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# Conference reports

## Legal Eagles - Wildlife collections and the law *(part 1)*

Proceedings of the BCG Conference, 30 April - 2nd May 1998, at the Royal Scottish Museum, Edinburgh

*(The items in this section are transcripts from tapes. No attempt has been made to police the spoken grammar with word processing tools - Ed.)*

## Introduction: The legal background to museum work.

*Jeremy Warren, MGC.*

I've been asked to speak to you today about the work which the Museums and Galleries Commission has been undertaking, in fact for some years now, with regard to museum collections and their legal status. Like any other type of organization museums and galleries have to work within a tight framework of the law. You'll be discussing in the course of today's meeting how museums, and your collections in particular, are affected by a variety of more specialist legislation, including in the case of natural science collections both international treaties and health and safety legislation but I'm going to try and talk to you a bit today about the legislation which specifically governs the museums in which we all work and more particularly their collections.

It is something of a surprise to many people to realize that in fact within the United Kingdom there is very little legislation specifically governing museums and galleries. The major exception to this rule is the group of national museums and galleries. One of the distinctive features which define a national museum is the fact that it is established and governed by statute. Most other museums have to rely on the more general provisions either of local authority legislation or charity law. Moreover, as we shall see it is the law of charity which provides the overreaching framework within most museums' work. In the MGC's view there are some serious problems with the law as it stands in relation to museum collections and this is why we published the discussion document 'The Legal Status of Museum Collections in the United Kingdom'. Essentially today I'll be taking you through the main issues raised in this but there is quite a lot in the booklet that I won't have time to speak about and I hope you'll all find it of use as a general introduction. We've more recently followed up the 'Legal Status' booklet with some formal advice to government and I'll touch on that more briefly at the end of my talk.

What are the visible symptoms of these problems? The MGC has along with many others become increasingly concerned in recent years at the relative vulnerability of museum collections. This can be seen most obviously in the apparent ease with which public and semi-public institutions, local authorities and universities in particular, have been able on occasion to pursue moves to dispose of valuable items or indeed whole groups of material from the museum collections which they apparently hold in trust. Often, and certainly in terms of publicity, these are the ones that hit the headlines, these are valuable works of art. For example, the Royal Holloway and Bedford New College's successful move to sell three paintings from its founders bequest, or the now happily abandoned plan by Edinburgh University to sell works of art from the 1824 Torrie Bequest. But other types of material are also involved. The University of Newcastle sold the very important George Brown Collection of South Pacific ethnographic material *en bloc* in 1986 and last year Eton College, the museum collections of which are provisionally registered decided to sell off almost the entire contents of its natural history museum. You may also be aware of various local authorities which over the past two or three years have threatened fairly widespread disposals from their museum collections (in each case these have been headed off at the last moment). The MGC has long accepted that there are circumstances when museums and art galleries may, working within the context of agreed collecting and management policies, have entirely legitimate reasons for disposing of objects from collections. We would never oppose sensible and sensitive collections management and any system that aims for wider legal protection for collections must reflect such practical issues. Many of the cases which have received so much publicity during the past few years have sadly not been so much to do with collections management as with asset stripping, realisation of capital assets. The issues here are both moral and practical in our view. Museums hold their collections in trust on behalf of the public. For almost all museums a large part of the collections came by gift or bequest from publicly spirited individuals usually in the expectation that they would remain permanently in the institution and in the public domain. Attempts to break the conditions or wishes of donors almost always result in bad publicity for the institution and by extension for the wider museum community. Perhaps the most recent and vivid example of that was the Burrell Collection saga where the Glasgow City Museums wanted to change the terms of Sir William Burrell's will and they had quite sound reasons for wanting to do that. It ended up resulting in a very lengthy and expensive legal case with a sort of Pyrrhic victory for the museum service but quite a lot of damage to the public perception of museums. The second problem with which we are concerned is no less serious but slightly different and it

is exemplified by the case of Chatterley Whitfield Mining Museum near Stoke on Trent which in 1993 closed and subsequently went into liquidation. Like all registered museums the collections at Chatterley Whitfield had not been included in the balance sheet and this had perhaps produced a false sense of security on the part of the museum authorities and indeed organisations like the West Midlands Museums Council and the MGC. In the event, along with all the other assets of the museum most of the collections were seized by the liquidators and subsequently sold at public auction to help pay creditors. In other words it was demonstrated to us that the insolvency provisions of company law meant that museum collections may be at risk in the event of liquidation. That case was particularly ironic because the collections ended up netting at auction about £250,000. By the time the liquidator's fees had been settled something like £14,000 got to creditors and a quite important collection was destroyed.

