

REVIEW BOARD DECISION

August 20, 2021

REQUEST FOR REVIEW OF REFUSED APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 1635-21-05-05-001 Curtiss P-40 Kittyhawk Aircraft RCAF 1034

INTRODUCTION

1. On June 2, 2021, David Maude (the Applicant) filed pursuant to subsection 29(1) of the *Cultural Property Export and Import Act* (the Act), a request for review by the Canadian Cultural Property Export Review Board (the Review Board) of a refused application for an export permit (the Request for Review), in relation to a Curtiss P-40 Kittyhawk Aircraft RCAF 1034 (the Aircraft). The permit was refused by a permit officer employed by the Canada Border Services Agency (CBSA) on the advice of an expert examiner who found that the Aircraft is on the *Canadian Cultural Property Export Control List* (the Control List), is of outstanding significance and meets the degree of national importance set out in the Act.
2. On July 12, 2021, and in response to a request by the Review Board, the Applicant filed written submissions (Written Submissions) and a legal opinion from the firm of Crease Harmon LLP dated June 29, 2021 (the Legal Opinion), to which was attached a letter dated June 29, 2021, from Warhawk Historic Military Aircraft, LLC of North Palm Beach, Florida (the Purchaser's Letter).
3. In summary, the Applicant contends that the Aircraft is not on the Control List because it is intended to be used in the United States by the Purchaser for a "commercial purpose".

REVIEW OF A REFUSED APPLICATION FOR AN EXPORT PERMIT

4. Section 29 of the Act provides the Review Board with jurisdiction to review an application for an export permit which has been refused by a CBSA permit officer. In reviewing an application for an export permit, subsection 29(3) of the Act requires that the Review Board determine whether the object in respect of which the application is made is included in the Control List, is of outstanding significance for one or more of the reasons set out in paragraph 11(1)(a) of the Act, and meets the degree of national importance referred to in paragraph 11(1)(b) of the Act. Where the Review Board determines that an object fails to meet one or more of the criteria set out in subsection 29(3), subsection 29(4) requires that it direct a permit officer to issue an export permit forthwith in respect of the object.

THE APPLICANT'S SUBMISSIONS

5. In the Written Submissions, the Applicant states that the Aircraft was constructed in 1941 in Buffalo, New York by the Curtiss Aeroplane Corporation and that the Applicant

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has accepted an offer to purchase the Aircraft from a private corporation for \$1,250,000 USD, conditional on the issuance of an export permit. The Purchaser's Letter identifies the purchaser as Warhawk Historic Military Aircraft, LLC of North Palm Beach, Florida. In the Purchaser's Letter, the purchaser states that it intends "to restore the [A]ircraft to airworthy condition and demonstrate it at airshows around the United States" for "a potential profit of between \$20,000 - \$40,000 per year". The Legal Opinion expresses views on the meaning of the term "commercial purpose" found in subsections 4(b) and 5(b) of Group VI of the Control List.

SUMMARY OF DECISION

6. In summary, the Review Board finds that the Aircraft is not included in the Control List because it is intended to be used for a commercial purpose. In view of the Review Board's decision with respect to the Control List, it is unnecessary for the Review Board to make a determination concerning the outstanding significance or national importance of the Aircraft.

ANALYSIS

7. Section 2 of the Control List provides that the Control List only applies "to an object that is 50 or more years old and was made by a natural person who is no longer living". The Review Board construes section 2 as meaning that the Control List applies to objects that are 50 or more years old and, where the objects were made by a natural person, that natural person must no longer be living.
8. The Aircraft was made more than 50 years ago by a corporation. The Control List therefore potentially applies to the Aircraft.
9. The Control list is comprised of eight groups of objects. The group of objects that could apply to the Aircraft is Group VI. Group VI applies to scientific or technological objects. Of the objects to which Group VI applies, the only relevant objects are machines. If the Aircraft is not a machine as that term is defined in Group VI, the Aircraft would not be included in Group VI and the Control List would not apply to the Aircraft.

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10. The Relevant parts of the Control List are as follows:

<i>Canadian Cultural Property Export Control List, C.R.C., c. 448</i>	<i>Nomenclature des biens culturels canadiens à exportation contrôlée, C.R.C., ch. 448</i>
GROUP VI Scientific or Technological Objects	GROUPE VI Objets scientifiques ou techniques
Interpretation	Définitions
1 In this Group,	1 Dans le présent groupe,
<i>machine</i> means a contrivance that is used in the performance of some kind of work or activity and that consists of inter-related parts and uses any source of energy including animal power, manpower, air, water, light, steam, gravity, friction, combustion or electricity, but does not include scrap metal intended for industrial purposes; (machine)	<i>machine</i> Tout appareil servant à exécuter un travail ou une activité donnée, formé de parties interdépendantes et utilisant une source d'énergie, notamment la force animale, la force humaine, l'air, l'eau, la lumière, la vapeur, la gravité, la friction, la combustion ou l'électricité. Est exclu de la présente définition la ferraille destinée à l'industrie. (machine)
Scientific or Technological Objects	Objets scientifiques ou techniques
4 The following objects made out of the territory that is now Canada if they relate to the history of science and the development of technology in Canada, namely,	4 Les objets suivants, fabriqués à l'extérieur du territoire qui constitue aujourd'hui le Canada, à condition qu'ils soient reliés à l'histoire de la science et au progrès de la technologie au Canada, à savoir :
(a) a scientific instrument, other than a scientific instrument that is intended to be used for any scientific or technological purpose, that has a fair market value in Canada of more than \$5,000; and	a) un instrument scientifique qui n'est plus destiné à servir à des fins scientifiques ou techniques et dont la juste valeur marchande au Canada dépasse 5 000 \$;

