

REVIEW BOARD DECISION

March 23, 2023

REQUEST FOR REVIEW OF A REFUSED APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0428-22-10-12-001, *Aufstieg*, 1924, by Wassily Kandinsky

INTRODUCTION

1. On October 11, 2022, Sotheby's Canada Inc. (the Applicant) applied¹ to the Canada Border Services Agency (CBSA) for a permit to export the work *Aufstieg*, 1924, watercolour and pen and ink on paper (the Object), by Wassily Kandinsky (Kandinsky).
2. On November 7, 2022, a permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to the Object.² The refusal was based on the advice of a representative of the Montreal Museum of Fine Arts (the Expert Examiner), who determined that the Object is of outstanding significance, and meets the degree of national importance set out in the *Cultural Property Export and Import Act* (the Act).
3. On November 29, 2022, the Applicant requested a review of its application for an export permit³ (the Request for Review) by the Canadian Cultural Property Export Review Board (the Review Board).
4. On December 16, 2022, and in response to a request by the Review Board, the Applicant filed a written statement in support of its Request for Review (Written Statement).
5. On January 18, 2023, the Review Board invited the Applicant to comment on the rarity of the works of Kandinsky, particularly watercolours, in collections in Canada based on information set out in the Artefacts Canada database and any other information that the Applicant possessed.
6. On January 31, 2023, the Applicant filed a statement (the Rarity Statement) with respect to the rarity of works by Kandinsky in Canada. The Applicant also advised the Review Board that it would not require an oral hearing. The Request for Review proceeded based on the written submissions alone.
7. Six members of the Review Board met on February 22, 2023 to consider the Request for Review.
8. For the reasons that follow, the Review Board finds that the Object is included in the *Canadian Cultural Property Export Control List* (the Control List) and is of outstanding significance by reason of its aesthetic qualities and value in the study of the arts.

¹ Application #0428-22-10-12-001.

² Subsection 13(1) of the *Cultural Property Export and Import Act* (the Act).

³ Subsection 29(1) of the Act.

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9. The members differ on whether the Object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. The majority of the Review Board finds that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.
10. The Review Board's decision was sent to the Applicant on February 23, 2023, with notification that these reasons would follow.
11. Additionally, and in accordance with subsection 29(4) of the Act, on February 23, 2023 the Review Board directed that a permit officer at the CBSA issue an export permit forthwith in respect of the Object.

LEGISLATIVE FRAMEWORK

12. The Review Board is established by the Act. Included in its duties are that it must, "on request...review applications for export permits."⁴
13. In its review of an application for an export permit, the Act stipulates that the Review Board must determine whether the object:
 - a) is included in the Control List;
 - b) is of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences; and
 - c) is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.⁵
14. If the Review Board determines that the object meets all the above criteria, the Review Board must then form an opinion as to whether an institution or public authority in Canada might make a fair offer to purchase the object within six months after the date of its decision. If so, the Review Board must establish a delay period of not less than two months and not more than six months during which the Review Board will not direct that an export permit be issued in respect of the object.⁶

⁴ Subsection 20(a) of the Act.

⁵ Subsection 29(3) of the Act.

⁶ Subsection 29(5) of the Act.

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15. If the Review Board determines that the object fails to meet one of the above criteria, the Review Board MUST direct a CBSA permit officer to issue an export permit for the object forthwith.⁷

THE APPLICANT'S SUBMISSIONS

16. The Object, *Aufstieg*, is a watercolour and pen and ink on paper, executed by Kandinsky (1866-1944) in 1924. It measures 31.7 x 22.8 cm. It is signed with the monogram and dated 24 at the lower left, titled, dated 1924, and inscribed No132 on the verso of the mount.
17. The Applicant states that the Object was created in Germany and that it is included in the Control List under Group V, Objects of Fine Art, Section 4(a).
18. The Applicant submits that the Object is not of outstanding significance because it does not have a close association with Canadian history or national life.
19. Furthermore, the Object does not have outstanding aesthetic qualities or a significant value in the study of the arts, as it is not from one of the artist's most important periods of his career, such as his "Blue Rider Period" (1902-1914) or his "Great Synthesis Period" (1934-1944). Instead, the Object comes from an extremely prolific time in the artist's career when he was teaching at the Bauhaus (1922-1933). The Applicant states that works from this period are readily available on the open market, as illustrated by the recent sales evidence provided in the Written Statement.
20. Furthermore, the Applicant does not consider the Object to be in pristine condition. The sheet is stained throughout, the edges are slightly discoloured, there are minor spots of foxing and the pigments have faded slightly.⁸
21. When asked by the Review Board to comment further on the rarity of works by Kandinsky in Canada, in the Rarity Statement, the Applicant suggested that two works currently in Canadian collections, *Untitled*, 1913, gouache (Museum London Collection) and *Etude pour Betonte Ecken [Coins accentués]*, 1922, watercolour, gouache, pen, ink over traces of graphite (Montreal Museum of Fine Arts Collection), are of museum quality while the Object is "rather a lovely work [...], but not important enough to be of

⁷ Subsection 29(4) of the Act.