Does this, therefore, mean that the law is ineffective in protecting collections? As is so often in these sorts of issues the answer is both no and yes. Those museums which are established by statute (and as I said earlier, that's mostly the nationals) will all have some provision in law governing disposals from their collections. There are a few national institutions, for example the National Gallery in London which are absolutely prohibited from any disposal but most nationals now have limited powers of disposal which reflect what most people would view as sensible or good practice. The British Museum, for example, may dispose by means of exchange, gift or other means of damaged or decayed material, duplicates and items which, in the opinion of the trustees are unfit to be retained and when the disposal would not be to the detriment of students.

Legislation covering disposals by nationals is quite conservative in its scope but one aspect of more recent legislation which is slightly more radical came with the Museums and Galleries Act of 1992. This act not only formalised arrangements to allow most nationals to transfer objects in their collections to other nationals it also provided a cut off point of 50 years for observance of any special conditions attached to gifts or bequests.

The situation is less comforting when it comes to the local authority sector. Local authorities have changed significantly in recent years. Whereas in the last century they had a role, in effect, as trustees for the public benefit, in recent years they have moved closer to a culture within which they see themselves, and indeed are organised internally, as trading bodies. This makes protection of collections held by local authorities more difficult. Since their statutory powers range much wider than normal charitable purposes, unless gifts to local authorities are extremely carefully worded they may not be regarded as charitable and therefore may not enjoy any protection and legally local authority collections are mostly part of the corporate property of that local authority. There are, however, two more positive factors which help to mitigate this position. First, the local authority accounting body, SITFA, has since 1994 required local authorities to account for all their fixed assets and in doing this they have to draw up asset registers of all material assets which include museum collections. At the same time, however, CIPFA introduced a new concept of community assets, which they define as "assets that the local authority intends to hold in perpetuity that have no determinable use for life and that may have restrictions on their disposal". All local authority museum collections should be treated by their owners as community assets in this sense and perhaps all of you who work there should ensure that they are doing that.

The second important point to note with local authorities is slightly more tricky to grasp but very important. A number of local authority museums began their lives as learned societies, often in the nineteenth century, only later passing under the control of a local authority. In other cases learned societies or other charitable bodies may have passed on their collections to municipal museums. In these circumstances the collections or items concerned may well form a special charitable trust and in this case the local authority will not be the corporate owner of the material but will simply act like any other trustee in respect of that property. In other words, they may not be able to sell the material even if they wanted to, at least not automatically.

The law is similarly unsatisfactory and indeed confusing for universities. Their museum collections are in strict legal terms the private property of those institutions even though they are still mainly publicly funded. But when it comes to individual cases the picture is more varied. The older collections such as the Ashmolean, Fitzwilliam or the Hunterian would almost certainly be regarded as special trusts and, therefore, will enjoy greater protection. The picture is much less likely to be clear with more recent collections and certainly collections which start as teaching collections within departments will within the law at least have very little protection.

