell, a long time friend of Lord Beaverbrook and a member of the Gallery’s Board of Governors from its inception. The article in reference to

the Gallery states: "It is his [Lord Beaverbrook's] idea, his gallery and his pictures that he gives to New Brunswick". It goes on to observe that "there are 300 paintings in the collection." And further: "Lord Beaverbrook by his gift and the pictures ... has given to New Brunswick a power of enjoyment which will last not for a year, not for a lifetime but for generations to come, always. No man can give more."

There are a number of Opening Works in Issue mentioned in the Wardell article. Specifically:

Nicholas Hilliard's miniature of *Queen Elizabeth*

Turner's *Fountain of Indolence*

Sisley's *Côte d'Angleterre*

Sir Matthew Smith's *Pears Against a Red Background*

Sutherland's portrait of *Helena Rubinstein*

Sutherland's Churchill Series.

The article observes of Sutherland's Churchill Series, "these are sufficient in themselves to attract visitors to Fredericton from all parts of the world".

It is significant that the article carefully notes that "the numbers with the titles correspond to the numbers given to the pictures in the gallery's Catalogue of the collection."

The article also refers to a number of works, some of which are Opening Works in Issue and some that are Converted Works.

Sir Winston Churchill's work "*La Capponcina*" (Converted Work), *View from Cherkley* (a Work in Issue) and *Marrakech* (a Work in Issue).

Les Deux Plages by Clarence Gagnon (a Work in Issue in litigation between the Gallery and the Canadian Foundation).

Riopelle's *Hameau* (a Work in Issue in litigation with the Canadian Foundation).

Sisley's *Côte d'Angleterre* (a Work in Issue).

The Sickert paintings mentioned are those in dispute with the Canadian Foundation although there are also Sickerts which are Works in Issue in this matter.

Matthew Smith's *Pears Against a Red Background* and a second Smith not mentioned by title (Works in Issue).

Paul Nash's *Cros de Cagnes* (a Work in Issue).

Gainsborough's *Peasant Girl Gathering Faggots* (a Converted Work) and *Lieutenant Colonel Edmund Nugent* (a Work in Issue).

John Hoppner's *Master Thomas Braddyll* (a Work in Issue).

Hogarth's *Portrait of John Pine* (a Work in Issue).

Turner's *Fountain of Indolence* (a Work in Issue).

Nicholas Hilliard's miniature of *Queen Elizabeth* (a Work in Issue).

The article also refers specifically to "the Lawrence which was lent by the Tait Gallery."

This demonstrates a clear recognition of the different status of works which are on loan.

HANSARD

The two last paragraphs of the *Atlantic Advocate* article were read into Hansard for the Canadian House of Commons by the Member of Parliament for Westmorland. This was done as a means of publicly thanking Lord Beaverbrook for the gift of the Art Gallery and its paintings.

Hansard reads:

"On September 16 last the Beaverbrook art gallery at Fredericton, New Brunswick was officially opened. The September issue of the *Atlantic Advocate* dealt extensively with this event and had many pages of pictures in colour. At this time, I should like to quote the last two paragraphs in the leading article

which appears on page 65 of that journal: 'Lord Beaverbrook by his gift of the gallery and the pictures, some of which will go in rotation to his second gallery at Starr House, St. John, and by his foundation of a million dollars to sustain them, has given to New Brunswick a power of enjoyment which will last not for a year, not for a lifetime, but for generations to come, for always. No man can give more.' There are in all about 300 paintings in this wonderful collection housed in a beautiful gallery. This is one of the most recent of the many well planned gifts to his native province by the Right Hon. Lord Beaverbrook."

That Lord Beaverbrook approved of the *Atlantic Advocate* article is apparent from his instructions in a letter to Edwy Cooke (Curator of the Gallery) telling him to send a copy of the *Atlantic Advocate* article to Mr. Nemerov, a donor presenting the Gallery with a painting. The letter dated February 3, 1960 states:

"Mr. Nemerov is also presenting the gallery with a painting by himself. Will you please send to Mr. Nemerov in Palm Springs, Florida a copy of the Gallery Catalogue, a copy of the Time giving a description of the Gallery and also a copy of the article which appeared in the Atlantic Advocate at the time of the opening.

I want Mr. Nemerov to have a clear idea of the gallery to which he is generously presenting this painting."

In approving the article Lord Beaverbrook confirmed his intention to give the paintings in the collection to the Gallery.

It is worth noting that Lord Beaverbrook included the Catalogue among the material to be sent. This confirms his continuing confidence in the accuracy of the 1959 Catalogue.

Stuart Trueman Article – *Canadian Art Magazine*

In November 1958, Stuart Trueman wrote an article in *Canadian Art* magazine entitled "An enduring gift to New Brunswick: The Lord Beaverbrook Art Gallery". Lord Beaverbrook

commissioned Trueman to write this article and paid him \$100.00 for it. There can be no doubt that it met with the approval of Lord Beaverbrook. Indeed, in a letter to Trueman, dated January 8, 1959, Lord Beaverbrook specifically thanked the author for the article.

The article makes the following pertinent references.

“An enduring gift to New Brunswick: The Lord Beaverbrook Art Gallery”

- “In presenting this art gallery to the citizens of his old home province, Lord Beaverbrook has not only presented them with a fine modern building with all its contents, but also has provided for the perpetual maintenance of the gallery and for acquisitions by it of further outstanding paintings”.
- “In the last decade he [Lord Beaverbrook] has been quietly assembling British and Canadian works of art of the eighteenth to twentieth centuries, purchased by his agents who have combed North America and Europe, and placing them in the safe keeping of the Bonar Law-Bennett Library of the University of New Brunswick in Fredericton, for the day they would find a permanent home in a new art gallery.”
- “But no other single gift can match in significance this new art gallery, with its collection of some three hundred memorable paintings.”
- “The whole project involves an expenditure of well over three million dollars, comprising \$665,000 for the building, more than one million and a half for works of art, and \$1,100,000 for the endowment. The latter fund will be administered by Lord Beaverbrook, his son William Maxwell Aitken and the widely representative Board of Trustees of the gallery.”
- “Already, another of Lord Beaverbrook’s gifts to Fredericton, the Bonar Law-Bennett Library, attracts numerous visiting scholars ...”
- “Premier Hugh John Flemming has said of the art gallery, ‘no man could make a finer, richer, more enduring gift to his friends than Lord Beaverbrook is now giving to the Province of New Brunswick.’ Opposition Leader J.E. Connolly has readily concurred, asserting that the long-term effects of the generous and foresighted gift are ‘beyond our vision’. New Brunswickers are beginning to realize, now that Lord Beaverbrook’s cherished dream of an art gallery has been transformed into a reality, how true such statements are.”
- Works that are in issue pictured in the article include:
 - *Pears on a Red Background* (Work in Issue).

- *Merrymaking* (which is in dispute with the Canadian Foundation).
- *Mrs. Billington as Saint Cecilia* (personal gift from Lord Beaverbrook).
- “Perhaps by coincidence, or perhaps Lord Beaverbrook as a newspaperman has a keen eye for drama and human interest, many of the works in the permanent collection have a colourful background. There is, for example, a series of studies by Graham Sutherland, showing the progressive steps leading up to his highly controversial *Portrait of Sir Winston Churchill*.”
- In addition,
 - The article specifically mentions two portraits by Sutherland which are Works in Issue. Those of Rubinstein and E. Sackville-West.
 - The article also mentions Thomas Gainsborough’s *Peasant Girl Gathering Faggots*, (a Converted Work) in the same paragraph as Gainsborough’s *Lieutenant Colonel Edmund Nugent* (a Work in Issue). It goes on to say: “For this painting (*Peasant Girl*) and another Gainsborough (*Edmund Nugent*) Lord Beaverbrook is understood to have paid a total of nearly a hundred thousand dollars.”
 - Sir Joshua Reynolds, *Mrs. Billington as Saint Cecilia* and *Mrs. Thrale and her Daughter* are also mentioned, so too is Hoppner’s *Portrait of Master Thomas Bradyll*.
 - Other highlights include works by Etty (Canadian Foundation), Peters, Turner (Work in Issue) and Hogarth, the latter represented by his *Portrait of John Pine* (a Work in Issue).
 - Other works that are specifically mentioned in the article are Constable’s *Flatford Mill* (which turned out to be a fake), Sisley’s *Cote d’Angleterre*, Stubbs’ *Hunters Out at Grass*, and Hilliard’s miniature of *Queen Elizabeth I* (Works in Issue).
 - The following artists are also identified as those whose works are part of the collection: Augustus John, Walter Sickert, Charles Conder, J.S. Sargent, Jacob Epstein, Sir Matthew Smith, Paul Nash, Sir William Orpen, Ben Nicholson, Stanley Spencer – whose paintings are Works in Issue.
 - The work of Sir Winston Churchill is also referred to in the article (a Work in Issue).
 - A number of works that are in dispute in the Canadian case are also mentioned, including Kriehoff’s *Merrymaking*.

Not only did Lord Beaverbrook specifically approve of the article and adopt it, he made use of it. He wrote to Mr. Tweedie, secretary of the Gallery Board, saying: "You should give as much publicity as possible to the article by Trueman on the Gallery. You should draw up a British mailing list and distribute the magazine very widely." He then wrote in his own hand: "I will send British mailing list".

Lord Beaverbrook then followed up with Mr. Tweedie with a list of additional individuals to whom he wished the article to be sent. He wrote:

"Dear Tweedie,

... In addition to those you name, copies should be sent to the enclosed list. You should send with the copy a letter expressing our appreciation of their gift or gifts."

As well, Lord Beaverbrook had a copy of the article sent to at least two Trustees of the First and Second Foundations, his sister, Jean Stickney, and J.B. Wilson of the *Daily Express*. He also sent a copy to his son Maxwell Aitken.

***TIME* Magazine Article – September 28, 1959**

The next article is the one which appeared in *TIME* magazine on September 28, 1959 shortly after the Gallery opened. The *TIME* article states in part as follows:

" 'This is not the first contribution that Lord Beaverbrook has made to the Arts in Canada' said Master of Ceremonies William G. Constable one time curator of the Boston Museum of Fine Arts 'but it is incomparably the greatest.'"

The latest gift of famed splenetic British publisher (Daily Express Evening Standard) to his boyhood province is an expertly lighted, \$1,000,000 museum of glazed bricks, white limestone and greyish-white marble.”

The article continues:

“Beaverbrook’s biggest donation is not the museum but most of the 300 paintings hanging in it. Valued at \$2,100,000, (emphasis added) Beaverbrook’s collection provides the gallery with a comprehensive sampling of British art from Hogarth to Francis Bacon, representative works of nearly all Canadian artists of stature, plus a scattered few paintings by Europeans. Other Canadian tycoons supplemented the basic collection with gifts of their own. Toronto’s Matthew James Boylen (asbestos copper and lead mines) presented the new gallery with twenty-two Krieghoffs; the estate of the late Sir James Dunn (steel and iron) added three Sickerts and Dali’s huge Santiago El Grande whose rearing horse dominates the picture window gallery. Beaverbrook’s favorite (“because I like it”) is Gainsborough *Peasant Girl Gathering Faggots* but he also cherishes his own portrait painted by Great Britain’s Graham Sutherland.

But for all his personal and financial successes in England, Beaverbrook’s heart remained in New Brunswick. So fond is he of the province that he often refers to it as his birth place and almost every autumn pays it a sentimental visit. On one sojourn, the benevolent Beaver gave it a library; on another, a theatre and town hall; on still another occasion a hockey arena, monument, hospital equipment – in fact so many donations that the whole Province begins to look like one huge personal monument to Lord Beaverbrook. With last week’s mammoth contribution to Canada’s relatively weak art treasures, the monument seems completed.”

Works in Issue that were mentioned in the *TIME* article include:

Freud’s *Hotel Bedroom*,

Gainsborough’s *Peasant Girl Gathering Faggots*,

Riopelle’s *Hameau* (Canadian Foundation litigation), and

Krieghoff’s *Merrymaking* (Canadian Foundation litigation).

Other Works in Issue are mentioned in the article by reference to the artist in this way:

“Beaverbrook’s collection provides the Gallery with a comprehensive sampling of British art from Hogarth to Francis Bacon”.

There can be no doubt that Lord Beaverbrook approved of the *TIME* article. On September 30, 1959 he wrote to a friend: "You will have seen the account of our pictures in Time. Our reception from newspapers, magazines and critics was most satisfactory".

As with the *Atlantic Advocate* article, Lord Beaverbrook instructed Edwy Cooke, the Gallery's Curator, to forward a copy of the *TIME* magazine article to a new donor, Mr. Nemerov. "I want Mr. Nemerov to have a clear idea of the Gallery to which he is generously presenting this painting".

Once again, Lord Beaverbrook approved of this article and made use of it. By doing so he confirmed his gift of the Works in Issue that were then part of the Gallery's collection.

***Daily Express* Article – September 17, 1959**

The next article to be considered appeared in a Beaverbrook paper, the *Daily Express*, on September 17, 1959. It was written by Ian Aitken and entitled "The Day that Enriches a Nation." The caption under the main picture reads: "The patron-alone in the treasury of canvas, colour and vision that now belongs to his fellow citizens." It also states: "With the gallery went a collection of more than 300 paintings and one thousand drawings and lithographs gathered by Lord Beaverbrook over a period of more than 40 years. With it too, went a generous endowment for the upkeep of the gallery and its contents."

The article refers to the speech made by Dr. Constable at the opening of the Gallery, stating: "Dr. Constable spoke glowingly of the gallery and of the collection of paintings it had to offer."

The article continued:

“Lord Beaverbrook will entertain his guests at a cocktail party and later at a dinner. Then late tonight he will lead his guests back to the gallery for a private viewing. Thereafter, the gallery and its almost priceless collection of art treasure will cease to be the property of Lord Beaverbrook and become the property of the people of New Brunswick.” (*emphasis added*)

***Sunday Express* Article – September 13, 1959**

There is a further article in the *Sunday Express* dated September 13, 1959 written by John Gordon, the Editor in Chief of the *Sunday Express* and a Trustee of the Beaverbrook Foundation. He wrote that:

“Mr. Diefenbaker, Canada’s Prime Minister, spoke warmly in Ottawa of the new Beaverbrook Art Gallery in Fredericton, New Brunswick. He said: “Lord Beaverbrook’s gift to the people of New Brunswick and the people of Canada is another example of the great generosity of this distinguished Canadian to his native land. I expressed my warm-hearted appreciation of this gift.”

The article also noted that the Premier of New Brunswick, Mr. Hugh John Flemming, had said: “No man could make a finer, richer, more enduring gift to his friends.”

These articles appeared in Lord Beaverbrook’s own newspapers. He must have known of them.

***Evening Standard* Article – September 17, 1959**

The *Evening Standard*, owned by the Second Beaverbrook Foundation, had printed an article about the opening of the Gallery on September 17, 1959. The journalist wrote that he was in Fredericton as a guest of Lord Beaverbrook. He states “in giving to the Province from which he originally came, the latest, I should add, in a long series of gifts, Lord Beaverbrook has shown

that there is no aspect of its country's life to which he is indifferent." There is a picture of Lord Beaverbrook in front of Hoppner's *Portrait of Master John Braddyll*, a Work in Issue. Various Works in Issue are mentioned in the article from the Sutherland portraits and landscapes to the two Gainsboroughs, Riopelle (Canadian Foundation), Krieghoffs (Canadian Foundation), and Hilliard's miniature of *Queen Elizabeth*. It was said in the article that there was some dispute as to whether Hilliard's miniature should have been allowed to leave England. The article also mentioned Stubbs' *Portrait of Two Hunters* (perhaps *Hunters Out at Grass*), two Constables, three Turners, two Lawrences, and four Sir Winston Churchill paintings including *La Capponcina* (a Converted Work) and *View of Cherkley*.

The tenor, tone and wording of all these articles which were accepted, acknowledged, adopted, used and sent by Lord Beaverbrook to his friends and to other donors, reflect their understanding of a generous and permanent gift of paintings, together with a Gallery and an endowment for the future to the people of New Brunswick. When these articles are read as a whole they can lead to no other conclusion. They demonstrate the intention of Lord Beaverbrook to make a gift to the Gallery of the Opening Works in Issue.

Lord Beaverbrook's Adoption of the Articles

Lord Beaverbrook gave instructions that copies of the *TIME* magazine, the *Atlantic Advocate* and *Canadian Art* articles be sent to donors to provide a "clear idea of the Gallery to which he is generously presenting his painting". He as well sent copies of the *TIME* and *Atlantic Advocate* articles to a list of some thirty people so that prospective donors and friends would be specifically aware of the articles.

On November 6, 1957, the *Daily Express*, one of the papers owned by the Beaverbrook Foundation, stated that "Lord Beaverbrook had bought Krieghoff's *Merrymaking* (a work in issue in the litigation with the Canadian Foundation) and stated that "the Gallery and its contents will be a gift from Lord Beaverbrook to the people of New Brunswick."

Not only did Lord Beaverbrook adopt the articles, he was proud of them and made a point of sending them to friends. He instructed Mrs. Ince to keep copies of these articles. This acceptance and enthusiastic adoption of the articles by Lord Beaverbrook will be significant when the legal authorities pertaining to the use that can be made of such articles is considered.

The articles may, as well, have influenced other donors. Dr. Boylen gave 22 paintings by Krieghoff to the Gallery. He said it broke his heart to part with them. He explained his reason for making this gift valued, at the time, at \$100,000.00 in these words: "Lord Beaverbrook has given so much to New Brunswick that I felt someone should help too. And the pictures will give a lot of pleasure to people down there and that's enough compensation".

The present Lord Beaverbrook testified. Obviously he could not be of great assistance with regard to the crucial events of 1959 and 1960. However, he was forthright and candid in evidence regarding his grandfather.

For example, he was asked whether the articles regarding his grandfather's gift may have been misleading with regard to its extent. He responded "Well he was a great propagandist and no doubt he liked to receive praise and gratitude".

