

## REVIEW BOARD DECISION

May 20, 2022

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

Application No.: 0495-22-03-04-001 *Two Horses, 1965*, by Kadhim Hayder

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#### INTRODUCTION

1. Bonhams Canada (the Applicant) applied to the Canada Border Services Agency (CBSA) for an export permit to export the work *Two Horses, 1965*, oil on canvas, by Kadhim Hayder (the Object).
2. A permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to the Object.<sup>1</sup> The refusal was based on the advice of a representative of the Royal Ontario Museum (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 March 18, 2022, the Applicant requested a review of its application for an export permit<sup>2</sup> (the Request for Review) by the Canadian Cultural Property Export Review Board (the Review Board).
4. On April 5, 2022, and in response to a request by the Review Board, the Applicant filed a written statement in support of its Request for Review.
5. On April 13, 2022, the Review Board informed the Applicant of the establishment of a Board Panel to preside over this proceeding and requested that the Applicant advise whether it agreed with the statements on the webpage, for which a link was provided in the written statement of April 5, 2022. The Review Board also requested that the Applicant advise whether it would require an oral hearing.
6. On April 13, 2022, the Applicant confirmed its broad agreement with the statements provided on the website and advised that it would not require an oral hearing.
7. 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 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 4 months ending **September 20, 2022**, during which it will not direct that an export permit be issued in respect of the Object.

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<sup>1</sup> Subsection 13(1) of the *Cultural Property Export and Import Act* (the Act).

<sup>2</sup> Subsection 29(1) of the Act.

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#### ISSUES TO BE DETERMINED BY THE REVIEW BOARD

8. The Review Board is created by legislation and, as such, it only has the powers granted to it by its governing statute, the Act.
9. 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.<sup>3</sup>
10. 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.<sup>4</sup> The purpose of the delay period is to provide an institution or public authority in Canada with an opportunity to purchase the object.
11. 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.<sup>5</sup>

#### THE APPLICANT'S SUBMISSIONS

12. 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.
13. The Applicant submits 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, nor does it have a close association with a Canadian cultural tradition or way of life.

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<sup>3</sup> Subsection 29(3) of the Act.

<sup>4</sup> Subsection 29(5) of the Act.

<sup>5</sup> Subsection 29(4) of the Act.

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Specifically, the Applicant states that the Object was created in Iraq by an Iraqi artist who has no “ties to this region, he never exhibited or travelled to North America” and that the Object “only has significance for a very small cross section of Iraqi and Arab art enthusiasts who have an interest in the Modern Art of the Middle East, which is not a category with broad or international appeal.”<sup>6</sup>

14. The Applicant also submits 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 states that the Object “was brought into Canada [...] when the current owner relocated to Canada in 2014.” Moreover, the Applicant contends that “[w]hilst Canada has a vibrant and multicultural society with a significant Arab diaspora, there is a relatively small Iraqi community in Canada and the Iraqi diaspora has only recently moved to Canada due to conflict in the Middle East. Even within the Iraqi diaspora, Modern Art is not a significant or even noticeable feature of culture or national heritage – it is a movement very much confined to a small local niche within the Middle East.”<sup>7</sup>

**ANALYSIS*****Two Horses, 1965, by Kadhim Hayder***

15. The Object, *Two Horses*, is an oil on canvas, executed by Kadhim Hayder (1932-1985) in 1965. It measures 100 x 75 cm. It is signed and dated *K Hadar 1965* at the lower left.

**Whether the Object is included in the Control List**

16. 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.

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<sup>6</sup> Written statement submitted by the Applicant, April 5, 2022, p. 2.

<sup>7</sup> *Ibid.*

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17. In its written submissions, the Applicant states that the Object is included in the Group V 4(b) of the Control List.
  18. 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.<sup>8</sup>
  19. The Object is a painting 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**

20. 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.<sup>9</sup>
21. The Applicant submits that the Object is not of outstanding significance because it does not have an association with Canada's artistic, cultural, scientific or social history or with a Canadian cultural tradition or social history. The Applicant notes that most of the artist's work is collected by public institutions in the Middle East (Dubai, Beirut, Qatar). The Applicant also contends that "the study, scholarship, collection, exhibition and appreciation of Modern Art from the Middle East is very much an academic niche, and most of the activity is focused in the Gulf countries (Qatar, UAE)"<sup>10</sup> and argues that it would not be beneficial for the Object to remain in Canada, removed from its original culture, art and academic contexts. 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.
22. The Applicant notes that following the artist's return to Iraq, after studying at the Royal College of Art in London (1961–1962), he was "infused with a sense of pan-Arab identity"<sup>11</sup> and that his art practice was inspired by the Battle of Karbala, in which the Prophet Muhammad's grandson Hussein ibn Ali perished. This study resulted in a

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<sup>8</sup> Control List, section 4.