As I think you can see from what I have said so far the law and the concept of charity is crucial for almost every sector of the museum world. This is perhaps, then, a good moment to look at what is meant by charity and the protection it can afford collections. Charity is an ancient and well-tested legal concept which goes back to Elizabethan times at least. The modern law derives from an act of parliament of 1601,

which set out the fundamental charitable categories or purposes, which were defined, and still today are defined as religion, education and poverty. Museums are defined as charities through the educational purpose and it is important to emphasise the mere holding of a collection is not a charitable purpose. You have to demonstrate that you are using that collection for educational purposes in order to qualify as a charity. Many museums, especially independents, are registered as charities and they register with the Charity Commission in England and Wales and with the Inland Revenue in Northern Ireland and Scotland. It is important to understand that the act of registering is not the same as creating the charity. Indeed some important categories of museums, notably the nationals and those which are part of universities are known as exempt charities. This means that they are not required to register and nor are they subject to supervision in the way that registered charities are but they enjoy the benefits of all charities. The majority of museums which register as charities choose also to form themselves into companies limited by guarantee and their chief reason for doing that is to reduce the potential liability facing trustees should the museum become insolvent. Trustees of an ordinary charitable trust have potentially unlimited liability if that trust gets into difficulties. If you form the charity by company limited by guarantee you can limit your liability normally to one pound.

Charitable status can be of help in protecting collections, although I must emphasise that it is never possible absolutely to prevent the disposal of collections or individual items. Collections would generally form part of a museums charitable property and that means that it must be used in a way that fits the purposes and the objects of the charity. If a charity has powers of disposal written into its constitution then a decision to dispose of material will rarely be questioned. If it does not, however, then in order to dispose of collection items the charity must make special application for what is known as a scheme and it must make this application to the appropriate regulator. In England and Wales that would be the Charity Commission, in Scotland the Lord Advocate and in Northern Ireland the Department of Health and Social Services. When they consider an application for a scheme the Charity Commission and its equivalents or indeed the courts if it gets that far will take into account a number of factors. They will certainly examine whether the property concerned was given with particular conditions attached, which might allow it to qualify as a special trust. Along the same lines they will examine whether the properties to be disposed of might form part of what is known as the permanent endowment of the charity. It is quite difficult to define exactly what is meant by special trust and permanent endowment. Lawyers will tell you that it needs to be looked at on a case by case basis, but speaking very generally in terms of collections they might, for example, be those parts that have existed since the establishment of the museum as a charity, so the founding collections of a museum, or which may be inalienable because of special conditions attached to gifts, bequests or indeed purchases. Generally the charity supervisory bodies will not willingly give permission for permanent endowments to be disposed of and certainly not to fund current expenditure. They may either refuse permission altogether or else invoke the so called *cypres* doctrine, and that is to direct the property to the closest possible alternative use and obviously in the case of museum collections that might mean proposing their transfer to a museum with similar collections. Indeed this happened with the Chatterley Whitfield Museum where the Charity Commission successfully argued that one element to the collections, the British Coal Collection, which in effect had been put on permanent loan to the museum from British Coal formed a special trust and therefore could not be seized by the liquidators. So that collection was subsequently transferred to the National Coal Mining Museum for England and is now held in trust by that museum.

In Scotland a further factor may be taken into account, and it is worth pointing out here that Scotland has a separate legal system and operates according to the principles of civil law, whereas the rest of the U.K. operates according to the principles of common law and often it means that things are done much better north of the border, certainly as far as the protection of collections is concerned. In terms of charity law, most charity law is similar but there are one or two important differences. In Scotland the Lord Advocate or the Courts are able to give special attention to the spirit of the original intention behind a gift and also the interests of the locality. In Scotland they distinguish between private trusts which are intended essentially to benefit an individual or group of individuals and public trusts which are clearly intended to benefit the public and in the case of the bequest of Sir James Erskine of Torrie to the University of Edinburgh they did decide that the effect of Sir James' intentions, although he didn't express them very clearly in his will was to create a public trust for the benefit of the people of Edinburgh and the students of the University.