⁸ Applicant's written statement dated December 16, 2022, at p. 2.

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museum quality”. The Applicant stated that “[i]t is amongst a secondary tier of works by the artist”.⁹

22. The Applicant further submits that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. The Object is not rare, it does not have a relationship with any group or community in Canada, and its provenance from the Scheyer Family, prior to its arrival in Canada, does not add any particular significance to the Object other than confirming its authenticity.

ANALYSIS

Whether the Object is included in the Control List

23. An object that falls under one of the eight groups in the Control List cannot be exported from Canada without a permit if it:
- is more than 50 years old;
 - was made by a natural person who is no longer living; and,
 - meets the criteria, including age or a minimum dollar value, set out in the Control List.
24. The Applicant admits that the Object is included in the Control List under Group V, Objects of Fine Art, subsection 4(a). Subsection 4(a) applies to drawings made outside the territory that is now Canada by a person who at the time was not ordinarily resident in the territory that is now Canada, and that have a fair market value in Canada of more than \$15,000.00 CAN.¹⁰
25. The Review Board agrees that the Object is a drawing that was made more than 50 years ago outside the territory that is now Canada by a person who is no longer living. At the time that he created the Object, Kandinsky was not ordinarily resident in the territory that is now Canada. The Review Board also agrees that the Object’s fair market value, as specified by the Applicant in its export permit application, exceeds \$15,000.00 CAN.
26. The Review Board therefore concludes that the Object is included in the Control List under Group V, Objects of Fine Art, subsection 4(a).

⁹ Applicant’s statement dated January 31, 2023, at p. 2.

¹⁰ Control List, section 4.

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Whether the Object is of outstanding significance

27. In reviewing a refused application for an export permit, the Review Board must determine whether the object is of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences.¹¹
28. The Applicant contends that the Object is not of outstanding significance as the Object does not have a close association with Canadian history or a close association with national life.
29. The Act does not require that an object have a direct connection to Canada in order for it to be subject to export control.¹² However, in order for an object to be considered of outstanding significance due to its close association with Canadian history, the Review Board agrees that the object must have a close association with, for example a Canadian event, person, movement, discovery or innovation. Similarly, if an object is to be found to be of outstanding significance due to its close association with national life, it must have a close association with, for example, a Canadian cultural tradition, spiritual practice, system of belief, or group or community. In this instance, the Review Board agrees that the Object does not have a close association with Canadian history or national life.
30. The Applicant contends that the Object does not have significant aesthetic qualities or value in the study of the arts. The Applicant relies on the fact that the Object is from a prolific period for the artist when he was teaching at the Bauhaus. As such, works from this period are not rare, nor is this Object an exemplar of the artist's work on paper as compared to his earlier works created during his "Blue Rider Period" or later works created during his "Great Synthesis Period". Furthermore, the Object has been handled and aged, would benefit from a restoration, and therefore cannot be considered in pristine condition.
31. The Review Board disagrees. Kandinsky was one of the most innovative artists of the first half of the 20th century. His oeuvre had an enormous influence on countless artists, including many Canadian artists. The Object is of outstanding significance for its aesthetic qualities. It is both innovative and significant in its composition, concept, execution and style and is a significant representative example of early 20th century abstractions. Although the Applicant has indicated that the Object has condition issues

¹¹ Paragraphs 29(3)(b) and 11(1)(a) of the Act.

¹² *Heffel Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82, at para. 39 [Heffel].

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including some fading of pigments, certain of those issues could be addressed on restoration. Although there is some colour fading, this fading is minimal and the colours largely remain fresh and vibrant.

32. Perhaps more important than its aesthetic qualities, the outstanding significance of the Object lies in its value in the study of the arts. Even though the Object is not from Kandinsky's "Blue Rider Period" or his "Great Synthesis Period", the work is representative of Kandinsky's oeuvre in general and exemplifies early 20th century avant-garde abstraction. The significance of the Object for its value in the study of the arts is enhanced by the fact that, other than prints, works of Kandinsky are rare in Canadian collections. There is no opportunity to research or study a Kandinsky watercolour in Canada.
33. For the above reasons, the Review Board concludes that the Object is of outstanding significance for its aesthetic qualities and value in the study of the arts.

