

REVIEW BOARD DECISION

December 29, 2021

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

Application No.: 0495-20-10-01-006 *Chemin entre des murs à Avallon*
by Félix Vallotton

INTRODUCTION

1. PACART (the Applicant) applied to the Canada Border Services Agency (CBSA) for an export permit to export the work *Chemin entre des murs à Avallon*, 1923, oil on canvas, by Félix Vallotton (the Object).
2. A permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to the Object.¹ The refusal was based on the advice of a representative of the Winnipeg Art Gallery (the 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 June 28, 2021, the Applicant requested a review of its application for an export permit² (the Request for Review) by the Canadian Cultural Property Export Review Board (the Review Board). Accompanying the Request for Review were submissions on its timeliness.
4. On September 16, 2021, the Review Board found that the Request for Review was filed within the 30-day deadline set out in the Act, and that as a result, it had jurisdiction to consider the matter.
5. On October 1, 2021, and in response to a request by the Review Board, the Applicant filed a written statement in support of its Request for Review. The Applicant also made additional submissions in a letter dated October 19, 2021, accompanied by an affidavit, as well as in a letter dated November 10, 2021.
6. For the reasons that follow, the Review Board finds that the Object is included in the Control List, is of outstanding significance by reason of its aesthetic qualities and its value in the study of the arts, and 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 6 months ending **June 29, 2022**, during which it will not direct that an export permit be issued in respect of the Object.

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

² Subsection 29(1) of the Act.

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ISSUES TO BE DETERMINED BY THE REVIEW BOARD

7. The Review Board is created by legislation and, as such, it only has the powers granted to it by its governing statute, the Act.
8. In the review of a refused application for an export permit, the Act stipulates that the Review Board must determine whether the object:
 - is included in the Control List;
 - 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
 - is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.³
9. 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.⁴ The purpose of the delay period is to provide an institution or public authority in Canada with an opportunity to purchase the object.
10. If the Review Board determines that the object fails to meet one of the above criteria, the Review Board directs a CBSA permit officer to promptly issue an export permit for the object.⁵

THE APPLICANT'S SUBMISSIONS

11. The Applicant states that the Object was created outside the territory that is now Canada and that it is included in the Control List under Group V 4(b), Objects of Fine Art.
12. The Applicant submits that the Object is not of outstanding significance because it does not have a close association with Canada's artistic, cultural, scientific or social history,

³ Subsection 29(3) of the Act.

⁴ Subsection 29(5) of the Act.

⁵ Subsection 29(4) of the Act.

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nor does it have a close association with a Canadian cultural tradition or way of life. Specifically, the Applicant states that the Object was created in France by a Swiss artist who has no “relationship to Canada whatsoever” and that the Object “does not depict a Canadian landscape, nor can it be identified with a prominent person, institution, or memorable event that relates to the art history, history, or national life of Canada in any way.” Furthermore, the Applicant contends that the Object does not have significant aesthetic qualities or value in the study of the arts because it is a late work of the artist who is best known for his woodblock prints of the 1890s-1900s, and not for his later landscapes known as “paysages composés”.

13. The Applicant also submits that the Object does not have such a degree of national importance that its loss to Canada would significantly diminish the national heritage. The Applicant states that the Object “has been in Canada for only three (3) years during which it was displayed exclusively in a private residence.” As such, the Applicant contends that “the Painting’s connection with Canada is tenuous, at best, and cannot be said to have contributed anything significant to Canada’s national heritage”.

ANALYSIS***Chemin entre des murs à Avallon, 1923, by Félix Vallotton***

14. The Object, *Chemin entre des murs à Avallon*, is an oil on canvas, executed by Félix Vallotton (1865-1925) in 1923. It measures 72.39 x 59.69 cm. It is signed *F. Vallotton* at the lower right.

Whether the Object is included in the Control List

15. 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.
16. In its written submissions, the Applicant states that the Object is included in the Group V 4(b) of the Control List.

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17. Group V 4(b) Objects of Fine Art of the Control List includes paintings made outside the territory that is now Canada that have a fair market value in Canada of more than \$30,000.00 CAN.⁶
18. 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. The Object's fair market value, as specified by the Applicant in its export permit application, exceeds \$30,000.00 CAN. The Review Board therefore concludes that the Object is included in the Control List.

