Federal Court Cour fédérale

Date: 20180612

Docket: T-1235-17

Citation: 2018 FC 605

Ottawa, Ontario, June 12, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

HEFFEL GALLERY LIMITED

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, in respect of the decision of the Canadian Cultural Property Export Review Board (the "Board") to delay the issue of an export permit for *Iris bleus, jardin du Petit Gennevilliers*, 1892, oil on canvas, 21¾" x 18¼" by Gustave Caillebotte (the "Painting") for six months, in order to allow an institution or public authority in Canada to make a fair offer to

purchase the Painting, in accordance with paragraph 29(5)(a) of the *Cultural Property Export and Import Act*, RSC 1985, c C-51 [*Act*].

II. Background

[2] The Applicant operates a fine-art auction house with offices in Vancouver, Calgary, Toronto, Ottawa and Montreal, under the trade name and style "Heffel Fine Art Auction House".

[3] In November 2016, the Applicant held a public auction, at which it offered the Painting for sale. A commercial gallery based in London, England, purchased the Painting for $678,500 CAD.

[4] The Applicant was required to apply for an export permit in order to send the Painting to London, pursuant to section 40 of the *Act*, because the Painting falls within Group V of the *Canadian Cultural Property Export Control List*, CRC, c 448 [*Control List*].

[5] In determining whether to issue an export permit, a permit officer referred the application to an expert examiner pursuant to subsection 8(3) of the *Act*. The expert examiner was Ms. Michelle Jacques, the Chief Curator of the Art Gallery of Greater Victoria (the "Expert Examiner"). She found that the Painting was of "outstanding significance" and "national importance" and therefore an export permit should not be issued, pursuant to subsections 11(1) and (3) of the *Act*. In accordance with subsection 13(1) of the *Act*, the permit officer advised the Applicant that the permit was denied.

[6] The Applicant then requested that the Board review its application for an export permit, pursuant to subsection 29(1) of the *Act*. An oral hearing was scheduled before a three member panel, including Ms. Katherine Lochnan who had recently been employed with the Art Gallery of Ontario ("AGO"). Both the Applicant and the Expert Examiner made written submissions and then were provided with each other's submissions in order to provide a rebuttal. The Applicant requested the opportunity to cross-examine the Expert Examiner at the oral hearing, but the Board denied this request.

[7] An oral hearing took place before the Board on June 7, 2017. Both the Applicant and the Expert Examiner made submissions.

[8] On July 13, 2017, the Board released its decision. It found that the Painting was of "outstanding significance" and "national importance" as per subsections 29(3) and 11(1) of the *Act*. It also found that a fair offer to purchase the object might be made by an institution or public authority in Canada and therefore it delayed the issuance of an export permit for a period of six months, pursuant to paragraph 29(5)(a) of the *Act*.

[9] On August 10, 2017, the Applicant submitted an application for judicial review of the Board's decision. An amended version of that application was submitted on October 11, 2017.

III. Issues

[10] The issues are:

A. Was the Board's decision unreasonable? In particular:

i. Did the Board adopt an unreasonable interpretation of "national importance" under paragraph 11(1)(b) of the *Act*?

ii. Was the Board's determination that the Painting was of "national importance" unreasonable?

B. Did the Board breach procedural fairness by forbidding the Applicant from cross-examining the Expert Examiner?

C. Did the participation of Board member Katherine Lochnan's in the hearing raise a reasonable apprehension of bias?

IV. Standard of Review

[11] The standard of review is correctness for questions of procedural fairness, and reasonableness for the Board's substantive decision.

V. Analysis

A. *Was the Board's decision unreasonable?*

(1) Did the Board adopt an unreasonable interpretation of "national importance"?

[12] The Applicant submits that the Board's interpretation of "national importance" is inconsistent with the object and purpose of the *Act*. Parliament intended for a high standard to be applied by expert examiners and the Board in order to avoid interfering with personal property rights. However, the Board adopted an overly broad interpretation such that any object that is put on the *Control List* and that meets the threshold of "outstanding significance" would automatically meet the requirement of "national importance". This renders the national

importance requirement meaningless and undermines Parliament's intention to only protect objects that are closely connected to our national heritage.

[13] The Respondent submits that the *Act* expressly covers cultural property that is foreign in origin and has no direct connection to Canada, and stricter controls are in place where that property has high market value and has been in Canada for longer than 35 years. In other words, significant value and long-standing presence in Canada indicate that a foreign-origin cultural object is important to our national heritage. Furthermore, the "national importance" criterion is a quantitative assessment that is focused on degrees of quality, significance or rarity, and the Board is entitled to deference when it makes such an assessment.

[14] In my opinion, the Board's interpretation of "national importance" is unreasonable. The fact that Canada is a diverse country with a multitude of cultural traditions and Canadians may wish to study their cultural traditions or the cultural traditions of other Canadians is not sufficient to render an object of national importance where the object or its creator has no connection with Canada. That interpretation is contrary to the words and scheme of the *Act* as well as Parliament's intention to restrict the scope of the *Act*.

