

REVIEW BOARD DECISION

January 26, 2024

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application #0428-23-08-28-002

A painting by John Singer Sargent, *Pressing the Grapes; Florentine Wine Cellar*, circa 1882, and a pastel by Jules Tavernier, *Indian Village in British Columbia*, 1882

INTRODUCTION

1. On August 24, 2023, Sotheby's Canada Inc. (the Applicant) applied¹ to the Canada Border Services Agency (CBSA) for a permit to export two works of art (collectively, the Objects), *Pressing the Grapes; Florentine Wine Cellar* (the Painting), circa 1882, by John Singer Sargent (Sargent), and *Indian Village in British Columbia* (the Pastel), 1882, by Jules Tavernier (Tavernier).
2. On October 19, 2023, a permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to the Objects.² The refusal was based on the advice of representatives of the Art Gallery of Ontario, who determined the Objects were of outstanding significance, and met the degree of national importance set out in the *Cultural Property Export and Import Act* (the Act).
3. On November 6, 2023, the Applicant requested a review (the Request for Review) of its application for an export permit³ by the Canadian Cultural Property Export Review Board (the Review Board) with respect to the Objects.
4. On November 22, 2023, and in response to a request by the Review Board, the Applicant filed a written statement (the Written Statement) in support of its request to review and advised the Review Board that it would not require an oral hearing.
5. On November 27, 2023, the Review Board invited the Applicant to comment on the rarity of works by Sargent and Tavernier in collections in Canada based on information set out in the Artefacts Canada database.
6. On December 2, 2023, in response to the Review Board's request, the Applicant filed a statement (the Rarity Statement) with respect to the rarity of works by Sargent and Tavernier in collections in Canada.

¹ Application #0428-23-08-28-002.

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

³ Subsection 29(1) of the Act.

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7. Seven members of the Review Board met on December 8, 2023 to consider the Request for Review. The Request for Review proceeded based on the written submissions alone.
8. For the reasons that follow, the Review Board finds that the Objects are included in the *Canadian Cultural Property Export Control List* (the Control List) and are of outstanding significance and national importance. The Painting by Sargent is of outstanding significance by reason of its aesthetic qualities. The Pastel by Tavernier is of outstanding significance by reason of its close association with Canadian history, close association with national life, and aesthetic qualities. The Review Board also finds that the Objects are of such a degree of national importance that their individual loss to Canada would significantly diminish the national heritage. Furthermore, the Review Board finds that an institution or public authority in Canada might make a fair offer to purchase either of the Objects within six months of this decision. With respect to the Painting by Sargent, the Review Board has established a delay period of **six (6) months** ending on **July 26, 2024**, during which it will not direct that an export permit be issued in respect of the Painting. With respect to the Pastel by Tavernier, the Review Board has established a delay period of **four (4) months** ending on **May 26, 2024**, during which it will not direct that an export permit be issued in respect of the Pastel.

LEGISLATIVE FRAMEWORK

9. The Review Board is established by the Act. Included in its duties are that it must, “on request...review applications for export permits.”⁴
10. In its review of an application for an export permit, the Act stipulates that the Review Board must determine whether an object:
 - a) is included in the Control List;

⁴ Subsection 20(a) of the Act.

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- 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

11. If the Review Board determines that an 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

12. If the Review Board determines that an 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

THE APPLICANT'S SUBMISSIONS

13. The Objects are as follows:

- a. *Pressing the Grapes; Florentine Wine Cellar* is an oil on canvas, executed by John Singer Sargent (1856–1925) in 1882. The Painting measures 61 x 48.2 cm.
- b. *Indian Village in British Columbia* is a pastel on paper laid down on paper that is mounted on stretcher, executed by Jules Tavernier (1844–1889) in 1882. The Pastel measures 61 x 106.6 cm.

⁵ Subsection 29(3) of the Act.

⁶ Subsection 29(5) of the Act.

⁷ Subsection 29(4) of the Act.