When questioned about his grandfather's circulation of the Trueman article, he stated "I am sure he forwarded it to many people; he was a great propagandist." He also made a very fair

and candid comment regarding the Works in Issue. He stated that they were "central to the Collection and the most valuable paintings in it".

A great propagandist cannot escape, any more than any other citizen, the consequences of authorizing and adopting public statements that indicate his intent to make a gift. Lord Beaverbrook's adoption of the statements is clear evidence of his intention to make a gift of works now in issue. He gave them to the Gallery; he delivered them to the Gallery; they were accepted by the Gallery. The gift was perfected. That gift is irrevocable.

The Articles are Evidence of the Intention to Give the Opening Works in Issue to the Gallery

In my view, when these articles are read individually and collectively, they clearly demonstrate Lord Beaverbrook's intention to give the paintings to the Gallery. Many of the Opening Works in Issue are specifically mentioned in the articles or they appear in the pictorial representations accompanying them. The articles, when they are read together, have a cumulative effect which when considered in context leads inexorably to the conclusion that Lord Beaverbrook intended to give the paintings in issue to the Gallery. Some of the articles also refer to the number of paintings being given by Lord Beaverbrook. The intention to give obviously includes all those Works in Issue that are referred to in the articles. Further, in light of the reference to the number of paintings given and the references to their value, it is reasonable and proper to infer that all the 88 Opening Works in Issue were intended to be given and were given to the Gallery.

Further, in light of all the evidence, I find it beyond belief that those articles that were published in Lord Beaverbrook's own newspapers were not known to and approved by Lord

Beaverbrook. He was very much 'hands on' with regard to the operation of his media empire and I cannot believe that any articles pertaining to his gift to the Gallery would have gone unnoticed. See, for example, the evidence of Mrs. Yorke referred to later. If there had been any questions about their accuracy, I am certain it would have been the subject of immediate and virulent criticism from him.

I must observe and emphasize that not one of the articles refers to works on loan. They refer to the contents of the Gallery as gifts from Lord Beaverbrook to the people of New Brunswick. This is a theme that is repeated over and over again. All these articles were known to Lord Beaverbrook. Several were acknowledged, adopted and disseminated by Lord Beaverbrook, and quoted by Lord Beaverbrook's newspapers. It will be remembered that the *TIME* article of 1959 also stated that "Beaverbrook's biggest donation is not the museum but most of the three hundred paintings hanging in it". As well, this article specifically reproduced the picture of Freud's *Hotel Room* which indicates clearly that it was one of the pictures that Beaverbrook intended to give to the Gallery and did in fact give to the Gallery. The gift was completed and perfected at the time of the opening.

These articles obviously reached a very wide audience. When they were adopted by Lord Beaverbrook, they constituted a very public announcement and confirmation of his gift of paintings to the Gallery. They were indeed the most important and most valuable part of his gift to the people of New Brunswick. The intention to make this magnificent gift was publicly announced and broadcast to the world. Clearly, Lord Beaverbrook encouraged and, through his newspapers, participated in the widespread dissemination of the news of his gift. It cannot now be said that it was not really a gift but only a loan that could be recalled on demand. If many of the paintings were merely on loan, then Lord Beaverbrook participated in a massive

misrepresentation. While there is no doubt that the gift of the Gallery, the endowment, and some of the paintings in the Collection was in itself generous, Lord Beaverbrook relied on the magnanimous gift of works now in issue to establish the significance and scope of his generosity. At no time did he indicate that the gift of art was not forever but was merely a loan that could be recalled on demand. I conclude that the articles accurately conveyed his intention to give the Works in Issue to the Gallery, and that it was not until after the gift had been completed that his intention changed.

The Use that Can be Made of the Articles

It cannot be forgotten that media articles are hearsay. It is seldom that the writer of the article can be made available for cross-examination. Cases have wisely put certain restraints on the use of such articles in evidence. Further, the weight that can be attached to them will vary widely depending upon the circumstances presented in each case. For example, newspaper articles that simply express opinions rather than reporting facts are entitled to little weight, except in circumstances where they have been expressly adopted as true.

The Supreme Court of Canada in *The Public School Board Association v. Alberta*, [2001] 1 S.C.R. 44 refused to admit as evidence certain newspaper articles. This position was rightly taken because in that case it was observed that (among other things)

“the two columns represent the opinions of two individuals writing in daily newspapers who may or may not have the underlying facts straight and whose opinion may or may not be valid. The authors cannot be cross-examined. The contents are apparently controversial”.

However, in other circumstances newspapers articles can and should be given significant weight. For example, if a newspaper article is brought to a person's attention and the person

does not object to or attempt to correct the article, more weight can be given to it as an admission. Of particular interest on this aspect is the case of *Canadian Pacific Limited v. Lamont et al.* (1983), 43 A.R. 257 (C.A.). In that case, Canadian Pacific delivered a scale model ship to the Navy League. When Canadian Pacific asked for the return of the model ship, the Navy League refused to return it on the basis that it had been given to the Navy League. The Navy League relied on various media reports of the presentation of the model ship to support the inference that Canadian Pacific had intended it to be a gift rather than a loan.

The Alberta Court of Appeal very properly held that the media coverage of the presentation of the model ship created a reasonable inference that the ship was intended to be “gifted” rather than loaned. The Court observed that the media were alerted to the event and the *Calgary Herald* gave front page coverage to it. The publicity conveyed a patriotic and altruistic image which must have come to the notice of and been apparent to Canadian Pacific. The Court of Appeal observed that a ceremony of this nature would be somewhat unusual in connection with a temporary loan of the model.

The Court of Appeal held that, with the public impression obviously created by the ceremony, “an inference may be drawn by the failure of Canadian Pacific to take any steps to correct that impression”. An inference was also drawn from the fact that Canadian Pacific “did nothing by way of correspondence with the Navy League or otherwise to alter the obvious impression that the publicity created namely that the model had been sent to the Navy League as a gift”.

The Court concluded that “while the newspaper story itself may well have been hearsay it was eminently reasonable for the trial judge to infer from the circumstances surrounding the presentation ‘that the model was given as a gift’. Indeed, I would make the same inference”.

In this case before me, the newspaper articles were clearly accepted as correct and adopted by Lord Beaverbrook. They were widely disseminated to a very large audience. He praised them. He had them collected and copies sent not only to those making a donation to the Gallery but to his friends. In response, he received a congratulatory letter from Winston Churchill. His actions in regard to the articles are clear evidence that the articles were accurate and that he did indeed intend to give and gave the paintings which were in the Gallery at the time of its opening.

The opening of the Gallery was a very public event attended by many of the most prominent citizens of New Brunswick. The speeches given at the opening received wide attention. I will next consider the speeches given prior to the Gallery opening and at the opening of the Gallery that also indicate the gift was made of the Opening Works in Issue.

Speeches Prior to and at the Opening of the Gallery

As I said earlier, it is convenient and helpful to deal with the evidence in segments. That, unfortunately, will lead to some repetition. For that I apologize. However, it may serve the useful purpose of emphasizing some of the significant evidence. This is a practice often adopted by counsel and may also be convenient to a judge or arbitrator.

Dr. Constable's Address at the University of New Brunswick Convocation

On October 19, 1956 Dr. Constable gave an address to Convocation at the University of New Brunswick. It is apparent that Dr. Constable asked for comments upon his forthcoming

speech from Lord Beaverbrook (then Chancellor of the University). In response, Lord Beaverbrook wrote a letter to him dated October 2, 1956. In that letter he suggested that Dr. Constable should deal with the need for a gallery in the maritime provinces since there is "no important picture gallery in the Maritimes". The letter also stated "you may wish to mention the plans for the gallery of which there has been no indication whatsoever to the public so far". He continued,

"The two Gainsboroughs in London which have not yet reached Fredericton might form the subject of some comments; possibly the other pictures in London which you have seen and which have not yet been exhibited here [Fredericton]."

In general, you may wish to comment on the educational influence of fine arts and the need for picture galleries in the university centers."

I would note that the Gainsboroughs are among the Opening Works in Issue and Converted Works.

On October 4, 1956, Dr. Constable wrote to Lord Beaverbrook that he was "grateful for your suggestions as regards to what I should say in my speech". He added "I very much want however to discuss the whole thing with you when I get to Fredericton." It is reasonable to infer that such a discussion took place. It is also very clear from the opening of Dr. Constable's address that Lord Beaverbrook was present when it was given.

The talk begins with the salutations "My Lord Chief Justice, My Lord Chancellor [Lord Beaverbrook], Mr. President, Mr. Premier, Members of the Senate of the University, Ladies and Gentlemen ...". Neither the content of the speech nor its tenor could have come as a surprise to Lord Beaverbrook. During the course of the talk Dr. Constable stated:

"If however, my conviction is to be justified that the arts can serve the community there must be works of art for that community to use and to enjoy. So comes

about my second reason for the particular pleasure it is in being here today. It gives me the opportunity of joining with you in acclaiming the noble gift of a collection of works of art and a gallery to house them which is being made to Fredericton by that great citizen of Canada and of the Commonwealth, Lord Beaverbrook. This gift marks an epoch in the history of the Maritime Provinces. For the first time there will be here in Eastern Canada a collection of works of art worthy of the community in which it is to be placed.”

Dr. Constable goes on to describe the Gallery. In reference to it he states:

“Inside, every thought is being given not only to enable the collection to be seen and enjoyed but to provide an atmosphere of intimacy and welcome. ... The collection itself is still in the process of growth. One thing is clear, it will not only be on a high level, but will have a marked character of its own. The dominant note is the presentation of British Art ranging from the 18th Century to our times. Perhaps I may be allowed to mention a few outstanding examples. So it is that if this great gift is to yield all that it can, Fredericton and New Brunswick must play their part. One measure of the value of the gift will be the extent to which it is used and the way in which it becomes part of the living and continual cultural heritage of this community.”

The following works of art were mentioned in the speech:

- Gainsborough, *Lieutenant Colonel Nugent* and *Peasant Girl Gathering Faggots* (the latter is described but not named);
- Reynolds, *Mrs. Billington as Saint Cecilia*;
- Turner and Constable (specific works are not mentioned);
- Charles Condor, Stanley Spencer, Paul Nash and Mathew Smith (specific works are not mentioned);
- Unspecified Canadian paintings, including Sutherland's series of oil sketches for Sir Winston Churchill's portrait and a portrait of Lady Beaverbrook; and
- Sir Winston Churchill (specific works not mentioned).

Thus, it is apparent from Lord Beaverbrook's letter to Dr. Constable that a reference was to be made to works collected and that had been seen by Constable in London. Looking at the speech as a whole, there can be no doubt that reference is made to Opening Works in Issue. Further, it gives a clear and strong indication of Lord Beaverbrook's intent to give the paintings to the Gallery in Fredericton.

Almost three years later, Dr. Constable gave another talk at the opening of the Gallery. Lord Beaverbrook had specifically asked the permission of the Gallery's Board of Governors to have Dr. Constable deliver an address at the opening. The opening was a very significant event with many of the prominent citizens of the province present at the opening ceremony, at the dinner in the evening, or both.

Dr. Constable at the opening referred to Lord Beaverbrook's gift. He said "I can tell you that this is the greatest pleasure in the world to be here on a most memorable and momentous occasion. The opening of the first gallery in the Atlantic provinces. As you know, this is not the first great service that Lord Beaverbrook has done for the arts in Canada", ... and added "although this is not Lord Beaverbrook's first gift to the arts in Canada it's incomparably the most important".

Dr. Constable continued and discussed the significance of some of the works of art and referred specifically to many of the Opening Works in Issue. For example he referred to Hilliard's miniature of Queen Elizabeth which he described as "probably the greatest work of art in Canada". He referred to the Gainsborough portrait of *Lieutenant Colonel Nugent* and Philippe Mercier's painting *Bacchanalian Scene of 1733* and to paintings by Turner, Constable, Kriehoff and others. He described the gift as primarily and greatly Lord Beaverbrook's. He added:

"Now there is one other aspect of the collection which I shall like to emphasize. When you go around it you will see that though the gift is primarily and greatly Lord Beaverbrook's yet other people have made gifts to the gallery and combined with him to make the collection what it is If I understand Lord Beaverbrook right this is not to be, as it were, a closed place but one in which people may contribute and help to make it something outside more than his own personal gift. It's a great pleasure to hear that the gallery is planned to play an important part in the work of the University of New Brunswick both as an inspiration for students but also as a source of knowledge."

Dr. Constable concluded his remarks in this way

"Today in Canada the creative artist is having a fairly tough time, but remember you cannot have art without artists so it is up to us all to encourage, to understand, and where we can patronize the living creator of works of art ... it makes me greatly daring to paraphrase one of the most moving sentences, I always feel, ever uttered by an Englishman and to say that this day, Lord Beaverbrook you've lit such a candle in New Brunswick as by God's grace will never be put out."

The words of this speech are clearly and obviously referring to a permanent gift of paintings, not a demand loan.

Speech of Lord Beaverbrook at the Opening of the Gallery

Lord Beaverbrook's own speech at the opening of the Gallery clearly indicates which paintings were on loan. He referred five times to loans. The references are as follows:

- 1) the loan of "a painting by Orpen";
- 2) the loan of another Orpen;
- 3) the loan of a portrait by Helena Rubinstein;
- 4) extended loans from the Tait Gallery; and
- 5) extended loans from the National Gallery.

He also referred to one painting that “belongs to the Beaverbrook Foundation”: the *Helena Rubinstein* painting. Thus, those paintings that were on loan were clearly identified in the speech and even more so in the Catalogue that was prepared for the opening which I will describe later. Lord Beaverbrook went on to state that the Gallery should not be “thought of as the last home of a collection of pictures and works of art”. At the end of his talk he stated “I hand it over to the people of my own Province of New Brunswick and in a sense to the young people of Canada. Here is the past and present, the future lies with them”. (*emphasis added*)

The tone and words of the speeches, like the articles, refer to gifts for generations to come. They demonstrate a very clear intention to make a gift of art that is permanent and not merely a loan. Lord Beaverbrook knew the importance of designating those works that were on loan and did so in his talk. The Gallery’s Catalogue, prepared for the opening and carefully reviewed by Lord Beaverbrook, clearly differentiated between works on loan and works which were part of the permanent collection.

In summary, both speeches of Dr. Constable refer to gifts of paintings and not to loans. The references made by Dr. Constable in the presence of Lord Beaverbrook are to gifts for generations to come. The same line of thought was carried out in his speech at the opening of the Gallery itself by the words “you have lit such a candle in New Brunswick that will never be put out”. These speeches form part of the background and context in which the issue must be resolved. They indicate a clear intention to give the paintings to New Brunswick to be enjoyed for generations to come. The speeches given at the opening along with the articles indicate so very clearly and in such a convincing manner that there was an intent to make a gift to the Gallery of the paintings that were in it at the time of its opening. They were a part of the great gift perfected at least by the day of the opening if not at the time of the delivery of the paintings

to the Gallery. The gift of the paintings in issue was for generations to come. It was permanent. It was not a loan.

It cannot be forgotten that Dr. Constable made his first speech at the Convocation of the University of New Brunswick to all who were assembled there. He made the second speech at the opening of the Gallery in the presence of many prominent people of the Province of New Brunswick. Many of the Opening Works in Issue were mentioned in these speeches and in the articles that were written concerning the Gallery and Lord Beaverbrook's gift of paintings. Anyone hearing the speeches or reading the articles would conclude that Lord Beaverbrook was making a gift of the Gallery and the works in it at the time of the opening. The articles so clearly and enthusiastically adopted by Lord Beaverbrook would by themselves confirm and demonstrate the clear intention to make a gift of the paintings in issue to the Gallery. Further, the speeches at the opening, standing alone, would confirm and demonstrate the intention of Lord Beaverbrook to make a permanent gift of the paintings to the Gallery. Taken together the articles and speeches constitute irrefutable evidence of the intent and the gift. Yet there is more that confirms the gift.

The Gallery Catalogue

In preparation for the opening of the Gallery a Catalogue was prepared. Three people were involved in its preparation: Lord Beaverbrook who gave it his special attention and, to an even greater extent, Dr. Constable and Russell Harper, who was then Curator of the Gallery.

Prior to the opening of the Gallery, Lord Beaverbrook had consulted Sir Alec Martin, the Chairman of Christies from 1940 through 1958, with regard to his collection for the Gallery. In

December 1957, Sir Alec Martin wrote to Lord Beaverbrook suggesting that there was "no need to wait until the building was erected and the pictures etc. in position" before making a catalogue. Sir Alec went on to say "... I suggest you have all the Pictures, Drawings, Engravings etc. that you propose giving to the gallery assembled in Fredericton and the making of a worthy Catalogue the whole benefaction put in hand". In a postscript he wrote:

"I think I would advise one catalogue only and this of the whole of your gift, numbered in alphabetical order of artists as they appear on my short draft list. This would enable you to put the work of making a worthy catalogue in hand as soon as you conveniently can, and be printed and ready for the official opening. This would also make it possible to make changes in the hanging from time to time if desired, the pictures always bearing the number of the complete catalogue."

Lord Beaverbrook did not respond to this letter to indicate that the paintings were to be on loan rather than a gift.

Russell Harper, working with Dr. Constable, prepared the 1959 Gallery Catalogue. In a letter of February 1959 to Harper, Lord Beaverbrook commented on the "paste up". Overall he found the draft Catalogue satisfactory.

He approved "Beaverbrook Art Gallery" as the title for the Gallery. He thought a small scroll should be retained as a space filler. He agreed that "Canada" should follow "New Brunswick" on the cover. He noted that there were considerable errors in the text and he strongly recommended hiring "a competent proof reader" to go over the Catalogue. He continued saying that "extraordinary care should be taken to avoid any mistakes whatsoever".