Whether the Object is of outstanding significance

19. 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.⁷
20. The Applicant submits that the Object is not of outstanding significance because it does not have an association with Canada's artistic, cultural, scientific or social history or with a Canadian cultural tradition or social history. The Act does not, however, require such an association for an object to be of outstanding significance by reason of either its aesthetic qualities or value in the study of the arts.
21. The Applicant also relies on the fact that the Object is not representative of the works for which the artist is best known, namely his woodblock prints of the 1890s and his paintings of the late 1890s and early 1900s, as a reason for which the Object is not of outstanding significance. The Applicant also contends that the Object dates from a period during which the artist's work seems to be in steep decline in terms of its significance in the context of modern art history.
22. The Applicant has stated that the Object is representative of Vallotton's landscape technique known as *paysage composé*, whereby the artist relies on field sketches only as a basic canvas on which to overlay his own imagined reality and/or personal reminiscences once back in the studio. Rather than an authentic depiction of nature, the resulting landscape is therefore, as the Applicant rightly points out, "a mix of imagination and memory", that is, one that displays a strong sense of the artist's emotional connection with, and subjective vision of, the nature scene. Vallotton, in his

⁶ Control List, section 4.

⁷ Paragraphs 29(3)(b) and 11(1)(a) of the Act.

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paysage composé, sought to disengage paintings from a literal representation of nature, to one that was rooted in memory, composition and experimentation. His approach to landscape, thus, follows a long art historical tradition of landscape as subject matter, and his work contributes to wider experiments and explorations that were central to modernist painting.

23. As also noted by the Applicant, Félix Vallotton is well known for his involvement with the French post-impressionist group *Les Nabis*, who played an important role in defining the aesthetic paradigm of Modernism. The Applicant however fails to recognize that although the Object was created after the active period of the movement (1888-1900), it is undoubtedly informed by its conceptual roots, while at the same time characteristic of the artist's own distinctive and consistent style. The painting's simplified, flattened forms, shallow perspective, palette with strong contrasts, and minimalist design place the work in formal continuity with its Nabis heritage, while its subject matter and composition are more reflective of Félix Vallotton's own personal approach to landscape representation.
24. For the above reasons, the Review Board concludes that the Object is of outstanding significance for its aesthetic qualities.
25. The Review Board also concludes that the Object is of outstanding significance for its value in the study of the arts.
26. Contrary to the Applicant's assertion, landscapes played an important role in Félix Vallotton's oeuvre. The artist spent many years developing his landscape practice and reflecting on it, as evidenced by writings left by the artist and others, for example, his "Livre de Raison: *paysage composé*." See also, "Félix Vallotton: Critique d'Art" (P. Koella, K. Poletti, 2012) for an historical overview of his art writings. His landscape paintings are also well documented in the Catalogue raisonné for the artist (M. Ducrey, 2008). Interest in Vallotton's *paysage composé*, is further evidenced by a robust auction market for this subject matter.
27. Félix Vallotton's *paysages composés*, of which this Object is both a representative and fine example, are of great importance to the study of the evolving practice of landscape painting within the modernist framework of art history. Public and scholarly access to the work would contribute to the understanding of Félix Vallotton's oeuvre in general, as well as of his landscape practice in particular. See, for example, scholarly studies of Vallotton and landscape, such as "Félix Vallotton: Les paysages de l'émotion," (Bruno Delaure, 2013).

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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

28. 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.⁸
29. In making that determination, the Review Board must measure the extent of the effect of the removal of 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.⁹
30. The Review Board is not confined to specific factors in its assessment of national importance. It has broad discretion to assess and determine whether a given object meets the degree of national importance set out in the Act.
31. In summary, the Applicant contends that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage because it was imported into Canada only three years prior to the filing of export permit application¹⁰ and because the Object does not have a connection to Canada or to Canadian heritage.
32. The Review Board accepts the Applicant's representations that the Object does not have a connection to Canada or to Canadian heritage. An object's national importance is not, however, dependent on a connection to Canada or to Canadian heritage. In *Canada (Attorney General) v. Heffel Gallery Limited*¹¹, the Federal Court of Appeal had for consideration whether the late 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"¹². Rather, an object can meet the degree of national importance "even if the said object or its creator have no direct connection to Canada."¹³ The Court explained that because paragraph

⁸ Paragraphs 29(3)(c) and 11(1)(b) of the Act.