I think you will be able to see from this that there are ways in which charitable law can be used to give added protection to collections and in the legal status document we came up with a series of recommendations and I'll touch on the main points of those. As you will have perhaps gathered by now it is crucially important when establishing a museum as a charity to give very careful attention to the wording of the object and purposes of the museum and to ensure in particular that these incorporate somewhere as a fundamental purpose of a charity the holding of a

collection in trust. The more you can use words like 'in trust' and 'in perpetuity' the easier it is to demonstrate that the preservation of that collection is a really fundamental purpose of the charity. But we concluded in this document that the best way under the existing law to ensure safety of collections is in fact to separate out the collection holding activity of a museum from the risk taking operational side through the establishment of two separate trusts and the problem with Chatterley Whitfield was that the museum went bankrupt, the collections were part of the assets of the entity that went bankrupt and therefore could be seized and so because most charitable trust museums are established as companies limited by guarantee their assets are particularly vulnerable should they get into any kind of financial difficulties and obviously if you are a company the rules of company law take over when you get into an insolvency situation , although any charity, even if it is not a company will risk having its assets seized to pay liquidators. So we have advised where practical, and certainly when starting new museums, a separate holding trust for collections should be set up with a management agreement between the two trusts to govern working relations and responsibilities. Another important recommendation is that museums and their trustees should take steps to ensure that they are aware of which parts of their museum collections could be considered as permanent endowments or covered by special trusts. Often when these crises arrive they are made worse because everyone is taken by surprise. No one within the museums tends to have looked at the collections and say well what conditions did that Victorian benefactor put to the gift of that important part of the collections. As curators it can be very helpful to see if you can be well informed of what the background of the acquisition of the collections was. Finally donors should be encouraged to be precise in terms of the wording of wills and deeds of gift and they should in particular make it clear if they wish a gift to be inalienable and again often the problems have come because wills and bequests are very imprecisely worded and people who want to exploit that can point to these inaccuracies and do so. Of course potential donors must always be made aware that museums are entitled to refuse gifts or bequests on the terms required by donors. A gift or bequest may be made more secure by means of a 'gift-over' clause, as it is called, through which a statement is added to the gift essentially specifying that if the beneficiary does not comply with the agreed terms the collection or gift should be transferred to another beneficiary institution. The most recent case in which this happened was with the Fitzwilliam Museum which in 1990 took over the remains of a collection called the Reitlinger Collection, which had been set up as a museum in 1950. The crooked trustees had been selling off material for years and it was actually rather by accident that the Fitzwilliam discovered that they were the gift over beneficiary and they went to go to court to claim what was left of the collection.

Some of these suggestions are quite complicated and by no means free of further problems. To take the separate trusts concept as an example, trustees of a collections trust could find themselves facing quite onerous liabilities to ensure the collections continuing accommodation and care if the operating (risk taking) trust fails and there is no obvious new home for the collections. Also there may well be VAT implications and inevitably running two trusts causes more bureaucracy and we have had a mixed response to this proposal. Some people think it is a very good idea and there are a number of cases were museums have gone ahead with this solution and there are lawyers and museum curators who are vehemently opposed to this solution.

Should the law therefore be changed? Well, I believe that most people who are concerned to ensure the longer term security of museum collections would think that it should be and it is worth remembering in this context that the 1996 government policy paper on museums 'Treasures in Trust' actually stated that "a museums collections are to be held on behalf of the public as inalienable cultural assets" which you think is fairly clear. The new government has accepted the principals within 'Treasures in Trust' and so, in theory, should be committed to making that statement of intent work. I think that this short survey will have shown you that it does not really reflect reality at present. The MGC has made a number of recommendations to the government therefore. In particular we have proposed that the government should take steps to establish in statute a much broader concept, which we have described as public museum collections. This in a way would be much closer to the situation in continental Europe where local authority, university and indeed other types of museums are covered by national legislation. The main purpose of setting up a concept of public museum collections would be the recognition that collections, established for the public benefit and funded through the public purse do effectively belong to the public, which has, accordingly, certain expectations and rights. Clearly ways should be explored in which this can be achieved without affecting the existing legal ownership of the collections as it is unlikely to be a starter if universities or local authorities were told they will lose their ownership of these collections and for good and bad reasons we find that people are quite jealous about asserting their ownership. Possible ways of doing this might be extension to the whole of the United Kingdom of the Scottish concept of public trust about which I talked earlier or giving statutory definition to the MGC's Registration Scheme. At the moment registration is a very important voluntary way in which to regulate conduct in terms of acquisition and disposal