<sup>9</sup> Paragraphs 29(3)(b) and 11(1)(a) of the Act.

<sup>10</sup> Written statement submitted by the Applicant, April 5, 2022, p. 2.

<sup>11</sup> Written statement submitted by the Applicant, April 5, 2022, p. 1.

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series of paintings known as *Melhamet al-Shahid*, or *The Epic of the Martyr*. The Applicant contends that the Object is one of the paintings of the series.

23. The Applicant states that the Object was showcased at the exhibition “The Epic of the Martyr” at the Baghdad National Museum in 1965. The current owner acquired the Object in 1965 directly from the artist. The owner and the artist were friends and both members of the faculty of Fine Arts in Bagdad.
24. In its written submissions<sup>12</sup>, the Applicant provides a link to a webpage that relates to the Bonhams London auction sale (June 2, 2021) of *How He Wandered with the Heart of a Martyr*, another painting by Kadhim Hayder from the series “The Epic of the Martyr”. On this webpage, there is an analysis of the series by Saleem Al-Bahloly, PhD, which states that when showcased at the National Museum of Modern Art in Baghdad in April 1965, the series received instant critical acclaim for the manner in which the artist addressed the human condition in the aftermath of the Ba’ath coup (1963) and employed a modernist style while drawing visual motifs from the Iraqi popular culture. According to the author, the importance of “The Epic of the Martyr” was largely due to the fact that “it demonstrated how artists could represent modern experience by drawing upon their cultural history.”<sup>13</sup>
25. In a later written submission<sup>14</sup>, the Applicant confirmed that the intent of providing the link in the written statement of April 5, 2022 was to show with a comparable example the approximate value of the Object and provide some information on the artist. However, the Applicant pointed out that because the article was commissioned with the intention of marketing the comparable object for sale, there was a natural inclination to exaggerate and emphasize the importance of the artist within the wider Middle East art movement. Specifically, the Application drew the Review Board’s attention to the statement “[t]his attempt to go beyond the conventional materials of painting, in order to use the artwork to stage an experience that is not only visual but also emotive, makes ‘The Epic of the Martyr’ one of the earliest pieces of contemporary art in the Middle East.”<sup>15</sup> The Applicant explained that there were other artists in the region who were practicing contemporary art before Kadhim Hayder as far back as the 1940s and that, even within Iraq, the artist was considered a second-generation contemporary artist after Faeq Hassan, Jewad Salim and Shakir Hassan Al Said.

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<sup>12</sup> Written statement submitted by the Applicant, April 5, 2022, p. 2.

<sup>13</sup> [www.bonhams.com/auctions/26663/lot/14](http://www.bonhams.com/auctions/26663/lot/14)

<sup>14</sup> Additional statement by the Applicant, April 13, 2022.

<sup>15</sup> *Ibid.*

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26. Despite the series not being necessarily “one of the earliest pieces of contemporary art in the Middle East”<sup>16</sup>, the Object is a representative and fine example of the artist’s iconic series of paintings “The Epic of the Martyr”. In view of its political and metaphorical dimensions and Khadim Hayder’s modern approach to the series and his drawing from historical events and Iraqi popular culture, the Review Board concludes that public and scholarly access to the work would contribute to broadening the understanding of Middle East art, Iraqi modern art, Kadhim Hayder’s oeuvre in general, as well as this landmark series in particular.
27. Furthermore, sales evidence<sup>17</sup> from the past ten years shows consistent interest for the paintings from the series “The Epic of the Martyr”, and that these attain the highest values among works by the artist. Sales evidence of other works by the artist have also consistently acquired more value<sup>18</sup>. This increased interest attests to the importance of the artist and the interest of collecting, exhibiting, and studying his work as well as to the significance of paintings from this series in particular.
28. For the above reasons, the Review Board concludes that the Object is 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**

29. 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.<sup>19</sup>
30. 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.<sup>20</sup>

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<sup>16</sup> *Ibid.*<sup>17</sup> [www.artprice.com/artist/232237/kadhim-haidar/lots/pasts/1/painting?keyword=martyr&p=1](http://www.artprice.com/artist/232237/kadhim-haidar/lots/pasts/1/painting?keyword=martyr&p=1)<sup>18</sup> [www.artprice.com/artist/23237/kadhim-haidar/lots/pasts/1/painting?ipp=30&sort=datesale\\_desc](http://www.artprice.com/artist/23237/kadhim-haidar/lots/pasts/1/painting?ipp=30&sort=datesale_desc)<sup>19</sup> Paragraphs 29(3)(c) and 11(1)(b) of the Act.<sup>20</sup> *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82 at paragraphs 37 and 43.