⁹ *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82 at paragraphs 37 and 43.

¹⁰ Affidavit of October 18, 2021, at paragraph 4.

¹¹ 2019 FCA 82.

¹² At paragraph 39.

¹³ At paragraph 39.

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11(1)(b) of the Act “is an open-ended provision”, not a “mandatory recipe”¹⁴, 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.

33. The Review Board acknowledges that the Object was only recently imported into Canada, and that the Applicant failed to declare as much in its permit application form.¹⁵ However, this fact has no bearing on the Object’s degree of value and importance, or its importance in the Canadian context.
34. Furthermore, the Object’s recent importation into Canada is not a factor which the Review Board may consider in the exercise of its statutory authority. While a CBSA permit officer must issue a permit forthwith if he or she is satisfied that the object in respect of which the application is made was imported into Canada within the thirty-five years immediately preceding the date of the application and was not exported from Canada under a permit issued under the Act prior to that importation¹⁶, the Review Board has no such authority¹⁷.
35. However, the evidence¹⁸ shows that only three paintings by Félix Vallotton are currently held in Canadian public institutions and that none of these paintings are landscapes. If the Object were to be acquired by a public institution in Canada, it would be the only landscape painting by the artist in such a public collection.
36. In view of the importance of the oeuvre of Félix Vallotton in the art history of the late 19th and early 20th century, the modernist approach to landscape as artform, the rarity of Vallotton’s paintings in public collections in Canada, as well as the importance of the landscape tradition in Canada and the potential of the Object to enter into a meaningful dialogue with that tradition, 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.

¹⁴ At paragraph 34.

¹⁵ In its correspondence of October 19, 2021, the Applicant confirmed it would not return to the CBSA to ask that the permit application be reconsidered in light of this error.

¹⁶ Paragraph 7(a) of the Act.

¹⁷ The Review Board may only direct a permit officer to issue an export permit in the situations described in subs. 29(4), 30(4) and 30(5), as well as in para. 29(5)(b).

¹⁸ Data retrieved from the Artefacts Canada database, available at https://app.pch.gc.ca/application/artefacts_hum/re_as.app?lang=en

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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

37. If the Review Board determines that an object is on the Control List and is of outstanding significance and of national importance, subsection 29(5) of the Act requires that the Review Board 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.¹⁹
38. 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.
39. The Applicant states that the owner of the Object has no knowledge of whether an institution or public authority in Canada might make a fair offer to purchase the Object.
40. Nevertheless, the database Artefacts Canada²⁰ shows that three public institutions, the National Gallery of Canada, the Montreal Museum of Fine Arts and the Art Gallery of Hamilton possess paintings of Félix Vallotton and that none of these paintings are landscapes.
41. Considering the importance of the oeuvre of Félix Vallotton in the art history of the 20th century and the significance of the Object in that oeuvre, and having regard to the low threshold, 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

42. 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

¹⁹ Subsection 29(5) of the Act.

²⁰ Available at https://app.pch.gc.ca/application/artefacts_hum/re_as.app?lang=en

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months and not more than six months during which the Review Board will not direct than an export permit be issued in respect of the object.²¹

43. The Review Board establishes a delay period of **six months**, ending **June 29, 2022**, 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 making an offer to purchase the Object and potentially acquire the appropriate funds to do so.

CONCLUSION

44. In conclusion, the Review Board determines²² 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 **June 29, 2022**, 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
Glen A. Bloom
Tzu-I Chung
Laurie Dalton
Madeleine Forcier
Theresa Rowat
Paul Whitney

²¹ Paragraph 29(5)(a) of the Act.

²² The circumstances of this matter, and in particular the preliminary matter relating to the timeliness of the Request for Review, required that the Review Board make a determination outside the four-month statutory deadline set out in the Act (subs. 29(2)).