

REVIEW BOARD DECISION

June 20, 2023

REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0428-23-02-08-001
***The Victim*, circa 1898, by Herbert James Draper**

INTRODUCTION

1. On February 7, 2023, Sotheby's Canada Inc. (the Applicant) applied¹ to the Canada Border Services Agency (CBSA) for a permit to export the work *The Victim*, circa 1898, oil on canvas (the Object), by Herbert James Draper (Draper).
2. On March 7, 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 Art Gallery of Ontario (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 23, 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 31, 2023, and in response to a request by the Review Board, the Applicant filed a written statement in support of its Request for Review (Written Statement) and advised the Review Board that it would not require an oral hearing. The Request for Review proceeded based on the written submissions alone.
5. Six members of the Review Board met on June 7, 2023 to consider the Request for Review.
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 six months ending **December 20, 2023**, during which it will not direct that an export permit be issued in respect of the Object.

¹ Application #0495-23-02-08-001.

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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LEGISLATIVE FRAMEWORK

7. The Review Board is established by the Act. Included in its duties are that it must, “on request...review applications for export permits.”⁴
8. 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
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.⁶
10. 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

THE APPLICANT’S SUBMISSIONS

11. The Object, *The Victim* is an oil on canvas, executed by Herbert James Draper (1863-1920) in 1898. It measures 107 x 40 cm. It is signed at the lower left *H.J. Draper*.
12. The Applicant states that the Object was created in London, England and that it is included in the Control List under Group V, Objects of Fine Art, Section 4(b).⁸

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.

⁸ Applicant’s written statement dated March 31, 2023, at p. 1 and 3.

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13. The Applicant submits that the Object is not of outstanding significance because “it is not the best example for the study of the arts as it is not representative of the artist’s legacy”.⁹ The Applicant consulted Simon Toll, Senior Specialist in Sotheby’s London Victorian Paintings Department who also wrote the catalogue raisonné and modern study of Draper’s work. Mr. Toll considers the Object as a minor work by Draper, “largely ignored by the art critics when it was exhibited [at the New Gallery] in London in 1898 (...). It is neither a famous work nor one by which the artist should be judged. It is neither a painting of outstanding significance in the artist’s oeuvre nor a picture which has any cultural reference or connection to Canada”.¹⁰
14. Furthermore, the Applicant submits that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. Mr. Toll states that the subject matter of the Object “is not a positive image of a woman for public display” and could be considered, similar to other paintings by Draper depicting near-naked girls, “as being misogynistic”, raising some controversy about its appropriateness for public display.¹¹
15. The Applicant further submits that the Object is not “a museum quality piece”¹² when compared to the artist’s large and dramatic mythological or English poetry inspired compositions that were purchased at the time they were painted by municipal museums in Britain. The absence of works by Draper in Canadian collections does not make the Object a rare or outstanding work in the artist’s oeuvre.

ANALYSIS

Whether the Object is included in the Control List

16. 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.

⁹ Applicant’s written statement, at p. 4.

¹⁰ Applicant’s written statement, at p. 3.

¹¹ *Ibid.*

¹² Applicant’s written statement, at p. 4.

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17. The Applicant admits 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
18. The Review Board agrees 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. The Review Board also agrees that the Object's fair market value, as specified by the Applicant in its export permit application, exceeds \$30,000.00 CAN.
19. 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

20. 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
21. The Applicant contends that the Object is not of outstanding significance as the Object does not have any cultural reference or connection to Canada and is not outstanding in the artist's oeuvre.
22. 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.

¹³ Control List, section 4.