He reformatted the copyright page of the Catalogue and placed in the center of that page the words "First Edition will not be reprinted. Copyright 1959". He questioned the accuracy of the reference to Dr. Boylen and asked that the manner in which he signed his name be verified

for the Catalogue. He stated that there should be consistency in the manner gifts were acknowledged in the Catalogue "i.e. presented by ...".

Pointing out discrepancies in the draft Catalogue, he wrote "You should decide where you are going to put these words and see that it is in the same place for every picture. Preferably the presentation should be mentioned at the conclusion of each separate narrative." He asked that the name of the subject of Varley's portrait, Janice Gladys Aiken, be removed. He stressed the need for an accurate Catalogue. He added "the most important thing at the moment is the question of proofreading. I am unable to do it here as I have too many engagements so I leave it to you to see that everything is read with the greatest possible care and skill." I have referred in some detail to Lord Beaverbrook's letter to demonstrate the care he was taking with the Catalogue and his insistence and emphasis on accuracy. All of which lends support for reliance upon the Catalogue.

He instructed Mr. Harper to consult and work with Dr. Constable. He suggested that when the Catalogue was in better shape he should go to Boston and discuss it with Dr. Constable. He concluded "you (Harper) are in charge of the Catalogue. You must safeguard against any omissions or mistakes." Mr. Harper acknowledged Lord Beaverbrook's wish to consult with Dr. Constable and he wrote back that "he outlined to me the type of introduction the Catalogue should have and we drafted a couple of paragraphs along the lines he indicated."

Dr. Constable did indeed oversee the work of the Catalogue. He spent time with Mr. Harper in Boston and spent three days in Fredericton working on the Catalogue in July 1958. He then wrote to Lord Beaverbrook to make a few suggestions concerning the paintings that should be included in the collection when it was finally handed over to the Gallery. Lord Beaverbrook in turn thanked Dr. Constable for his letter and accepted his suggestions both as to the Catalogue

and the composition of the collection. It should be noted that Russell Harper was experienced with Catalogues. He had been the chief Cataloguer at the Royal Ontario Museum which at the time had the largest collection of works of art in Canada.

The Catalogue, in its final form does, I believe, express the views of Dr. Constable, Mr. Harper, Lord Beaverbrook and Brigadier Wardell (its publisher) with regard to the ownership of the paintings in the Gallery's collection.

It is noteworthy that none of the Works in Issue is described as being on loan although a number of other paintings that are not in issue are specifically identified as being on loan. See for example George Sutherland's portrait of Helena Rubinstein identified as a loan from Madame Rubinstein.

The Gallery Catalogue clearly identified works of art that were on loan. The designation "L" before the work was used in all cases where the painting was in fact on loan. The absence of the same designation pertaining to the Opening Works in Issue is significant in light of the care taken in the preparation of the Catalogue and the designation of other items with an "L" and their accreditation.

The Catalogue must be considered in light of the letter of advice sent by Sir Alec Martin, the great care that Lord Beaverbrook took with it and the work of Mr. Harper and Dr. Constable. When that is done, the 1959 Catalogue can be taken as demonstrating that those paintings from the Foundation or Lord Beaverbrook that were not designated as "on loan" were gifts to the Gallery. It serves to confirm that those paintings in issue in the Gallery on the day of its opening that were not designated as loans were indeed gifts made to the Gallery.

The Foundation's submissions were rather dismissive of Mr. Harper for his alleged lack of experience, and indeed of Dr. Constable. I cannot accept those submissions, Mr. Harper was qualified and he obviously worked under the supervision both of Lord Beaverbrook and of Dr. Constable. I am satisfied that he worked carefully to ensure the Catalogue's accuracy. It is clear that he did so under the watchful eye of Lord Beaverbrook. Further, the work of Dr. Constable on the Catalogue both in Boston and in Fredericton was extensive. His was a very real and significant contribution to the Catalogue and to its accuracy. When all of this evidence is considered together it lends weight to a consideration of the Catalogue as evidence of the intent of Lord Beaverbrook to make a gift of all the paintings in issue located at the Gallery at the time of its opening.

Something must be said about the Foreword of the Catalogue. It reads:

"FOREWORD

The Beaverbrook Art Gallery, together with its endowment, is a gift of Lord Beaverbrook to the Province of New Brunswick for the benefit and enjoyment of all its citizens. It stands on the banks of the St. John River in the capital city of Fredericton, and was opened to the public on September 16, 1959. Its administration is under the control of a Board of Governors. The educational work of the Gallery is carried on in close relationship with the University of New Brunswick.

The Collection was begun by Lord Beaverbrook during the First World War. Extensive additions have been made during the past five years. Principally the works consist of British and Canadian paintings of all periods. This publication is a preliminary catalogue listing all paintings acquired prior to July 1st, 1959."

It might be argued that the first sentence of the Foreword should be taken as an indication that only the Gallery itself and its endowment are a gift from Lord Beaverbrook to the people of New Brunswick. It is clear from the second paragraph, however, that the gift includes the Beaverbrook collection, and the paintings acquired prior to the opening of the Gallery.

Considered in context, I would conclude that the word "acquired" must here be used in the sense of "acquired for" the Beaverbrook Art Gallery. Further, the word acquired should be understood as denoting a gift unless a work had been designated as a loan.

There is as well a letter regarding the Catalogue that must be considered. On October 10, 1958, R. Tweedie wrote to Brigadier Wardell with regard to the costs of preparing and printing the 1959 Catalogue.

Mr. Tweedie at this time had multiple roles. One of them was as Secretary of the Board of Governors of the Gallery. It appears that he had the confidence of Lord Beaverbrook and corresponded with him. The last paragraph of the letter confirms the gift of the paintings and the Gallery by Lord Beaverbrook. It reads:

"The Gallery and paintings are donated by Lord Beaverbrook and no charges for these items (relating to the preparation and printing of the catalogues) fall upon the Gallery funds. The catalogues and all other similar expenses must be discharged by the Gallery from this endowment. It falls to me as Secretary of the Board of Governors to carry out all transactions relating to the endowment funds.

If above is acceptable kindly advise.

Yours sincerely,

R.A. Tweedie,
Secretary"

This letter provides strong confirmation that the Gallery and the paintings in it (the Opening Works in Issue) were donated by Lord Beaverbrook.

The Export Forms and the Description of the Works as Gifts

When paintings were being exported from the United Kingdom to New Brunswick, and particularly during the years from 1954 through 1959, exports from the United Kingdom were subject to the provisions of two statutes. They were the *Exchange Control Act*, 1947 (the "Exchange Act") and the *Import Export and Customs Powers Defence Act*, 1939 (the "Export Act"). The Exchange Act was concerned with protecting the value of British currency and was administered by the Bank of England. The Export Act was concerned with controlling the export of culturally significant items and was administered by the Board of Trade. The two regimes worked together to regulate exports from the United Kingdom during the relevant time.

The exporter was statutorily required to complete a document known as the CD3. A declaration had to be made by the exporter as to the truth of the contents and penalties could be exacted for false statements.

A number of these export documents prepared by or on behalf of the Beaverbrook Foundation refer to Works in Issue as gifts being exported to the Art Gallery in Fredericton. For example, in May 1958 the Board of Trade stated to the Tate Gallery that Sisley's *Cote d'Angleterre*, Sickert's *Sunday Afternoon*, (both Works in Issue) Sutherland's *Sketch of Sir Winston Churchill* (a Converted Work) and Kriehoff's *Family in a Sleigh* (also a Work in Issue), were all exported as "a gift to Lord Beaverbrook's Art Gallery, Fredericton, New Brunswick. Included in this same shipment were other Works in Issue such as Sargent's *Vine Press*, Allan's *Penny Wedding*, Sickert's *Bonne Fille*, Lowry's *Yachts*, Churchill's *Marrakech*, Stubbs' *Hunters out at Grass*, (a Converted Work), Lavery's *Lloyd George*, and Turner's *Warkworth Castle*.

In May 1958, the Board of Trade again advised the Tate Gallery that Stubbs' *Hunters out at Grass* (a Converted Work) and Wolstenholme's *The Essex Hunt* (a Work in Issue) were exported as a gift to the Lord Beaverbrook Art Gallery.

In May 1958, the Board of Trade stated to the Tate Gallery that Lambert's *Painting of Lady Beaverbrook* and Birket Foster's *On the River Mole*, two Works in Issue, were exported as a gift to the Beaverbrook Art Gallery.

On March 5, 1959, the Board of Trade referred to Wright's *Synnot Children* and Turner's *Fountain of Indolence* (a Work in Issue), and described the export of these named works as being "To The Lord Beaverbrook Art Gallery, Fredericton, New Brunswick". Although the *Fountain of Indolence* is not described as a gift neither is it said to be a loan.

It is clear that, when the Foundation intended to export the pictures on loan, it did so by a specific reference to the loan. On June 17, 1959, Sheila Elton (the Foundation's Secretary) completed an export declaration referring to a list of paintings worth £9,550.0.0. The export declaration stated "No currency is involved. The paintings are gifts to the Art Gallery, with the exception of the Graham Sutherland painting of *Helena*, which is being lent by the owner for one year". This is the only document from the Bank of England, the Tate Gallery or the National Portrait Gallery that refers to a loan of a painting owned by the Foundation. The *Helena Rubinstein* (sitting) picture was a loan to the Gallery and is not and never has been a Work in Issue. There were two other paintings that Sheila Elton described as gifts which are Works in Issue, namely, Sargent's *San Vigilio* and Sutherland's *Helena Rubinstein* (standing).

It is apparent that the Bank of England and the Board of Trade documents express an intention to gift. There are no descriptions of works as being on loan apart from that referred to as the Graham Sutherland painting of *Helena Rubinstein* (sitting). The Gallery argues that the

forms indicate that the Foundation always made it clear when it exported works of art as gifts. Further, the forms clearly designated those which were sent on loan.

The Foundation takes the position that these are routine documents that did not necessarily indicate that the paintings exported were gifts. Reliance was placed upon an expert's report filed by Mr. Anthony Parker, OBE, who was a member of the staff of the Bank of England for 25 years, ending in 1973. Unfortunately, Mr. Parker's health did not permit him to be subjected to cross-examination. For that reason alone, it is difficult to place a great deal of reliance upon the report. However, there is something even more important which, in my view, indicates that the report should be treated with great care and caution.

Mr. Parker stated in his report that "The Bank of England administrative practice carried out within agreed policy guidelines at any given time is the only meaningful point of reference", and that "both policy and, therefore, practice were constantly changing". He further stated that "the only relevant point of reference in respect of UK exchange control matters is the appropriate Bank of England administrative practice at any given time." His textbook acknowledges that the Bank can change its practice swiftly in reaction to different circumstances. It would seem unlikely that Mr. Parker could have had personal knowledge of the policy or practice of a department some four to nine years before he became involved with it. Thus, his position that indefinite loans would have been treated as equivalent to gifts must be treated with great caution.

The export documents are declared to be true in at least one instance by Mrs. Elton, the Secretary to the Foundation. The exporter was well aware of the difference between a gift and a loan. This is made quite clear by the careful distinction made between paintings that were gifts and the *Helena Rubinstein*, which was on loan from the owner. Further, these are public documents statutorily required to be completed by an exporter and constitute admissions on the

part of the exporter. They are public documents required to be completed by the government of the United Kingdom.

What use, if any, can be made of these documents?

The Supreme Court of Canada in *R. v. Finestone*, [1953] 2 S.C.R. 107 considered this issue. In that case, a person in Canada was given a permit to export tin plate from Canada to the United States and from there, ultimately to Peru. The accused was charged with exporting tin plate to Europe that had not been authorized. The Crown sought to introduce a customs bill of lading that the U.S. customs officials had prepared. It stated that the goods had been shipped from the United States to a European country. The Court held that the U.S. custom form was admissible because it was prepared pursuant to a public duty imposed by U.S. law. Although it was recognized that the form contained hearsay information, the source of the information was trustworthy because "the law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity". Justice Rand held that the foreign government records were equally trustworthy and concluded that the grounds for exception to the hearsay rule have equal force in the case of an entry made pursuant to a duty under foreign as well as domestic law.

It could be argued that the form considered by Justice Rand was completed by a U.S. official whereas in this case, the document was completed in part by a U.K. government official and in part by a representative of the exporter. Yet, I do not think that this constitutes a viable basis for distinguishing the case from what is at issue in this arbitration. The law of the United Kingdom required the exporter to complete the CD3 form. The exporter was required to make a declaration as to the truth of the contents with penalties imposed for a breach of this obligation. In those circumstances, I cannot see any real basis for distinguishing the *Finestone* case.

In *R. v. P. (A)* (1996), 92 O.A.C. 376; 109 C.C.C. (3d) 385 the Ontario Court of Appeal considered the decision in *Finestone*. Justice Borins for the Court concluded that: "statements made in public documents are admissible as an exception to the rule against hearsay evidence. This exception is 'founded upon the belief that public officers will discharge their tasks properly, carefully, and honestly'". The Ontario Court of Appeal laid down a test for admissibility. The test required (1) that the document was made by a public official, that is, a person on whom a duty has been imposed by the public, (2) the public official makes the document in the discharge of a public duty or function, (3) the document was made with the intention that it serve as a permanent record, and (4) the document must be available for public inspection.

In this case, the document was made on the basis of information supplied by or on behalf of the exporter by a public official in discharge of public functions and it was made with the intention that it would serve as a permanent record. Thus, the first three elements of the test in *P.(A)* have been met. Further, the government officials were, through the exporter's declaration, required to discharge their duty and they certainly had to discharge their duties with fidelity and accuracy. Since the exporter or the representative of the exporter was clearly aware of the difference between a loan and a gift, it can be assumed that the document was appropriately and accurately completed. The document met the test for being available for public inspection because it was discovered by the Gallery in its search of public records in the United Kingdom. The reasons of the Supreme Court in *R. v. Finestone* give some indication that the last element may not be a requisite element of the rule. However, it is not necessary to consider that issue since the requirement has been met in any event.

I have concluded that the export documents can be considered as evidence indicating an intent to make a gift of paintings to the Art Gallery in Fredericton. The information the

documents contained originated with and came from the Foundation. I can and do take from these documents that there was a continuing intent to make a gift of the paintings to which they referred.

Witnesses as to the Intention to Give

Mr. K.C. Irving

The evidence of Mr. Irving, although honestly given, is of limited assistance. He does remember attending the Board meeting of May 29, 1959. His general impression was that it was never suggested that the collection was anything but Lord Beaverbrook's gift to New Brunswick. He had made many other gifts but this was probably his most personal one – this was the collection of works that he had chosen and he had determined that their home would be in New Brunswick.

Although Mr. Irving's impression of the May 29 meeting appeared to be vivid and honest, he could not recall specific items discussed. He did say that the meeting was basically Lord Beaverbrook reporting on where things were at this point, what he had done and what he intended to do.

He remembered the opening of the Gallery and he stated that Lord Beaverbrook "glowed a bit that day", and that he received many expressions of gratitude.

Claire Fisher

Claire Fisher was, in the 1950s, working at her father's art gallery in Montreal. She testified clearly, carefully and well. I found her to be a completely honest, reliable, and credible witness. She was hired by Lord Beaverbrook to assist him with his collection of Canadian paintings. She stated that she met personally with him on a number of occasions during her visits to Fredericton and to Cherkley and to Lord Beaverbrook's home in London. She said, "He made me his confidante and confided in me his private thoughts and opinions". She added, "We had many conversations about his cherished dream to acquire the finest works available for his Art Gallery which was to be his gift to the people of New Brunswick, his beloved Province".

She confirmed that Lord Beaverbrook treated her, in her words, "like a professional". It is to be noted that when Lord Beaverbrook made a written offer of employment to her, he advised her that: "It is understood that you will visit Fredericton and examine all Canadian paintings which are to form the nucleus of the permanent collection (*emphasis added*) in order to make certain they are in perfect condition and suitably framed". This memorandum demonstrates that Lord Beaverbrook used the phrase "the permanent collection".

It is also noteworthy that Dr. Constable had a high regard for her. He wrote to Lord Beaverbrook saying "I think that any suggestions she may make for withdrawals should be seriously considered".

Her evidence confirmed the public perception that Lord Beaverbrook was making a gift of the paintings in the Art Gallery (the permanent collection) to the people of New Brunswick.

Thomas Forrestall

At the outset, I must say that I was impressed with the evidence of Thomas Forrestall. He gave his testimony in a clear, straight-forward way. He responded to questions appropriately and was not shaken in his position in cross-examination. I am satisfied that his evidence can and should be relied upon.

He testified that he was hired shortly after the official opening of the Gallery in September 1959 and worked until mid-March when he had to leave as a result of poor health. He had a discussion with Lord Beaverbrook on the day he was hired, in September 1959. He stated that the gist of the conversation was along these lines:

"I was to look after these paintings that are in the Gallery, that belonged to the Gallery as much as the Gallery belonged to them: I think the two went - I saw going hand in hand. You couldn't separate the two. The Gallery and the paintings were all one big gift."

He said for the most part that he worked in the vault of the Gallery. His job included the documenting of the location of the works of art, supervising their arrival and their departure from the Gallery, and keeping accession records for each painting.

He testified that the accession records he maintained were made up of the catalogue and the location sheets.

It is apparent that 85 of the Opening Works in Issue were in the Gallery when he was there. He was able to identify his handwriting on 72 of the location sheets relating to Works in Issue. He acknowledged that the accession records were incomplete at the time he worked at the Gallery. However, he did not recall ever seeing the designation on any of the Works in Issue that they were "Property of the Beaverbrook Foundation". What is very important in his testimony

is his statement that, if he had seen such a designation, he would have remembered it because it would have changed the status of the paintings. He testified that he would have been very aware of the change of the status of the paintings. He did not recall "Property of the Beaverbrook Foundation" being on the sheets and, as he said, he dealt with those sheets all day every day.

He went on to say that it was never his understanding that the Beaverbrook works were on loan. He remembered that pictures such as Graham Sutherland's *Rubinstein* were distinctly on loan and everyone knew it. He stated that such a piece was not "part of the permanent collection". He defined the term "permanent collection" in these words: "these paintings belonged to the Gallery and they were part of that gift to the people of New Brunswick, kind of a totality, and it would follow through to the people of New Brunswick and the people of Canada".

