

REVIEW BOARD DECISION

January 26, 2024

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0495-23-09-06-001

A group of 100 “mammoth plate” albumen print photographs, 1861-1870
by Carleton E. Watkins

INTRODUCTION

1. On September 5, 2023, Christie’s Canada Ltd. (the Applicant) applied¹ to the Canada Border Services Agency (CBSA) for a permit to export 92 separate photographic images by Carl[e]ton E. Watkins² (Watkins) later described as a group of 100 “mammoth plate” albumen print photographs, 1861-1870, by Carleton E. Watkins³ (collectively the Object).
2. On October 2, 2023, a permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to the Object.⁴ The refusal was based on the advice of a representative of the Art Gallery of Ontario (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 October 20, 2023, the Applicant requested a review of its application for an export permit⁵ (the Request for Review) by the Canadian Cultural Property Export Review Board (the Review Board).
4. On November 11 and 12, 2023, and in response to a request by the Review Board, the Applicant filed written statements (collectively the Written Statement) in support of its Request for Review.
5. On November 14, 2023, the Applicant advised the Review Board that it would like to make oral submissions to the Review Board.
6. A hearing was held on December 14, 2023 during which Darius Himes, Deputy Chairman, International Head of Photography, Christie’s New York, made oral submissions on behalf of the Applicant before the Review Board.

¹ Application #0495-23-09-06-001.

² Applicant’s email, dated October 20, 2023.

³ Applicant’s written statement, dated November 12, 2023, at p. 1.

⁴ Subsection 13(1) of the *Cultural Property Export and Import Act* (the Act).

⁵ Subsection 29(1) of the Act.

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7. For the reasons that follow, the Review Board finds that the Object is included in the *Canadian Cultural Property Export Control List* (the Control List), is of outstanding significance by reason of its aesthetic qualities and value in the study of the arts. However, the Review Board finds that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.
 8. The Review Board’s decision was sent to the Applicant on December 15, 2023, with notification that these reasons would follow.
 9. Additionally, and in accordance with subsection 29(4) of the Act, on December 15, 2023 the Review Board directed that a permit officer at the CBSA issue an export permit forthwith in respect of the Object.

LEGISLATIVE FRAMEWORK

10. The Review Board is established by the Act. Included in its duties are that it must, “on request...review applications for export permits.”⁶
11. 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.⁷
12. 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

⁶ Subsection 20(a) of the Act.

⁷ Subsection 29(3) of the Act.

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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.⁸

13. 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.⁹

THE APPLICANT'S SUBMISSIONS

14. The Object is a grouping of photographs consisting of 97 individual and one 3-part triptych loose, mounted, “mammoth plate” albumen prints. The negatives from which these albumen prints were made were all created between 1861 and 1867. Each photographic mount measures 67.5 x 53.6 cm. Each albumen print measures 52 x 38.7 cm and each have calligraphic titles under the photograph. The Object has been part of the British Columbia Archives (amalgamed with the Royal British Columbia Museum in 2003) for 110 years.
15. The Applicant states in its Written Statement that: “[t]hese particular photographic prints were originally part of a custom-made souvenir album produced for an unidentified patron”. This album contained these 100 prints and is titled: *SOUVENIRS D'UNE TOURNEE A TRAVERS LA CALIFORNIE ET L'OREGON, 1871* [MEMORIES OF A TOUR THROUGH CALIFORNIA AND OREGON, 1871]. Furthermore, the Applicant states that this album was disbound at an unknown date.¹⁰
16. The Applicant further states that the Object was made in the Western United States of America, outside of Canadian territory and as such the prints “are not included in the Control List”.¹¹ However, in the form “Application for Cultural Property Export Permit”, the Applicant indicated that the Object – or each individual print, is under Group VII, Textual Records, Graphic Records and Sound Recordings, subsection 9(d), a photograph made outside the territory that is now Canada, that has a fair market value in Canada of more than \$2,000.¹²

⁸ Subsection 29(5) of the Act.

⁹ Subsection 29(4) of the Act.