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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23. The Review Board does determine that the Object is of outstanding significance for its aesthetic qualities and value in the study of arts.
 24. The Review Board agrees with the Expert Examiner's conclusions. In the Application for Cultural Property Export Permit, the Expert Examiner indicated that the Object is of outstanding significance by reason of its aesthetic qualities and its value in the study of the arts. The Expert Examiner stated that the Object is "significant in its composition and execution" and that it is "[a] representative example of the artist's oeuvre, and of the Pre-Raphaelite and Neo-Classical styles."¹⁶
 25. With respect to aesthetic qualities, the Review Board notes that the work is a very good representation of an academic nude painting, as well as draughtmanship from the 19th century. Furthermore, the unclothed human body and classical draughtmanship are key elements that Draper was known for. The Review Board finds that the painting is representative of the artist's work, who painted images of nude women and girls. The positioning of the body, the landscape, the colours and the painterly quality are all examples of the aesthetic qualities of this piece, as well as the period of art history.
 26. In response to the Applicant's argument that the Object is a minor work within the artist's oeuvre, the Review Board notes that it was created around the same time as arguably one of the Draper's best-known works, *Lament for Icarus*, 1898, for which the artist won the gold medal at the *Exposition Universelle de Paris* in 1900. The *Lament for Icarus* was later bought for the National Gallery of British Art (now known as the Tate Gallery). The Object was therefore created at one of the highest points of the artist's career.
 27. The Applicant also notes that the Object is mentioned little in the artist's catalogue raisonné. While the Review Board recognizes the catalogue raisonné on the artist's work, it does not agree that the catalogue should be the only source in which the aesthetic qualities of the work and its value in the study of arts should be assessed.
 28. The Review Board also did not consider the fact that the Object was rejected at the Royal Academy exhibit in 1898 as an indicator of its outstanding significance, considering the politics behind exhibitions of the 19th century and the Royal Academy.¹⁷ The Review Board rather sees this as indicative of the work's value in the study of arts:

¹⁶ Application for Cultural Property Export Permit, Part II, section 28

¹⁷ See Holger Hoock, "The King's Artists: The Royal Academy of Arts and the Politics of British Culture 1760-1840" (Clarendon Press, 2003).

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both as an art object representative of the artist's body of work, but also as an example of works that go in and out of favour with tastes over time.

29. As for the controversial subject of the Object, the Review Board notes that the subject of the nude body in British art history has been and remains an important area of research today in the art field.¹⁸
30. For the above reasons, the Review Board concludes that the Object is of outstanding significance for its aesthetic qualities and its 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

31. 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.¹⁹
32. 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.²⁰
33. 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",²¹ 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.²²

¹⁸ See for example: Allison Smith, "Exposed: The Victorian Nude," (2002), published in the context of an exhibition organized by the Tate Gallery in London, which describes how the nude in art continues to be an area of research, reassessment and display.

¹⁹ Paragraphs 29(3)(c) and 11(1)(b) of the Act.

²⁰ *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.

²¹ *House of Commons Debates*, (7 February 1975) at p. 3026.

²² *Ibid.*

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34. 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.²³
35. 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.²⁴
36. Finally, 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.²⁵
37. As indicated above, the Applicant submits that the Object is not a masterpiece in Draper's oeuvre. However, the Review Board disagrees with the Applicant that the Object is not of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.
38. There is no work by Hebert James Draper in public collections in Canada, highlighting the rarity of the Object in Canada.
39. The Review Board notes moreover the strong connection between British painting of the 19th century and Canadian art histories. Many Canadian artists were trained in Europe, thus the art historical developments from that region have a considerable impact on Canadian art. British institutions like the Royal Academy would have had a lasting impact on the art and influence in Canada, as well as on the establishment of societies such as the Royal Canadian Academy of Arts.
40. The representation of classical draughtmanship, the nude body, and the painterly approach of the Object are part of a larger art historical movement that had lasting

²³ *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>>

²⁴ *Heffel*, at para 37.

²⁵ *Heffel*, at paras. 37 and 43.

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influence on Canadian artists of the same period. For example, the work of Paul Peel (1860-1892), a Canadian painter of the 19th century who, like many artists of this period, had part of his art training and exhibitions in Europe. He also created the famous Canadian work “A Venetian Bather,” 1889, which is in the collection of the National Gallery of Canada and was the first nude to be displayed in a museum in Canada. Paintings of the nude body that demonstrate academic painterly traditions such as drapery, draughtmanship and colour have had a lasting impact on the development of art history in Canada.

41. In view of the importance of Draper in British painting of the 19th century, the rarity of the artist’s paintings in Canada, and the influence of British academic painting on Canadian art history, 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

42. 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.²⁶
43. 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.
44. The Applicant states that they have no information on 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.

²⁶ Subsection 29(5) of the Act.

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45. While the Review Board recognizes that works of the 19th Century are not collected by every institution in Canada, it notes that there are large museums and galleries in Canada with 19th century European and Canadian collections that have subject experts in these fields. The Review Board also recognizes the rarity of this work, in that there are none in Canadian collections, which increases the likelihood that an institution might make a fair offer on the work.
46. Therefore, 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

47. 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.
48. 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 making an offer to purchase the Object and potentially acquire the appropriate funds to do so.

CONCLUSION

49. 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

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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