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14. The Applicant states that the Objects were created in Florence, Italy (for the Painting by Sargent) and in British Columbia, Canada (for the Pastel by Tavernier).⁸ The Applicant submits that the Painting is included in the Control List under Group V, Objects of Fine Art, Section 4(b) and the Pastel is included in the Control List under Group V, Objects of Fine Art, Section 4(a).⁹
15. In its Written Statement, the Applicant states that the Objects are of not outstanding significance and national importance.
16. The Applicant noted that the Painting, *Pressing the Grapes; Florentine Wine Cellar* is overall “dark, murky and difficult to read, even in person at close inspection”¹⁰ when referring to its aesthetic qualities. Furthermore, the Applicant states that “the most influential works [by Sargent] from this period were of Spanish or Venetian subjects, not Florentine”¹¹ such as *El Jaleo*, 1882, a monumental painting based on drawings he made in southern Spain in 1879. With respect to its value in the study to the arts, the Applicant notes that contrary to *El Jaleo* and other works by Sargent, *Pressing the Grapes* was not exhibited at the London Fine Art Society exhibition of 1882.
17. With respect to national importance, the Applicant agrees with the Expert Examiner that Sargent’s oeuvre cannot be understood without representation from this period; however, the Applicant does not consider *Pressing the Grapes; Florentine Wine Cellar* to be one of the best works to represent this specific period. The Painting has been in the collection of the Beaverbrook Art Gallery since 1954 and since that time it has been exhibited only twice in Canada, and only in the context of the Beaverbrook collection. The Applicant states that “[w]e do not feel that this work is of such national importance that its export from Canada would diminish our cultural patrimony”.¹²
18. With respect to the outstanding significance of the Pastel, *Indian Village in British Columbia*, in its Written Statement, the Applicant agrees that this work “has value as a European document of contact with Indigenous peoples in Canada, yet this value is

⁸ Applicant’s written statement dated November 22, 2023, at p. 1 and p. 6.

⁹ Applicant’s cultural property export permit application, Part II, at p. 2, and Applicant’s written statement dated November 22, 2023, at p. 4 and p. 8.

¹⁰ Applicant’s written statement dated November 22, 2023, at p. 4 and p. 5.

¹¹ Applicant’s written statement dated November 22, 2023, at p. 5.

¹² *Ibid*

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diminished given the lack of site specificity or an indication of which Indigenous nation is depicted”.¹³ The Applicant also states that the work shows sections that are unfinished, such as the village itself, making it one of the artist’s “weaker works”.

19. With respect to national importance of the Pastel, the Applicant recognizes that works by Tavernier may be rare in Canada, however, this specific work had “minimal visibility” and Tavernier’s oeuvre in general has not been the subject of scholarly interest in Canada.¹⁴
20. Furthermore, in the Rarity Statement, the Applicant compares the Objects to another painting by Sargent, *San Vigilio, Lake Garda*, 1913, and another pastel by Tavernier, *Village of Skidegate, British Columbia*, 1882, both in the Beaverbrook Art Gallery collection together with the Objects. The Applicant explains how these two other works are stronger compositions than the Objects, concluding that if the word rarity is defined as “singular”, “one-off”, “a gem”, it would apply to *San Vigilio, Lake Garda* and *Village of Skidegate, British Columbia* but not to the Objects.¹⁵

ANALYSIS

Whether the Object is included in the Control List

21. 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.
22. The Applicant admits that the Painting, *Pressing the Grapes; Florentine Wine Cellar* 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

¹³ Applicant’s written statement dated November 22, 2023, at p. 8.

¹⁴ Applicant’s written statement dated November 22, 2023, at p. 9.

¹⁵ Applicant’s rarity statement dated December 2, 2023, at p. 3.

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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.¹⁶

23. The Applicant submits that the Pastel, *Indian Village in British Columbia* is included in the Control List under Group V, Objects of Fine Art, subsection 4(a). Subsection 4(a) applies to drawings or prints 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 \$15,000.00 CAN
24. The Review Board agrees that the Painting, *Pressing the Grapes; Florentine Wine Cellar*, 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 fair market value of the painting, as specified by the Applicant in the export permit application, exceeds \$30,000.00 CAN. The Review Board therefore concludes that the Painting is included in the Control List under Group V, Objects of Fine Art, subsection 4(b).
25. With respect to the Pastel, the Review Board notes that although the Applicant has agreed that the Pastel was made in British Columbia, it applied for an export permit under Group V, Objects of Fine Art, subsection 4(a), which is reserved for objects of fine art that are made outside the territory that is now Canada. In the year the Pastel was created, 1882, British Columbia was part of the territory that is now Canada. Although the precise location of the subject matter of the Pastel is not identified, the view is similar to visual depictions of totem formations from the mid to late 1800s along the Northwest coast including sites like Masset Village frontal poles and Tlingit Community House. Other works by Tavernier, such as another pastel titled *Village of Skidegate, British Columbia*, have been identified as being created within the same region. As such, the Review Board finds that the Pastel was created on-site in British Columbia and therefore Group V, Objects of Fine Art, subsection 4(a) is not applicable.

