

REVIEW BOARD DECISION

June 20, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0495-23-02-03-001

Three Women with Pineapples, 1958, by Anita Magsaysay-Ho

INTRODUCTION

1. On February 2, 2023, Christie's Canada Ltd. (the Applicant) applied¹ to the Canada Border Services Agency (CBSA) for a permit to export the work *Three Women with Pineapples, 1958*, oil on canvas (the Object), by Anita Magsaysay-Ho (Magsaysay-Ho).
2. On February 28, 2023, a permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to the Object.² 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 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 5, 2023, the Applicant requested a review of its application for an export permit³ (the Request for Review) by the Canadian Cultural Property Export Review Board (the Review Board).
4. On March 29 and April 1, 2023, and in response to a request by the Review Board, the Applicant filed written statements in support of its Request for Review (Written Statement).
5. On May 8, 2023, and in response to a request by the Review Board, the Applicant advised the Review Board that it would like to make oral submissions to the Review Board.
6. A hearing was held on June 8, 2023, during which Brett Sherlock, International Consultant, and Emmanuelle Chan, Associate VP and Specialist Head of 20th Century Day Sale, Hong Kong, both employees of Christie's, made oral submissions on behalf of the Applicant.
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) and is of outstanding significance by reason of its aesthetic qualities and value in the study of the arts and

¹ Application #0495-23-02-03-001.

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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is of such a degree of national importance that its 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 the Object 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 Object.

LEGISLATIVE FRAMEWORK

8. The Review Board is established by the Act. Included in its duties are that it must, “on request...review applications for export permits.”⁴
9. 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.⁵
10. 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 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
11. 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.⁷

⁴ Subsection 20(a) of the Act.

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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THE APPLICANT'S SUBMISSIONS

12. The Object, *Three Women with Pineapples*, is an oil on canvas, executed by Magsaysay-Ho (1914-2012) in 1958. It measures 71.4 x 55.6 cm. It is signed and dated 1958 at the lower left corner. The Object has no known publication and exhibition history.
13. The Applicant states in its Written Statement that the Object was most likely created in the Philippines where the artist resided with her family from 1949 to 1963, and as such the Object "is not included in the Control List".⁸ However, in the form "Application for Cultural Property Export Permit", the Applicant indicated that the Object is under Group V, Objects of Fine Art, section 4(b).⁹
14. The Applicant submits that the Object is not of outstanding significance nor of national importance because "it was created in and inspired by her country of origin, [and] must be seen as a work that is socially and culturally specific to the Philippines".¹⁰
15. Furthermore, the Applicant considers that works by Magsaysay-Ho have not been in demand in Canada's collections. The Applicant did not identify works by the artist in any major Canadian museums or art galleries. The Applicant did not find any recorded exhibitions of Magsaysay-Ho works in Canada during the time the artist lived in Canada (from 1971 to 2012).¹¹
16. The Applicant further submits that the Object currently belongs to an American citizen and that the Object arrived in Canada in the 1980s. The Object's provenance, prior to its arrival in Canada, does not add any particular significance to the Object other than confirming some connection between the artist and the family of the current owner, and that the Object was most likely obtained in Manila in the late 1950s.¹²
17. Furthermore, in response to questions from the Review Board, Ms. Chan submits on behalf of the Applicant during the oral hearing that, while there are some Western art practice influences present in Magsaysay-Ho's works, there were no direct Western mentors or influences. All of Magsaysay-Ho's mentors were Filipino artists.

⁸ Applicant's written statement, at p. 2 and 4.

⁹ Application #0495-23-02-03-001, Part II, section 24.1, Control List Reference.

¹⁰ Applicant's written statement, at p. 4.

¹¹ Applicant's written statement, at p. 5.

¹² Applicant's written statement, at p. 2.

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18. Ms. Chan on behalf of the Applicant further submits the Object is not the artist's most exceptional work when considering the artist's market, due to its smaller dimensions. However, considering the Object's "more intimate scale", the brushwork and period of this work are significant.
19. With respect 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, Ms. Chan submits on behalf of the Applicant during the oral hearing that it would be difficult for her to comment on whether Canadian institutions would make an offer for the Object given that her area of expertise does not include Canada's art market. However, it is her view that a work that was painted while the artist lived in Canada would have a higher likelihood of being purchased by a Canadian institution.

ANALYSIS

Whether the Object is included in the Control List

20. 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.
21. 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 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.¹³
22. The Review Board finds that the Object 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. At the time that she created the Object, Magsaysay-Ho was not ordinarily resident in the territory that is now Canada. The Review Board also agrees that the Object's fair

¹³ Control List, section 4.

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market value, as specified by the Applicant in its export permit application, exceeds \$30,000.00 CAN.

23. The Review Board therefore concludes that the Object is included in the Control List under Group V, Objects of Fine Art, subsection 4(b).

Whether the Object is of outstanding significance

24. 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.¹⁴
25. The Applicant did not make submissions specific to each of the elements under which an Object could be considered of outstanding significance under the Act. Instead, it makes a global argument that the Object is not of outstanding significance as the Object is socially and culturally specific to the Philippines. In contrast, works by Magsaysay-Ho from the period when the Object was created are aesthetically different to her later works created when she was living in Canada and were influenced by the seasonal changes in Vancouver.
26. The Act does not require that an object have a direct connection to Canada in order for it to be subject to export control.¹⁵ 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.
27. The Review Board determines that the Object is of outstanding significance for its aesthetic qualities and value for the study of the arts. The Applicant notes that the Object is not of outstanding significance because it reflects Philippine subject matter rather than those subjects which the artist generally chose to portray while she was resident in Canada from 1971 until her death in 2012. However, the Act does not require such specificity for an object to be of outstanding significance by reason of

¹⁴ Paragraphs 29(3)(b) and 11(1)(a) of the Act.