but it is a voluntary and non-statutory scheme. In our view public museum collections could include nationally funded, local authority, university and armed services museums. The position of independent museums would need further consideration because most do not receive regular public funding. Nevertheless the considerable benefits they receive from their charitable status might mean that they too should be included in the new statutory concept or alternatively they might be encouraged voluntarily to subscribe. And the concept of public museum collection should finally reinforce the presumption that museum collections are indeed inalienable cultural assets. The MGC would not wish to see a situation where it became impossible for museums to exercise sensible collections management decisions, for example by transferring material to another public museum collection, but it should become impossible for governing bodies to asset strip and flout conditions agreed with benefactors. We are currently awaiting the reaction of Government which is consulting its lawyers so I can't tell you what their opinion of our advice is but that has really brought you up to date with a broad survey of the legal background to museum collections and how we think it could be improved and what we are doing to try and achieve that.

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# The Work of the Wildlife Liaison officers

*Bryan Robertson, Lothian and Borders Police.*

I am Sergeant Bryan Robertson, and I'm the Co-ordinator for the 9 Wildlife Liaison Officers for Lothian and Borders Police, a job I have been doing for seven years, part time. Indeed, everybody in Lothian and Borders Police and, for that matter, in Scotland, who is a Wildlife Liaison Officer is doing it part time. For my part, I've got a full time beat sergeant's job in East Lothian. To do my Wildlife Liaison job I've got to beg, borrow and steal time, finance, whatever expertise is needed, and that's the only way it's getting done. However, I have no real complaints there, though I am a bit envious of Steve and one or two other forces in England, with four or five full-timers. Perhaps it's fair comment to say in this environment there is more than one way to skin a cat, and the job is still getting done in Scotland.

So, what are we? Well, in some quarters Wildlife Liaison Officers are referred to as a virus. We come from unknown origins, where circumstances permit, we expand and spread and we tend to cause havoc wherever we go. Perhaps that's true for some people and I'm pleased about that. As far as origins are concerned, it is a wee bit unknown but I like to put forward the idea there are two origins. Let's go back to 1982 when the 1981 Wildlife and Countryside Act came out. Literally overnight somebody threw this wad of potential offences at Chief Constables and said 'here get on with it, it's up to your officers to deal with all these potential offences, taking eggs, plants whatever'. This was really a problem for Chief Constables – how do they deal with that?

At about the same time, there was a case down in the south of England, which went drastically wrong in court and caused a fair bit of embarrassment for the police force concerned. There was a bit of a post-mortem to decide what went wrong and what we are going to do with it. To his credit, a former Assistant Chief Constable, Terry Rands, who was interested in wildlife to begin with, took this on board. The norm is to identify the lowest rank involved in a case, which has gone wrong, and point the big finger and say 'you're it, you're to blame'. Mr Rands did not take this attitude. He quite rightly identified the fact that it was totally unacceptable to expect constables to be out there, 'jacks of all trades', specialists in traffic, drugs, community involvement and now wildlife. So from my point of view, he is the grand daddy of us all. He decided that the way his force was going to meet the challenge was to identify somebody who, though not a specialist in wildlife nor a specialist in wildlife law to begin with, but would learn more about the various acts that the police force was going to get hit with and build up a reservoir of expertise. And so the WLO was born!

We have increased from those days. My force has nine officers this year, though up until last year we only had two. Strathclyde has one for every Division, and so it increases all the time. By and large this is being caused by public and media interest. There is a problem out there. When we get some meaningful figures, it seems to indicate that things are getting worse but I don't personally believe that. I think it is because we are becoming better at recording things and getting the message across. Wildlife crime is another thing for the police to deal with. It is a typical area to work in, in that there are seldom any witnesses out there, but that is not to say that we can't take that challenge, try and do something about it, and keep the public informed. We want to do a better job than we have been doing in the past and I think we are.

I'm going to show you some slides which will better explain, perhaps, some of the areas we do get involved with. Before I do that I must warn you that there is the very odd gruesome slide to be found so if you could just bear with me. I mentioned earlier that it is part of our job to build up a knowledge of not just the law but of experts. Where are they? What can they do for us? I would like to think I've got a good working