

REVIEW BOARD DECISION

July 19, 2021

REQUEST FOR CONFIDENTIALITY ORDER IN CONTEXT OF REVIEW OF APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT**Application No.: 0495-20-10-23-003 *Tête de Marguerite* by Henri Matisse**

INTRODUCTION

1. Sotheby's Canada Inc. (the Applicant) applied to the Canada Border Services Agency (CBSA) for an export permit to export the work *Tête de Marguerite* by Henri Matisse (the Object).
2. A permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to the Object. 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 May 26, 2021, the Applicant requested a review by the Canadian Cultural Property Export Review Board (the Review Board) of its refused application for an export permit. On that date, the Applicant also filed a confidentiality request (the Confidentiality Request).
4. In support of its Confidentiality Request, the Applicant made submissions in the form of two written statements, the first of which was accompanied by two affidavits.
5. This decision addresses the merits of the Confidentiality Request.

ISSUES TO BE DETERMINED BY THE REVIEW BOARD

6. The Applicant asks that the name and residential address of the owner of the Object be redacted from the public record and not be included in the public version of the Review Board's reasons for decision on the request for review of the refused application for an export permit.
7. The open-court principle is protected by the constitutionally-entrenched right of freedom of expression. It requires that the Review Board's hearings in export matters and the documents filed in support of those matters be publicly available. While the Review Board has the authority to limit the public's access to its hearings and records, it may only do so in accordance with the principles set out in *Sherman Estate v. Donovan*, 2021 SCC

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25, and *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41.¹

8. Those cases set out that the person asking a court or administrative agency to exercise its discretion to limit the public's access to proceedings or records must establish that (1) the public nature of the proceedings poses a serious risk to an important public interest, (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk, and (3) as a matter of proportionality, the benefits of issuing the order outweigh its negative effects. Only where all three prerequisites have been met can the Review Board issue the order sought by the Applicant.

APPLICANT'S POSITION

9. First, the Applicant submits that the owner has a privacy interest in maintaining her anonymity and has a reasonable expectation of privacy in relation to the contents of her home. The Applicant further contends that the owner's privacy and security interests would be at risk if her name and address were disclosed, because she would be the subject of unsolicited inquiries from the art world and media, and because she could be targeted by thieves who would be interested in the Object but also other valuables in her home. The Applicant maintains that the owner's name and address reveal personal and intimate biographical details about her which warrant protection.
10. Second, the Applicant also argues that its commercial interests are at risk. Specifically, the Applicant submits that it promises its clients confidentiality throughout the sale process, an industry-wide standard, and that the practice would be at serious risk if the owner's name and address were made public.
11. Finally, the Applicant argues that the benefits of treating the information in issue as confidential outweigh any of its negative effects. The owner's name and address have no bearing on the issues to be decided and nobody has expressed interest in that information. As such, the issuance of a sealing order would have no negative effects.

¹ See also *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76.

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ANALYSIS

12. The Review Board is of the view that the Applicant has failed to establish that the privacy and commercial interests identified are important public interests which would be seriously at risk if a confidentiality order were not issued.
13. According to *Sherman*, an individual's privacy interest only has a public dimension when that interest is predicated on human dignity. In other words, a person's privacy may be a matter of public concern only when the dissemination of personal information would "occasion an affront to their dignity that society as a whole has a stake in protecting".² Embarrassment and inconvenience are not enough to make the interest a public one.
14. In addition, according to *Sherman*, dignity is at serious risk only where the information that would be disseminated is sufficiently sensitive to strike at an individual's biographical core and threaten his or her integrity. Stigmatized medical conditions, stigmatized work, and sexual orientation have been accepted by the courts as important public interests which warrant protection.
15. In the present matter, the Review Board finds that the Applicant has failed to establish that the owner's name and address strike at her biographical core and that their dissemination would occasion an affront to her dignity. In addition, the fact that the owner could be the subject of unsolicited inquiries from the art world and media is precisely the kind of embarrassment and inconvenience which the Supreme Court of Canada has stated are insufficient to warrant limiting the public's access to the courts.
16. While the Review Board accepts that the public has an interest in protecting the owner's physical safety and security, the Applicant has not demonstrated that her security would be at risk if her name and address were known. Rather, the Review Board finds that the Applicant has made precisely the kind of speculative assertions the Supreme Court of Canada in *Sherman* stated were insufficient to warrant protective measures limiting the open court.³
17. With respect to the identified commercial interest, the Review Board concludes that the Applicant has failed to show that the interest is public in nature, i.e. that there is a general

² *Sherman*, at para. 33.

³ *Sherman*, para. 98.

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public interest in protecting an auction house's commitment to its clients to sell their luxury items and works of art confidentially. Rather, the Review Board finds that the argument is akin to the type of private interest specific to the Applicant which the Supreme Court of Canada in *Sierra Club* stated is insufficient to warrant limitations on the open court.

18. Further, even if the Review Board had concluded that the commercial interest had a public dimension, it would have found that the Applicant had failed to explain how the disclosure of the owner's name and address in this single matter would constitute a "serious threat"⁴ to its commercial practice as a whole.
19. As the first prerequisite to limiting the open court has not been met, there is no need to consider whether alternative measures could prevent the serious risk alleged or whether the benefits of a confidentiality order would outweigh its negative effects.

CONCLUSION

20. For these reasons, the Applicant's Confidentiality Request is denied.

For the Review Board

Sharilyn J. Ingram, Chair
Tzu-I Chung
Laurie Dalton
Madeleine Forcier
Theresa Rowat
Paul Whitney

⁴ *Sierra Club*, at para. 54.