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31. 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.
32. 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 considering it was imported into Canada only eight years prior to the filing of export permit application and considering the Object does not have a connection to Canada or to Canadian heritage.
33. 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*<sup>21</sup>, 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"<sup>22</sup>. Rather, an object can meet the degree of national importance "even if the said object or its creator have no direct connection to Canada."<sup>23</sup> The Court explained that because paragraph 11(1)(b) of the Act "is an open-ended provision", not a "mandatory recipe"<sup>24</sup>, 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.
34. The Review Board acknowledges that the Object was only recently imported into Canada, and that the Applicant failed to declare so in its permit application form.<sup>25</sup> However, this fact has no bearing on the Object's degree of value and importance, or its importance in the Canadian context.
35. Furthermore, 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

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<sup>21</sup> 2019 FCA 82.

<sup>22</sup> At paragraph 39.

<sup>23</sup> At paragraph 39.

<sup>24</sup> At paragraph 34.

<sup>25</sup> Written statement submitted by the Applicant, April 5, 2022, p. 1.

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years immediately preceding the date of the application and was not exported from Canada under a permit issued under the Act prior to that importation<sup>26</sup>, the Review Board has no such authority<sup>27</sup>. In Part I, under section B.36 of the *Application for Cultural Property Export Permit*, the Applicant indicated by error that the Object was not imported in the last 35 years. The CBSA permit officer decision to refer the application to an expert examiner for consideration was based on this incorrect information on the Object's importation to Canada supplied by the Applicant. The Applicant specified that there was an error when originally submitting the permit application after the notice of refusal was sent by the CBSA permit officer based on the advice of the Expert Examiner.

36. The evidence<sup>28</sup> shows that there are no artworks by Kadhim Hayder held in Canadian public institutions. If the Object were to be acquired by a public institution in Canada, it would be the only painting by the artist in a public collection.
37. In view of the importance of the oeuvre of Kadhim Hayder in Iraqi modern art, the art history of the Middle East, the modernist approach to recontextualizing the practice of mourning through poetry and theatrical re-enactments of the Battle of Karbala, in the series "The Epic of the Martyr", which includes the Object, the lack of Hayder's paintings in public collections in Canada, the excellent provenance of the Object, the Object's contribution to an understanding of Canada's diversity, specifically, the Iraqi and Middle Eastern diaspora, and Canadians' understanding of Middle Eastern cultures, and Iraqi modern art, as well as the importance of acquiring such Object to advance research on art of the Middle East, and modern Iraqi art, in particular, 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**

38. 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

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<sup>26</sup> Paragraph 7(a) of the Act.

<sup>27</sup> 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).

<sup>28</sup> Data retrieved from the Artefacts Canada database, available at [https://app.pch.gc.ca/application/artefacts\\_hum/re\\_as.app?lang=en](https://app.pch.gc.ca/application/artefacts_hum/re_as.app?lang=en)

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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.<sup>29</sup>

39. 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.
40. In its written statement dated April 5, 2022, the Applicant does not provide any information that may indicate whether a fair offer to purchase the Object might be made by any institution or public authority in Canada within six months after the date of the Review Board’s decision in the proceeding. In the absence of evidence to the contrary, the Review Board cannot assume that no institution or public authority in Canada would be interested in acquiring the Object. The Review Board is aware that institutions in Canada collect and exhibit contemporary and historical art from the Middle East. Two prominent institutions that do so are the Royal Ontario Museum and the Aga Khan Museum, both of Toronto, Ontario.
41. Considering the importance of the oeuvre of Kadhim Hayder in the Middle East art history and art history of the 20<sup>th</sup> century and the fact that institutions in Canada collect and exhibit contemporary and historical art of the Middle East, 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.

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

42. 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.<sup>30</sup>

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<sup>29</sup> Subsection 29(5) of the Act.

<sup>30</sup> Paragraph 29(5)(a) of the Act.

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43. The Review Board establishes a delay period of **four months**, ending **September 20, 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

44. 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 **September 20, 2022**, during which it will not direct that an export permit be issued in respect of the Object.

### For the Review Board

Glen A. Bloom  
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