Mr. Forrestall has, in the ensuing years, achieved great success as an artist. He readily agreed that the Gallery owns a number of his paintings and has held exhibitions of his works.

The Foundation contended that they had been led to believe on discovery that Mr. Forrestall's role at the Gallery was relatively unimportant. That is unfortunate. I take his evidence to be helpful and important with regard to how the paintings were described and marked when he was there, from September through March 1960. I accept without any doubt that, if he had seen the designation "Property of the Beaverbrook Foundation" on the paintings or in the records, he would have remembered it and known of it, because it would have changed the status of the paintings. His evidence is perhaps of the greatest importance with regard to the situation at the Gallery prior to the attendance of Mrs. Ince in October of 1960. I should add that counsel for the Foundation had the opportunity to cross-examine Mr. Forrestall and did so skilfully and at some length.

As I say, he was a witness whose evidence I can accept without question and that I can and do rely upon. I conclude from it that there was not any designation on the Works in Issue or in their accession records as they existed up to March 1960 that they were the property of Lord Beaverbrook or the Beaverbrook Foundation. Their descriptions were changed by Mrs. Ince when she came to the Gallery in October 1969.

Josephine Yorke

Mrs. Yorke was Lord Beaverbrook's personal secretary from 1953 through to 1959. She carried out secretarial functions and accompanied Lord Beaverbrook on his travels. She was responsible for transcribing dictaphone messages and acting as a liaison with his Fleet Street office. She kept his diary and took notes at meetings that he attended.

With regard to the Gallery, she testified that Lord Beaverbrook was extremely sentimental about New Brunswick. She said it was his great idea to go out and do something for the Province – to give back some of what New Brunswick had given to him. He wanted to put New Brunswick, particularly Fredericton and Newcastle, in the public eye. She watched the progress of the collection of paintings until it grew to such an extent that it would need a building in which it could be shown.

She described the manner in which Lord Beaverbrook worked on the collection. She said that he gave paintings from his own personal collection and some that were given to him. She described Lord Beaverbrook as soliciting friends for donations of paintings and that people like Mr. Hirshorn and Mr. Boylen realized that Lord Beaverbrook was actually setting up an Art Gallery and began to give him pictures. She testified that, although she had no recollection of any documents pertaining to the Beaverbrook Foundation, she knew that pictures were being collected and sent to New Brunswick. She understood that they were intended for the Lord

Beaverbrook Art Gallery. She stated that there was no question that he wanted his collection there for the building.

Although she attended the opening of the Gallery in September 1959, she could not recall much of the opening day ceremony. She remembered that Lord Beaverbrook was in a particularly happy state of mind.

She was generous in her praise of Mrs. Ince and Mr. Millar, trusted employees of Lord Beaverbrook. Mr. Millar she described as an absolutely honest individual with no guile at all. She described Mrs. Ince as a saint and testified that she was very loyal, "very, very, very loyal".

Of significance was her evidence that Lord Beaverbrook closely followed the affairs of his newspapers. Her evidence confirms that he would have been aware of any articles pertaining to him and to his Gallery that appeared in his newspapers. I think that any other conclusion would be unrealistic.

The testimony of these witnesses is helpful. Claire Fisher confirmed Lord Beaverbrook's intention to give paintings to the Gallery and his attachment to the Province. Her description of his dream of his great gifts to the Province was moving. K.C. Irving confirmed the public perception of Lord Beaverbrook's gift. Mrs. Yorke confirmed his great interest in his newspapers and their work. Mr. Forrestall established the status of Works in Issue in the Gallery up to March 1960.

Correspondence which Tends to Confirm the Gift of Paintings

There is, as well, some correspondence that supports the inference that the Works in Issue were part of Lord Beaverbrook's great gift to New Brunswick. There are two letters flowing between Mrs. Ince and Mr. Tweedie. They read:

"May 29, 1958

Dear Mr. Tweedie,

Thank you very much for all the letters you have recently sent me.

I am sending you copy of a letter which Lord Beaverbrook has received from Mr. Alfred Hecht and our expert.

It relates to a painting Lord Beaverbrook has just bought - The Fountain of Indolence by J.M.W. Turner - which will be going out to the Art Gallery shortly.

Would you be good enough to show this copy letter to your committee.

Yours sincerely,

(Mrs.) M. Ince"

"June 5, 1958

Dear Mrs. Ince,

Thank you for your letter of 29th May together with the enclosure bearing upon The Fountain of Indolence by J.M.W. Turner.

This sounds like a most interesting and valuable addition to the Gallery here, and you may be sure that this matter will be fully reported to the Board of Governors at our next meeting which, we hope, will take place shortly.

Yours sincerely,

R.A. Tweedie"

When these letters are considered in the context of the other evidence, they provide support for the conclusion that the Works in Issue were indeed a gift to the Gallery. They deal with a Work in Issue that was sent to the Gallery and was in the Gallery at the time of its opening.

On March 14, 1956, Lord Beaverbrook stated to Mr. Main, of the Montreal Trust Company, that he "was giving these pictures to the Beaverbrook Foundations here so that they might present them to the new Art Gallery in Fredericton, when it is in being".

Further, on March 20, 1956 Lord Beaverbrook wrote to Mr. Millar about the best method of giving the pictures to the Gallery. He referred to pictures "in my possession at the time of my death", to provision in his will, and to Canadian pictures that Lord Beaverbrook had presented to the Foundation. He stated, "the English pictures are simply held at Fredericton for the benefit and advantage of the Foundations. The Foundations in turn will in due course present them to the new Gallery when the new Gallery is ready".

On May 8, 1956, Mr. Millar wrote to Mr. Main stating that the paintings were "owned in Canada by the Foundations", and they were "designed for the new Art Gallery". On May 15, 1956, like Mr. Millar, Mr. Main described the paintings donated to the Foundations on July 15, 1955 as "of course designed for the new Art Gallery".

This correspondence confirms that the Foundation was, indeed, engaged upon a scheme to equip an Art Gallery with paintings, which would be presented to the Gallery when it was completed.

The Powers and Intention of the Foundation

As I have already indicated, the intention of Lord Beaverbrook to give the Opening Works in Issue to the Gallery also constitutes the intention of the Foundation, through which he acted and which he dominated. This conclusion is confirmed by an examination of the powers in

the Trust Deed pursuant to which the Foundation purported to act in presenting paintings to the Gallery.

In 1954 Lord Beaverbrook created the First and Second Beaverbrook Foundations in the United Kingdom. The First Beaverbrook Foundation came into existence on April 26, 1954 and the Second Beaverbrook Foundation on September 29 of the same year. Although the First Beaverbrook Foundation's objects were initially narrower than the second, on June 22, 1955 the First Beaverbrook Foundation's powers were amended so that they were the same as those of the Second Beaverbrook Foundation. Trust Deeds were drafted establishing the powers of the Foundations.

Section 2, clauses (e) and (f), of the Trust Deed provided as follows:

"2. The Trustees shall hold the trust fund upon trust to pay or apply the income thereof for or towards such one or more of the following purposes or institutions as are charitable and in such manner as the Trustees shall in their absolute discretion from time to time think proper that is to say:

(e) in purchasing for or providing funds for the purchase by libraries museums or art galleries in the Province which are either open to the public or form part of an educational establishment of books manuscripts papers letters periodicals maps paintings prints statuary and other documents or works of art which are of educational interest

(f) for such other charitable purposes to be carried into operation in the United Kingdom or in the Province for the benefit of persons normally resident in the Province as the Trustees may from time to time think fit".

On January 1, 1960, clause 2(e) was amended to read as follows:

"(e) in purchasing books manuscripts papers letters periodicals maps paintings prints statuary and other documents or works of art which are of educational interest for the purpose of making the same available for inspection by the public in the Province or in purchasing for or providing funds for the purchase of the same by

libraries museums or art galleries in the Province which are either open to the public or form part of an educational establishment.”

Both the Gallery and the Foundation are in agreement that the Second Foundation’s Trust Deed, pursuant to clause 2(f), has always been sufficiently broad to allow works of art to be either gifted or loaned to the Gallery. The only issue between them is whether the original clause 2(e) could be interpreted to allow paintings to be lent to the Gallery.

These clauses and their interpretation are relevant only in determining whether the Trustees of the Foundations believed both that they were acting pursuant to clause 2(e) and that this clause only permitted gifts. If so, then the Trustees must have intended that the Opening Works in Issue be given to the Gallery as gifts. Beyond that the clauses are of no significance. It is convenient now to consider, first the expert evidence on the interpretation of clause 2(e), and whether the Foundation relied upon clause 2(e) in sending the paintings to the Gallery.

The Interpretation of Clause 2(e)

Two outstanding English experts gave helpful evidence as to the law of trust as it applies in England: Mr. Furness, Q.C. for the Gallery and Mr. Herbert, Q.C. for the Foundation. They considered the provisions of the Trust Deed which I have set out above. They agreed that the only relevance of their interpretation of clause 2(e) is that, if the Trustees believed they were acting under clause 2(e) and that clause 2(e) only permitted gifts, this would be evidence that the Trustees must have intended that the paintings they acquired for the Gallery were to be gifts.

The experts testified that an English court interpreting the original clause 2(e) would consider “the ordinary and natural meaning of the words used”. Further, that the court would

have regard to the factual context in which the document was created as an aid to its construction. They agreed that, in interpreting the provision, the court would not have regard to evidence of the settlor's own personal intentions for the deed such as "the settlor's private instructions to solicitors as to what he wants", or "the conduct of the parties, the settlor or the Trustees after the deed was executed".

Mr. Furness, Q.C. testified that the language of the original clause 2(e) talks about purchasing paintings for art galleries, and "that when you buy a painting for an art gallery the natural meaning of the words, what you would naturally understand them to mean, is that you are buying it as a gift, and it is not a natural meaning of the word to suppose that it would authorize you to buy it for yourself and then lend it". In his view, if clause 2(e) contemplated a power to loan, the drafter would have drawn the clause in a way which not merely authorized the Trustees to buy for galleries, museums or libraries, it would have said that the Trustees could buy for the purpose of exhibiting in museums and galleries.

Mr. Furness, Q.C. considered that there are two alternatives in the original clause 2(e): (1) first, it provides for the purchase of paintings by art galleries in the Province or (2) second, it provides for the purchase of paintings for art galleries in the Province. Option (1) is intended to permit money to be given to an art gallery so that it could purchase paintings to own. Option (2) is simply an alternative means of performing Option (1). Mr. Furness considered the options as "sort of two sides of essentially the same coin". This he took as an indication that the original clause 2(e) was intended for gifts only – not loans.

Mr. Herbert, Q.C. agreed that under clause 2(e) "clearly the Trustees were authorized to make a gift of a painting to the gallery", and "it is plain and obvious" and he had no doubt about it.

Mr. Herbert, Q.C. stated that, if the Trustees approached him for advice on the scope of this section, he could not guarantee that the original clause 2(e) empowers the Trustees "to form a collection for public inspection". Rather, he stated "I think that it is probable that that's what it includes", that is to say, that clause 2(e) includes the power to form a collection for public inspection and "if you want to put it beyond doubt you can execute a deed of variation".

Thus, both experts agree that the original clause 2(e) clearly gives the Foundation the power to give paintings to the Gallery. This is, I believe, the most natural meaning of the language in clause 2(e) "to purchase for art galleries in the Province". It is unlikely that the Trustees would have understood the original language in clause 2(e) to refer to a power to loan. By July 21, 1959 there were five Trustees of the Second Beaverbrook Foundation. Specifically, Lord Beaverbrook, three of his newspaper employees (J.B. Wilson, William Barkley and John Gordon) and his grandson Billy Montague. None of these Trustees had legal training. Thus, it may be assumed they, without legal advice, would sensibly interpret the words in their ordinary and natural meaning. The importance of the Trustees' understanding of clause 2(e) becomes apparent from the Foundation's submissions.

Counsel for the Foundation strongly argued that there was no evidence either before 1960 or after 1960 that the Trustees were operating under a particular paragraph of their Trust Deed when they sent art to the Gallery. Counsel for the Gallery disagreed. He pointed to evidence which indicates that the Foundation and its advisors relied specifically on clause 2(e) and that the clause was amended in 1960 in order to include a power to exhibit paintings on loan.

In a letter dated December 9, 1959, the solicitors, Herbert Smith, wrote to Sheila Elton, secretary of the Foundation. The solicitors described the amendment to clause 2(e) as "the extension of the objects to permit the purchase of books, works of art etc. by the Foundations in

order that they may be retained in the ownership of the Foundations for exhibition to the public". The letter also stated that any works of art retained by the Foundations are to be made available for inspection by the public and that, "I assume this covers what Lord Beaverbrook desires".

This letter indicates that the 1960 amendment provides an extension to the Foundation's objects to permit it to retain the ownership of the works of art for exhibition to the public. It is a clear indication that Lord Beaverbrook intended, after January 1, 1960, to loan paintings to the Gallery while retaining ownership of them in the Foundation.

In addition, the Gallery points to the following evidence to establish that the Foundation and its advisors relied specifically on clause 2(e), and not on clause 2(f), in presenting paintings to the Gallery:

- On December 15, 1959, Mrs. Elton cautioned Lord Beaverbrook not to hang Foundation pictures on his walls, since the charitable purpose of the amended clause 2(e) was "for us to lend pictures for the enjoyment of the people of the Province, without any transfer of ownership ...". This was clearly a reference to the amendment to clause 2(e).
- In another obvious reference to the January 1, 1960 amendment of clause 2(e), on January 12, 1962, Mr. Millar (who kept the accounting records) advised Lord Beaverbrook that "Beaverbrook Foundations here own pictures and they lend them out, but there is a specific clause in the objects put in at the request of the lawyers to cover this ...".
- On September 10, 1976, the Goodman, Derrick & Co. law firm (retained by the Foundation) referred to paintings "which had been acquired out of income Account by reference to the terms of Clause 2(e) of the Deed ...". (*emphasis added*)

- On September 22, 1977, Black, Geoghegan & Till, accounting firm of the Foundation, stated to Anne Westover, the Secretary of the U.K. Foundation, that “sub-clause (e) permits the purchase *inter alia* of paintings which are of educational interest ‘for the purpose of making the same available for inspection by the public in the Province’ and I understand that it was in this context that the pictures in question were acquired”.
- On October 25, 1977, Leonard Hoffman (retained as counsel to the Beaverbrook Foundation) stated that the Trustees exercised “the power conferred by clause 2(e), ... bought some paintings, paid for them out of income and exhibited them to the public”. Like Black, Geoghegan & Till, Leonard Hoffman referred to the version of clause 2(e) that was amended on January 1, 1960, rather than the version that was in force between 1954 and 1959. (*emphasis added*)
- There is no evidence that the Trustees ever relied on clause 2(f) to justify any loaning scheme.

Counsel for the Gallery submitted, and I agree, that the September 22, 1977 statement by Black, Geoghegan & Till that paintings were acquired pursuant to clause 2(e) is significant. They were the original accountants of the Foundation. It is apparent that Black, Geoghegan & Till was involved in the financial affairs of the First and Second Beaverbrook Foundations from 1955 until after 1969. It was said that “in some sense from an accounting and formal point of view, they were something of an institutional memory of the Foundation”.

With regard to the amendment to the Trust Deed on January 1, 1960, Mr. Furness, Q.C. gave as his opinion that “it appears that Lord Beaverbrook’s legal advisors at the time felt that a specific power was required before such transactions (purchasing paintings for the purpose of

inspection) were undertaken". It is important to note that Mr. Youdan, for the Foundation, characterized the January 1, 1960 amendment as a "minor amendment". Mr. Furness, Q.C. disagreed with Mr. Youdan's interpretation and expressed his opinion "that the extension which Herbert Smith is driving at is this idea that from now onwards the Foundations can actually retain ownership of the works of art they have purchased. Personally, I think it is pretty clear what they had in mind".

It is not necessary to go further with this issue. For now it will suffice to say that there is evidence which I accept that clause 2(e) of the Trust Deed was amended on January 1, 1960, in accordance with Lord Beaverbrook's instructions, so that the Trustees would be authorized, pursuant to clause 2(e), to make loans as well as gifts to the Gallery. This is simply another fact that will have to be taken into account together with the speeches and articles which manifest the intention of Lord Beaverbrook and the Foundation, prior to January 1960, to give paintings to the Gallery.

In coming to this conclusion, I have been guided by the testimony of both experts in English trust law, particularly that of Mr. Furness, Q.C. I believe that the natural meaning of the original clause 2(e) indicates that it refers to gifts and not loans. This was the opinion of Mr. Furness, Q.C. It is supported by the opinion of Mr. Herbert, Q.C., who would have advised the Trustees to amend the 1954 Deed to put the question of loaning powers beyond doubt. The failure to seek an amendment to the Trust Deed prior to January 1, 1960 supports the conclusion that, before that date, the Trustees' intention was to make gifts of paintings to the Gallery, rather than loans. Further support for that conclusion comes from the evidence that Lord Beaverbrook's advisors characterized the importance of the January 1, 1960 amendment as extending the power to lend pictures without any transfer of ownership.

The Intention of the Foundation as Indicated by its Accounting Records

The accounting evidence is not determinative of the issues in this case. However, in light of the Foundation's reliance upon it, it must be reviewed.

