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Case Maori Panels – New Zealand and Ortiz Heirs

George Ortiz – Ortiz Heirs – New Zealand/Nouvelle-Zélande – Te Papa Museum – Indigenous object/objet autochtone – Post 1970 restitution claims/demandes de restitution post 1970 – Judicial claim/action en justice – Judicial decision/décision judiciaire – Negotiation/négociation – Settlement agreement/accord transactionnel – Choice of law/droit applicable – Enforcement of foreign law/applicabilité du droit public étranger – Illicit exportation/exportation illicite – Conditional restitution/restitution sous condition – Request denied/rejet de la demande – Repurchase/rachat – Sale/vente

In 1972, five rare Maori wooden panels were discovered in a swamp in New Zealand's North Island. Shortly after the discovery, the panels were illegally exported out of the country by an antiquities dealer and then bought by Swiss collector George Ortiz. In 1978, the panels were offered for sale by Sotheby's London. Having traced the panels, the Attorney-General of New Zealand brought an action in the United Kingdom seeking inter alia their repatriation. Following the case's failure, New Zealand pursued the return of the panels through alternative means. It was only in 2014 – after George Ortiz's death – that New Zealand obtained the return of the Maori panels by virtue of an agreement with the heirs of Ortiz.

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I. Chronology

Post 1970 restitution claims

- **1807-1842:** In the midst of a series of battles fought amongst various Maori tribes, the Ngā Puhī and Te Āti Awa won the battle of Te Motu Nui, in the North Island, against the Waikato. Fearing vengeance, the Te Āti Awa fled south. Like many other Maori tribes during this turbulent time, the Te Āti Awa hid their most precious belongings (including five elaborately carved panels that once lined the walls of a pātaka)¹ in a swamp near Te Motu Nui, near Waitara in the province of Taranaki in the North Island. For unknown reasons, nobody returned to recover these panels.²
- **1972:** Manukonga, a Maori man, discovered the five carved panels. He did not contact any authority about his discovery, and instead hid them within his own home.
- **1973:** Manukonga reached out to antiquities dealer Lance Entwistle. Having recognized the panels as some of the finest carving that ever existed and taking advantage of Manukonga's ignorance, Entwistle bought them for \$6,000 NZD and subsequently exported them to New York. The panels were sold to Swiss collector George Ortiz for \$65,000 USD.³
- **4 October 1977:** Ortiz's five-year-old daughter Graziella was kidnapped. The kidnappers held her for \$2,000,000 USD ransom.
- **June 1978:** Ortiz consigned 234 pieces of his art and antiquities collection to Sotheby's in London to recover the money he lost in paying Graziella's ransom. The collection was auctioned under the title "The George Ortiz Collection of Primitive Works of Art". Included in that auction were the five Maori panels, valued at £300,000.⁴ Following the publication of the auction catalogue, the Attorney-General of New Zealand issued a writ declaring that the five panels belonged to New Zealand, and sought an interim injunction to prevent their sale and ensure their return. Pending judgment, the Maori panels were withdrawn from the sale and returned to Ortiz.⁵
- **1982-1984:** The Court of Appeal and House of Lords rejected New Zealand's claims.
- **8 October 2013:** George Ortiz died at his home in Geneva, Switzerland.
- **March 2014:** Representatives of the New Zealand Government and of Te Papa Museum (the national museum of New Zealand) reached an agreement with the heirs of George Ortiz providing for the return of the panels.⁶
- **July 2014:** The panels returned to New Zealand and were placed in temporary storage in the Te Papa Museum.⁷

¹ A pātaka is a stilted wooden storehouse that was extremely important to communities. See Yates, "Ransoms and Repatriations".

² Yates, "The Motonui Panels".

³ *Attorney-General of New Zealand v. Ortiz* [1982] 3 W.L.R. 570, 575-576. See also Finlayson, "Motonui Panels Returned", and Fleming, "Push for Funds to Restore Ancient Epa".

⁴ Yates, "Ransoms and Repatriations". See also Yates, "The Motonui Panels".

⁵ The sale of the other items in the collection brought Ortiz \$2,9 million USD. Having recouped his loss from Graziella's ransom, Ortiz decided not to sell the panels. Hauptfuerer, "Jorge Ortiz Has His Kidnapped Daughter".

⁶ Finlayson, "Motonui Panels Returned". See also Harvey, "Motonui Panels Returned to Taranaki".

⁷ Ministry for Arts, Culture, and Heritage, "The Motonui Panels: Returned to New Zealand".