¹⁵ *Heffel Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82, at para. 39 [*Heffel*].

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either its aesthetic qualities or value in the study of the arts. The Review Board finds that the artist's incorporation of 20th-century modernism in her painterly approach is of interest in understanding the global interpretation and adaptation of modernism within regional ethnocultural contexts.¹⁶

28. The Applicant submits sales evidence indicating that the prices of Magsaysay-Ho's oil on canvas paintings created between 1950 and 1959 have been increasing over the past eight years, with sales of works comparable to the Object exceeding \$2,000,000.00 CAN. Such results attest to the importance of the artist and the interest in collecting, exhibiting, and studying her work.

29. For the above reasons, the Review Board concludes that the Object is of outstanding significance for its aesthetic qualities and value in the study of the arts.

Whether the Object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage

30. 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.¹⁷

31. 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.¹⁸

32. 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",¹⁹ 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.²⁰

¹⁶ See Sara Slew & Sarah Lee, *Reframing Modernism: Painting from Southeast Asia, Europe and Beyond* (2016)

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

¹⁸ *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.

¹⁹ *House of Commons Debates*, (7 February 1975) at p. 3026.

²⁰ *Ibid.*

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33. 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.²¹
34. 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.²²
35. 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.²³
36. As indicated above, the Applicant submits that the Object is not from the period when Magsaysay-Ho lived in Canada and that the Object must be seen as a work that is socially and culturally specific to the Philippines. The Review Board accepts the Applicant's representations that the Object does not have a specific connection to Canadian heritage, beyond the artist's residence in Canada and assumption of Canadian citizenship. An object's national importance, however, is not dependent on a connection to Canada or to Canadian heritage. In *Canada (Attorney General) v. Heffel Gallery Limited*, the Federal Court of Appeal considered whether the painting *Iris bleus* created in France by the French impressionist painter Gustave Caillebotte met the criterion of national importance under the Act. In that case, the Court stated that the national importance criterion does not require that a given object "necessarily have a connection to Canada"²⁴. Rather, an object can meet the degree of national importance "even if the said object or its creator have no direct connection to Canada"²⁵. The Court explained that because paragraph 11(1)(b) of the Act "is an

²¹ *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>>

²² *Heffel*, at para 37.

²³ *Heffel*, at paras. 37 and 43.

²⁴ *Heffel*, at para 39.

²⁵ *Heffel*, at para 39.

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open-ended provision”, not a “mandatory recipe”²⁶, the Review Board may rely on factors related to the degree of value and importance of the object as well as its importance in the Canadian context in determining whether it is of national importance such that its loss to Canada would significantly diminish the national heritage.

37. The evidence shows that there are no artworks by Magsaysay-Ho held in Canadian public institutions. If the Object were to be acquired by a public institution in Canada, it would be the only painting by the artist in a public collection.
38. In view of the importance of the oeuvre of Magsaysay-Ho within Philippine and Southeast Asian modern art, the excellent provenance of the Object, the lack of Magsaysay-Ho’s paintings in public collections in Canada, the significant growth of the Filipino-Canadian community, as supported by recent Canadian census data,²⁷ the Object’s contribution to an understanding of Canada’s diversity, specifically the Filipino diaspora, and Canadians’ understanding of twentieth-century immigrant communities and Filipino modern art, as well as the importance of acquiring such Object to advance research on these international contexts in modern art, the Review Board concludes that the Object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.
39. In view of the above, and on the basis of the evidence before it, the Review Board concludes that the Object is of such a degree of national importance that its 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 Object within six months after the date of the determination

40. 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.²⁸

²⁶ Heffel, at para 34.

²⁷ Statistics Canada, *Census Profile, 2021 Census of Population*, online: <https://www12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/details/page.cfm?Lang=E&DGUIDList=2021A000011124&GENDERList=1,2,3&STATISTICList=1,4&HEADERList=0&SearchText=Canada.>; ExplorAsian, *Filipino-Canadian History*, <https://explorasian.org/learn/education/filipino-canadian/>

²⁸ Subsection 29(5) of the Act.

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41. 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.
42. In its written statement, the Applicant indicates that it contacted a limited number of Canadian institutions to inquire whether they held any work by Magsaysay-Ho, but did not specifically inquire as to the institutions’ interest in acquiring the Object. Lacking evidence to the contrary, the Review Board cannot assume that no institution or public authority in Canada would be interested in acquiring the Object, particularly in view of the Review Board’s knowledge that a number of Canadian institutions intend to diversify their collections to include currently under-represented communities within Canadian society.
43. Considering the importance of Magsaysay-Ho’s oeuvre in Asian modernist art of the latter twentieth century, as well as the interest of Canadian institutions in diversifying their collections, and having regard to the low threshold specified in the Act, the Review Board is of the view that an institution or public authority might make a fair offer to purchase the Object within six months of the Review Board’s determination in this matter.

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

44. 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.²⁹
45. 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 Object. 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

²⁹ Paragraph 29(5)(a) of the Act.

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making an offer to purchase the Object and potentially acquire the appropriate funds to do so.

CONCLUSION

46. In conclusion, the Review Board determines that the Object is on the Control List, that it is of outstanding significance, and that it is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. Furthermore, the Review Board is of the opinion that a fair offer to purchase the Object 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 Object.

For the Review Board

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