Mr. Kenyon, who was retained by the Foundation, traced, in the Foundation's accounting ledgers, the £12,108.7.0. sum which is referred to in Lord Beaverbrook's memorandum to Trustees, dated July 15, 1955. In the memorandum, Lord Beaverbrook gave to the Foundation paintings costing £12,108.7.0. Lord Beaverbrook described the gift as a "donation, this day, to your Trust Fund". (The memorandum is quoted in full earlier in these reasons). Mr. Kenyon observed that this sum was debited to the Foundation's donations account, thereby recording money or assets leaving the Foundation. He found it hard to explain why there was a debit to the donations account when, if anything, one would have expected a credit on the basis that it is a donation to the Foundation and, therefore, it is assets coming into the Foundation rather than leaving the Foundation. Together with the £12,108.7.0 debit to the Foundation's donations account, Mr. Kenyon also described a credit of the same amount to the Foundation's trust fund. He stated that this entry was consistent with Lord Beaverbrook's memorandum which referred to works of art being given to the Foundation for the trust fund and, therefore, the credit to the trust account in the ledger is what one would expect to see in respect of such a donation. It is significant that the £12,108.7.0 was initially posted to the Foundation's trust fund. It was subsequently transferred to the Foundation's income account described as a "donation", in circumstances where the income account was described as "gifts held on like trusts as to income".

The Foundation began to purchase paintings in 1954. These purchases were initially recorded in the Foundation's donations account reflecting assets donated by the Foundation. Mr. Kenyon agreed that the debit to the donations account "suggests that the bookkeeper who made these entries may have understood that entry to relate to a donation and further that a bookkeeper would not have made up the information and that the information must have come from somewhere".

Twelve days after Lord Beaverbrook wrote his July 15 memorandum, all the paintings that the Foundation had to that date purchased were then transferred out of the Foundation's donations account to a pictures account. Mr. Kenyon said that he would not expect the pictures account to indicate one way or the other "as to whether the pictures were held on trust for a third party". The pictures acquired subsequent to July 15, 1955 were treated no differently than the pictures referred to and included in Lord Beaverbrook's July 15 memorandum.

Mr. Young testified as to accounting matters on behalf of the Gallery. He stated that the July 15, 1955 memorandum was "consistent with the building of a collection of works to be presented to the Gallery when formed or opened".

Mr. Furness, Q.C., testifying as an expert on trust matters on behalf of the Gallery, testified that the July 15, 1955 memorandum would probably be governed by English law because it is addressed by an English resident (Lord Beaverbrook) to the Trustees of an English Trust. He observed that Lord Beaverbrook in that memorandum states that he has "been buying pictures and they are in store" and that the original purpose was "to sell the paintings to the Foundation to add to your collection for the Art Gallery", but he is now prepared to give them to the Foundation for the same purpose.

Mr. Furness, Q.C. stated that the memorandum meant that the £12,108.7.0 worth of paintings are a donation to that part of the assets that the Foundation held which was going to be part of the collection that was going to the Gallery. He observed that the July 15 memorandum is simply a statement of intention that the paintings which are donated in the schedule are to be dealt with by the Trustees in the same way as they are dealing with the paintings they have already bought. He concluded that the July 15 memorandum was sufficiently clear to amount to a declaration of trust of the paintings which are listed in the schedule to the memorandum. He thought it was clear that Lord Beaverbrook was telling the Trustees to hold the paintings on the same trusts and with the same powers as applied to the Trustees' own collection. He concluded that it was clear enough to amount to a declaration of trust. He cited in support of his conclusions two cases, *T.Choithram International SA v. Pagarini*, [2001] 1 W.L.R. 1 (P.C.) and *Pennington v. Waine*, [2002] 4 All E.R. 215; [2002] E.W.C.A. Civ. 227.

Mr. Herbert, Q.C., the English trust expert who testified on behalf of the Foundation, stated that one way of interpreting the memorandum that would do the least violence to the language of the document would be to conclude that Lord Beaverbrook intended "an express addition to the Foundation's trust fund". However, he could see a less extreme view as just being "a contrast between buying the paintings and accepting the paintings as a gift in which case somehow you have to write in some other trust to allow the painting to be dealt with in the same way as the other paintings". Mr. Herbert agreed that, if the document is interpreted as a whole, you might say the July 15 memorandum is specifically for the collection for the Art Gallery. He concluded that questions of construction are matters of impression and that there was very little that he could say by way of advice as to how I should approach this issue.

In my view, the memorandum of July 15, 1955 does express an intention to make a gift. Lord Beaverbrook referred to "a scheme to equip an Art Gallery in Fredericton, New Brunswick and you have already acquired a number of pictures". He referred in that same memorandum to "your collection for the Art Gallery". The manner of dealing with the pictures referred to in the memorandum, as well as all of the pictures that had been acquired by the Foundation up to that date, is evidence of a plan to collect pictures in the Foundation's pictures account for the purpose of giving them to the Gallery.

It is significant that Mr. Kenyon agreed that if it was found that (1) "from late 1954 until late 1959, Lord Beaverbrook and the Trustees were engaged upon a scheme or a program to equip an Art Gallery in Fredericton" and (2) "Lord Beaverbrook and the Trustees intended the Second Beaverbrook Foundation to hold the Works in Issue and to donate the pictures to the Gallery when the Gallery was ready to receive them" then the Foundation's accounting records are "equally consistent with an intention to donate the paintings to the Gallery as they are with an intention not to donate the paintings to the Gallery". It is as well significant that there is no reference to any intention to loan the paintings.

In my view, the memorandum of July 15, 1955 constitutes evidence of an intent to make a gift of the paintings to the Gallery, and the accounting records are consistent with that intent. I find that Lord Beaverbrook and the Trustees were, from 1954 through 1959, engaged upon a scheme to equip the Gallery with paintings and Lord Beaverbrook and the Trustees intended to hold the Works in Issue and donate them to the Gallery when it was ready to receive them.

THE THREE ELEMENTS OF A PERFECTED GIFT

There is a very helpful review of the law of gifts in the Canadian text entitled *Principles of Property Law* by Professor Bruce Ziff (4th Edition, Toronto: Carswell 2006). In that text the author describes the three elements of a perfected gift, namely, (1) the intention to donate, (2) an acceptance and (3) a sufficient act of delivery.

Intention To Make a Gift

Phipson on Evidence (16th Edition, Sweet & Maxwell 2005, p. 1101), states that documents “which are or have been in the possession of a person are generally admissible against that person to show her/his knowledge of their contents”. The text further states that “documents which are or have been in the possession of a party will, as we have already seen, generally be admissible against him as original evidence to show his knowledge of the contents, his connection with or complicity in the transactions to which they relate or a state of mind with reference thereto.”

Lord Beaverbrook’s intention to make a gift of the paintings in the Gallery at its opening can be established by the newspaper and magazine articles which he approved, accepted, acknowledged, adopted, commissioned, disseminated, published and used.

The intention to make a gift of the paintings is also established by the speeches given by Dr. Constable, first at the Convocation of the University of New Brunswick when Lord Beaverbrook was present and, second, at the opening of the Gallery. It should be remembered that the first speech given at the University was reviewed, discussed, commented upon and authorized by Lord Beaverbrook. Lord Beaverbrook asked the Board of Governors’ consent to Dr. Constable making a speech at the opening of the Gallery. On both occasions, the speeches

constituted a public declaration of Lord Beaverbrook's intent to give the Works in Issue at the Gallery in September 1959 to the Gallery.

This gift was further confirmed by the 1959 Catalogue which distinguished between the works in the Gallery collection and the other works which were on loan from other owners.

The gift was also confirmed by the export documents listing the paintings as gifts to the Beaverbrook Art Gallery in Fredericton.

In addition, there was support in the evidence of the witnesses that Lord Beaverbrook clearly conveyed his intention to give the collection of paintings to the Gallery.

The Foundation takes the position that the newspaper articles cannot establish an intention to make a gift. I cannot agree. I have tried to make it clear that all the articles were specifically approved by Lord Beaverbrook, apart from the earlier *TIME* magazine article which he felt did not give sufficient praise to the proposed Gallery and the paintings and dealt unfairly with Sutherland's series on Churchill. In every other case, he either approved or commissioned the articles or specifically praised and adopted them. They were sent to proposed donors and they were sent to friends of Lord Beaverbrook. By his words and actions he adopted those articles and acknowledged and accepted them as correct. He made generous use of them. These articles were repeated, either quoted or adopted with very similar wording, in his own newspapers. Lord Beaverbrook must have known of his papers' articles. These articles were announced to the world with a media drum roll and very publicly proclaimed. They do indeed establish Lord Beaverbrook's intent to give the Works in Issue that were in the Gallery at its opening.

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

The speeches of Dr. Constable which were authorized by Lord Beaverbrook and delivered in his presence, first at the University Convocation and then at the Gallery opening, either standing alone or taken together, establish Lord Beaverbrook's intention to give the paintings in issue to the Gallery.

Lord Beaverbrook's Intent is the Intent of the Foundation

It must be emphasized that Lord Beaverbrook was a Trustee of the Foundation and its directing mind. The other Trustees were trusted employees and family members. His intent was indeed the intent of the Foundation which he in every way dominated. Thus, when I speak of Lord Beaverbrook's intent to give the paintings to the Gallery, that includes and incorporates the intention of the Foundation.

In any event, the records and correspondence of the Foundation indicate that, prior to the amendment of clause 2(e) of the Trust Deed in January 1960, the Foundation presented paintings to the Gallery as gifts, not loans.

Delivery and Acceptance of a Gift

It is common ground between the parties that a gift has three elements: (1) an intention to donate, (2) acceptance, and (3) a sufficient act of delivery. It also appears to be agreed both by Canadian text writers and by Michael Furness, Q.C. and Mark Herbert Q.C., the English trust law experts called by the parties, that:

“Words of gift are not, per se, required in order to demonstrate intention to make a gift. And further, that although equity will not assist a volunteer nor will equity strive officiously to defeat a gift. Further, while a gift of land requires a deed, there is no particular formality that is required to transfer tangible personal property such as a work of art and a physical act of delivery is sufficient to complete a gift of such property.” *HALSBURY’S Laws of England* (4th Edition, Vol. 20 (1), at para 50)

Further, at common law, the transfer of possession to the donee does not need to be contemporaneous with the expression of the intention to donate, so long as the intention continues until the gift is complete. Delivery may follow the expression of the intention or it may precede it. See Ziff, *Principles of Property Law*, (4th Edition, Toronto: Carswell 2006 at pages 141 and 142).

Although “acceptance” is referred to in some of the authorities, it is now apparent that it is not in fact a prerequisite that a gift vest in the donee. Further, the acceptance does not have to be express in order to be valid. See for example *Standing v. Bowring* (1885), 31 Ch. D. 282. *HALSBURY’S Laws of England* (4th Edition, vol. 20(1)) states with regards to gifts at paragraph 50: “Express acceptance by the donee is not necessary to complete a gift. It has long been settled that the acceptance of a gift by a donee is to be presumed until his dissent is signified even though he is not aware of the gift.”

At common law a gift vests in the donee as soon as the donor has done everything to transfer the legal and beneficial interest in the property to the donee. Ordinarily a gift of land will require a deed. However, there is no particular formality required to transfer tangible personal property such as a work of art. The physical act of delivery is sufficient to complete a gift of personal property.

A GIFT ONCE GIVEN IS IRREVOCABLE

If an intended gift is completed, it is not revocable at the option of the donor unless the donor has expressly reserved a power of revocation. Even if the donor subsequently changes his mind and wishes that the property had been conveyed subject to a power of revocation or on a different basis such as an extended loan, the gift cannot be revoked unless there is an express reserved power of revocation. See *McHugh v. Robichaud* (1979), 51 A.P.R. 349 at para. 14 (N.B.C.A.). Any power of revocation or other limiting condition must be imposed at the time of the gift and it cannot be imposed at some later date after the gift has been made. See also *Child v. Chase*, [1981] 2 W.W.R. 673 (Sask. Dist. Ct.).

In this arbitration the intention to make the gift has been very clearly established. The Opening Works in Issue were delivered to the Gallery and accepted by the Gallery. The gift was completed and could not be revoked.

In addition to the common law principles, there is superimposed upon them or added to them subsection 7(3) of the 1957 Gallery Act. That section provides:

“Any gift made or to be made shall enure to the benefit of the Board of Governors if made to the said Board under any name or for any purpose from which name or purpose it can be reasonably

inferred that the Board of Governors was intended to be benefited.”

The Foundation argues that the section was designed simply to address the problem of donations made to “the people of New Brunswick” or “the Fredericton Gallery” or such other vague designations, particularly before the creation of the Gallery. In my view, the section goes much farther than that. It must be noted that there are no temporal restrictions on the provision. It refers to gifts made in the past, present and future. This is apparent from the words “any gift made” or “to be made”. That provision has remained in the Act from 1954 until the present.

The provisions of subsection 7(3) are that a gift shall be applied where it may be reasonably inferred that the intention is that a gift shall enure to the benefit of the Board, notwithstanding that it is not specifically so stated. Obviously, if those statutory conditions are met, then the gift shall be applied. It is significant that neither the common law nor the Act require any special language of gift for it to be valid and no special acceptance is required. In this case, I have found that the expressed intention of Lord Beaverbrook and through him, the Foundation, was to make a gift of the Opening Works in Issue to the Gallery. The Works in Issue which were the subject matter of the gift were delivered to the Gallery. They were accepted and displayed by the Gallery as its collection. The gift was completed and perfected at the latest when the Gallery was opened. It is reasonable to infer and I do so find that the Board of Governors of the Gallery was intended to be benefited.

LISTS OF PAINTINGS AND FIDUCIARY BREACHES

At the outset of this segment pertaining to lists of paintings and fiduciary breaches, it is necessary to emphasize that I am satisfied, beyond a shadow of a doubt, that by the time of the

opening of the Gallery in September 1959, a gift had been made by Lord Beaverbrook to the Gallery of the Opening Works in Issue. Further, that the gift, once made, could not be revoked. Lord Beaverbrook's attempts to reassert the Foundation's ownership of the Opening Works in Issue constitute very serious and significant breaches of the fiduciary duty which he owed to the Gallery as a member of its Board of Governors.

The evidence pertaining to lists is helpful and significant in determining the intention of Lord Beaverbrook. A list of paintings dated May 20, 1959 was placed in evidence. It refers to many of the Opening Works in Issue. The list of pictures was initialled by the Trustees of the First and Second Beaverbrook Foundations.

The Foundation takes the position that this list is evidence that at one time the Trustees of the Foundation intended to make a gift of the listed paintings to the Gallery but that a decision was made instead to leave the paintings with the Gallery on an extended loan. The list itself does not refer to gifts or loans. It certainly does not give any indication that the paintings were to be on loan to the Gallery. If there was to be a loan, it would be reasonable to expect that the terms of the loan would have been set out in a document and given to the Gallery. I have not seen such a document.

At the May 29, 1959 meeting of the Board of Governors held just a few months before the opening of the Gallery insurance on the paintings was discussed. Prior to this Board meeting Mr. Tweedie (Secretary to the Gallery Board) sent a memorandum to Board members on May 26 which lists "a number of the more expensive pictures owned by the Gallery". The memorandum went on to state "you will appreciate the difficulty involved in placing a value on the collection. It is suggested therefore that certain pictures might be insured (see list) including several valuable paintings gifted to the Gallery."

The list of paintings that was referred to in the Tweedie memorandum as the more expensive pictures owned by the Gallery was entitled "Paintings" and it listed 23 items and set out their value both in dollars and pounds. Included in the list were *Flatford Mills* (Converted Work), a Gainsborough painting, *Colonel Nugent* (an Opening Work in Issue), Gainsborough's *Peasant Girl* (a Converted Work), Hilliard's miniature (an Opening Work in Issue), Hogarth's *John Pine* (an Opening Work in Issue), Sisley's *Cote d'Angleterre* (an Opening Work in Issue), Stubbs' *Hunters out at Grass* (a Converted Work) and Turner's *Fountain of Indolence* (an Opening Work in Issue).

The Foundation takes the position that eight items on the list were gifts while the rest were loans, and that there was no need to distinguish between them for insurance purposes. However, the list does not describe any painting as being on loan. It lists gifts by others including Dr. Boylen. There is no distinction on the list between gifts and loans from the Foundation.

If the Foundation considered that some of the paintings were on loan, their position had not been conveyed to the Gallery Board. At the Board's meeting on March 17, 1955, the Gallery was described to the Lieutenant Governor as "one of the finest galleries of its size to be found anywhere on the continent." I must also consider and take as part of the context, the letter of thanks from Premier Robichaud to Lord Beaverbrook "of the treasures of art now being collected whereby "our province will possess assets of inestimable value." It is difficult to see how the memorandum from Mr. Tweedie which described the paintings listed as some of the more expensive pictures owned by the Gallery was somehow not a list of paintings owned by the Gallery.

On May 29, 1959 the Board of Governors reviewed the Tweedie memorandum of May 26 and after discussion it was resolved not to insure either the Gallery building or its contents.

The May 26 list was a partial list of paintings. There can be no doubt that later in the meeting on May 29 Dr. Mackay (President of the University of New Brunswick) asked "if a list of Gallery paintings could be made available to the Board". Lord Beaverbrook undertook to furnish each member with a proper list.

On June 17, 1959 Mr. Tweedie, who had attended the May 29 meeting, wrote to Mrs. Ince stating that Lord Beaverbrook had promised to send him a complete list of paintings the moment it was ready. He explained that he required the information urgently for publicity efforts including the upcoming *TIME* magazine article.

On June 24, 1959, Mrs. Ince wrote to Lord Beaverbrook and told him that Mr. Tweedie was asking for a complete list of paintings. She advised him that she had "marked up one of the copies you gave me of English (etc, paintings)". She asked if this list could go to Mr. Tweedie.

The list of paintings referred to by Mrs. Ince was entitled "List of Paintings Now in Custody of Beaverbrook Art Gallery". It listed over 234 paintings. Mrs. Ince's handwriting appeared on the document. The situation becomes still murkier at this point. The last page of the document states that an asterisk is intended to denote "the property of First and Second Beaverbrook Foundations and on extended loan to Beaverbrook Gallery". A number of Works in Issue, including Freud's *Hotel Bedroom*, have asterisks, although Turner's *Fountain of Indolence* does not have an asterisk. On June 24, Lord Beaverbrook dictated a memorandum for Mrs. Ince which read "Here is Mrs. Ince this list returned to you. Have it made up please without any marks on it at all and then we'll send such list out to Mr. Tweedie, one single copy".

