

complexities of memory, archivists and historians will find once again the value of working together, sharing ideas, and developing the historical underpinnings and collective stories that not only document the lives of all Canadians for future generations, but, dare one say it in these cynical and fragmented postmodern times, assist again in the process of community understanding and nation-building.

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**Artful Ownership: Art Law, Valuation and Commerce in the United States, Canada and Mexico.** AARON MILRAD. Washington, D.C.: American Society of Appraisers, 2000. 342 p. ISBN 0-937828-03-3.

This is the first of a number of new publications sponsored by the American Society of Appraisers. Although there are several books already standard to the study of art law, this is the first to provide an overview of legal reasoning from the perspectives of professionals in the valuation of personal properties.<sup>1</sup> It is also the first attempt to provide a comprehensive comparison of case law in the United States and Canada, combined with a review of Mexican civil codes, that is designed for valuers and valuation specialists.

Aaron Milrad is eminently qualified to conduct this study. A lawyer with an international reputation as an authority on copyright, art law, publishing, and media law, he was the coauthor, with Ella Agnew, of *The Art World: Law, Business & Practice in Canada*, published in 1980. He is also an art collector and has served on the board of art museums in Toronto (the Art Gallery of Toronto and the Koffler Gallery) and Tel Aviv. He is currently on the board of the International Foundation for Art Research in New York, the Museum Trustees Association, and the Contemporary Cultural Institution of the Royal Ontario Museum.

Let us be clear from the outset: this work will not be an easy read for archivists, unless they work for a law library or a law firm. Even then, they may find the terminology and the interlocking intricacies of case law and civil codes a little hard to absorb in one reading. Milrad tries to be as helpful as he can in interpreting the legalisms, but there is just too much law to cover

<sup>1</sup> Jessica Darraby, *Art, Artefact and Architecture Law* (New York, 1995); Franklin Feldman, Stephen E. Weil, and Susan Duke Biederman, *Art Law: Rights and Liabilities of Creators and Collectors* (Boston, 1986, and 1993 supplement); Scott Hodes, *What Every Artist and Collector Should Know About the Law* (New York, 1974); Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers and Artists/With 1992 Update* (New York, 1989/1992).

to make *Artful Ownership* bedtime reading, not that I would recommend the work for bedtime in any case. He highlights so many pitfalls in the collection of art works, and, by extension, any personal property, that any conscientious and law-abiding archivist faced with the inherent risks of acquisition would either suffer from insomnia or nightmares.

Take the question of title, for example, where Milrad rightly begins his overview. Does the seller or the donor “own” the work? Has the work been stolen? As Milrad reminds us, “anyone who obtains objects or goods from a thief can have title and ownership to those objects and goods no greater than the title held by the thief.” This may appear to be painfully obvious, but it is surprising how many institutions have neglected to learn the provenance of the “goods” they acquired, or have even made an attempt to establish the provenance. The courts take a dim view of “wilful blindness.”

Milrad provides a disturbing tour through the vagaries of the law relating to theft and the illegal alienation of personal property. Disturbing, because the laws determining when an “innocent purchaser” (or archival custodian) can claim “ownership” (not itself as simple a concept as it would appear – possession is not necessarily ownership) vary from jurisdiction to jurisdiction. Worse still, the time limitations governing actions to recover such property may vary as well, and in some cases, for example, Nazi loot taken from the Jews, there are no limitations. Under both civil law and common law, the courts have had difficulty in determining when the owner was aware of the theft (apparently inventory control in museums, galleries, and auction houses leave something to be desired) and what the owner is supposed to do (“due diligence”) to alert authorities and the marketplace to establish a claim to ownership. The role of the International Foundation for Art Research (IFAR) as a clearing house is becoming increasingly important in this respect, and globalization and the impact of multinational trade agreements is making international cooperation more vital every year. Milrad quotes case law whenever he can, but in the tangled web of lower court decisions that are reversed on appeal and then reversed again by superior courts, often on technicalities that have no general application, there is little solid guidance for collectors or custodians in either Canada, the U.S., or Mexico. As his disclaimer in the frontispiece clearly states: “When dealing with specific issues, the reader should seek professional and legal advice, and no decision or action should be taken by relying on the contents of this book.”

