

REVIEW BOARD DECISION

November 5, 2021

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

Application No.: 0809-21-04-22-073 *Seascape with Steamer and Sailboat* by Emil Nolde

INTRODUCTION

1. Uno Langmann Limited (the Applicant) applied to the Canada Border Services Agency (CBSA) for an export permit to export the work *Seascape with Steamer and Sailboat*, 1946, watercolour on japan paper, by Emil Nolde (the Object).
2. On May 14, 2021, a permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to the Object.¹ The refusal was based on the advice of a representative of the National Gallery of Canada (the Expert Examiner), who determined that the Object is on the *Canadian Cultural Property Export Control List* (the Control List), and 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 June 2, 2021, the Applicant requested a review by the Canadian Cultural Property Export Review Board (the Review Board) of its application for an export permit.²
4. The Applicant made submissions in a letter dated June 2, 2021, and in a written statement dated July 7, 2021.
5. The Review Board contracted Anne Grace of the Montreal Museum of Fine Arts (the Expert Advisor) to prepare a report providing advice relating to the Object. The Review Board received the report (the Grace Report), and on September 3, 2021, the Review Board shared the Grace Report with the Applicant and gave the Applicant an opportunity to provide the Review Board with a written submission in response.
6. The Applicant did not provide the Review Board with a written Submission in response to the Grace Report.
7. On September 17, 2021, the Applicant requested a hearing in this matter in order to make oral submissions to supplement the written material that it had already provided.
8. The Review Board scheduled a hearing in this matter on October 20, 2021, during which the Applicant made oral submissions.
9. For the reasons that follow, the Review Board finds that the Object is included in the Control List, is of outstanding significance by reason of its aesthetic qualities and its value in the study of the arts, and is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. The Review Board also finds that an institution or public authority in Canada might make a fair offer to

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

² Subsection 29(1) of the Act.

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purchase the Object within six months of this decision. The Review Board therefore establishes a delay period of 3 months ending **February 5, 2022**, during which it will not direct that an export permit be issued in respect of the Object.

ISSUES TO BE DETERMINED BY THE REVIEW BOARD

10. In the review of an application for an export permit, the Review Board must determine whether the object:
 - is included in the Control List;
 - 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
 - is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.³
11. If the Review Board determines that the object meets all of 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.⁴ The purpose of the delay period is to provide an institution or public authority in Canada with an opportunity to purchase the object.
12. If the Review Board determines that the object fails to meet one of the above criteria, the Review Board directs a CBSA permit officer to promptly issue an export permit for the object.⁵

³ Subsection 29(3) of the Act.

⁴ Subsection 29(5) of the Act.

⁵ Subsection 29(4) of the Act.

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THE APPLICANT'S SUBMISSIONS

13. The Applicant informed the Review Board that the Object was created outside the territory that is now Canada and stated that the Object is on the Control List under Group V Objects of Fine Arts.
14. The Applicant submitted that the Object is not of outstanding significance because it does not have a close association with Canada's artistic, cultural, scientific or social history and that the Object does not have a close association with a Canadian cultural tradition or way of life. Furthermore, the Object is not a rare work as Emil Nolde was a prolific artist producing over 20,000 watercolours. Finally, the Applicant contended that the Object does not have significant value in the study of the arts because it is a late work in Emil Nolde's oeuvre and is part of a large suite of works of similar motifs.
15. The Applicant also submitted that the Object does not have such a degree of national importance that its loss to Canada would significantly diminish the national heritage. The Applicant stated that there are many works by Emile Nolde in both public and private collections in Canada. It declined to identify any of such works in private collections. The Applicant did however provide a list of works by Emil Nolde in the collections of the Art Gallery of Ontario and the National Gallery of Canada. The Applicant admitted that the Object was different from the works in those public collections but that it was a very late example, not rare, from the artist's oeuvre and was without a Canadian context. Other than for the study of European art, the Applicant contended that the Object would not advance research, a new interpretation, meaning or understanding of Canada's cultural heritage and that the Object has no connection to Canada.
16. In its letter of June 2, 2021, and in its oral submissions the Applicant identified the steps it had taken to offer the Object for sale within Canada by including it on its website and highlighting the work in its June 2021 calendar which it sent to its mailing list including to public institutions. In response it received no serious enquiries from its clients or public institutions.
17. In a biography of Emil Nolde included in the Applicant's written submissions it is stated that:

