

REVIEW BOARD DECISION

June 20, 2023

REQUEST FOR REVIEW OF APPLICATIONS FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0428-23-03-30-001

The Resurrection: Rejoicing, 1947, by Stanley Spencer
and

Application No.: 0428-23-05-10-001

The Marriage at Cana: A Servant in the Kitchen Announcing the Miracle, 1952–1953, by Stanley Spencer

1. This decision deals with two applications submitted by Sotheby's Canada Inc. (the Applicant) to the Canadian Cultural Property Export Review Board (the Review Board) to review refused export permit applications. Both applications pertain to works by the artist Stanley Spencer (Spencer). The first is in respect of *The Resurrection: Rejoicing, 1947*, oil on canvas, triptych (*The Resurrection*). The second is in respect of *The Marriage at Cana: A Servant in the Kitchen Announcing the Miracle, 1952–1953*, oil on canvas (*The Marriage*) (collectively, the Objects).
2. These two applications contain many of the same facts. The Objects are works by the same painter, in the same medium, were executed within six years of one another and have very similar provenance. Moreover, the applications were made by the same Applicant and only one written submission, applicable to both works, was provided. Consequently, the Review Board has decided to issue one decision letter in respect of the Objects. While each object was individually assessed against the requirements of the *Cultural Property Export and Import Act* (the Act) based on its own merits, many of the factors considered by the Review Board are applicable to both objects.

INTRODUCTION

3. On March 29, 2023, the Applicant applied¹ to the Canada Border Services Agency (CBSA) for a permit to export the work *The Resurrection*. On April 27, 2023, a permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to the *Resurrection*.² The refusal was based on the advice of a representative of the National Gallery of Canada (Expert Examiner for *The Resurrection*), who determined the *Resurrection* is of outstanding significance, and meets the degree of national importance set out in the Act.
4. On May 9, 2023, the Applicant requested a review³ of its application for an export permit³ by the Review Board with respect to *The Resurrection*.

¹ Application #0428-23-03-30-001.

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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5. On May 9, 2023, the Applicant also applied⁴ to the CBSA for a permit to export the work *The Marriage*.
 6. On May 26, 2023, and in response to a request by the Review Board, the Applicant filed a written statement in support of its request to review *The Resurrection* and advised the Review Board that it would like to make oral submissions to the Review Board. In anticipation that *The Marriage's* export application would also be refused by CBSA, the Applicant also notified the Review Board that its written submissions for *The Resurrection* could also be applied to *The Marriage*.
 7. A hearing with respect to *The Resurrection* was held on June 9, 2023, during which the Applicant made oral submissions to the Review Board comprised of six members.
 8. On June 14, 2023, a permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to *The Marriage*.⁵ The refusal was based on the advice of a representative from the National Gallery of Canada (Expert Examiner for *The Marriage*), who determined that the Object is of outstanding significance, and meets the degree of national importance set out in the Act.
 9. On June 15, 2023, the Applicant was notified that its export application for *The Marriage* had been refused and requested a review⁶ by the Review Board.
 10. On June 19, 2023, the Applicant confirmed that it would not require an oral hearing for *The Marriage*.
 11. Five members of the Review Board met on June 20, 2023, to consider the request for review of *The Marriage*.
 12. For the reasons that follow, the Review Board finds that both *The Resurrection* and *The Marriage* are included in the *Canadian Cultural Property Export Control List* (the Control List) and are of outstanding significance by reason of their aesthetic qualities and value in the study of the arts and are of such a degree of national importance that

⁴ Application #0428-23-05-10-001.

⁵ Subsection 13(1) of the *Cultural Property Export and Import Act* (the Act).

⁶ Subsection 29(1) of the Act.

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their individual 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 either of the Objects within six months of this decision. The Review Board therefore establishes a delay period of six months ending **December 20, 2023**, during which it will not direct that an export permit be issued in respect of the Objects.

LEGISLATIVE FRAMEWORK

13. The Review Board is established by the Act. Included in its duties are that it must, “on request...review applications for export permits.”⁷
14. 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;
 - 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.⁸
15. 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.⁹

⁷ Subsection 20(a) of the Act.

