

REVIEW BOARD DECISION

June 15, 2022

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

Application No.: 0395-22-03-18-001, *Garten am Wasser*, 1932, by Paul Klee

INTRODUCTION

1. Landau Fine Art (the Applicant) applied to the Canada Border Services Agency (CBSA) for an export permit to export the work *Garten am Wasser*, gouache and watercolour on paper on board, 1932, by Paul Klee (the Object).
2. 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 Montreal Museum of Fine Arts (the Expert Examiner), who determined that the Object 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 *Cultural Property Export and Import Act* (the Act).
3. On April 19, 2022, the Applicant (through its legal counsel), requested a review of its application for an export permit² (the Request for Review) by the Canadian Cultural Property Export Review Board (the Review Board).
4. On May 6, 2022, and in response to a request by the Review Board, the Applicant (through its legal counsel), filed a written statement in support of its Request for Review. The Applicant confirmed that it would not require an oral hearing. The Applicant asked the Review Board to consider the Request for Review on the basis of its written submissions alone and on an expedited basis.
5. 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 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 purchase the Object within six months of this decision. The Review Board therefore establishes a delay period of four months ending **October 15, 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

6. The Review Board is created by legislation and, as such, it only has the powers granted to it by its governing statute, the Act.

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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7. In the review of a refused application for an export permit, the Act stipulates that 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
 8. 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.⁴ The purpose of the delay period is to provide an institution or public authority in Canada with an opportunity to purchase the object.
 9. 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

THE APPLICANT'S SUBMISSIONS

10. The Applicant states that the Object was created outside the territory that is now Canada and that it is included in the Control List under Group V 4(b), Objects of Fine Art.
11. The Applicant further states that the Object, first imported into Canada in 2007, is owned by a Swiss company (the Owner) and is consigned to the Applicant for the purpose of exhibition and sale. As such, the Applicant states that the CBSA should have issued a permit for [the Object's] export pursuant to s.7(a) of the Act."⁶

³ Subsection 29(3) of the Act.

⁴ Subsection 29(5) of the Act.

⁵ Subsection 29(4) of the Act.

⁶ Applicant's written statement, dated May 6, 2022, at p. 1.

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12. Nevertheless, the Applicant acknowledges that the Review Board's jurisdiction "excludes consideration of the 35-year rule found in section 7(a) of the Act."
 13. The Applicant further acknowledges that the Object is of outstanding significance and national importance and recognizes that the Review Board is bound by the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Heffel Gallery Limited*.⁷
 14. However, the Applicant contends that there is no basis on which to believe that a fair offer to purchase the Object might be made by a Canadian institution or public authority within six months of the Review Board's decision.
 15. In support of this contention, the Applicant submits that since the consignment of the Object in 2007, no offers or expressions have been received from the directors, curators or board members of any Canadian institutions.⁸
 16. Should the Review Board find that a Canadian institution or public authority in Canada might make a fair offer to purchase the Object within six months of its decision, the Applicant asks that a delay period of no more than two months be imposed. The Applicant explains that because of its inability to immediately return the Object to the Owner, the Owner has demanded payment of the Object's consigned value of \$1,500,000.00 US, plus interest. The Applicant submits that the legal and business consequences it and Canada's art sector as a whole now face as a result of the refused export permit in this matter warrant the imposition of the shortest delay possible.

ANALYSIS***Garten am Wasser, 1932, by Paul Klee***

17. The Object, *Garten am Wasser*, is a gouache and watercolour on paper on board, executed by Paul Klee (1879-1940) in 1932. It measures 28 x 38 cm. It is signed *Klee* at the lower right.

Whether the Object is included in the Control List

18. An object that falls under one of the eight groups in the Control List cannot be exported from Canada without a permit if it:

⁷ 2019 FCA 82.

⁸ Applicant's written statement dated May 6, 2022, at p. 3.

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- 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.
19. In its written submissions, the Applicant states that the Object is included in the Group V 4(b) of the Control List.
20. Group V 4(b) Objects of Fine Art of the Control List includes paintings made outside the territory that is now Canada that have a fair market value in Canada of more than \$30,000.00 CAN.⁹
21. The Object is a painting¹⁰ 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 export permit application, exceeds \$30,000.00 CAN. The Review Board therefore concludes that the Object is included in the Control List.

Whether the Object is of outstanding significance

22. 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
23. The Applicant does not dispute that the Object is of outstanding significance.
24. With respect to the Object's aesthetic qualities and value in the study of the arts, the Review Board notes that the Object is a remarkable example of Klee's oeuvre.
25. 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.

⁹ Control List, section 4.