On June 25, 1959, Mrs. Ince replied to Mr. Tweedie enclosing a list of paintings. The list was not attached to the letter or the copy of it that is in evidence.

On July 2, 1959, Mr. Tweedie replied to Mrs. Ince acknowledging receipt of the "lists of Canadian and British paintings". He stated that the lists were being stencilled and that he expected to have fifty copies of each list available by the end of the week.

On July 13, 1959, Mr. Tweedie wrote to the Board of Governors enclosing a list of Canadian and British paintings reminding the members that, when the Board held its last meeting, Lord Beaverbrook had agreed to make this information available for the private use of the Governors. Unlike the asterisk list, this list given to the Governors contained no indication of ownership of the Works in Issue. One list of 120 Canadian paintings and one of 254 British paintings was provided to the Board. The list explicitly identified paintings which were on extended loan from the National Gallery of Canada in Ottawa, from the Tait Gallery in London, and one painting on loan from Madame Rubinstein.

The parties naturally take different positions with regards to these lists. The Foundation argues that Mr. Tweedie prepared the asterisk list because his typewriter was used to type it. They allege that, in response to Lord Beaverbrook's instructions to send a list without any markings on it, Mrs. Ince simply sent to Mr. Tweedie her mark up of the asterisk list and a typed list of paintings. Mr. Tweedie then prepared a clean list of British and Canadian paintings without any designation as to ownership which he sent to the Board of Governors. The Foundation also points out that the asterisk list is full of errors, specifically, it does not describe the *Fountain of Indolence* as the Foundation's property.

The Foundation submits that Dr. Mackay was simply requesting a list of Gallery paintings that is to say, those paintings that were in the Gallery rather than a list of the Gallery's

paintings. Lord Beaverbrook simply complied with the request of the Board and sent a list of the paintings that were on display in the Gallery without regard to their ownership.

The Gallery takes the position that it is unlikely that Mrs. Ince would have ignored Lord Beaverbrook's instructions to make up a list without any marks on it.

The Gallery contends that it is unlikely that Mr. Tweedie compiled the asterisk list or was sent a copy of it. It notes that Mr. Tweedie simply acknowledged the arrival of lists from Mrs. Ince but made no reference to Lord Beaverbrook's memorandum to her. The Gallery says it is unlikely that such an important memorandum would have been ignored by Mr. Tweedie if he had received it. It appears to me that the Gallery's position is far more rational and more likely to be correct than that of the Foundation. If Mr. Tweedie had already had the asterisk list, it is unlikely that he would have requested a further list from Mrs. Ince. As I see it, these lists are not determinative of the issue of ownership.

However, the evidence of the lists does demonstrate that something most unfortunate was occurring which constituted a breach of Lord Beaverbrook's fiduciary duty owed to the Gallery. The asterisk list with its designations of ownership was deliberately held back from the Board of Governors of the Gallery. In my view, that is the only appropriate conclusion. Lord Beaverbrook was withholding important and relevant new information from the Board of Governors in breach of his fiduciary duty.

It is significant that the *TIME* magazine article was composed with the assistance of the July 13, 1959 lists of paintings. It is this article which described the Gallery as Lord Beaverbrook's greatest landmark. It went on to state that Lord Beaverbrook's biggest donation was not the museum but most of the three hundred paintings hanging in it. Again, it is worth recalling that the article specifically reproduced Freud's *Hotel Bedroom*, an Opening Work in

Issue. The article concluded that "with last week's mammoth contribution to Canada's relatively weak art treasures, Beaverbrook's monument seems completed".

Again it should be noted that Lord Beaverbrook wrote to a friend with regard to the account in *TIME* magazine. He observed that the reception from newspapers, magazines and critics was most satisfactory. The article was adopted and used by Lord Beaverbrook. It constitutes convincing evidence of his gift to the Gallery of the Opening Works in Issue. Certainly, it does not disclose or even hint at any change of heart concerning the ownership of the collection.

There was the subsequent failure to disclose the very significant changes to the accession records undertaken by Mrs. Ince. These changes altered or attempted to surreptitiously alter the status of the paintings which had been the subject of a gift to the Gallery. There was a change in Lord Beaverbrook's plans for the Opening Works in Issue from a generous gift to a mere loan that could be recalled on demand.

These disclosures should have been made at the earliest possible moment. Yet, Lord Beaverbrook concealed the information for over a year. He did so from the opening of the Gallery in September 1959, when he basked in the praise and gratitude of the people of New Brunswick, until November 1960 when Mrs. Ince, acting on his instructions, altered the accession records. Even then, he did not address the implications of the assertion of ownership by the Foundation or clarify the terms on which the paintings would be held. All in all, Lord Beaverbrook's breaches of fiduciary duty were significant, surreptitious and deceptive.

A BRIEF HISTORY OF THE GALLERY FROM 1960 TO 2004

This will first entail a review of the Gallery's accession records prior to and subsequent to 1960.

It is important to remember that the Trust Deed of the Foundation was amended on January 1, 1960 to provide a power to make works of art "available for inspection by the public in the Province" (i.e. New Brunswick or Nova Scotia). The purpose of the amendment was described as "the extension of the objects to permit the purchase of books, works of art, etc. by the Foundations in order that they may be retained in the ownership of the Foundations for exhibition to the public". The amendment and its purpose should have been made known to the Gallery Board.

It is clear that the Post-Opening Works in Issue, that were shipped to the Gallery more than a year after its opening, and after the amendment to the Trust Deed, were described as being "on loan".

The Gallery's Accession Records Prior to March 1960

The evidence of Tom Forrestall with regard to the Gallery's accession records from September 1959 to the time he left because of illness in March 1960 is of critical importance. I should say at the outset and emphasize that I accept without question the evidence of Tom Forrestall. He was clear, direct, fair and unbiased.

He has become a well established Nova Scotia artist.

He was hired by Lord Beaverbrook in September 1959 and placed in charge of the vault and its contents. This included the safeguarding of the items contained in the vault. He was in

charge of accession files for all paintings and drawings. He was, for the months that he was there, the Gallery's Assistant Curator in charge of the vault and accession records.

He said that he worked mostly in the vault where the paintings were stored while not on display. In fact, he spent about two-thirds of his time there. His task was to bring the accession files and catalogue sheets "up to speed".

He carefully explained that each work of art had its own file that was located in the vault. The file contained pertinent information about the work including its size, the medium, the artist, its provenance, pertinent dates and a location sheet which noted where the work was located and whether it was on display or in the vault. He recognized his own handwriting on a number of location sheets including Freud's *Hotel Room*, Hogarth's *John Pine*, and Sickert's *Bonne Fille*, all Opening Works in Issue. He recognized his handwriting on 72 of the 85 location sheets for Opening Works in Issue.

Mr. Forrestall said that he did not have any specific discussions with Lord Beaverbrook about ownership of the works in the Gallery. However, the gist of his talks with Lord Beaverbrook was that he was to look after the paintings in the Gallery and that the paintings "belonged to the Gallery as much as the Gallery belonged to them". He understood from Lord Beaverbrook that the works and the Gallery itself went hand in hand and that you could not separate the two because they were all "one big, great gift".

Mr. Forrestall went on to say that he never heard Lord Beaverbrook talk about any of the works being on loan to the Gallery. He went so far as to say that it never even entered into his understanding. He was well aware of paintings that were on loan to the Gallery such as the *Helena Rubinstein* that was on loan from Madame Rubinstein herself. They were distinct from the paintings that were part of the "permanent collection". He understood the permanent

collection to mean "that these paintings belonged to the Gallery and that they were part of that gift to the people of New Brunswick, kind of a totality, and it would follow through to the people of New Brunswick and the people of Canada".

He reviewed and considered various catalogue sheets which stated the works to be "Property of the Beaverbrook Foundations". He testified that he could not remember having ever seen those entries on the catalogue sheets. He would have noted the description and been aware of it in 1959 because "it would change the status of the painting". If this designation had been on catalogue sheets, the paintings, he said, would have assumed "the status of the *Rubinstein*, the Graham Sutherland *Rubinstein* that was on loan". He was very clear in his testimony that he "dealt with these sheets every day, pretty well". He would have been "very much aware" of any such change in status of the paintings. He did not recall any such entries, and I find that there were no such entries on the catalogue sheets as he knew them up to March 1960.

The Gallery Accession Records Subsequent to March 1960

In July 1960, Mr. Cooke, the Gallery's Curator, wrote to Mrs. Ince. He explained that the records of many of the paintings in the Gallery's collection were woefully inadequate. He expressed concern about this and his desire to bring the records up to date as soon as possible. He enclosed a sample accession form and explained that the Gallery was anxious to know, for each painting, the acquisition date, the source of acquisition, whether it was acquired by gift or purchase, the purchase price, ownership of reproduction rights, and so on.

For some time Mr. Cooke shipped catalogue sheets to Mrs. Ince for her to complete in England. Later, Lord Beaverbrook proposed to send her to Fredericton "so that the whole system will be wonderfully well organized".

In October 1960, Mrs. Ince travelled to Fredericton to review the Gallery's accession records. During her stay she finished the card index for the paintings, filled in the catalogue sheets for the English paintings, and affixed labels to paintings including those alleged to belong to the Beaverbrook Foundation.

On November 7, 1960, Mrs. Ince wrote to Lord Beaverbrook to tell him that she had "destroyed all the old accession sheets," and that she had replaced each old sheet with "a new sheet giving all the available details of the paintings". Her letter is important and the relevant portions are set out below:

"Dear Lord Beaverbrook,

As I mentioned I have made a complete card index which will be used for reference under "accession" numbers. The files which are kept in the steel cabinet will remain in alphabetical order.

I have destroyed all the old accession sheets. And each file is now fitted with a new sheet giving all available details of the paintings.

...

I now go to the University to check your Collection most of which is in the Lloyd George room. There are several books on loan.

I will leave here on Friday and be in London on Saturday. ..."

It is impossible to determine what records were destroyed by Mrs. Ince. Mr. Forrestall recognized the catalogue sheets as originals to which the designations "Property of the Beaverbrook Foundations" had been added after his departure. The Gallery submitted that Mr.

Forrestall's evidence is consistent with the frequently awkward placement and misaligned typing of these designations on the catalogue sheets.

Importantly, Mr. Forrestall testified that the handwriting on the *Fountain of Indolence* catalogue sheet, which refers to "42 x 65-1/2" in pencil, could have been his. If this is correct, then as the Gallery pointed out, Mrs. Ince did not destroy all the former records, but only those that described works as "purchased for the Gallery", or records from export documents that described "gifts to the Art Gallery", or other information recorded at the time of accession of each work.

The Gallery noted that the Foundation referred to one example of evidence that Mrs. Ince might have destroyed which survived the destruction. The Foundation submitted that the surviving sheet "suggested that the only items destroyed by Ms. Ince were extremely rudimentary sheets that contained far less information than the catalogue sheets". The sheet itself refers to Turner's *View of Cricket St. Thomas*, describes where the painting was purchased, its cost, and other information. It contains no property designation. The Gallery points out that the sheet itself was not even an original Gallery record. Rather, it is a record of the Sir James Dunn Foundation. While the sheet states "replaced with new sheets July 15/60," the *View of Cricket* painting was not shipped to the Gallery until late 1963. Therefore, the handwriting on the sheet is unlikely to have been Cooke's and the sheet was not likely prepared by Harper, and it is not, as suggested by the Foundation, "highly likely that what happened is the information on these old sheets was simply transferred into the new, jazzy, printed accession sheets."

In the result, it is impossible to determine what information it was that Mrs. Ince destroyed. What is clear is that the designations such as "Property of the Beaverbrook Foundation" or "Property of the Beaverbrook Art Gallery" or "Property of the Beaverbrook Art

Gallery (presented by Lord Beaverbrook)" were first put on the Gallery's catalogue sheets in October or November 1960. They were not on the Gallery's sheets when Mr. Forrestall left in March 1960.

It is also clear that in 1960 new labels were affixed to the paintings, particularly those that Mrs. Ince described as "owned by the Beaverbrook Foundations". On November 2, 1960, she wrote to Lord Beaverbrook in this vein: "The labels for paintings presented to the Gallery by you arrived yesterday and these have been affixed and also those belonging to paintings owned by the Beaverbrook Foundation". There is no reason to doubt the veracity of Mrs. Ince. She was undoubtedly a loyal, helpful and intelligent secretary to Lord Beaverbrook. It is not necessary to find that her work was malicious or done in bad faith. Perhaps because of her loyalty and perhaps because of the personality of Lord Beaverbrook and his ability to convince people of the correctness of his position, she would not and could not have perceived any harm in recording pictures as the "Property of Beaverbrook Foundations". In any event, she might well have believed that the Works in Issue would never be withdrawn from the Gallery.

I cannot speculate as to what was destroyed by Mrs. Ince. However, the fact remains that the destruction of the old records was selective and was carried out pursuant to the directions of Lord Beaverbrook. In those circumstances it would, if necessary, be appropriate for me to draw adverse inferences as to what was destroyed.

Mrs. Ince destroyed at least some part of the Gallery's old accession records. However, she did not change the Gallery's numbering system that assigned a number to each painting. She was aware before she came to Fredericton that each painting was to have a permanent number and, no matter what happened to a picture, that number belonged to it in the Gallery's records for all time.

Each painting in the Gallery was assigned an accession number. The 1958 textbook titled *Museum Registration Methods* explains that "all objects should be marked with permanent accession or loan numbers as soon as possible after they have been officially accepted". The textbook goes on to state that "numbers used for loans should indicate that the objects to which they are attached are loans and not permanent accessions". The text suggested that loans should have a different register and should be clearly identified by a symbol such as the letter "L" prefixed to each number.

The Gallery's numbering system clearly distinguishes between paintings that were on loan and paintings that were not. It is significant that the internal numbering system does not designate as loans any of the Opening Works in Issue.

There can be no doubt that in 1959 the works that were on loan to the Gallery were designated with an "L" in the Gallery's internal documents. This is borne out by a letter, dated May 24, 1959, from Russell Harper (then Curator of the Gallery) to Mrs. Ince.

"... In case the numbers of the loan items scare you, you will note that the number has "L" for loan, the last three digits of the year in which the picture was borrowed, as "959", and then simply numbers added for the various pictures borrowed in the year."

Both sides called experts with regard to cataloguing, method of registration and accession numbers. I have some misgivings about the evidence of the experts on both sides and have not given it a great deal of weight.

Yet, the fact remains that the Gallery did have a recognized accession numbering system and that all loans were designated with the "L" followed by the accession number. It would later become important to note that the numbers did not change and these were the numbers that were referred to in the 1959 Gallery Catalogue prepared by Mr. Harper under the direction and with

the assistance of Dr. Constable. It was clear from 1960 on that works sent to the Gallery by the Foundation were on loan.

It matters not what caused the change of heart. The fact remains that the gift of the Opening Works in Issue was completed no later than September 1959 when the Gallery was opened. The intent to make the gift had been expressed clearly and unequivocally. There had been a clear intent to make a gift of the paintings. The paintings had been delivered to the Gallery, accepted and acknowledged. The gift was confirmed by Dr. Constable and by Lord Beaverbrook in his speech at the dinner the day of the opening. The gift had been completed and perfected.

The Curators of the Gallery

Mr. Cooke was the Curator when the Gallery opened in 1959. It will be recalled that he was concerned about the records of the Gallery and welcomed the assistance of Mrs. Ince who came in October 1960.

The next Curator was Stuart Smith. He made some unfortunate remarks to the press in connection with the matters now in dispute. Some were unfair and inaccurate. His words could have been taken as an allegation that the present heirs of Lord Beaverbrook wished to take the paintings for their own benefit. This, of course, they could not do for the paintings belong to the Foundation. The Trustees receive a relatively modest salary for their work on behalf of the Foundations and may receive some public recognition or benefit for the charitable donations that they make through the Foundation to charities in the United Kingdom. The Foundation has

every right to benefit charities in the United Kingdom as well as those in the Province of New Brunswick.

Mr. Smith's remarks may have been unfortunate as well with regard to Sir Max Aitken, Lord Beaverbrook's son, who became the Custodian of the Gallery on his father's death. As I said earlier, he was a decorated fighter pilot in the Second World War. He did excellent work on behalf of the Gallery resolving a dispute with Lady Dunn. He convinced her that it was not possible for her to seek the return of paintings which she had given as a gift to the Gallery.

However, it may well be, as Mr. Smith testified, that the scope of his role as Curator was limited and that he was unable to engage the attention of Sir Maxwell Aitken to the degree he would have liked on issues such as the maintenance of the paintings in the Gallery. These are small issues and should not, in any way, be taken to tarnish the reputation of Sir Maxwell Aitken.

Ian Lumsden was the Curator of the Gallery from 1969 to 2001. He was followed by Bernard Reardon who remains the Curator at the present time.

Other Witnesses: Impending Crisis

The widow of Sir Max testified at the hearing. It was obvious that she was hurt and angered by the actions of the Gallery Board in bringing this action claiming ownership of the Works in Issue. Nonetheless, in the circumstances, the Governors of the Gallery had a statutory duty of due diligence to determine the true ownership of the paintings in the Gallery.

It is not without significance that Mrs. Judith Budovitch, testifying as a long-serving member of the Gallery Board and its Chair from 1991 to 2000, praised the great assistance that

was provided by Lady Beaverbrook both to the Gallery and to Mrs. Budovitch. I think all counsel agreed that Mrs. Budovitch was a truly exceptional witness. She was the soul of honesty. Her integrity, sense of fairness and candour were evident throughout her testimony. She is dedicated to her Province, to Fredericton and to the Gallery. She has given unstintingly of her time for the benefit of the Gallery. When she became aware of her statutory duty to investigate the ownership of the Works in Issue, she steadfastly laboured to fulfil it.