⁸ Subsection 29(3) of the Act.

⁹ Subsection 29(5) of the Act.

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16. 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.¹⁰

THE APPLICANT'S SUBMISSIONS

17. The Objects are as follows:

- a. *The Resurrection: Rejoicing* is an oil on canvas, a triptych, executed by Stanley Spencer (1891–1959) in 1947. Each panel measures 76 x 50.8 cm.
- b. *The Marriage at Cana: A Servant in the Kitchen Announcing the Miracle* is an oil on canvas, executed by Stanley Spencer (1891–1959) in 1952–1953. The painting measures 91.8 x 152.7 cm.

18. The Applicant states that the Objects were created in England and that they are included in the Control List under Group V, Objects of Fine Art, Section 4(b).¹¹

19. In the Written Statement the Applicant acknowledges that the Objects are of outstanding significance and national importance, stating that the Objects, despite not having any close association with Canadian history or national life, are of “exceptional quality”.¹² The Applicant noted that the Objects both belong to important series within the context of Spencer’s oeuvre. *The Resurrection* is part of a series by Spencer on the subject of the resurrection, while *The Marriage* is part of a series of works which depict the Marriage at Cana planned for Spencer’s unrealized Church House project. The Applicant states that other paintings from these series are in major public collections. The Applicant also described the Objects as representative of Spencer’s figurative style.

20. In its Written Statement, the Applicant also agreed with the assertion of the Expert Examiner for *The Resurrection* that this work is more “ambitious” than *The Marriage*. The Applicant states that *The Resurrection* is representative of Spencer’s figurative

¹⁰ Subsection 29(4) of the Act.

¹¹ Applicant’s written statement dated May 26, 2023, at p. 5.

¹² *Ibid.*

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style, while *The Marriage* has a darker colour palette and depicts fewer individuals in a composition that leads to a less individualized and more formulaic presentation.

21. Furthermore, the Applicant confirmed again during the hearing for *The Resurrection* that they do not dispute its outstanding significance and national importance.
22. With respect to 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, the Applicant submitted in its Written Statement that the Beaverbrook Art Gallery “made public via media release its intention to deaccession a number of paintings in its collection. No interest was received from any Canadian media outlets and no Canadian institutions contacted the Beaverbrook”.¹³
23. During the hearing, when asked by the Review Board to explain how the media release was distributed, Tom Smart, Executive Director and CEO of the Beaverbrook Art Gallery, explained that the Gallery distributed a release through their communications department to the local public media about an upcoming deaccession of a certain number of works from the collection of the Beaverbrook Art Gallery. He also confirmed that no collecting institutions in Canada were contacted directly and that they did not specifically mention the deaccession of *The Resurrection* itself.

ANALYSIS**Whether the Objects are 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.

¹³ Application’s written statement dated May 26, 2023, at p. 6.

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25. The Applicant admits that the Objects are 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.¹⁴
26. The Review Board agrees that the Objects are paintings 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 of each painting, as specified by the Applicant in the individual export permit applications, exceeds \$30,000.00 CAN.
27. The Review Board therefore concludes that the Objects are included in the Control List under Group V, Objects of Fine Art, subsection 4(b).

Whether the Objects are 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.¹⁵ The Applicant does not dispute that the Objects are of outstanding significance. The Review Board also recognizes the detailed responses for both *The Resurrection* and *The Marriage* provided by the expert examiners who also determined that the Objects were of outstanding significance by reason of their aesthetic qualities and value in the study of arts.
29. The Review Board determines the Objects are of outstanding significance by reason of their aesthetic qualities and value in the study of arts.
30. With respect to the Objects' aesthetic qualities, the Review Board finds that the painterly technique used in both *The Resurrection* and *The Marriage* are exemplary in the artist's oeuvre.

¹⁴ Control List, section 4.

¹⁵ Paragraphs 29(3)(b) and 11(1)(a) of the Act.