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<p>(b) a machine, other than a machine that is intended to be used for a manufacturing, industrial or commercial purpose, that has a fair market value in Canada of more than \$5,000.</p> <p>5 The following objects made out of the territory that is now Canada other than the objects described in item 4, if they are related to the history of science and the development of technology, namely,</p> <p>(a) a scientific instrument, other than a scientific instrument that is intended to be used for any scientific or technological purpose, that has a fair market value in Canada of more than \$8,000; and</p> <p>(b) a machine, other than a machine that is intended to be used for a manufacturing, industrial or commercial purpose, that has a fair market value in Canada of more than \$8,000.</p>	<p>b) une machine non destinée à servir à la fabrication ou à des fins industrielles ou commerciales, dont la juste valeur marchande au Canada dépasse 5 000 \$.</p> <p>5 Les objets suivants, fabriqués à l'extérieur du territoire qui constitue aujourd'hui le Canada et non décrits à l'article 4, à condition qu'ils soient reliés à l'histoire de la science et au progrès de la technologie, à savoir :</p> <p>a) un instrument scientifique qui n'est plus destiné à servir à des fins scientifiques ou techniques et dont la juste valeur marchande au Canada dépasse 8 000 \$;</p> <p>b) une machine non destinée à servir à la fabrication ou à des fins industrielles ou commerciales, dont la juste valeur marchande au Canada dépasse 8 000 \$.</p>
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11. The Aircraft was made by a corporation in the United States and has a fair market value in Canada of \$1,250,000, the amount that the purchaser has agreed to pay for the aircraft conditional on the issue of an export permit. Assuming, but not deciding, that the Aircraft falls within the definition of "machine" in Group VI, the Aircraft would be included in the Control List if either of subsection 4(b) or 5(b) of Group VI applies to the Aircraft. Each of the subsections excludes machines that are intended to be used for a commercial purpose. The issue in the Request for Review is whether the Aircraft is intended to be used for a commercial purpose. If so, the Aircraft is not included in the Control List.
12. The Applicant correctly acknowledges that neither the Act nor the Control List defines the term "commercial purpose". He does, however, point to the Government of Canada's *Guide to Exporting Cultural Property from Canada* (the Guide) which simply reiterates that "[m]achines, such as aircraft or automobiles (Group VI), are not subject

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to export control if they are being exported for a manufacturing, industrial or commercial purpose.” In addition, the Legal Opinion refers to Canadian jurisprudence which has given the term its plain meaning: a purpose focussed on profit.

13. As neither the Act nor the Control List defines “commercial purpose”, the Review Board must turn to statutory interpretation. As a statutory decision-maker, the Review Board must interpret the Act and any related regulations using the modern approach to statutory interpretation endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*¹.
14. Specifically, the Review Board must read the words of the Act and the Control List in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. “Where the words of a provision are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretation process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role”²
15. The Control List, as a regulation, must be interpreted in a way that furthers the purpose of the Act as a whole. In other words, “[t]he intent of the statute transcends and governs the intent of the regulation”.³
17. The Review Board is of the view that the term “commercial purpose” is precise and unequivocal. As such, its ordinary meaning plays a dominant role in the interpretive process. The Merriam-Webster Dictionary (online) defines “commercial” as “viewed with regard to profit”, and the Canadian jurisprudence referred to in the Legal Opinion shows that “[c]ommercial purposes” “has the meaning normally attributed to it: a purpose focused on profit”.⁴ This is very likely the “meaning that would be understood by a competent language user upon reading the words in their immediate context”.⁵
18. The context of the exemption within the Control List and the purpose of the Act are not particularly helpful in construing the meaning of “commercial purpose”. The Act seeks to preserve the national heritage in Canada through, among other things, a system of

¹ [1998] 1 SCR 27.

² *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 10.

³ *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26, at para. 38, citing Elmer A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 247.

⁴ *Saxer v. College of Opticians of British Columbia*, 2002 BCSC 1676, at para. 20.

⁵ Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto, Ont: Irwin Law 2016, at p. 61.

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export controls ultimately designed to encourage Canadians to donate or sell significant objects to Canadian cultural organisations. The Control List merely “sets forth objects or classes of objects, the export of which the Governor in Council deems necessary to control in order to preserve the national heritage in Canada”.⁶

19. Ultimately, the Review Board finds that it is reasonable to conclude that machines that are being acquired for the purpose of financial gain are not subject to cultural property export control, and that this interpretation is not inconsistent with the context of the Control List or the purpose of the Act.
20. Such an interpretation is also consistent with the definition of the term provided by the Department of Canadian Heritage (PCH) in a public interpretive document⁷ on its website. That document plainly states that “no permit is required for cars and motorcycles” (which, like aircraft, are “machines” captured by Group VI of the Control List) “being exported for a manufacturing, industrial or commercial use, i.e. they are not being acquired for a private or public collection”.
21. The Purchaser’s Letter establishes that the Aircraft is intended to be used for financial gain, a commercial purpose. Even assuming that the Aircraft is a machine, it is not included in the Control List because it is intended to be used for a commercial purpose.

⁶ *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82 at para. 12

⁷ Assessment Tool – Exporting Antique Vehicles: <https://www.canada.ca/en/canadian-heritage/services/export-permits-cultural-property/assessment-tool-export-antique-vehicles.html>

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CONCLUSION

22. For the reasons expressed above, the Review Board determines that the Aircraft is not included in the Control List and hereby directs that a permit officer issue an export permit forthwith for the Aircraft.

For the Review Board

Sharilyn J. Ingram, Chair
Glen A. Bloom
Tzu-I Chung
Laurie Dalton
Madeleine Forcier
Theresa Rowat
Paul Whitney