

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0495-23-05-16-002

La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis

INTRODUCTION

1. On May 15, 2023, Christie's Canada Ltd. (the Applicant) applied¹ to the Canada Border Services Agency (CBSA) for a permit to export the work *La lutte de Jacob et l'ange [Les Lutteurs]* circa 1892-1893, oil on canvas (the Object), by Maurice Denis.
2. On June 6, 2023, 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 National Gallery of Canada (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 July 4, 2023, 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 July 15 and July 19, 2023, and in response to a request by the Review Board, the Applicant filed written statements in support of its Request for Review (Written Statements). The owner of the Object (the Owner) also provided her own statement (Personal Statement) dated July 13, 2023.
5. On August 23, 2023, and in response to a request by the Review Board, the Applicant advised the Review Board that it would like to make oral submissions to the Review Board.
6. A hearing was held on September 8, 2023 during which Brett Sherlock, International Consultant, and Anika Guntrum, International Director, Vice Chairman 20/21 Department - Paris, both employees of Christie's, made oral submissions on behalf of the Owner before the Review Board.
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 aesthetic qualities and value in the study of 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

¹ Application #0495-23-05-16-002.

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

³ Subsection 29(1) of the Act.

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0495-23-05-16-002

La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis

within six months of this decision. The Review Board therefore establishes a delay period of six months ending **March 29, 2024**, during which it will not direct that an export permit be issued in respect of the Object.

LEGISLATIVE FRAMEWORK

8. The Review Board is established by the Act. Included in its duties are that it must, “on request...review applications for export permits.”⁴
9. 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
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.⁶
11. 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

⁴ Subsection 20(a) of the Act.

⁵ Subsection 29(3) of the Act.

⁶ Subsection 29(5) of the Act.

⁷ Subsection 29(4) of the Act.

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT**Application No.: 0495-23-05-16-002*****La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis*****THE APPLICANT'S SUBMISSIONS**

12. The Object, *Les Lutteurs* is an oil on canvas, executed by Maurice Denis (1870-1943) in 1892-1893. It measures 45.7 x 36.8 cm. It is signed at the lower left *MAVD*.
13. The Applicant states that the Object was created in France and that it is included in the Control List under Group V, Objects of Fine Art, Section 4(b).⁸
14. The Applicant submits that the Object is not of “outstanding importance [significance] to Canada’s National Heritage”⁹ because “Maurice Denis was a French artist, not a Canadian artist. He had no connection to Canada in any way. The subject of the artwork is also not Canadian, nor is it Canada-inspired”.¹⁰
15. During the oral hearing, the Applicant further submitted that the Nabis, which included Maurice Denis, was influential in certain regions of France, particularly in Paris and Brittany. However, the Applicant was not aware of any Canadian artists who were active contemporaneously to the Nabis who may have been influenced by it, nor were they aware of any Canadian artists who may have interacted with Nabis artists in France. They also submitted that this particular work was an outlier for the artist, in that it did not feature his wife or otherwise fit into his personal narrative.
16. Furthermore, the Applicant submits that the Object has been on long-term loan to the Art Gallery of Ontario (AGO) since 2017 after being included in the AGO’s exhibition *Mystical Landscapes: Masterpieces from Monet, Van Gogh and More* in 2016-2017, the last time the Object has been on public view.¹¹ The Applicants further states that: “[t]he only other time *Les Lutteurs* was exhibited in a Canadian institution was in 2006, where it was part of the Montreal Museum of Art’s Maurice Denis exhibition, *Earthy Paradise*.¹²
17. The Applicant submits that “the Pont-Aven / Nabis works [including the Object] were not publicly exhibited more frequently because these kinds of works would not enhance any existing collection in any Canadian institution”.¹³

⁸ Application’s cultural property export permit application, Part II, at p. 3.⁹ Applicant’s written statement, dated July 19, 2023, at p. 2.¹⁰ *Ibid.*¹¹ Applicant’s written statement, at p. 3.¹² *Ibid.*¹³ *Ibid.*

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT**Application No.: 0495-23-05-16-002*****La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis***