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31. The technique employed in the Objects is part of the larger trajectory and development of British modernism and art history more generally. Spencer was celebrated for his biblical scenes and complex groupings, as depicted in both *The Resurrection* and *The Marriage*. The complexity, style, and approach of both paintings are outstanding in relation to aesthetics.
32. Although *The Resurrection* is more complex in composition than *The Marriage*, both are of outstanding significance due to their aesthetic quality in their own right.
33. With respect to the value in the study of the arts, Spencer's biblical scenes were highly celebrated during his lifetime, and afterwards. In considering the value in the study of the arts for *The Resurrection*, the Review Board notes that Spencer revisited the resurrection theme in several significant and monumental works in his oeuvre; notable examples include, *The Resurrection, Cookham* 1924–1927 and *The Resurrection: Port Glasgow* 1947–1950.¹⁶ Spencer's Resurrection series has also been the subject of academic study and research.¹⁷
34. Similarly, *The Marriage* is also an outstanding example of Spencer's biblical scenes and consequently is of outstanding significance by reason of its value in the study of the arts. Its subject, the Marriage at Cana, was explored in his other works, such as *Marriage at Cana: Bride and Bridegroom*¹⁸, a series of lithographs the artist created in the 1950s¹⁹, and in his unrealized Church-House project. The Marriage at Cana was also a popular theme in art history, as it is the first miracle of Jesus Christ in the Gospel of St. John. *The Marriage* thus contributes to a greater understanding and discourse regarding this subject matter in art history more generally.

¹⁶ Stanley Spencer, *The Resurrection, Cookham*, 1924–1927, oil on canvas, support: 2743 × 5486 mm, Tate Modern and Stanley Spencer, *The Resurrection: Port Glasgow*, 1947–1950, oil on canvas, support: 2146 × 6655 mm, Tate Modern.

¹⁷ R H Wilenski, "Stanley Spencer: Resurrection Pictures 1945-50," (Faber and Faber, 1951).

¹⁸ Stanley Spencer, *Marriage at Cana: Bride and Bridegroom*, 1953, oil on canvas, 66 x 51 cm, Glynn Vivian Art Gallery.

¹⁹ Stanley Spencer, *Marriage at Cana: Bride and Bridegroom*, 1953, lithograph on Japan paper, 64.9 x 50.7 cm, National Gallery of Canada. This lithograph is also in the collections of the Art Institute of Chicago and the Museum of Modern Art.

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35. Spencer also explored themes of love and marriage in his work, as exemplified in *The Marriage*. Spencer's personal life, including his marriages, have been the subject of much academic focus and analysis. In the artist's oeuvre, *The Marriage* is thus a significant work in connection with this frequently visited subject matter, his personal life, thus furthering its value to the study of the arts.
36. The creation dates of both *The Resurrection* and *The Marriage* are also significant. *The Resurrection*, created in 1947, was influenced by Spencer's time as a war artist and was painted during the aftermath and end of the Second World War. *The Marriage*, created in 1952–1953, as well as *The Resurrection* were also created during the period between 1935 and 1950 when Spencer resigned in protest from the Royal Academy of Art.
37. The Review Board also recognizes the important role of Spencer's work generally in the history of British painting, and notes that Spencer's art has been the subject of continued research.²⁰
38. For the above reasons, the Review Board concludes that the Objects are of outstanding significance for their aesthetic qualities and value in the study of the arts.

Whether the Objects are of such a degree of national importance that their 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.²¹
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

²⁰ See for example: Nigel Rapport, "Distortion and Love: An Anthropological Reading of the Art and Life of Stanley Spencer," (Routledge: 2016), and for a complete catalogue: Keith Bell Stanley, "Spencer: complete Catalogue," (Phaidon, 2000).

²¹ 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.²²

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",²³ 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.²⁴
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.²⁵
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.²⁶
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

²² *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.

²³ *House of Commons Debates*, (7 February 1975) at p. 3026.

²⁴ *Ibid.*

²⁵ *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>.

²⁶ *Heffel*, at para 37.