- **20 March 2015:** The panels were formally returned to the Te Āti Awa in Taranaki.⁸

II. Dispute Resolution Process

Judicial claim – Judicial decision – Negotiation – Settlement agreement

- Having traced the five Maori panels in Sotheby's auction catalogue, the Attorney-General of New Zealand brought an action in the United Kingdom seeking an injunction restraining the sale of the panels, a declaration that they were the property of the New Zealand Government by virtue of the 1962 Historic Articles Act (hereinafter "1962 Act"), and an order for their return to New Zealand.
- While the trial court found in favour of the plaintiff, the Court of Appeal and House of Lords rejected New Zealand's claims.
- Following the case's failure, New Zealand had to pursue return of the Maori panels through alternative means. However, the Government's multiple requests to Ortiz to negotiate the return of the panels were unsuccessful.
- Upon Ortiz's death in 2013, representatives of the New Zealand Government and of Te Papa Museum travelled to Geneva to speak with Ortiz's heirs about returning the panels. The heirs were willing to negotiate and an agreement was eventually reached in 2014.⁹

III. Legal Issues

Choice of law – Enforcement of foreign law – Illicit exportation

- The panels – a rare example of Maori wood carving that were regarded as national "historic articles" under the law of New Zealand – had been exported from New Zealand in 1973 by Lance Entwistle in violation of the 1962 Act. The panels were sold to Swiss collector George Ortiz. Entwistle told Ortiz that, although the panels had been exported without a permit, he was their legal owner and was allowed to sell them. He also provided falsified provenance documents. As part of the sale, Ortiz agreed to not show the panels to New Zealand archaeologists or any third parties for a period of two years.¹⁰
- In 1978, the New Zealand Government brought a case in the United Kingdom relying on the 1962 Act and the Customs Act of 1966. The former made it unlawful for any person to remove a national "historic article" from New Zealand without the Government's express permission. It further provided that "[a]n historic article knowingly exported or attempted to be exported in breach of this Act shall be forfeited to Her Majesty".¹¹ On the other hand, the Customs Act

⁸ Yates, "The Motonui Panels".

⁹ Finlayson, "Motonui Panels Returned". See also Harvey, "Motonui Panels Returned to Taranaki".

¹⁰ *Attorney-General of New Zealand v. Ortiz* [1982] 3 W.L.R. 570, 575–76, 580–82, 585. See also Finlayson, "Motonui Panels Returned".

¹¹ Section 12(2).

of 1966 provided that no goods could be seized “except within two years after the cause of forfeiture has arisen”, and that goods “may be seized as forfeited wherever found within the territorial limits of New Zealand”.¹² In other words, New Zealand argued that, as a Commonwealth country, the 1962 Act and the Customs Act of 1966 indicated that from the moment of illegal exportation the panels became property of the Crown. Accordingly, New Zealand contended that Her Majesty was legally entitled to seek recovery of the panels no matter where in the world they were (including outside of Commonwealth countries). The Government hoped that once Her Majesty recovered the panels, she would then return the panels to New Zealand or appropriate Maori group.¹³

- The trial court upheld the claimant’s case: Staughton J. held that title had passed automatically to New Zealand upon illegal export and that an English court would recognize such ownership rights in accordance with English public policy.¹⁴ The judgment was appealed.
- The Court of Appeal reversed¹⁵ the decision of the trial court by looking at two issues: whether, on the facts alleged, the claimant had acquired title under New Zealand law; and, if so, whether the foreign legal provisions could be enforced by an English court. On the first issue the Court held that the New Zealand Government had not acquired title on the Maori panels given that forfeiture under the 1962 Act was not automatic, as it could only occur if the objects were actually seized at customs before they left the country. Consequently, on the second issue the Court decided that the claim for the return of the panels should fail on the grounds that the 1962 Act could not be enforced in the United Kingdom. In particular, Lord Denning, of the Court of Appeal (concurring that the 1962 Act did not provide for the automatic forfeiture of the panels by virtue of the export), held that, ruling otherwise, the 1962 Act would “infringe the rule of international law which says that no country can legislate so as to affect the rights of property when that property is situated beyond the limits of its own territory [...]”.¹⁶ Furthermore, Lord Denning stated that, by virtue of international law, no State had sovereignty beyond its own frontiers and, hence, an English court should not entertain a suit brought by a foreign sovereign to enforce its penal, revenue laws or “other public laws”: “if any country should have legislation prohibiting the export of works of art, and providing for the automatic forfeiture of them to the state should they be exported, then that falls into the category of ‘public laws’ which will not be enforced by the courts of the country to which it is exported, or any other country, because it is an act done in the exercise of sovereign authority which will not be enforced outside its own territory”.¹⁷ He therefore explained that the category “other public laws” had to be understood to include the legislation prohibiting the export of works of art. New Zealand appealed this decision.
- The House of Lords affirmed the Appellate Court’s decision.¹⁸ In particular, it held that the action failed on the grounds that New Zealand had not been able to establish its entitlement to or ownership of the carvings: on a correct interpretation of the 1962 Act, forfeiture was not

¹² Sections 275(4) and 276.

¹³ *Attorney-General of New Zealand v. Ortiz* [1982] W.L.R. 570, 575-576, 580-582, 585.

¹⁴ *Attorney-General of New Zealand v. Ortiz* (1982) Queen’s Bench Division 349, 1 July 1981.

¹⁵ *Attorney-General of New Zealand v. Ortiz* [1982] 3 W.L.R. 570 Court of Appeal 21 May 1982.

¹⁶ *Ibid.*, p. 20.