18. In her Personal Statement, the Owner confirms that the Object “was initially lent to the AGO in 1974 and was kept in their vaults until about 1996 when it was returned to my [her] home”.¹⁴ According to the Owner, the Object was borrowed in 2006 by the Montreal Museum of Fine Arts [for the *Maurice Denis: Earthly Paradise* exhibition] and again by the AGO in 2016 for the *Mystical Landscapes* exhibition in Toronto and France. She also submits that the Object was briefly exhibited in the AGO’s main gallery in 2018 to replace works on display in the exhibition *Building a new world Impressionism in the Age of Industry*.
19. The Owner also states that over the years, she has offered to loan the Object to the AGO, the National Gallery in Ottawa and the Montreal Museum of Fine Art: “[e]xcept when it was part of two specific shows or to replace paintings that were in another show, there has been no interest in borrowing it. This suggests to me that the Directors and curators of Canada’s major museums do not have a specific interest in the painting”.¹⁵ The Applicant reiterated this point during the oral hearing.
20. Finally, during the oral hearing, the Applicant submitted that the option to purchase, rather than lend, the Object has not been made to any Canadian institution.

THE EXPERT EXAMINER’S REASONS FOR REFUSAL

21. In his reasons for refusal, the Expert Examiner indicated that the Object is of outstanding significance and national importance. The Expert Examiner stated that the Object is “exemplary of Denis’ art and of the Nabis movement” being “characteristic in terms of style, composition, palette and subject” and was included in major monographic exhibitions.¹⁶ The Expert Examiner notes also that there are only four paintings by Maurice Denis in Canadian public collections, the most important being *Landscape with Hooded Man*, 1903, in the National Gallery of Canada.

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

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

¹⁴ Owner’s personal statement, dated July 13, 2023, at p. 1.

¹⁵ *Ibid.*, at p. 2.

¹⁶ Expert Examiner’s letter, dated June 6, 2023, at p. 2.

REVIEW BOARD DECISION

September 29, 2023

**REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY
EXPORT PERMIT****Application No.: 0495-23-05-16-002*****La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis***

-
- 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.
23. The Applicant admits that the Object is included in the Control List under Group V, Objects of Fine Art, subsection 4(b). Subsection 4(b) applies to paintings or sculptures 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 \$30,000.00 CAN.¹⁷
24. The Review Board agrees that 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 Review Board also agrees that the Object's fair market value, as specified by the Applicant in its export permit application, exceeds \$30,000.00 CAN.
25. The Review Board therefore concludes that the Object is included in the Control List under Group V, Objects of Fine Art, subsection 4(b).

Whether the Object is of outstanding significance

26. 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.¹⁸
27. The Applicant contends that the Object is not of "outstanding importance" as Maurice Denis is not Canadian, has no connection to Canada, and the Object is not Canadian nor Canada-inspired.
28. The Act does not require that an object have a direct connection to Canada in order for it to be subject to export control.¹⁹ However, in order for an object to be considered of outstanding significance due to its close association with Canadian history, 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

¹⁷ Control List, section 4.

¹⁸ Paragraphs 29(3)(b) and 11(1)(a) of the Act.

¹⁹ *Heffel Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82, at para. 39 [*Heffel*].

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT**Application No.: 0495-23-05-16-002*****La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis***

association with, for example, a Canadian cultural tradition, spiritual practice, system of belief, or group or community. In this instance, the Review Board finds that the Object does not have a close association with Canadian history or national life.