Whether the Object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage

34. In reviewing a refused application for an export permit, the Review Board must determine whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.¹³
35. Although an object may be of outstanding significance, the effect of removing the object from Canada may not meet the threshold of national importance. Certain considerations may overlap in the determination of outstanding significance and national importance. The determination of national importance is however a separate analysis involving different considerations than the determination of outstanding significance.¹⁴
36. In making the determination of whether an object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage, the Review Board must measure the extent of the effect of removing the object from Canada by taking into consideration relevant factors that speak to the degree of value and importance of the object to Canada, as well as its importance in the Canadian context.¹⁵

¹³ Paragraphs 29(3)(c) and 11(1)(b) of the Act.

¹⁴ *Heffel*, at para 37.

¹⁵ *Heffel*, at paras. 37 and 43.

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37. In determining whether an object is of “such a degree of national importance that its loss to Canada would significantly diminish the national heritage”, the Review Board is guided by the modern view of statutory interpretation set out by the Supreme Court of Canada. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Court stated:

A court interpreting a statutory provision does so by applying the “modern principle” of statutory interpretation, that is, that the words of a statute must be read “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”: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., Interpretation Act, R.S.C. 1985, c. I-21.¹⁶

38. The Review Board is guided by Parliament’s intent when it interprets the export controls in the Act. It is recognized that the objects that Parliament intended to be subject to export controls were those of “high national significance in Canada”¹⁷, “of the first order of importance”¹⁸, “treasures”¹⁹, and “national treasures”²⁰. It is also recognized that Parliament wished to achieve a balance between the desire to retain important cultural property in Canada without unduly interfering with the property rights of the owners of cultural property.²¹

39. It is the opinion of the Review Board that it is particularly important to carefully find this balance when dealing with cultural property that is not of Canadian origin.²² With respect to an object which had been made outside Canada and subsequently imported

¹⁶ 2019 SCC 65, at para. 117.

¹⁷ *House of Commons Debates*, (7 February 1975) at p. 3027 [Faulkner in the House].

¹⁸ Faulkner in the House at p. 3026.

¹⁹ *House of Commons Debates*, (7 February 1975) at p. 3030 and 3031 (R. Gordon Fairweather)

²⁰ *Senate*, Standing Committee on Health, Welfare and Science, (30 April 1975) at p. 5:8 (Hon. James Hugh Faulkner) [Faulkner in the Senate].

²¹ Faulkner in the House at p. 3026.

²² Faulkner in the Senate at p. 5:8.

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into Canada, such an object could become subject to export control based in part on its association to Canada.²³

40. In order to respect Parliament's intent to limit the control of cultural property to a minimum and balance the desire to retain important cultural property in Canada against respect for property rights, the Review Board is of the view that only treasures of first order importance can be found to be of such a degree of national importance their loss to Canada would significantly diminish the national heritage.
41. As indicated above, the Object is not from Kandinsky's "Blue Rider Period" or his "Great Synthesis Period" in which his works were most innovative. The Applicant describes the object as being among a secondary tier of works of the artist. Although the Object is of outstanding significance especially for its value in the study of the arts, the Object does not meet the threshold of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. The Object has the condition issues discussed above. It is not of high national significance in Canada, it is not of the first order of importance and it is not a treasure. The Object has been in a private collection in Canada since 1984. Its sole association with Canada is an exhibition at the Montreal Museum of Fine Arts in 1991. This does not elevate the Object to a treasure.
42. In view of the above, and on the basis of the evidence before it, the Review Board concludes that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.

Whether an institution or public authority in Canada might make a fair offer to purchase the Object within six months after the date of the determination

43. Since the Review Board concludes that the Object is not of national importance, it is unnecessary for the Review Board to form an opinion on whether an institution or public authority in Canada might make a fair offer to purchase the Object.

CONCLUSION

44. In conclusion, the Review Board determines that the Object is included in the Control List and is of outstanding significance by reason of its aesthetic qualities and value in the study of the arts. However, the Review Board determined that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. As a result, and in accordance with subsection 29(4) of

²³ Faulkner in the Senate at p. 5:8.

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the Act, the Review Board has directed a permit officer at the CBSA to issue an export permit forthwith in respect of the Object.

For the Review Board

Sharilyn J. Ingram, Chair
Glen A. Bloom
Tzu-I Chung
Patricia Feheley
Madeleine Forcier
Paul Whitney

Jo-Ann Kane (recused)