[t]wo most important subject themes in Nolde's work were flowers and the sea. Both gave him freedom to explore and express colour, and evoked in the artist an extreme sense of homeland, or "Heimat" in German.

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18. The Applicant attached to its written submissions an email from Professor Henrik Hanstein (the Hanstein Email), a member of the German Expert Advisory Council for National Valuable Cultural Property. In that email Professor Hanstein expressed the view that the Council would not refuse export of the work from Germany as “the watercolour does not date from a period that would fall under an export ban and furthermore, it is not a rare work.”

THE GRACE REPORT

19. The Expert Advisor stated that Emil Nolde is widely considered among the most prolific and accomplished 20th-century artists to work in watercolours. Between 1941 and 1945, Emil Nolde made 1,300 watercolours now known as the Unpainted Pictures. Although the Object falls outside that series, as a group, the late watercolours, which includes the Object, are among the works considered the most significant in Emil Nolde’s artistic production.
20. With respect to the Object’s aesthetic qualities, the Expert Advisor highlighted the role of colour as the most important single element in Emil Nolde’s work. Although the Object is painted using only five colours, the artist “captures the spirit of the sea, allowing the sensation of colour to suffuse the image.”
21. With respect to the value of the Object in the study of the arts, the Expert Advisor expressed the view that the Object is “a highly accomplished watercolour that is typical of the aesthetic that Emile Nolde developed during an historically significant moment of his life.” The Object would contribute to the contextualization of the work of the artist in Canadian collections. The Grace Report concludes with the following:

Nolde’s reputation as an extraordinary colourist, and as one of the most accomplished artists of his time to produce watercolours, confirms the general consensus that a late watercolour such as *Seascape with Steamer and Sail* is an important object of study within the art historical context of the 20th century.

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ANALYSIS***Seascape with Steamers and Sailboat, 1946, by Emil Nolde***

22. The Object, *Seascape with Steamers and Sailboat*, is a watercolour on japan paper, executed by Emil Nolde (1867-1956) in 1946. It measures 21.6 x 26 cm. It is signed *Nolde* at the lower right.

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. In its written submissions, the Applicant stated that the Object is included in the Control List.
25. Group V Objects of Fine Art of the Control List includes drawings made outside the territory that is now Canada that have a fair market value in Canada of more than \$15,000.00 CAN.⁶ A drawing is defined in that group as including a watercolour.⁷
26. 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. The Object's fair market value, as specified by the Applicant in its written submissions, exceeds \$15,000.00 CAN. The Review Board therefore concludes that the Object is included in the Control List.

The Hanstein Email

27. The fact that the German Expert Advisory Council for National Valuable Cultural Property would not ban the export from Germany of the Object is irrelevant to this matter. The law relating to the export of cultural property from Canada is set out in the

⁶ Control List, section 4.

⁷ Control List, section 1.

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Act. As indicated above, the Object dates from a period that is covered by the Control List. The fact that the Object might not evoke an export ban in Germany, based solely on its date of production by Nolde, is irrelevant.

