THE JC ESSAY

Fight for Nazi-looted art must continue

Howard Spiegler

FOR MORE than 15 years, I and my law firm have been fortunate to have been provided the opportunity to handle, on behalf of the families of victims of the Holocaust, some of the most significant cases brought to recover artworks looted by the Nazi regime as part of its murderous programme to eliminate a whole race of people from the face of the earth.

The efforts to recover Nazi-looted art have been well-publicised and reported on internationally. As a result, the sometimes enormous sums paid for recovered artworks at auction and elsewhere have also been widely covered, and some commentators have criticised the lawyers and researchers who have helped the claimants recover their art. Some even criticise the claimants themselves. Still others have begun calling claimants and their lawyers "bounty hunters" and referring to the "restitution industry" as a huge money-making operation. They reproach claimants for selling the works they recover, rather than donating them to museums and so proving that they are not "doing this just for the money".

And I am not now speaking about extreme right-wing bloggers whose rants we might comfortably dismiss as antisemitic ravings. Rather, these type of comments have come from so-called legitimate sources. There's Jonathan Jones, an art writer for the *Guardian* and a former Turner Prize juror, who wrote in 2009: "A work of art should never, ever be taken away from a public museum without the strongest of reasons. Making good the crimes of the Nazis may seem just that — but it is meaningless. No horrors are reversed. Instead, historical threads are broken, paintings are taken away from the cities where they have the deepest meaning, and money is made by the art market."

And then there is Sir Norman Rosenthal, former exhibitions secretary of the Royal Academy of Arts — and the son of Jewish refugees — writing in the *Art Newspaper* in 2008: "Grandchildren or distant relations of people who had works of art or property taken away by the Nazis do not now have an inalienable right to ownership, at the beginning of the 21st century. If valuable objects have ended up in the public sphere, even on account of the terrible facts of history, then that is the way it is."

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Added to this chorus is Bernd Schultz, director of Berlin's Villa Grisebach auction house, who in 2007 put it very simply: "They say 'Holocaust,' but mean money… In New York, some call this Shoah Business."

In my view, such comments are offensive and lack any justification. Let us not forget that these artworks are being recovered for the heirs of their true owners. They were taken away from them by the murderers of the Third Reich, often in the course of carrying out the Final Solution. Who except the families of these owners have the right to decide what to do with their property?

Regardless of whether these works are important to the world's culture, surely it is the choice of the claimants and the claimants alone as to whether they would like to donate or loan them to the great museums, sell them on the open market or keep them among their prized possessions? In other words, we should treat them with the same respect we accord to any other collector who owns a great artwork. Would we ever require that all those who own great art, but whose families did not lose it during the Holocaust, donate it to museums to prove that they are not greedy and selfish?

How ironic and repulsive it is to criticise victims of the Nazis, who are not only trying to get back their own property but trying to correct in some small way the ghastly injustices of the Nazis. As for the researchers and lawyers who work for years on these cases, with no certainty of victory: is it improper for the claimants to pay them even if that means selling the artworks they have recovered?

But the criticism of our work has not stopped there. A different attack was launched during the decade-long case to recover the "Portrait of Wally" by Egon Schiele, the first major case of its type heard in the US. We represented the Bondi Jaray estate in that case against the Leopold Museum of Vienna, and worked jointly with the US federal government throughout the case. It was brought by the government under the so-called forfeiture laws, based on our contention that "Wally" was wrongfully imported into the United States for temporary exhibition at the Museum of Modern Art in New York in violation of the National Stolen Property Act.

It began with the US government's seizure of "Wally" at the Museum of Modern Art to prevent its return to Austria, pending the resolution of the case, which sent shock waves around the world. The case was finally resolved in 2010 by the payment of the artwork's full value by the Leopold Museum to Jaray's estate. The Leopold Museum also agreed to post a sign next to "Wally" wherever it is displayed, setting out the facts of its prior ownership and the lawsuit, and have it displayed at the Jewish Heritage Museum in New York for three weeks before it was returned to Austria.

Throughout the decade of the court proceedings, we heard repeatedly from many quarters this simple question: why was the US government involved in the case at all? Why were substantial government resources being committed to what these same critics characterised as nothing more than a title dispute, one that should have been resolved in a civil lawsuit between the estate and the Leopold Museum? Indeed, the question entered into the lawsuit itself, when the two major American museum associations, and several important individual museums, joined as "friends of the court" on the side of the Leopold Museum and the Museum of Modern Art to urge the court to dismiss the case entirely.

THIS LINE of questioning is critically important because it really raises the issue of whether governments should play a major role in trying to resolve Nazi-looted art claims. Despite the misgivings of many, it is clear that this action was both consistent with and fully promoted the express public policy interests of the US regarding Holocaust-looted art.