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and importance of the object to Canada, as well as its importance in the Canadian context.²⁷

45. The Applicant does not dispute that the Objects are of national importance.
46. The Review Board determines that the Objects meet the criteria of national importance by reason of their rarity, provenance, and contextual associations and research value.
47. With respect to the rarity of the Objects, the Applicant stated in the hearing that *The Resurrection* is a duplicate in their collection as they have another painting by Spencer – namely, *The Marriage*. The Review Board does not agree with this assessment, as both *The Resurrection* and *The Marriage* are unique works. There are no other similar paintings by the artist in Canadian collections. As outlined above, the Objects are considered of outstanding significance and are further considered by the Review Board to be unique, rare works in a Canadian collection from two of the artist's most celebrated series.
48. Further, the Review Board finds that *The Resurrection* and *The Marriage* both have important provenance to Canada: in particular that they were exhibited in Canada and purchased by Lord Beaverbrook, who funded the construction of and assembled the original collection for the Beaverbrook Gallery's opening on September 16, 1959. As a result of this connection, the Objects have a significant connection to the development of Canadian museums' collections and influence on art history in Canada. According to the Applicant's own website, British Modernism is a key part of the collection of the Beaverbrook Art Gallery. The Objects' provenance demonstrates a clear connection to Canadian history and art historical development.
49. With respect to the contextual associations and research value of the Objects, as noted above, the Objects have a strong contextual association to Canadian museums and art historical developments.
50. Additionally, while the Objects have significant research value for understanding developments in modern British painting, the Review Board also considers them to have a strong contextual and research value to Canada. The legacy of British painting

²⁷ Heffel, at paras. 37 and 43.

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has had a lasting influence on the development, education and understanding of art in Canada.²⁸

51. For example, one might consider the work of well-known Atlantic Canadian realists such as Alex Colville, who developed a particular form that is sometimes referred to as “Maritime Magic Realism,” of which one source of inspiration was British art historical developments, specifically realism and modernism. Colville then went on to study and teach in New Brunswick, influencing generations of artists, and would become an artist of national and international importance in Canadian art histories.²⁹
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.³⁰
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.³¹

²⁸ See for example Joan Murray, “Canadian Art in the Twentieth Century,” (Dundurn: 1999).

²⁹ Andrew Hunter, *Alex Colville* (Goose Lane Editions, 2014).

³⁰ Subsection 29(5) of the Act.

³¹ Review Board’s decision in the Request for Review of Permit Application No.1635-22-07-13-005 at para. 38.

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55. With respect to *The Resurrection*, the Review Board notes that while the Beaverbrook Art Gallery was not contacted directly in response to its media release distributed regionally that it was intending to deaccession certain works, *The Resurrection* was not specifically mentioned in that media release. The Applicant also confirmed that no Canadian institutions were contacted about the deaccession of *The Resurrection* or *The Marriage*. The Review Board also takes into consideration the notes by the Expert Examiner for *The Resurrection* and *The Marriage* about the significance of the Objects. The Expert Examiner notes that Spencer “is represented in Canadian public collections principally by landscapes and portraits, lesser genres in his oeuvre”³², which suggests that it is likely an institution might make a fair cash offer for the Objects.
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 months, ending December 20, 2023, during which it will not direct that an export permit be issued in respect of the Objects. 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 either of the Objects and potentially acquire the appropriate funds to do so.

³² Expert Examiner’s letter “RE: Application for Cultural Property Export Permit, no. 0428-23-05-10-001.”

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CONCLUSION

59. In conclusion, the Review Board determines that the Objects are included in the Control List and are of outstanding significance by reason of their aesthetic qualities and value in the study of the arts and that the Objects are of such a degree of national importance that their individual loss to Canada would significantly diminish the national heritage.
60. Furthermore, the Review Board is of the opinion that a fair offer to purchase either of 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 **December 20, 2023**, during which it will not direct that an export permit be issued in respect of the Objects.

For the Review Board for the *Resurrection*

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

For the Review Board for the *Marriage*

Sharilyn J. Ingram, Chair
Tzu-I Chung
Laurie Dalton
Jo-Ann Kane
Paul Whitney