¹⁶ Control List, section 4.

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26. Instead, the Review Board finds the Pastel is included in the Control List under Group V, Objects of Fine Art, paragraph 3(1)(a). Paragraph 3(1)(a) applies to drawings or prints made within or 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, that have a fair market value in Canada of more than \$7,500.00 CAN, and that meet one of the requirements of paragraph 3(2)(b). Per paragraph 3(2)(b), Objects referred to under paragraph 3(1) must also

(a) have been commissioned by a person who at any time ordinarily resided in the territory that is now Canada,

(b) incorporate a Canadian theme or subject, or

(c) be identified with a prominent person, institution or memorable event that relates to the art history, history or national life of Canada.

27. The Review Board finds all of the requisite elements of Group V, Objects of Fine Art, paragraph 3(1)(a) have been met – the Pastel was made within the territory that is now Canada, the fair market value of the pastel, as specified by the Applicant in the export permit application, exceeds \$7,500.00 CAN, and per paragraph 3(2)(b), it incorporates a Canadian theme or subject, namely a First Nation settlement. Thus, the Pastel is subject to the Control List.

Whether the Object is of outstanding significance

28. 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.¹⁷ As noted earlier, the Applicant disputes that the Objects are of outstanding significance.

¹⁷ Paragraphs 29(3)(b) and 11(1)(a) of the Act.

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29. The Review Board determines the Painting by Sargent is of outstanding significance by reason of its aesthetic qualities.
30. The Painting depicts the grape pressing, an important moment in winemaking. The fresh grapes are brought in from the fields and must be crushed immediately. The urgency of the task is captured in this lively painting. The raking exterior daylight pierces the gloom of the building interior, leading the eye past a figure straining against a weight and captures the figure working to turn the wheel. This figure might be lost in the dark except for the bright spot of light reflecting from the window off the handle of the crushing device. Fully loaded brushstrokes add to the sense of urgency as does the fact that the artist does not fully finish the right side of the building. It is a fully developed, dynamic painting of considerable aesthetic importance.
31. In addition, the Painting is an important painting in the study of the artist's career as it captures fully the exuberance and influences of trip he had recently made to Spain and Italy.
32. The Painting dates to the early 1880s, a period following a seminal trip taken by Sargent to Spain, where he was able to study the works of many artists. Perhaps the most apparent influence on Sargent's style was that of Spanish painter Diego Velazquez. This influence is apparent in the Painting, as well as other works by Sargent from the same period. Close to the same time as his trip to Spain, he also visited Italy, which also inspired many of his paintings, including the Painting.
33. For the above reasons, the Review Board concludes that the Painting is of outstanding significance for its aesthetic qualities.
34. With respect to the outstanding significance of the Pastel by Tavernier, the Review Board determines that the Pastel is of outstanding significance by reason of its close association with Canadian history, close association with national life, and aesthetic qualities.
35. With respect to close association with Canadian history, Tavernier was one of several European artists to travel to Canada in the 19th century who recorded their encounters

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with Indigenous communities. Much of the information that exists today about life and times in the 19th century in North America is a direct result of accomplished, trained artists such as Tavernier who directly recorded what they encountered in sketches, watercolours or pastel works such as the subject work. From these, subsequent generations learn about early Canadian history.

36. With respect to national life, the Pastel is a work of ethnographic interest that provides significant regional detail about Northwest Coast Indigenous peoples in the 19th century. Considered together with the lack of historical writing about this period, the Pastel provides contextual and detailed information about this part of Canada and its occupants at the time of the artist's visit.
37. With respect to aesthetic qualities, the Pastel features a canoe with several figures. In the background are several other canoes and further off, the recognizable features of a northwest coast indigenous settlement. The main figure in the canoe is wearing what appears to be a Northwest Coast hat, maybe Salish. Rather than simply recording the scene, Tavernier washes the entire scene in the golden light from a majestic sunset resulting in drawing which, aside from the importance of the content, is an aesthetically beautiful work of art.
38. For the above reasons, the Review Board concludes that the Pastel is of outstanding significance for its close association with Canadian history, close association with national life and aesthetic qualities.

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.¹⁸
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

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

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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.¹⁹

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",²⁰ 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.²¹
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.²²
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.²³
44. 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.²⁴

¹⁹ *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.

²⁰ *House of Commons Debates*, (7 February 1975) at p. 3026.