¹⁷ *Ibid.*, p. 24.

¹⁸ *Attorney-General of New Zealand v. Ortiz* [1984] A.C. 1; [1983] 2 W.L.R. 809; 21 April 1983.

automatic, but could take place only once the object in question had been actually seized, which it had not. In other words, the House of Lords stated that the 1962 Act did not affect the transfer of property in the panels from Entwistle to New Zealand upon Entwistle attempting to export the panels unlawfully. The House of Lords did not dwell on the question of whether the 1962 Act should be enforced on grounds that it was a foreign or public law.

IV. Adopted Solution

Conditional restitution – Request denied – Repurchase – Sale

- After George Ortiz's death in 2013, his heirs were willing to negotiate with New Zealand and representatives of the Te Papa Museum for the reason that their father had wished to return the panels to their country of origin. However, they did not intend to gift the panels.¹⁹ Eventually, the parties agreed on the sale of the panels, which were bought by the New Zealand Government for \$4,5 million NZD in 2014.
- Upon the panels return to New Zealand in early 2014, ownership was given to the Te Āti Awa. The community decided to place the panels in the Puke Ariki Museum in 2015 for safekeeping and display. Today they are set on a frame reflecting the shape of a pātaka, and set at the height that the original storehouse would have stood. The frame rotates slowly, allowing visitors a 360 degree view of the structure and allowing them to appreciate the panels from the exact angle they were meant to be seen from.

V. Comment

- This case is a great example of courts looking to foreign jurisdictions to determine (national) ownership of cultural objects. Ambiguity as to whether national legislation vests ownership rights in the claimant State has led many courts to find in favor of possessors (defendants) rather than the State (plaintiff). In this specific case, English courts established the principle that foreign export rules ("public laws") cannot be enforced outside the jurisdiction of the exporting State, even when exportation occurred in breach of such rules.
- The illicit trade in cultural objects has been the subject of increasing concern since the conclusion of the *Ortiz* case. In particular, various legislative measures have been adopted at the national and international level.²⁰ All in all, these instruments have been designed to

¹⁹ Finlayson, "Motonui Panels Returned".

²⁰ Many States have ratified (and thus adopted domestic measures to implement) the following instruments: the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in 1970 by the United Nations Educational, Scientific, and Cultural Organization (UNESCO); the Convention on Stolen or Illegally Exported Cultural Objects adopted in 1995 by the International Institute for the Unification of Private Law (UNIDROIT); and the Directive 2014/60 of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State. Likewise, many bilateral agreements have been concluded by major art-importing countries, such as Switzerland (see at:

promote international cooperation in preventing and fighting the illicit movement of cultural property. Moreover, a number of cases demonstrate that the principle of the non-enforceability of foreign laws established by the Court of Appeal in *Ortiz* is no longer good law, provided that the claimant State can prove that a legislative declaration of national ownership was in force at the time of the export.²¹ In effect, if at the time the objects were removed from the country of origin a national law was in place vesting ownership of such property in the State, “exportation constitutes a sufficient act of conversion to be deemed a theft”.²²

- Regarding the solution of this case, selling cultural heritage back to the victims of that theft is problematic on three fronts. First, it promulgates the idea that everything – even cultural heritage – has a price and a selling point. For the people who are victims of cultural heritage theft, the objects are worth much more than money. Second, such a solution is only available to those countries and peoples with the financial resources to engage in the art market. Finally, and most importantly, this is an inherently unfair solution more akin to ransom than to remedy. Requiring the nation from whom cultural heritage has been stolen to pay for it to be returned is akin to requiring a person to pay the thief for their watch back; it is contrary to Western paradigms of criminal law, theft, and remedy, and continues to disadvantage victims of cultural property theft and delegitimize the harm caused by colonization and war.

VI. Sources

a. Court decisions

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- *United States v. McClain* 545 F.2d 988 (5th Cir. 1977).
- *United States v. Schultz*, 178 F.Supp. 2d445 (S.D.N.Y. 3 January 2002), *aff'd*, 333 F.3d 393 (2nd Cir. (NY) 10 June 2003).

b. Legislation

- Historic Articles Act of 1962 (New Zealand).
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- UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970).

<https://www.bak.admin.ch/bak/en/home/cultural-heritage/transfer-of-cultural-property/bilateral-agreements.html>) and the United States (see at: <https://theantiquitiescoalition.org/problems-and-solutions/bilateral-agreements/>).

²¹ See *United States v. McClain* (545 F.2d 988 (5th Cir. 1977)); *United States v. Schultz*, 178 F.Supp. 2d445 (S.D.N.Y. 3 January 2002), *aff'd*, 333 F.3d 393 (2nd Cir. (NY) 10 June 2003); and *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.* [2007] EWCA Civ. 1374. On the latter case see Alessandro Chechi, Raphael Contel, Marc-André Renold, “Case Jiroft Collection – Iran v. The Barakat Galleries Ltd.,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

²² *United States v. McClain* 545 F.2d 988, 1003 (5th Cir. 1977).

- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995).
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