Whether the Object is of outstanding significance

28. In reviewing an 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.⁸
29. The views expressed by the Expert Advisor in the Grace Report with respect to the significance of the aesthetic qualities of the Object were not challenged by the Applicant.
30. The Applicant's principal argument that the Object is not of outstanding significance is that the Object does not have an association with Canada's artistic, cultural, scientific or social history or with a Canadian cultural tradition or social history. The Act does not however require such an association for an object to be of outstanding significance by reason of either its aesthetic qualities or value in the study of the arts.
31. The Applicant also relied on the oeuvre of Emil Nolde as including over 20,000 watercolours as a reason for which the Object is not of outstanding significance. The Applicant claimed that the Object was not rare.
32. Although Emil Nolde was prolific in creating watercolours, the Expert Advisor concluded that the Object, as a late watercolour, reflected the aesthetics of the artist's celebrated Unpainted Pictures series of which only 13 percent were landscapes (including seascapes). The Applicant has stated that seascapes and flowers were the most important subject themes in the artist's work. Furthermore, only one of the artist's works in public collections in Canada is a watercolour and that work depicts a celebrated expressionist dancer and is circa 1920. There are no late watercolours in public collections in Canada and no watercolours that are a seascape, one of the two most important subject themes of the artist. As a result, the Review Board concludes that the fact that Emil Nolde's oeuvre includes over 20,000 watercolours does not negate the significance of the work's aesthetic qualities or value in the study of the arts.

⁸ Paragraphs 29(3)(b) and 11(1)(a) of the Act.

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33. For the above reasons, the Review Board concludes that the Object is of outstanding significance for its aesthetic qualities.
34. The views expressed by the Expert Advisor in the Grace report with respect to the significance of the Object in the value of the study of the arts also went unchallenged. The Object in a public collection in Canada would contribute to the understanding of Emil Nolde's oeuvre. Furthermore, the Object would be an important object of study within the art historical context of the 20th century.
35. The Review Board therefore concludes that the Object is also of outstanding significance for its 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

36. In reviewing an 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.⁹
37. In making that determination, the Review Board must measure the extent of the effect of the removal of 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.¹⁰
38. The Review Board is not confined to specific factors in its assessment of national importance. It has broad discretion to assess and determine whether a given object meets the degree of national importance set out in the Act.
39. In summary, the Applicant contends that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage because of the Object's lack of rarity and because the Object does not have a connection to Canada or to Canadian heritage.
40. The comments about the Object's lack of rarity expressed above in connection with the Object's outstanding significance apply as well to the Object's degree of national importance. The fact that the artist's oeuvre includes over 20,000 watercolours does not diminish the Object's national importance. If the Object were to be acquired by a

⁹ Paragraphs 29(3)(c) and 11(1)(b) of the Act.

¹⁰ *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82 at paragraphs 37 and 43.

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public institution in Canada the work would be the only seascape and the only late watercolour in such a public collection. That fact would therefore increase, and not diminish, the Object's national importance.

41. The Review Board accepts the Applicant's representations that the Object does not have a connection to Canada or to Canadian heritage. An object's national importance is not, however, dependent on a connection to Canada or to Canadian heritage. In *Canada (Attorney General) v. Heffel Gallery Limited*¹¹, the Federal Court of Appeal had for consideration whether the late painting *Iris bleus* created in France by the French impressionist painter Gustave Caillebotte met the criterion of national importance under the Act. In that case, the court stated that the national importance criterion does not require that a given object "necessarily have a connection to Canada"¹². Rather, an object can meet the degree of national importance "even if the said object or its creator have no direct connection to Canada."¹³ The Court explained that because paragraph 11(1)(b) of the Act "is an open-ended provision", not a "mandatory recipe"¹⁴, the Review Board may rely on factors related to the degree of value and importance of the object as well as its importance in the Canadian context in determining whether it is of national importance such that its loss to Canada would significantly diminish the national heritage.
42. In view of the importance of the oeuvre of Emil Nolde in the art of the 20th century, and in particular of his late watercolour works, of the rarity of late watercolour works in public collections in Canada, the Review Board concludes that the Object is 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. If the Review Board determines that an object is on the Control List and is of outstanding significance and of national importance, subsection 29(5) of the Act requires that the Review Board form an opinion as to whether an institution or public

¹¹ 2019 FCA 82

¹² At paragraph 39.