While all the material in *Artful Ownership* is a valuable resource for archivists faced with the legal implications of acquisitions – there are chapters on auction houses (increasingly suspect in their operations as recent legal actions against Sotheby and Christie’s have revealed), insurance, copyright, and taxation – the chapters on the role and responsibilities of valuers and on cultural property legislation are particularly insightful and relevant.

There is one observation on the role of auction houses in establishing “fair

market value” that is worth underlining. Milrad points out that the price set at auction is not necessarily a valid indication of value, since there are too many variables at play. Two collectors bidding against one another may inflate the price well beyond “market value,” or there may be dealer manipulation in rigged bidding that will offer a value lower than a “fair market” would bring. “Consequently,” as he summarizes, “auction results by themselves are often an inadequate basis for estimating a market value of any particular work of art or object. Often they are no more than one indicator of a price achieved at a particular time and place of a particular object of personal property” (p. 120).

Milrad also reminds us that the appraisal reports of auction houses and the catalogue estimates are for value only. They do not authenticate the works. In Sotheby’s terminology: “The appraisal was not deemed to be a representation or warranty with respect to authenticity of authorship ... genuineness or attribution” (p. 135). There is a fair quantity of case law in the U.S. on whether such disclaimers absolve the auction house or the dealer when the work proves to be less than it was represented to be.

The chapter on taxation, as might be expected, is definitely taxing. The comprehensive summary of U.S. tax laws relating to tax deductible donations (pages 228–48) has the virtue of making one feel grateful for the *Cultural Property Export and Import Act* and the comparatively straightforward regulations that govern the recipient/donor relationship in Canada. Milrad also offers a ringing defence of tax benefits that should be mounted on the wall of every office in Revenue Canada: “Whether a donor’s impetus is social standing or a genuine desire to share the works with the designated institution, its members, and the general public for the greater good, any tax regime that does not recognize the benefit to the community of such donations is short-sighted and ultimately harmful to the nation it serves.” Amen.

Although Milrad attempts to draw a distinction between “valuation” and “appraisal,” most people use the terms interchangeably. What is more significant is the attempt in recent years to establish standards for professional valuers and appraisers. Milrad reviews the events leading up to the creation of the Appraisal Foundation in 1986–87 and the development of the Uniform Standards of Professional Appraisal Practise (USPAP). He describes the role of the Appraisal Qualifications Board (AQB) and the Appraisal Standards Board (ASB) and their efforts to apply the three criteria of professional status to appraisers: 1) education in a body of knowledge; 2) recognized methods; and 3) specialized vocabulary.<sup>2</sup> Many appraisers in Canada and the U.S.,

<sup>2</sup> Curiously there is no mention of the National Archival Appraisal Board (NAAB), a unique Canadian administrative response to the appraisal of donations for tax benefits. NAAB is an independent, not-for-profit corporation established in 1983 to enable all archival repositories to obtain the services of qualified appraisers at a reasonable cost.

however, remain “unregulated,” which is why his explication of contract law and the vital role of the appraisal contract in clearly stipulating the responsibilities of the appraiser, and of the contracting institution, is so valuable.

The last two chapters in *Artful Ownership* deal with cultural property legislation and import and export, and here Milrad’s comparisons between the intent and the effectiveness of legislation in Canada, the U.S., and Mexico is illuminating and indicative of where future legislation and regulation should be focussed. The history of the Canadian Cultural Property Export Review Board, a unique administrative response to the regulatory challenge in all three countries, is explored in order to illustrate the problems inherent in maintaining a balance between the nation’s desire to protect its cultural heritage and undue interference in the global market in personal cultural property. Not an easy task in an age when redress of historical grievances against one’s own government or against former colonial governments increasingly involves repatriation of misappropriated cultural property.

*Artful Ownership* would be a valuable addition to any cultural institution’s library if only for the references to case law that make up most of the footnotes. There are so few of these cases in Canada that every one needs to be gleaned for what it could predict the courts might decide on issues like the imposition of a “blockage discount” in appraising a large body of work from one artist. This issue comes into play when considering the value of a large collection of letters or the thousands of art works that result from the production of animated films.<sup>3</sup> In an increasingly litigious age, custodians of culture need all the help they can get.

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<sup>3</sup> *Robert E. Zelinsky v. Her Majesty the Queen* [1996], 50 D.T.C. 1594 (T.C.C.).