²¹ *Ibid.*

²² *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>.

²³ *Heffel*, at para 37.

²⁴ *Heffel*, at paras. 37 and 43.

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45. As noted above, the Applicant disputes that the Objects are of national importance.
46. The Review Board determines that the Objects meet the criteria of national importance both by reason of their rarity and research value.
47. With respect to the rarity of the Painting by Sargent, there are only five works by Sargent in Canadian collections, including the Painting. Of the other works, two are portraits and two are landscapes and all four are dated after 1900. By contrast, the Painting dates to the early 1880s, and is the only depiction in a Canadian collection from this period of Sargent's oeuvre.
48. With respect to research value, *Pressing the Grapes; Florentine Wine Cellar* is a very successful painting, made so by Sargent's manipulation of light and dark to capture an important moment in the cycle of Florentine winemaking. The Painting captures and demonstrates a key moment in the artist's career; as such, it is of important research value for the study of Sargent's oeuvre.
49. With respect to the rarity of the Pastel by Tavernier, there are only two known plein air sketches of Indigenous settlements in the Pacific Northwest by Tavernier. In addition to the Pastel, the other, identified in the Rarity Statement by the Applicant, is *Village of Skidegate, British Columbia*. The Pastel is thus a rare object within Canadian collections.
50. With respect to the research value of the Pastel, it was created on site in British Columbia, in the second last decade of the 1800s, in keeping with Tavernier's artistic practice. The work features a Northwest Coast canoe with a figure wearing an Indigenous hat resembling a Northwest Coast Salish design. The view of the village in the background could be identified and is of interest to Canadian history. As noted above with respect to the Pastel's outstanding significance, these factors make the Pastel of significant research value to learn about Indigenous ways of life during that period.

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51. Moreover, little is known Tavernier's time in British Columbia. The Pastel represents an object of research value into his life from this period.

52. In view of the above, and on the basis of the evidence before it, the Review Board concludes that the Objects are of such a degree of national importance that their individual 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 Objects within six months after the date of the determination

53. If the Review Board determines that an object is on the Control List and is of outstanding significance and of national importance, it must 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.²⁵

54. 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.²⁶

55. The Applicant stated it did not have any information as to whether an institution or public authority might make a fair offer to purchase the Objects. The Review Board however takes into consideration the following note made by one of the two Expert Examiners: "a delay period for these works [the Objects] is important in alerting Canadian museums to their availability because [Canadian] museums did not receive notice of this deaccessioning until October 3, 2023 – after the application was sent for expert examiner review".²⁷ The Review Board agrees with this statement, and finds that, if made aware of the availability of the Objects and provided with enough notice, an institution in Canada might make a fair cash offer for the Objects.

²⁵ Subsection 29(5) of the Act.

²⁶ Review Board's decision in the Request for Review of Permit Application No.1635-22-07-13-005 at para. 38.

²⁷ Expert Examiners' Justification, n.d., last paragraph.

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56. Therefore, the Review Board is of the view that an institution or public authority might make a fair offer to purchase either of the Objects within six months of the Review Board's determination in these matters.

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

57. 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.

58. The Review Board establishes a delay period of six (6) months, ending July 26, 2024, during which it will not direct that an export permit be issued in respect of the Painting by Sargent.

59. The Review Board establishes a delay period of four (4) months, ending May 26, 2024, during which it will not direct that an export permit be issued in respect of the Pastel by Tavernier.

60. The Review Board is of the view that these delay periods of different lengths, which reflect the respective estimated values of the Objects, are necessary to provide institutions and public authorities with sufficient time to consider the possibility of making an offer to purchase the Objects and potentially acquire the appropriate funds to do so.

CONCLUSION

61. In conclusion, the Review Board determines that the Objects are included in the Control List and are of outstanding significance by reason of the Sargent Painting's aesthetic qualities and the Tavernier Pastel's close association with Canadian history, close association with national life, and aesthetic qualities; and that the Objects are of such a degree of national importance that their individual loss to Canada would significantly diminish the national heritage.

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62. Furthermore, the Review Board is of the opinion that a fair offer to purchase the Objects 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 **July 26, 2024**, for the Painting by Sargent and of **four months** ending **May 26, 2024** for the Pastel by Tavernier, during which it will not direct that an export permit be issued in respect of the respective Objects.

For the Review Board

Joanne Stober, Chair
Daniel Chouinard
Tzu-I Chung
Monte Clark
Patricia Feheley
Susan MacKenzie
Paul Whitney