¹³ At paragraph 39.

¹⁴ At paragraph 34.

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authority in Canada might make a fair offer to purchase the object within six months after the date of the determination.¹⁵

44. The threshold under the Act for determining whether an institution or public authority might make a fair offer to purchase an object is very low. Paragraph 29(5)(a) uses the word “might”. The threshold is therefore just a possibility. This threshold is far less than a probability or a certainty. The Review Board therefore concludes that only limited evidence or information is required for the Review Board to be satisfied that an institution or public authority might make a fair offer to purchase.
45. The evidence shows that two public institutions, the Art Gallery of Ontario and the National Gallery of Canada, have collected the work of Emil Nolde. The Applicant relies on the fact that it offered the Object for sale on its website and featured the Object in its June 2021 calendar which it sent to its mailing lists including public institutions. It did not receive any serious enquires about purchasing the Object. It relies on those facts to negate the possibility that an institution or public authority might make a fair offer to purchase the Object.
46. The Review Board rejects this argument for two reasons. First, it is possible for an institution or public authority to obtain a grant from the Department of Canadian Heritage¹⁶ to purchase an object in respect of which the Review Board has established a delay period during which it would not direct an export permit be issued. Such a grant would not be available to purchase an object offered for sale by the Applicant. Institutions and public authorities might not have sufficient financial resources to purchase an object without a grant from the Department of Canadian Heritage. Second, there is no indication that the Applicant forwarded a copy of its June 2021 calendar featuring the Object to all institutions or public authorities in Canada whose collecting mandates include the works of Emil Nolde. The Applicant did not however identify the public institutions to which it forwarded the calendar.
47. Considering the importance of the oeuvre of Emil Nolde in the art historical context of the 20th century and the significance of the Object in that oeuvre, and having regard to the low threshold, the Review Board is of the view that an institution or public authority might make a fair offer to purchase the Object within six months of the Review Board’s determination in this matter.

¹⁵ Subsection 29(5) of the Act.

¹⁶ Section 35 of the Act; see also <https://www.canada.ca/en/canadian-heritage/services/funding/movable-cultural-property.html>.

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Delay period during which the Review Board will not direct that an export permit be issued in respect of the Object

48. When the Review Board is of the opinion that an institution or public authority in Canada might make a fair offer to purchase an object within six months after the date of the determination, 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.¹⁷
49. The Applicant requested that the delay period be very short to enable the Object to be included in an auction in Germany in November 2021. The purpose of the delay period is to enable an institution or public authority to decide whether it will make a fair offer to purchase an object and to secure the necessary funding for the acquisition, including potentially through a grant from the Department of Canadian Heritage. Establishing the length of a delay period is not dependent on the convenience or desires of the applicant for an export permit.
50. The Review Board is unable to accede to the Applicant's request for a very short delay period. The minimum delay period that the Review Board is able to establish is prescribed by the Act as two months.
51. The Review Board establishes a delay period of **three months**, ending **February 5, 2022**, during which it will not direct that an export permit be issued in respect of the Object. The Review Board is of the view that this delay period is necessary to provide institutions and public authorities with sufficient time to consider the possibility of making an offer to purchase the Object and potentially acquire the appropriate funds to do so.

CONCLUSION

52. In conclusion, the Review Board determines¹⁸ that the Object is on the Control List, that it is of outstanding significance, and that it is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. Furthermore, the Review Board is of the opinion that a fair offer to purchase the Object might be

¹⁷ Paragraph 29(5)(a) of the Act.

¹⁸ The circumstances of this matter, and in particular the delay incurred by the Grace Report and the Applicant's request for an oral hearing, required that the Review Board make a determination outside the four-month delay set out in the Act (subs. 29(2)).

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made by an institution or public authority in Canada within six months after the date of this decision. The Review Board therefore establishes a delay period of three months ending **February 5, 2022**, during which it will not direct that an export permit be issued in respect of the Object.

For the Review Board

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