She has as well displayed great courage in standing up to the threats that were made to her and to other members of the Board by Timothy Aitken, a member of the Gallery Board and a Trustee of the Foundation. She spoke of the deteriorating conditions at Board Meetings. She spoke of an unpleasant, threatening atmosphere. Although the present Lord Beaverbrook sincerely apologized for the letter of March 12, 2004 sent by Timothy Aitken to Mr. Hay, a member of the Gallery Board, with copies to all members of the Board, it should be read in order to appreciate the effect it must have had on all Board members. It follows:

“Dear Mr. Hay

I am writing to you as the Custodian of the Beaverbrook Art Gallery to express my growing concern as to the way you and certain other directors appear to be conducting specific business in relation to the Gallery and the “Beaverbrook Foundations”. I do not believe you or the other directors concerned, fully understand your fiduciary responsibilities to the Gallery, which should very much come first.

Of course, I refer to the, at best ‘provocative’, at worst downright ‘hostile’ manner in which you have treated the supportive approach made to you by both the Canadian and English Beaverbrook Foundations. To seek to exclude a director of your board simply because he is a member of one of those foundations is totally unacceptable. To have not communicated one word of the process directly to me as Custodian of the Gallery is equally inexplicable. You have received considerable amounts of money from the Canadian Foundation, even during those years when income for the Gallery was not readily available and the English Foundation made up the shortfall. At the very least that support – continuous – should be sufficient to expect ‘good corporate manners’ from you in return. Instead it now seems that you choose to spend some of that money along with

other donations, on an expensive attempt to refute facts which auditors have systematically agreed to over the last forty years.

What are you really trying to accomplish? To upset and anger your biggest and most consistent donors? To drive such a wedge in personal terms that you place the very future of the Gallery in doubt? As I said earlier, actions that are provocative if not hostile do not instil either confidence or support among the very Trustees upon whose support the Gallery has and may continue to depend.

Against such a background you then request more time presumably to spend more money – the Gallery's money, on an agenda which strikingly appears to NOT have the Gallery's future best interest in mind. From my perspective this is totally unacceptable and profoundly not in the best interests of the Gallery or the community which benefits from the Gallery.

Enough Mr. Hay. I for one want an explanation before matters deteriorate so far that an irretrievable breach is created by your short sighted and unthoughtful behaviour. My secretary can be reached on +1 212 750 0064. She will be instructed as to where you can reach me by fax and phone.

Finally let me make it crystal clear that I am in constant touch with Lord Beaverbrook, that we have fully discussed all these matters in detail and are of one mind as to what the positive outcome should be. Should you choose to imperil that outcome for whatever personal reasons you and some other directors have developed, then not only will you be subject to the financial consequences of those actions, but so will the Gallery and the rest of the Board. Accordingly, I would request that you personally distribute this letter to each and every director without delay."

This letter, and further correspondence from Timothy Aitken, has a menacing and threatening ring to it. The Foundation representatives on the Board were threatening the other Board members with dire financial consequences. The atmosphere at Board Meetings must have been unpleasant to say the least.

ACKNOWLEDGEMENTS BY THE GALLERY THAT THE FOUNDATION OWNED ALL THE WORKS IN ISSUE

There can be no doubt that the Gallery, principally through the actions of its curators, on numerous occasions and in numerous ways, whether in catalogues or specific statements,

acknowledged that it believed, until some time shortly before the commencement of this litigation, that the Foundation owned the Works in Issue. As I say, this was done in numerous ways. After 1961 there were annual audit statements acknowledging that the Foundation was the owner of the Works in Issue. There were Gallery catalogues that were published after 1961 and letters written which acknowledged that the Foundation was the owner of the Works in Issue. It is on this basis that the Foundation raises the defences of limitation, estoppel, waiver, acquiescence and laches.

The Foundation contends that, had it not been for the Gallery's representations and admissions, which were made by the Gallery for over 40 years, the Foundation would not have permitted the Gallery to retain possession of the Works in Issue. Further, the Foundation would have commenced proceedings against the Gallery many years ago for the declaratory and other relief sought in this arbitration. As well, it would not have made monetary contributions to the Gallery over the years.

The Foundation states that, because the proceedings were not commenced earlier, it has been severely prejudiced. Specifically:

- A number of important documents have gone missing. Among those missing documents are the Foundation's first Minute Book, covering the period from 1954 to 1974.
- In addition, a number of documents may have been destroyed when the Gallery's storage basement was flooded in 1973.

- Many witnesses have died who might have given evidence helpful to the Foundation. The first Lord Beaverbrook, Colin Mackay, Robert Tweedie, Edwy Cooke, Margaret Ince, and George Millar would be included in this list.
- The Foundation continued to provide financial support to the Gallery which it would not have done had it known of the Gallery's position as put forward in this action.

It is said that the prejudice suffered by the Foundation brings into play principles of waiver, acquiescence, estoppel and laches which prevent the Gallery from denying the Foundation's title to the Works in Issue.

The Gallery's Board of Governors, through Mrs. Budovitch, testified that the Gallery's audit report letters which acknowledged the Foundation's ownership of the Works in Issue were not brought to the Board's attention. I accept her evidence that they were not. On this, the curators failed in the duty they owed to the Board. That lack of knowledge would not in itself serve as a defence for the Gallery. However, the Foundation faces other difficulties in establishing its position.

DELAY AND THE FIDUCIARY RESPONSIBILITIES OF LORD BEAVERBROOK

At the outset, it is important to recognize the position held by Lord Beaverbrook. He was a member of the Board of Trustees of the Foundation. In essence, he was the Foundation. Further, Lord Beaverbrook was a member of the Board of Governors of the Gallery and the Custodian of the Gallery, a role that was reserved for him in the 1957 Gallery Act and confirmed in the later Gallery Act. As a member of the Board of Governors of the Gallery, he owed a

fiduciary duty to that Gallery. He was in a special position with regard to the Gallery and, as a result, he was duty bound to act in the best interests of the Gallery. He was thus bound to fully disclose matters he knew or ought to have known would be of importance to the Gallery.

Lord Beaverbrook publicly declared his intention to give the paintings and delivered them to the Gallery prior to its opening and confirmed the gift at the opening. In doing so, he perfected the gift of those paintings. If there was any change with regard to his understanding of ownership then he had a duty to disclose it to the Gallery. Common decency required no less. More importantly, the law required no less. Yet he carefully concealed, until Mrs. Ince had made the changes in the records in the vault of the Gallery, any indication that in his opinion a very substantial portion of his magnificent gift was, in reality, no more than a loan that could be recalled at any moment. He carefully insisted that the Governors of the Gallery should receive a list of paintings devoid of any indication of ownership. He had many opportunities to speak to the Board. Yet, he did not tell the Board of his change of position from giving the paintings to loaning them. His silence breached his fiduciary duty to the Gallery and misled the Gallery Board. Moreover, his public declarations of his intention to give the paintings, together with delivery and acceptance of the gift, perfected the gift of the Opening Works in Issue.

I have already held that Lord Beaverbrook had no power to revoke the gift. His failure to address his changed position as to the ownership of the Works in Issue with the Gallery Board constituted a breach of his fiduciary duty. As a consequence of this breach, the issue did not crystallize for the Board until years later.

I conclude that the delay in addressing the issue of ownership of the Works in Issue was, in large part, due to the failure of Lord Beaverbrook to raise the issue.

Prejudice

First let us consider the defence of prejudice. Prejudice to parties resulting from delay was considered by Justice Borins in *Belanger v. Southwestern Insulation Contractors Ltd.*, (1993), 16 O.R. (3d) 457 (Ont. Ct. Gen. Div.). In his reasons he stated "the court should consider the availability of its witnesses, whether the evidence is largely documentary or based on the recollection of individuals, the efforts made by the defendant to preserve its evidence and any other relevant consideration". The loss of evidence such as the loss of documents and the death of witnesses does not automatically create prejudice if both parties suffer equally from the loss. It could be said that the Gallery has suffered prejudice equal to if not greater than that of the Foundation. There is no doubt, for example, that former Premier Robichaud, Michael Wardell, Edwy Cooke, to name three, would have been valuable witnesses for the Gallery.

With regard to documents, the loss of the Minutes of the Foundations for the years 1954 through 1964 may have been as detrimental to the Gallery as it was to the Foundation.

Further, there is the question of the four drawer, steel filing case that was locked and barred. Mr. Smith gave evidence that he was told that it contained documents pertaining to the Gallery. However, on instruction, he shipped it back to the Foundation still unopened. Again, both sides must speculate as to what it contained. The letter from Mrs. Ince to Lord Beaverbrook indicated that information pertaining to the paintings had been placed in the filing case. It may have been of assistance to both sides or to one or the other. Again, I would have to speculate as to what was in the filing cabinet. It is difficult to think that it was not of importance to the Foundation and perhaps of greater importance to the Gallery. Why else would the Foundation have had it shipped back to England rather than opening its drawers and sorting through the documents at the Gallery and only sending what was necessary back to the United Kingdom?

I conclude that responsibility for the delay in addressing the issues under review is shared and that both parties have been prejudiced thereby. As discussed below, the paramount responsibility lies upon Lord Beaverbrook resulting from his breach of the fiduciary duty he owed to the Gallery. It cannot be forgotten that Lord Beaverbrook insisted that the Gallery Act provide that he would be a member of the Gallery Board of Governors and the Custodian of the Gallery. He sought and obtained the position which imposed upon him the fiduciary duties that the law rightly recognizes are strict and onerous.

THE AUTHORITY OF CURATORS TO DIVEST PAINTINGS

It is now necessary to deal with the submission of the Foundation that the curators of the Gallery were in the position of Chief Executive Officers of the Gallery, that they knew that the Foundation asserted ownership of the Works in Issue and that they accepted that position. It is contended that these actions of the various curators bind the Gallery.

I cannot accept that position. It is necessary to go back once again to the *Beaverbrook Art Gallery Act*. The Act was passed in 1957 and in force through 1961. That Act provided in subsection 4(2) that:

“Property vested in the Board of Governors at the commencement of this Act and property subsequently acquired by the said Board is the property of Her Majesty in right of the Province, subject, however, to the terms and conditions upon which such property was acquired.”

Clause 5(b) authorized the Board of Governors to dispose of works of art:

“5(b) subject to section 6, [the Board of Governors], may acquire, withdraw and dispose of works of art and other property, both real and personal, on such terms and conditions as it sees fit.”

Clause 5(c) provides that the Board of Governors “ shall manage, control and administer the property vested in the Board of Governors together with the income received by it from any gifts and endowments made for the benefit of the gallery or for any other purpose in connection therewith”.

Clause 8(d) of the Act authorized the Board of Governors to make by-laws “for the protection of its property and any other property in its care”.

Section 6 of the Act required the expressed consent of the Custodian, Lord Beaverbrook, to acquire, withdraw or dispose of a work of art to or from the Gallery. Upon his death, the consent of his son, Sir Maxwell Aitken, was required. After Sir Maxwell Aitkin’s death, a resolution of the Board of Governors expressing approval was required to acquire, withdraw or dispose of a work of art.

Subsection 7(3) of the Act provided that any gift made or to be made shall “enure to the benefit of the Board of Governors ... if made to the said Board under any name or for any purpose from which name or purpose it can be reasonably inferred that the Board of Governors was intended to be benefited”.

In summary, the Act vested all property acquired by the Gallery in the Province of New Brunswick. The Board was required to manage and control its property, including the disposition of works of art. It is true that Lord Beaverbrook had a power to veto any decisions by the Board to acquire, withdraw or dispose of works of art. Yet, the decisions could only be made by the Gallery Board. It was truly a Board decision, subject only to a veto by Lord

Beaverbrook. The Act also provided that gifts were to enure to the benefit of the Board of Governors if it could be reasonably inferred that the Board of Governors was intended to be benefited.

The Gallery enacted by-laws in 1958. Among other things, the by-laws (i) required the Curator to have charge of the exhibition, safekeeping and preservation of the works of art from time to time owned by or lent to or in the possession of the Gallery, (ii) made the Curator “responsible for the care and maintenance of the Gallery”, and (iii) required that “any acquisition, withdrawal, or disposal of a work of art to or from the Gallery made by the Custodian, shall be deemed to have been made by the Board of Governors with the express consent of the Custodian”.

To the extent that item (iii) above is inconsistent with the Act, its validity is open to serious question. In any event, in my view, this by-law could not provide Lord Beaverbrook with the requisite discretion to retract gifts made to the Gallery and to re-convey title to them to the Foundation without any notice or compensation to the Gallery.

Further legislation pertaining to the Beaverbrook Art Gallery was passed in 1961. The only significant difference between the 1957 Act and the 1961 Act is that the latter Act created “The Beaverbrook Art Gallery” as a corporate entity. The 1961 Act also vested in the Beaverbrook Art Gallery the property that had been vested in the Province. The other provisions that are significant to this case remain generally the same. It is clear that, like the 1957 Act, the 1961 statute stipulated that the Board shall “manage, control and administer the property”. Again, it is only the Board which is authorized to acquire, withdraw and dispose of works of art.

In *Prager v. The Beaverbrook Art Gallery* (2005), 291 N.B.R. (2d) 23 (Q.B.), the New Brunswick Court of Queen’s Bench held that the Act empowered the Board of Governors “to

manage, control and administer the Gallery's property, and that it requires them to do so by using the verb 'shall'. The court concluded that it was the Board's duty to manage the property.

It is clear that neither the 1957 nor the 1961 Act authorized the curator to dispose of or transfer works of art. Thus, the Board's approval is statutorily required, subject to the Custodian's approval, to acquire, divest or transfer works of art. Although the documents make it clear that a number of curators and employees of the Gallery purported to confirm that the Works in Issue were the property of the Beaverbrook Foundation, neither statute permits a curator to dispose of works of art. That can only be done by the Board of Governors.

ESTOPPEL

Estoppel cannot apply in the face of an express statutory provision. See, for example, *St. Ann's Island Shooting and Fishing Club Ltd. v. Canada*, [1950] S.C.R. 211. In that case, Justice Rand held "that there can be no estoppel in the face of an express provision of a statute". Further, in *Kenora (Town) v. Vacationland Dairy Co-Operative Ltd.*, [1994] 1 S.C.R. 80, the majority held that a statute can indeed "affect the operations of the common law principles of restitution and bar the defence of estoppel or change of position where there exists a clear positive duty on the public [body] which is incompatible with the operation of those principles".

The New Brunswick Court of Appeal in *Glew v. Westfield Village* (1997), 189 N.B.R. (2d) 267 (C.A.) held that estoppel cannot be used to defeat a statute on the ground that it would lead to a result which would be contrary to public policy.

It would be inconsistent with the specific provisions of the *Beaverbrook Art Gallery Act* to find that a curator's apparent confirmation as to ownership could be the basis for an estoppel

that would divest the Gallery of paintings that, pursuant to the statute, belong to New Brunswick or to the Gallery. Only the Gallery Board could divest the Gallery of a painting or paintings.

The Gallery is a public institution operated for the benefit of New Brunswick. Its objects are "to foster and promote the study and public enjoyment and appreciation of the arts of painting, drawing, sculpture ... including the exhibition and production of works of art". In my view, to permit representations by a curator or any employee of the Gallery to divest paintings would be contrary to public policy since it would defeat the Gallery Act which imposes a duty on the Board of Governors to manage, control and administer the Gallery's property. Moreover, anyone familiar with the provisions of the statute would be aware that the curator and staff had no authority to divest ownership of paintings.

The Gallery also argues that the requirements for estoppel have not been satisfied. It notes that there is no identification by the Foundation of the type of estoppel that it contends applies in this case. I will assume that the estoppel is "estoppel by representation" such that the Foundation, as recipient of the representation, believed that a certain state of facts existed: namely, that the Gallery acknowledged the Foundation's ownership of the paintings in issue. As a result of the representation, the Foundation altered its position and did not put forward a claim. The Gallery's representations had led the Foundation to believe that it was adequately protected by the acknowledgment of its ownership of the paintings.

However, text writers have stated that there is no estoppel where the representee (the Foundation) induced the representation by concealing material facts from the Gallery. The Foundation's reliance on such a representation could not be reasonable. The Foundation's claim to have been induced to act or fail to act on the basis of the misrepresentation will fail either if it had actual knowledge or constructive knowledge of the concealed facts. See K.R. Handley,

Estoppel by Conduct and Election (London: Sweet & Maxwell, 2006 at 3) and Spencer Bower, *Estoppel by Representation* (4th Edition, 2004 at 96).

The Foundation, through Lord Beaverbrook, must have known that the Foundation's claim to ownership of the Opening Works in Issue was false and that, in fact, a gift had been perfected. Further, the actions of the Foundation, through Lord Beaverbrook, indicated an intention to mislead the Board of Governors of the Gallery. Lord Beaverbrook was vitally interested in the Gallery Act. He had been consulted before it was enacted and had expressed his approval. He had ready access to excellent legal advice on both sides of the Atlantic. As a result, he knew or ought to have known that only the Board of Governors could divest the Gallery of its works of art.

Lord Beaverbrook, as a Trustee of the Foundation and a member of the Board of the Gallery, owed a fiduciary duty to the Gallery as well as to the Foundations. He was duty bound to act in good faith toward the Gallery and to make all material disclosures that would be relevant and significant to the Gallery. Certainly, the Foundation's claim to ownership of the Works in Issue at the Gallery, whether valid or not, was something that he was duty bound to disclose to the Board of Governors at the earliest possible opportunity. He failed to do so. Further, and more importantly, he must have been aware of the falsity of the representation of the Foundation as to ownership in the face of his perfected gift of the paintings – gifts that were trumpeted in the press and at the opening of the Gallery. He could not have it both ways.

It is significant that the Foundation's claim to ownership of the Works in Issue was not made until Mrs. Ince had visited the Gallery and destroyed the old records. I am sure she acted in good faith and out of loyalty to Lord Beaverbrook. However, no one can say what she destroyed. Any inferences to be drawn could and perhaps should be adverse to the position of

Lord Beaverbrook who ordered the destruction of the original records. In my view, actions taken by Lord Beaverbrook through Mrs. Ince are such that the defence of estoppel cannot be relied upon by the Foundation.

