

## REVIEW BOARD DECISION

July 20, 2022

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

**Application No.: 0495-22-04-07-001, *Vue de Naples*, 1881,  
by Pierre-Auguste Renoir**

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#### INTRODUCTION

1. On February 3, 2022, Christie's Canada Limited (the Applicant) applied<sup>1</sup> to the Canada Border Services Agency (the CBSA) for a permit to export the work *Vue de Naples*, 1881, by Pierre-Auguste Renoir (the Object).
2. On February 24, 2022, a permit officer employed by the CBSA sent to the Applicant a written Notice of Refusal (the First Notice of Refusal). The refusal was based on the advice of a representative of the Winnipeg Art Gallery, an 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 28, 2022, the Applicant requested a review (the First Request for Review) by the Canadian Cultural Property Export Review Board (the Review Board) of the refused application for an export permit. The Applicant acknowledged that the First Request for Review was late<sup>2</sup>, apologized for the error, and asked the Review Board to proceed with the review.
4. On April 4, 2022, the Review Board, by way of letter from the Executive Director of the Secretariat, informed the Applicant that it could not consider the First Request for Review, because it was filed late and the Review Board did not have the statutory authority to extend the 30-day filing deadline in subs. 29(1) of the Act.
5. In response, the Applicant again applied to the CBSA, where a permit officer assigned a new permit application number<sup>3</sup> to the very same February 3, 2022, application, and refused to issue an export permit for the same reasons it had initially refused to issue one. A new Notice of Refusal (the Second Notice of Refusal) dated April 20, 2022, was then sent to the Applicant.
6. On April 28, 2022, the Applicant returned to the Review Board, requesting once again that it review the refused application for an export permit (the Second Request for Review). The Applicant believed the Second Notice of Refusal dated April 20, 2022, had remedied the fact that the First Request for Review was late.

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<sup>1</sup> Application No. 0495-22-02-04-001.

<sup>2</sup> The request should have been filed on or before March 24, 2022.

<sup>3</sup> Application No. 0495-22-04-07-001, the subject of this decision.

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7. On May 20, 2022, the Review Board received correspondence from the CBSA, informing it that the Second Notice of Refusal had been issued in error and was therefore invalid. The CBSA further stated that it had informed the Applicant of the situation.
8. On June 14, 2022, the Review Board shared with the Applicant the correspondence from the CBSA and provided it with an opportunity to make submissions on whether the Review Board may consider the merits of the Second Request for Review. The Applicant did not make submissions and the time to do so has elapsed.

#### ISSUE

9. The issue before the Review Board is whether, in the circumstances, it may consider the merits of the Second Request for Review.

#### ANALYSIS

10. The Review Board is a creature of statute and as such, it draws its authority from its enabling legislation, the Act. That authority, however, is not limited to only those powers which are expressly set out in the legislation. Rather, it includes “all of those powers which are reasonably necessary for the accomplishment of the mandate which that legislation imposes upon” the Review Board.<sup>4</sup>
11. Pursuant to subs. 29(1) of the Act, the Review Board has the authority to entertain requests for review of refused export permit applications. The Review Board finds that implicit in that authority is the power to ensure that those requests for review stem from valid CBSA decisions. This implicit power is necessary for the Review Board to effectively carry out its mandate.
12. Pursuant to subs. 8(1) of the Act, a permit officer seized of an application for an export permit must process the application, unless the object in issue was the subject of a previous export application which was refused within the two years immediately preceding the date of the application:

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<sup>4</sup> Robert W. Macauley, James L.H. Sprague, Lorne Sossin *Practice and Procedure before Administrative Tribunals*, (Toronto: Thomson Carswell, 2004, 2019, 2021), Vol. 4, at C. 29.1. See also *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, and *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4.

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<p><b>8 (1)</b> A permit officer who receives from a resident of Canada an application for an export permit in respect of an object shall, where he does not issue an export permit under section 7, and where he is not aware of any notice of refusal sent in respect of the object under subsection 13(1) during the two years immediately preceding the date of the application, determine whether the object is included in the Control List.</p>	<p><b>8 (1)</b> Dans le cas où un résident présente une demande de licence relative à un objet auquel l'article 7 ne s'applique pas, l'agent, s'il n'a pas eu connaissance de l'envoi d'un avis de refus conforme au paragraphe 13(1), concernant cet objet, au cours des deux années précédant la date de la demande, détermine l'appartenance de celui-ci à la nomenclature.</p>
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13. In other words, once an application for an export permit is refused, the CBSA permit officer may only consider a new application in respect of the same object once two years have elapsed from the date a first notice of refusal is sent.
14. In the matter before the Review Board, the First Notice of Refusal in respect of the Object was sent on February 24, 2022. The CBSA permit officer could therefore only consider a new export permit application in respect of the Object two years from that date. As the CBSA permit officer did not have the authority to consider a new application approximately two months after the First Notice of Refusal was sent, the Review Board considers the second permit application and Second Notice of Refusal to be invalid.
15. As evidenced by its correspondence of May 20, 2022, this position is shared by the CBSA.
16. The Review Board further observes that by considering a new application for an export permit before the requisite two years had elapsed, the CBSA permit officer effectively rendered meaningless the statutorily-mandated 30-day time limit imposed by subs. 29(1) of the Act, which the Review Board has previously determined it does not have the authority to extend. Proceeding with the Second Request for Review in the circumstances would have the same effect.

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17. For these reasons, no request for review lies to the Review Board from refused permit application no. 0495-22-04-07-001, and the Review Board has no authority to consider its merits.

#### **For the Review Board**

Sharilyn J. Ingram, Chair  
Glen A. Bloom  
Tzu-I Chung  
Laurie Dalton  
Patricia Feheley  
Jo-Ann Kane  
Paul Whitney