29. The Review Board does, however, find that the Object is of outstanding significance by reason of its aesthetic qualities and value in the study of arts.
30. With respect to the Object's aesthetic qualities, the Review Board agrees with the Applicant's submission that the Nabis played an important role in the development of French and modern art. Denis was a key figure of the Nabis, his ideas of colour and form would inspire other movements and artists, through his art, as well as his writings including his manifesto, which spoke of the flatness of a canvas – a central idea of modern art.²⁰
31. The Review Board, however, recognizes that it is not the artist, but rather the object that must be of outstanding significance. The Board finds that the painting, in its painterly execution, concept and technique is of outstanding significance for its aesthetic qualities. The object in question displays a mastery of the handling of colour, form, and a sensibility to the subject matter. The flatness of the canvas, blocks of colour, and the treatment of the landscape shows several influences of the Nabis movement including decorative elements and Japanese art.
32. The Review Board further recognizes the aesthetic qualities of the Object in its subject matter. The Applicant submits that it was an outlier in the artist's work. The Review Board does not agree, and notes that Denis was often referred to as "*le nabi aux belles icônes*" and religion often influenced his work.²¹ The Review Board notes that the subject matter also reflects the 'woman in the garden' motif which was explored by both Denis and other Nabis artists.
33. The Review Board thus concludes that the Object demonstrates outstanding aesthetic qualities through its subject matter, execution, style, colour and technique.
34. With respect to the Object's value for the study of the arts, the Review Board notes again the important role that the Nabis played in the development of modern art. The

²⁰ Maurice Denis "*Définition du néo-traditionnisme*" (1890) *Art et critique*.

²¹ See for example Jean-Paul Bouillon, *Maurice Denis. Le spirituel dans l'art* (Paris: Gallimard, 2006) and Catherine Verleysen, *Maurice Denis et la Belgique, 1890-1930* (Leuven: Universitaire Pers Leuven, 2010).

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT**Application No.: 0495-23-05-16-002*****La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis***

Review Board also notes that the Object has been included in exhibitions and catalogues.

35. The Review Board notes the Object has contributed significantly to an understanding of the arts, as well as a technique, period, and tradition. The late 19th century was a seminal period in French painting that would impact not only the development of modern art in Europe but would have a lasting effect on art history.
36. The Review Board also notes the important period in which this artwork was created both in art history and in the work of the artist. The 1890s would see a break in the Salons of Paris, which would put in motion a repositioning and reawakening of art and its definitions. The Object was created during this upheaval in the artworld.
37. The Review Board also observes that the Object was created at an important time in the artist's career, coinciding with his marriage to his first wife, who would become an important muse in his work, his series *the Muses*, which depicted women in the landscape, and his collaborative work "Le Voyage d'Urien" written by Andre Gide.²² The Object is thus highly contextualized within the work of Nabis, the artist, and his personal life, which further contributes to its value in the study of the arts.
38. The Review Board thus 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

39. 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.²³
40. In determining whether an object meets these criteria, the Review Board is guided by the modern view of statutory interpretation, whereby the words of a statute must be

²² See for example Jean Cassou & Agnes Humbert, *Les Nabis et leur époque, 1888-1900* (Genève: Éditions Pierre Cailler, 1954) and Albert Kostenevitch, *Les Nabis* (New York: Parkstone International 2012).

²³ Paragraphs 29(3)(c) and 11(1)(b) of the Act.

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT**Application No.: 0495-23-05-16-002*****La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis***

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.²⁴

41. Consequently, the Review Board takes into consideration Parliament's intent that export controls should apply only to those objects "of the first order of importance",²⁵ and that a balance must be achieved between the desire to retain important cultural property in Canada without unduly interfering with the property rights of the owners of cultural property.²⁶
42. 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.²⁷
43. The Review Board also recognizes that 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.²⁸
44. Finally, 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.²⁹
45. As indicated above, the Applicant submits that the Object should "not be considered to be of any outstanding importance to Canada's National Heritage".

²⁴ *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.

²⁵ *House of Commons Debates*, (7 February 1975) at p. 3026.

²⁶ *Ibid.*

²⁷ *Request for review of a refused application for cultural property export permit: Aufstieg by Vassily Kandinsky* (March 23, 2023), CCPERB Decision, online: CCPERB <<https://www.ccperb-cceebc.gc.ca/en/review-of-refused-export-permits/decisions/aufstieg.html>>

²⁸ *Heffel*, at para 37.

²⁹ *Heffel*, at paras. 37 and 43.