¹⁰ Applicant's written statement, dated November 12, 2023, at p. 3.

¹¹ Applicant's written statement, dated November 12, 2023, at p. 6.

¹² Applicant's cultural property export permit application, Part II, at p. 2 to 6 and appendix.

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17. The Applicant does not address directly in its Written Statement if the Object is of outstanding significance and national importance. In this section of the statement, the Applicants states that Watkins spent most of his life in the United States of America (San Francisco, California) “traveling extensively throughout the American [W]est for work as a photographer but never once setting foot in Canadian territories”.¹³
 18. The Applicant submits that the prints constituting the Object are “exemplary examples” however, “they are not the only ones in Canadian Institutions”. The Applicant lists three institutions in Canada that currently hold Watkins mammoth plate albumen prints: the “Centre Canadien d’Architecture [sic] [Canadian Centre for Architecture], Montreal (119 examples), the National Archive [sic] [Library and Archives Canada] in Ottawa (13 examples) the National Gallery of Canada, Toronto [sic] [Ottawa] (3 examples)”.¹⁴
 19. In addition to these institutions, the Applicant notes that another album from the British Columbia Archives collection, with the same provenance, is in the process of being gifted to a museum in Montreal. This album known as the *Sidebotham* album is intact and comprised of 15 “similar mammoth plate” prints by Watkins taken in Yosemite Valley, California, and 10 of the American West by other American photographers, plus 5 photographs by William Notman and other material relating to Eastern Canada.
 20. During the oral hearing, the Applicant submitted that the Object is indeed comprised of 100 individual albumen prints, and that the permit application has been submitted for 92 photographs (including triptychs), as listed in the spread sheet in appendix to the application form. The Applicant reaffirmed that the Object should not be considered as a group or a collection but as individual works within what is now a disbound album, the album being disbound in the past decades. If exported, the Applicant confirmed that the prints would be marketed individually during a single auction sale.
 21. Furthermore, the Applicant submitted again that these prints are not on the Control List since the Control List “does not include archives”. The Applicant described the prints as being in pristine condition since they have not been exhibited during the 110 years they have been in the British Columbia Archives in Canada. Such condition for

¹³ Applicant’s written statement, dated November 12, 2023 at p. 6.

¹⁴ *Ibid.*

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mammoth plate albumen prints from this early period in photography history renders the Object of “incredible” quality.

22. Finally, during the oral hearing, the Applicant stated again that major Canadian institutions, as identified in its Written Statement, have a significant number of prints by Watkins, in various formats, including mammoth plate albumen prints, citing the example of the Canadian Centre for Architecture in Montreal holding more than one hundred prints.

THE EXPERT EXAMINER’S REASONS FOR REFUSAL

23. In his reasons for refusal, the Expert Examiner indicated that the prints are of outstanding significance and national importance. The Expert Examiner stated that they are of outstanding significance for “their aesthetic qualities, condition and scale” and of national importance because “[t]here are very few Watkins works in Canadian art museums, particularly landscape view of some of his most renown compositions of this scale and quality”.¹⁵

ANALYSIS

Whether the Object is included in the Control List

24. 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.
25. The Applicant makes conflicting submissions as to whether the Object is included in the Control List. In its written statement, it submits the Object is not in the Control List. However, in its export permit application, it submits that the Object is included in the Control List under Group VII, Textual Records, Graphic Records and Sound Recordings, subsection 9(d). Subsection 9(d) applies to a photograph made outside

¹⁵ Expert Examiner’s justification, dated September 29, 2023, Cultural Property Export Permit Application, Part II at p. 6.

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the territory that is now Canada, and that has a fair market value in Canada of more than \$2,000 CAN.¹⁶

26. The Review Board agrees that the Object is comprised of photographs that were 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 fair market value or the individual albumen prints, as specified by the Applicant in its export permit application, exceeds \$2,000.00 CAN.
27. However, the Review Board does not agree that the Object should be assessed as a group of individual photographs.
28. The Control List also applies to a collection of associated photographs made outside the territory that is now Canada that has a fair market value in Canada of more than \$10,000.¹⁷
29. The Review Board finds that the 100 photographs are a collection of associated photographs made outside the territory that is now Canada. As described by the Applicant, this specific group of prints were originally presented in a bound album. The photographs are also visually and thematically related and were made by the same creator – Watkins. As such, the Object is included in the Control List.