As former US district court chief judge (and later Attorney General) Michael B Mukasey determined in one of the early decisions in the case: "On its face, [the National Stolen Property Act] proscribes the transportation in foreign commerce of all property over $5,000 known to be stolen or converted. Although the museum… would have it otherwise, art on loan to a museum — even a [so-called] 'world-renowned museum' — is not exempt." Explaining further, the court added that "if 'Wally' is stolen or converted, application of [the Act] will 'discourage both the receiving of stolen goods and the initial taking,' which was Congress's apparent purpose." The court concluded that there was "a strong federal interest in enforcing these laws".

Indeed, it was the US government that led the way in urging governments around the world to seek ways to advance the policy of identifying art looted from the Nazis and returning it to its rightful owners. It convened a meeting of 44 nations at the Washington Conference in 1998, which adopted the Washington Principles on Nazi-Confiscated Art. One principle states that pre-war owners and their heirs should be encouraged to come forward to make known their claims to art that was confiscated by the Nazis and not subsequently restituted, and another states that, once they do so, steps should be taken expeditiously to achieve a just and fair solution, recognising this may vary according to the facts and circumstances surrounding a specific case.

Another principle adopted at the Washington Conference encouraged the resolution of these disputes by "alternative dispute resolution," where possible, to avoid long drawn-out litigation. Throughout the "Wally" case, there was much consternation expressed that it had not been settled much earlier and that such long litigation was exactly the wrong way to go about resolving Nazi-looted art claims. But it is important to understand that the government brought this action and seized "Wally" before it was about to be put on a plane to Austria and thus beyond the reach of any plausible attempt at resolution. The Austrian government, while adopting a law in 1998 that was purportedly designed to ensure the careful review of claims for Nazi-looted artworks, had determined that, as a "private foundation", the Leopold Museum was not covered by this — despite the fact that the Austrian government provided a substantial amount of the Leopold Museum's funding and appointed half of its board of directors.

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IN ANY court case, it is of course usually in all the parties' best interest to reach a mutually acceptable resolution as early as possible. But, as is often the case, it is only after the court issues a decision resolving many of the issues — as happened in the "Wally" case in autumn 2009 — that the parties become clearly focused on what is going to be the likely outcome of the case. But regardless of how long it took, securing the artwork in the US, certainly promoted the government's interest in fairly resolving these cases and preventing the trafficking of stolen Holocaust property.

The Washington Conference led eventually to the Holocaust Era Assets Conference, held in Prague in 2009, at which 46 nations adopted the Terezin Declaration. That pronouncement makes clear that Holocaust-looted art claims should be resolved on their merits ,without regard to so-called technical defences like the statute of limitations. But this has led to criticism as well.

At a series of US State Department-organised meetings, although the museum community joined calls for the resolution of Nazi-looted art claims on this basis, they raised an objection. The museum representatives made clear that they retained the right to move to dismiss cases on the grounds of the statute of limitations, if they have made the determination in particular cases that the claims in the case lacked merit. Thus, rather than allow these claims to be determined on their merits before a court of law, these museums would rather play the role of judge and jury themselves once they are convinced that they are right. Clearly, there is still much work to be done to reach a consensus on this matter.

One commentator, Eric Gibson, who well understood the true significance of the efforts to recover these precious belongings for the families of the original owners, once asked the question: "Why do we bother with recovering [Nazi-looted art] at all? Plundering is, after all, the handmaiden of war. And the world's museums are filled with objects lifted during conflicts from the Romans on." Gibson's answer to his own question eloquently describes just why the recovery of these looted artworks is so critically important: "Why do we bother? [Because] the Nazis weren't simply out to enrich themselves. Their looting was part of the Final Solution. They wanted to eradicate a race by extinguishing its culture as well as its people. This gives these works of art a unique resonance, the more so since some of them were used as barter for safe passage out of Germany or Austria for family members. The objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice."

And even more poignant are the words of Henry Bondi, the now-deceased former leader of the family of Lea Bondi Jaray, on whose behalf we sought the recovery of "Wally": "You ask did they kill, yes they killed. They killed for art, when it suited them. So killing Jews and confiscating art somehow went together."

Earlier this week, on Monday, we observed Yom Hashoah, the Day of Holocaust Remembrance, and we recently commemorated the 75th anniversary of the Anschluss, the annexation of Austria by Germany in 1938, which ushered in the nightmare of the Holocaust for the huge number of Jews and other victims of Nazism who lived there and in and so many other places. Shame on those who would prefer that we forget history and forgo our efforts to try in some small way to right the terrible wrongs fomented in its darkest hours.

Howard N Spiegler, Esq. is co-chair of the international art law group of Herrick, Feinstein, a law firm based in New York. He will be in discussion with Ben Uri gallery chairman David Glasser at the London Jewish Cultural Centre on April 29 as part of the Ben Uri 'Talking Art' series. For tickets see www.ljcc.org.uk