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT**Application No.: 0495-23-05-16-002*****La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis***

46. An Artefacts Canada report indicates that there are currently only four paintings by Denis held in Canadian public institutions,³⁰ which indicates the Object's rarity.
47. The Review Board does not agree with the Applicant's submission that the Nabis movement was only influential in regions of France, but not Canada. The Review Board finds that the Object is of national importance for its research value, rarity, and strong contextual associations to Canada.
48. The influence of French painting on the development of modern art is well documented. There has also been substantial research on the connection between French painting of the 19th and 20th century, European modernism and Canadian art history. A number of exhibitions in Canada have also explored these connections.³¹ An example of this connection is the influence that modernist painterly approaches and symbolist strategies had on Canadian artists such as the Group of Seven.
49. The Review Board also finds that this geographical area influenced Canadian artists who travelled to, visited salons, and saw exhibitions in Europe during the relevant period. Emily Carr is such an example. Her time in Brittany and France has been well documented and has been the subject of exhibitions.³²
50. Further the Review Board notes the research value of the Object. It was exhibited in the groundbreaking exhibition, *Mystical Landscapes* in 2017. This exhibit sought to challenge the blockbuster exhibition archetype and contribute to the field in new ways. It included Canadian artists alongside European ones, such as Carr, Varley

³⁰ Data retrieved from the Artefacts Canada database, available at https://app.pch.gc.ca/application/artefacts_hum/re_as.app?lang=en. A copy of this report was provided to the Applicant on August 28, 2023 with an invitation to make submissions with respect to the report. The Applicant did not make any submissions in respect of this report.

³¹ See for example Angela Smith, "Fauvism & Cultural Nationalism" (2002) 4:1, *International Journal of Postcolonial Studies* 35. Here Angela Smith argues that Paris as the centre for avant garde of the early 20th century helped to fuel a climate for artists and writer from British Colonies to develop their own national identity. The connection has also been the subject of exhibitions. See for example *Affinities: Canadian Artists and France* (Vancouver Art Gallery, 2019), as well as the internationally touring exhibition *Canada & Impressionism: New Horizons* (National Gallery of Canada, 2020).

³² See for example Kathryn Bridge, "Emily Carr in Brittany: Moment of Artistic Breakthrough" (2019) *National Gallery of Canada Magazine*, available at <https://www.gallery.ca/magazine/your-collection/emily-carr-in-brittany-moment-of-artistic-breakthrough>. See also the exhibition *Emily Carr Fresh Seeing: Modernism and the West Coast* (Audain Gallery, 2020).

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT**Application No.: 0495-23-05-16-002*****La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis***

and Harris. The Object was also exhibited in Canada in 2006 and 1969, further underscoring its research value.³³

51. In view of reasons its rarity, contextual associations, and research value, 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

52. 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.³⁴
53. 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.
54. As indicated above, the Owner submitted that “[d]irectors and curators of Canada’s major museums do not have specific interest in the Object” because these institutions did not take the Owner up on the offer to loan the Object. The Review Board does not find this to be a reliable indicator as to whether an institution or public authority might make a fair offer to purchase the Object, as a loan is different than an acquisition.
55. Based on the Applicant’s submission, the Object has never been offered for acquisition, either by sale or donation, to a Canadian institution.
56. While the Review Board recognizes that French works of the 19th Century are not collected by every institution in Canada, it notes that there are both large and small

³³ In addition to the exhibitions listed in the submission that included the work of Denis, see also *Maurice Denis: Journeys* (National Gallery of Canada Library & Archives: 2010), an exhibition of his lithographs.

³⁴ Subsection 29(5) of the Act.

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0495-23-05-16-002

La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis

museums and galleries in Canada with 19th century European and Canadian collections who employ experts in these fields.

57. The Review Board also recognizes the rarity of the Object, in that there are only four in Canadian collections, which increases the likelihood that an institution might make a fair offer on the Object.
58. Therefore, 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

59. 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.
60. The Review Board establishes a delay period of six months, ending March 29, 2024, 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

61. 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 six months ending **March 29, 2024**, during which it will not direct that an export permit be issued in respect of the Object.

REVIEW BOARD DECISION

September 29, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0495-23-05-16-002

La lutte de Jacob et l'ange [Les Lutteurs], circa 1892-1893, by Maurice Denis

For the Review Board

Joanne Stober, Chair
Daniel Chouinard
Tzu-I Chung
Laurie Dalton
Patricia Feheley
Jo-Ann Kane
Susan Mackenzie
Paul Whitney