Whether the Object is of outstanding significance

30. 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
31. The Applicant contends that Watkins is not Canadian, has no connection to Canada, and the Object is not comprised of any Canadian landscapes.

¹⁶ Control List, Group VII, s.9(d).

¹⁷ Control List, Group VII, s.9(e).

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

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32. 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 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.
 33. 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.
 34. With respect to the Object’s aesthetic qualities, the Review Board agrees with the expert examiner that the mammoth plate albumen prints are excellent examples of Watkins’ work. Watkins is considered one of the most important American photographers of the time and the Object is a sublime testament to his skill as a photographer and printer. The excellent condition and scale of the Object further adds to its aesthetic qualities.
 35. With respect to the Object’s value for the study of the arts, the Review Board notes Watkins’ important contribution to the field and practice of photography. A leader and pioneer in documenting the vast wilderness of the West, Watkins’ first images of Yosemite brought him worldwide acclaim and were groundbreaking technically and artistically. His photographic talent was recognized in 1868, when he was awarded a medal for landscape photography at the Paris International Exposition, and the Medal of Progress in Vienna in 1873.
 36. Watkins’ technical and artistic mastery are on full display in the Object. The arduous process of capturing the images in the wilderness, combined with the skillful photographic capturing of light and tone make these works seminal to the history of photography.
 37. The Review Board thus concludes that the Object is also of outstanding significance for its value in the study of the arts.

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

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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

38. 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.²⁰
39. 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 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.²¹
40. 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”,²² 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.²³
41. 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.²⁴
42. 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

²⁰ Paragraphs 29(3)(c) and 11(1)(b) of the Act.

²¹ *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.

²² *House of Commons Debates*, (7 February 1975) at p. 3026.

²³ *Ibid.*

²⁴ *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>>

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importance is however a separate analysis involving different considerations than the determination of outstanding significance.²⁵

43. 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.²⁶
44. As indicated above, the Applicant submits that Watkins has no connection with Canada and that a number of similar mammoth plate albumen prints by Watkins are already in collections in Canada.
45. The Review Board finds that the Object is of not of national importance.
46. Although the Review Board is appreciative of the artistic, technical and research value of the Object, it recognizes that the Object is not the only example of Watkins' work available in Canadian holdings. As has been previously noted, another album of Watkins' work with the same provenance as the Object is in the process of being gifted to a museum in Montreal. In addition, several other institutions in Canada hold exemplars of Watkins' mammoth plate albumen prints. Thus, the loss of this one collection of Watkins' prints from Canadian holdings will not entirely prevent Watkins' work from being studied and appreciated in Canada.
47. Moreover, the Review Board also notes that the prints that make up the Object are geographically focused on the United States and lack any connection to Canada. This lack of a connection to Canada further weakens the Object's significance to Canada's national heritage.
48. In view of the above, and on the basis of the evidence before it, the Review Board concludes that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.

²⁵ *Heffel*, at para 37.

²⁶ *Heffel*, at paras. 37 and 43.

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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

49. Since the Review Board concludes that the Object is not of national importance, it is unnecessary for the Review Board to form an opinion on whether an institution or public authority in Canada might make a fair offer to purchase the Object.

CONCLUSION

50. In conclusion, the Review Board determines that the Object is included in the Control List and is of outstanding significance by reason of its aesthetic qualities and value in the study of the arts. However, the Review Board determined that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. As a result, and in accordance with subsection 29(4) of the Act, the Review Board has directed a permit officer at the CBSA to issue an export permit forthwith in respect of the Object.

For the Review Board

Joanne Stober, Chair
Monte Clark
Patricia Feheley
Susan MacKenzie
Paul Whitney