With his particular knowledge of the Gallery Act, Lord Beaverbrook must have been well aware that only the Board of Governors of the Gallery could deprive the Gallery of the ownership of paintings. I agree with the Gallery's position that the Foundation suppressed or concealed material facts from the Gallery. As I have said, Lord Beaverbrook knew that the curators' representations as to Foundation ownership were incorrect. It must be remembered that:

(i) In response to a request in 1959 by the Board of Governors for a list of paintings Lord Beaverbrook very deliberately instructed Mrs. Ince not to send to the Gallery a marked-up list of paintings (the asterisk list) that listed certain paintings as "Property of First and Second Beaverbrook Foundations and on extended loan to Beaverbrook Gallery". Rather, the Board of Governors were provided with lists of paintings that had no designation of ownership. This was a deliberate withholding of information, whether accurate or not, that was important to the Board of Governors.

(ii) The Foundation did not tell the Gallery that by January 1, 1960, it had extended its trust powers "to permit the purchase of works of art by the Foundations in order that they may be retained in the ownership of the Foundations for exhibition to the public". This was an extension that was described by the Foundation's solicitors, dated December 9, 1959, as covering "what Lord Beaverbrook desires".

In his report, Mr. Furness, Q.C. stated that the December 9, 1959 letter indicated that "Lord Beaverbrook's legal advisers at that time felt that a specific power was required

before such transactions (i.e. purchases of works of art that are retained in the ownership of the Foundation) were undertaken”.

In Mr. Furness’ opinion, “the extension which Herbert Smith (i.e. the solicitors for the Foundations who wrote the December 9, 1959 letter) are driving at is this idea that from now onwards (January 1, 1960, the date of the amendment) the Foundation can actually retain ownership of the works of art that they have purchased”. “Personally”, he said, “I think it is pretty clear what they had in mind”.

It was significant that it was not until May 2006, more than one year after the Foundation had first claimed privilege over the December 9, 1959 letter and others, that the Gallery was provided with a copy.

(iii) It is very clear that, prior to 1960, neither Lord Beaverbrook nor any of the Trustees of the Foundation ever suggested to the Gallery that the Works in Issue were subject to a loan.

(iv) It was not until 2006 that the Gallery, through searches of the English National Archives, discovered a large number of U.K. export documents completed by employees of the Foundation, that described many of the Works in Issue as gifts to the Gallery.

(v) Mrs. Ince destroyed and altered the Gallery’s accession records in October and November 1960. It would be pure speculation as to what was actually destroyed, however, she did write “Property of the Beaverbrook Foundation” on the catalogue sheets, which had not been present on those sheets when Tom Forrestall was in charge between September 1959 and March 1960. From that point, the Gallery had to

undertake extensive research to assess the basis of the Foundation's claim to ownership of the Works in Issue. The truth had been hidden by the actions of Lord Beaverbrook.

Mr. Forrestall testified, and I accept his evidence, that he could not recall any reference to Property of Lord Beaverbrook or Beaverbrook Foundations on catalogue sheets in 1959. If they had contained anything like that, it would have changed the status of the paintings and he would have been very much aware of that. I have no doubt and find that, on this as with all his evidence, he is credible and that I can and should rely upon his testimony.

Lord Beaverbrook told others that he had absolute power over the Gallery. He did not disabuse members of the Board of Governors who believed this. Lord Beaverbrook treated the Board of Governors as though it were simply an honorary body or an advisory body and nothing more. In a memorandum to file, dated March 4, 1957, Lord Beaverbrook stated "I am the custodian of the Gallery and succeeded by my son. Under the Act we have absolute powers". He stated many times that he had absolute power although he must have known that this was not true. Rather, it was clear from the statute that the Board of Governors was not an honorary body and Lord Beaverbrook was well aware of the provisions of the Gallery's statute.

In an undated note to George Millar Lord Beaverbrook said again that "the Custodian has complete authority, absolute power, ... All these functions of directors they're just an honorary body, Mr. Millar nothing more...". Yet, Lord Beaverbrook was familiar with the Art Gallery Act and knew or ought to have known that he did not have absolute power and that only the Board of Governors could dispose of or divest works of art.

In a letter to Mr. Cooke, dated October 27, 1962, Lord Beaverbrook stated that "the Governors are an advisory Board and their wishes when reached in annual or special meetings will be of importance and most likely to influence the Custodian and his designated successors".

Michael Wardell, a member of the Gallery Board, clearly believed that the Custodian was in charge. He wrote in a letter to Lord Beaverbrook that he had the undoubted right to do what he liked under the Gallery Act. There is no record of a reply, even though Lord Beaverbrook must have known that the statement was incorrect.

Ronald Irving certainly believed, in 1959, that the Board of Governors would act upon Lord Beaverbrook's initiative and support his suggestions. This too was the opinion of Mr. Smith, the Curator from 1964 to 1969. A reasonable inference that can be drawn from the evidence is that Lord Beaverbrook encouraged the perception that, as far as the Gallery was concerned, he was omnipotent.

In March 1959, the Board of Governors had submitted a report to the Lieutenant-Governor in Council pursuant to the terms of section 10(2) of the Art Gallery Act. The report referred to "more than 300 paintings, prints and drawings in the collection. Lord Beaverbrook continues to make purchases to enhance the beauty and importance of the collection" and stated that the "Art Collection has been stored in the Gallery vault". The report went on to say that the Gallery will prove to be one of the finest Galleries of its size to be found anywhere in this continent." The report was signed by Mr. Tweedie, who was secretary to both the Board of Governors of the Gallery and the Second Foundation. It was approved on behalf of the Board by Premier Flemming. This is further proof of the Board's understanding that Lord Beaverbrook had made a gift of the collection of paintings stored in the vault. Lord Beaverbrook must have known of the Board report.

After the report to the Lieutenant-Governor and after Mrs. Ince stated that she had destroyed the Gallery's accession records, on December 16, 1960, Michael Wardell wrote to Lord Beaverbrook to say that he had met with the Provincial Comptroller-General who would

require action as to the proper listing of pictures in the Gallery with statement of ownership in every case. In response, Lord Beaverbrook wrote to Mr. Millar saying that he did not intend to reply to the Comptroller-General except to report in relation to money, nothing else. As to pictures "that is none of his business" said Lord Beaverbrook.

Stuart Smith testified that he had been told that the large, locked, green filing cabinet contained an "archive of material relating to the collection ... in a large green filing cabinet with an iron bar down through the handles and padlock on top". The cabinet "sat there just inside the vault on the left-hand side", and probably has about four drawers". He was told that it was correspondence relating to the collection and that it contained Lord Beaverbrook's correspondence and dealings with the collection. Some two months later, Mr. Smith was told that all records pertaining to the collection should be in England. He, therefore, sent the cabinet, still locked, to Mrs. Ince.

A number of material facts were concealed from the Gallery by Lord Beaverbrook in breach of his fiduciary duty to the Gallery. It must be remembered that he was also a Trustee of the Foundation. He was familiar with the Gallery Act. He knew that the Opening Works in Issue had been frequently and properly described, in articles that he approved and adopted, as part of his gift to the Province. He knew or should have known that at the opening of the Gallery the gift was perfected and was then irrevocable. As a result, he knew that the Foundation did not own these paintings and he knew or ought to have known that representations made by the Curator had no power to convey paintings to the Foundation.

The Gallery's claim cannot, therefore, be barred by principles of estoppel or any other equitable principles. It was the lack of disclosure and calculated concealment by Lord Beaverbrook himself which led to the problems presented in this case. He did not act in the best

interests of the Gallery. He breached his fiduciary duty to the Gallery. His acts and his failure to disclose material facts to the Gallery prevent the Foundation from using defences of estoppel, laches or limitations. It was his actions and his failure to disclose pertinent facts which gave rise to this unfortunate situation and the ensuing litigation.

FRAUDULENT CONCEALMENT

Guerin v. The Queen, [1984] 2 S.C.R. 335 sets out the principles of fraudulent concealment. Justice Dickson, as he then was, stated that “fraudulent concealment of the existence of a cause of action” will “suspend the operation” of a limitation period. The circumstances “need not amount to deceit or common law fraud”. Equitable fraud is sufficient. It is defined as “conduct, which having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other”. In this context, “unconscionable” does not require proof of unscrupulousness or showing no regard for conscience. Rather, “unconscionable” includes that which is “not in accordance with what is right or reasonable”. If fraudulent concealment exists, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it.

The Foundation has vigorously contended that the Gallery knew and had copies in its archives of all the articles which demonstrated Lord Beaverbrook’s intention to give the paintings in issue to the Gallery. It is argued that, despite this knowledge, the Gallery did nothing either to establish its claim or to object to the return of the Converted Works to the Foundations. However, it is reasonable to assume that the Gallery Board must have been both in

awe of Lord Beaverbrook and, at the same time, very grateful to him, and trusting that he would always do that which was right and proper with regard to the Gallery, his greatest gift.

It cannot be forgotten that the members of the Gallery Board volunteered their time for the benefit of the Gallery, their community and their Province. They may have thought that the Works in Issue would be left with the Gallery indefinitely. In any event, it was the Beaverbrook family that would have appeared to the Board to have had the wealth and power to achieve all their aims. It was they who had access to the best legal advice and the funds necessary to litigate their cases.

Yet, most importantly, it was Lord Beaverbrook who withheld information and actively misled the Board contrary to his fiduciary duty. I am not at all surprised that the Gallery Board took no action to investigate its title to the Works in Issue until 2003. It was only then that the Board became aware that the Foundation meant to take back all the Works in Issue within the space of ten years, rather than leaving them on permanent loan. Further, it was only later that the Board became aware of evidence such as the export documents that confirmed its claim to ownership of some of the Works in Issue. The Board should not be held to blame for delays. Rather, the blame should rest primarily upon Lord Beaverbrook who knew and yet failed to disclose and, indeed, misled the Board with regard to important matters. If fairness and equity are to prevail, Lord Beaverbrook and, through him, the Foundation must be held primarily responsible for the delays.

The actions of Lord Beaverbrook concealing the claim of the Foundation to ownership by withholding the asterisk list and never disclosing or even discussing with the Gallery Board the Foundation's claim to ownership, misled the Gallery. His actions amounted to a fraudulent

concealment of a cause of action as to the ownership of the Opening Works in Issue which suspended the operation of a limitation period. See *Guerin v. The Queen, supra*.

SPECIAL RELATIONSHIP

In this case, it is clear that the Board of Governors of the Gallery and Lord Beaverbrook were in a special relationship. That is to say, Lord Beaverbrook as a member of the Gallery Board of Governors had a fiduciary duty to act in good faith and to provide pertinent information to the Board.

In *Halloran v. Sargeant* (2002), 168 O.A.C. 138, 217 D.L.R. 4th 327 (Ont. CA), it was held that, where there is a special relationship (as there is in this case), there is a clear obligation to provide accurate information to the other party. The failure to do so is a breach of the obligation of good faith and fair dealing amounting to unconscionability or not in accordance with what is right or reasonable. In my view, the actions of Lord Beaverbrook were most certainly not in accordance with what was right or reasonable. In the circumstances, it is not appropriate or acceptable in law for the Foundation to invoke a limitation period in order to deny the Gallery's claim when the Foundation through Lord Beaverbrook misrepresented and concealed the Gallery's rights and relevant information.

THE OWNERSHIP OF WORKS IN ISSUE DELIVERED TO THE GALLERY AFTER SEPTEMBER 30, 1959

The Gallery has put forward the position that it is entitled to works that were received subsequent to the opening of the Gallery. It advanced this claim on the basis that the paintings must have been sent to it by way of a loan which would continue so long as the works were on

exhibit for the benefit of the people of the Province (New Brunswick and Nova Scotia). I cannot accept that contention. It was clear that Post-Opening Works in Issue sent by the Foundation to the Gallery after 1960 were on loan. The Foundation did not undertake that the loan would continue as long as the works were on display and exhibited for the benefit of the public.

The Gallery relied on the wording of clause 2(e) of the Trust Deed as amended in January 1960. Its position was that the paintings must have been sent to it on the basis of a loan that would continue for as long as the Gallery exhibited the paintings to the people of the Provinces (New Brunswick and Nova Scotia).

Such a loan would constitute a very specific trust and the terms of the trust would have to have been made known to the Gallery. These terms were not set out and, as a result, I cannot accept the Gallery's position. In the absence of specific terms, the works were simply on loan and the loan was such that the works could be recalled at any time. In order to have reasonable cohesion with regard to exhibits and displays, the Gallery would have to have a reasonable notice period for the return of the paintings.

I conclude that Works in Issue that came into the Gallery after its opening were clearly marked "Property of the Beaverbrook Foundation on Loan" and remain the property of the Foundation. There has not been any evidence of an intention by Lord Beaverbrook or the Foundation to make a gift of paintings to the Gallery after its opening.

Subsequent to the Gallery opening, some gifts were made by the Foundation. They were carefully listed and initialled by Foundation Trustees in "Gift Letters". These works are not in dispute between the parties. Neither were these gifts as valuable as those comprising the Post-Opening Works in Issue. They must be excepted from the finding that the Post-Opening Works in Issue were not gifts but rather were on loan to the Gallery.

CONVERTED WORKS

In 1976, the Foundation requested that three Opening Works in Issue be sent by the Gallery to England for restoration. They were Gainsborough's *Peasant Girl Gathering Faggots* (Lord Beaverbrook's favourite painting), and two by Stubbs, *White Dog in a Landscape*, and *Hunters out at Grass*.

Peasant Girl Gathering Faggots and *Hunters out at Grass* were sold by the Foundation for £107,000. *White Dog in a Landscape* was not sold although it apparently remains in the possession of the Foundation. It may be that it was beyond restoration. The proceeds of the sale were not paid to the Gallery because, at the time, the Foundation would have incorrectly believed that the paintings belonged to it.

Two paintings that were gifts to the Gallery, at the Gallery's opening, *View from the Guidecca* and *Flatford Mill* and thirteen prints entitled *Cries of London*, are presently in the possession of the Foundation. They too were gifts to the Gallery either at the time of or before the Gallery was opened. Two works that were gifts to the Gallery were removed at the request of the Custodian, namely, Brymner's *Nude Study* and Churchill's *La Capponcina*. The value of the Converted Works in Issue has been agreed upon between the parties, if they are found to be converted. In my view, these works were indeed converted.

It has been held by the Supreme Court of Canada that conversion is a tort of strict liability and it is no defence that the wrongful act was committed quite innocently. The tort involves a wrongful interference with the goods of another such as taking, using or destroying those goods in a manner inconsistent with the owner's right of possession. See *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727.

Although it is true that consent by the true owners is a defence to an action for conversion, here the Gallery did not consent to the sale of the *Peasant Girl* and *Hunters out at Grass* or to the continued possession by the Foundation of *White Dog*. Nor, in light of Lord Beaverbrook's breach of his fiduciary duty could the Gallery have given an informed consent to the Foundation's taking and continuing possession of any of the Converted Works *View from the Guidecca*, *Flatford Mill* or *Cries of London*.

The Gallery's claim of a perfected gift is not barred by any applicable limitation period. It is repetitious but it is necessary to repeat that there was a failure to disclose important information to the Gallery's Board, including:

- i. Lord Beaverbrook's apparent decision to transform or attempt to transform his gifts of paintings into loans from the Foundation to the Gallery;
- ii. The significance of the revisions to accession records completed by Mrs. Ince at the request of Lord Beaverbrook;
- iii. The export documents that referred to the paintings as gifts that were not located until 2006, although they were completed by or on behalf of the Foundation and must have been known to the Foundation; and
- iv. The terms, if any, on which loans of paintings were made.

The facts listed should have been disclosed by Lord Beaverbrook. As I said, as a member of the Gallery Board of Governors he was in a fiduciary relationship to the Gallery. In that fiduciary position, he was duty bound to act in the best interest of the Gallery and to disclose all relevant and material facts. All these were facts, that he would have known, or should have known, were material and important to the Gallery. The law does not require common decency

although that concept should have applied to Lord Beaverbrook in his disclosures. However, he had a duty as a fiduciary to act in the best interests of the Gallery and to disclose material facts to the Gallery. Instead, he failed to disclose vitally important information to the Board and encouraged the Board to consider its role as nothing more than an honorary advisory group.

The fact that he was also a member of the Board of Trustees of the Foundation does not reduce, in any way, his fiduciary obligation owed to the Gallery. When there was a conflict of interest, it should have been disclosed to the Gallery at the earliest possible opportunity. No such steps were taken. In these circumstances, the failure to disclose and the misleading of the Board by Lord Beaverbrook prohibits the tolling of statutory limitation periods.

Further, the relevant material could not have been discovered before 2003 when the Gallery's Board of Governors was put on notice of the risk to its collection and it was duty bound to proceed with the requisite due diligence to determine the ownership of the Works in Issue.

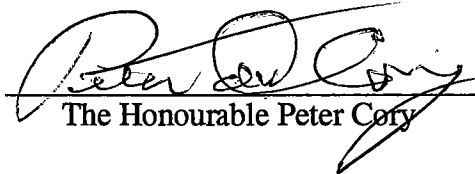
I have been advised that the parties have agreed upon the value of the Converted Works. Since I have found that the Foundation did convert the works, the Gallery is entitled to be paid the value of those works. To this agreed upon value should be added the legal rate of interest on judgments in New Brunswick from the time of the conversion until the appropriate sum is paid to the Gallery, or the works returned to it.

COSTS

Before I deal with the issue of costs, I would like to have the submissions of counsel on this issue. Those submissions may be either in writing or made orally, whichever is the desire of

counsel. If counsel do not wish to make such a submission, and so advise me within 30 days of the delivery of these reasons, I will make an award as to the costs.

March 20, 2007



The Honourable Peter Cory