¹⁰ The Review Board notes that according to the definitions in the [Control List](#), the Object could also be considered as a drawing (*drawing means a unique artistic representation or work including calligraphy, usually on paper, parchment or vellum, executed in media such as pen and ink, ink wash, black or colour chalk, pastels, charcoal, graphite, water colour, gouache or metal-point*). If the Object is a drawing, made outside the territory that is now Canada, it would be included in Group V4 (a) of the Control List: a drawing or print that has a fair market value in Canada of more than \$15,000.00 CAN.

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

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

26. 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.¹²
27. 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.¹³
28. 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.
29. 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 considering it was imported into Canada in 2007, less than 35 years ago. However, the Applicant recognizes that the Review Board is bound by the decision in *Heffel*.
30. In *Heffel*, 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”¹⁴. Rather, an object can meet the degree of national importance “even if the said object or its creator have no direct connection to Canada.”¹⁵ The Court explained that because paragraph 11(1)(b) of the Act “is an open-ended provision”, not a “mandatory recipe”¹⁶, 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.

¹² Paragraphs 29(3)(c) and 11(1)(b) of the Act.

¹³ *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82 at paragraphs 37 and 43.

¹⁴ At paragraph 39.

¹⁵ At paragraph 39.

¹⁶ At paragraph 34.

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31. The Review Board acknowledges that the Object was imported into Canada 15 years ago. However, this fact has no bearing on the Object's degree of value and importance, nor its importance in the Canadian context.
 32. Furthermore, as the Applicant concedes, the Object's recent importation into Canada is not a factor which the Review Board may consider in the exercise of its statutory authority. While a CBSA permit officer must issue a permit forthwith if he or she is satisfied that the object in respect of which the application is made was imported into Canada within the thirty-five years immediately preceding the date of the application and was not exported from Canada under a permit issued under the Act prior to that importation¹⁷, the Review Board has no such authority¹⁸. The CBSA permit officer's decision to refer the application to an expert examiner for consideration was based on the information supplied by the Applicant on the Object's importation into Canada and the Object's subsequent exportation under a general permit.
 33. The evidence¹⁹ shows that there is a limited number (11) of drawings and paintings by Paul Klee held in Canadian public institutions. If the Object were to be acquired by a public institution in Canada, it would be the third work from the 1930's by the artist in a public collection.
 34. In view of the international importance of the oeuvre of Paul Klee in art history and the rarity of drawings and paintings by Paul Klee 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

35. 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 authority in Canada might make a fair offer to purchase the object within six months after the date of the determination.²⁰

¹⁷ Paragraph 7(a) of the Act.

¹⁸ The Review Board may only direct a permit officer to issue an export permit in the situations described in subs. 29(4), 30(4) and 30(5), as well as in para. 29(5)(b).

¹⁹ Data retrieved from the Artefacts Canada database, available at https://app.pch.gc.ca/application/artefacts_hum/re_as.app?lang=en

²⁰ Subsection 29(5) of the Act.

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36. 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 – 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.
37. In support of its contention that no institution or public authority in Canada might make a fair offer to purchase the Object, the Applicant states that since the Object was consigned in 2007, it has been displayed both at the Applicant’s gallery during various in-house exhibitions, and at international trade fairs, but has nonetheless received no expressions of interest or offers to purchase from the directors, curators, or board members of any Canadian institution²¹.
38. The Review Board accepts the Applicant’s submission that the Object did not attract interest during that period. However, the Review Board is aware that institutions in Canada collect and exhibit works by Paul Klee. In addition, the Review Board’s past experience has demonstrated that an export delay can create opportunities for fund-raising for the acquisition of such objects by institutions and public authorities in Canada.
39. In *Heffel*, *Iris bleus* was sold at a public auction in Canada and the purchaser was not a public institution or public authority. However, once the Review Board established a delay period for the issue of an export permit in respect of the work, the Art Gallery of Ontario made an offer to purchase the work and was able to raise sufficient funding, including through a grant from the Department of Canadian Heritage²². It is possible that something similar would arise in relation to *Garten am Wasser*, and the Applicant has not provided sufficient evidence or rationale to negate such a possibility.
40. Considering the importance of the oeuvre of Paul Klee in the art history of the 20th century and the fact that institutions in Canada collect and exhibit his work, 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.

²¹ Applicant’s written statement dated May 6, 2022, at p. 3.

²² See <https://ago.ca/collection/object/2019/2268>

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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

41. 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.²³
42. The Review Board establishes a delay period of **four months**, ending **October 15, 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

43. In conclusion, the Review Board determines 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 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 four months ending **October 15, 2022**, during which it will not direct that an export permit be issued in respect of the Object.

For the Review Board

Sharilyn J. Ingram, Chair
Glen A. Bloom
Patricia Feheley
Jo-Ann Kane
Paul Whitney

²³ Paragraph 29(5)(a) of the Act.