[15] Subsection 11(1) of the *Act* provides the criteria by which to assess an object that is the subject of an application for an export permit and is included in the *Control List*:

a) whether that 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; and

b) whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.

[Emphasis mine]

[16] In determining what constitutes "such a degree of national importance that its loss to Canada would significantly diminish the national heritage", the Board relied on the Department of Canadian Heritage, *Guide to Exporting Cultural Property from Canada,* June 2015 [*Guide*]. It stated:

> Appendix 3 of the [*Guide*] sets out a series of factors supporting national importance that the Review Board may consider in making its determination. These factors include the provenance of the object, the impact of its creator, its origin, its authenticity, its condition, its completeness, its rarity or uniqueness, its representativeness, its documentary or research value, as well as contextual associations that it may have.
>
> […]
>
> The Review Board is of the view that an object can meet the degree of national importance required by the Act even if the object or the creator has no connection to Canada. Canada is a diverse country with a multitude of cultural traditions. The loss of an object to Canada could significantly diminish the national heritage if that loss would deny a segment of the population exposure to or study of their cultural traditions or the cultural traditions of other Canadians. The [*Guide*] affirms this point in the following terms:
>
> > For the purposes of the Act, national heritage includes cultural property that originated in Canada, or the territory now known as Canada, as well as significant examples of international cultural property that reflects Canada's cultural diversity or that enrich Canadians' understanding of different cultures, civilizations, time periods, and their own place in history and the world.

[17] In other words, the Board held that an object is of national importance even if the object or its creator has no connection to Canada, if the loss of that object to Canada would deny a segment of the population exposure to or study of their cultural traditions or the cultural traditions of other Canadians.

[18] To determine whether this interpretation is reasonable, it is necessary to read the words "national importance" and "national heritage" contextually and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21).

[19] The ordinary meaning of paragraph 11(1)(b) of the *Act* suggests that the object must have a direct connection to Canada. Given a purposive construction, the phrase "whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage" immediately brings to mind an analysis of whether an object is so important to Canada that its removal would be a significant loss of a part of Canadian culture. At a minimum, the object must have a significant impact on Canadian culture.

[20] The requirement of a direct connection to Canada is also supported by the dictionary meaning of the words "national" and "heritage". The *Canadian Oxford Dictionary,* 2nd ed, definition of the word "national" includes "of or pertaining to a nation or the nation, especially as a whole" and "peculiar to or characteristic of a particular nation". The definition of the word "heritage" includes "things such as works of art, cultural achievements and folklore that have been passed on from earlier generations" and "a nation's buildings, monuments, countryside,

etc., especially when regarded as worthy of preservation". Together, the words "national" and "heritage" require the object to not only be culturally significant, but also for that significance to be particular to Canada and Canadians.

[21] This interpretation accords with the scheme of the *Act*. Most objects in the *Control List* require a direct connection to Canada, such as having been recovered in Canada, made in Canada, made by a person who once resided in Canada, or otherwise having some relation to Canadian history or a Canadian theme or subject. While some objects captured by the *Control List* have no apparent connection with Canada, but merely exceed a specified age and value, those objects are the exceptions, not the norm.

[22] In any event, an object's inclusion in the *Control List* is not determinative of whether or not an export permit should be issued for that object. It triggers a review of the export permit application by an expert examiner or the Board. In other words, those exceptional objects with no apparent connection to Canada are subject to further review under the stricter criteria of "outstanding significance" and "national importance".

[23] Given a purposive construction, the reference to both of "outstanding significance" and "national importance" implies that these two criteria are independent and have distinct considerations. An object may be of outstanding significance due to its aesthetic qualities or its value for study, pursuant to paragraph 11(1)(a) of the *Act*, but those qualities are independent of the necessary criterion that the object is also of national importance and part of Canadian heritage pursuant to paragraph 11(1)(b). An object must be both significant *and* related to

national importance and Canadian heritage. To suggest that an object is of national importance only because of its value for study – as was suggested by the Board - would undermine the second criterion and render it meaningless. Courts should avoid adopting an interpretation that would render any portion of a statute meaningless, pointless or redundant (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: 2014, LexisNexis Canada) [*Sullivan*] at 211).

[24] Furthermore, Parliament has never adopted the much broader definition of cultural property found in the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 14 May 1954, Can TS 1999 No 52 [*Convention*]. The *Convention* refers to "cultural property" as objects "of great importance to the cultural heritage of every people". The *Act* contains provisions related to the *Convention*, but does not incorporate that definition. The distinct contrast between "national heritage" and "cultural heritage of every people" suggests an intent to limit the range of objects captured by the *Act.*

[25] Finally, the legislative history confirms that Parliament intended for the *Act* to have limited application and to focus on objects with a more direct connection with Canadian heritage. The Honourable James Hugh Faulkner, who was Secretary of State at the time the *Act* was introduced, spoke about the loss of "national treasures" and "preserving Canadian heritage". MP Gordon Fairweather spoke about "Canadian nationalism, the Canadian ethic and our cultural heritage" and the need to prevent the removal of national treasures so that Canadians can discover their shared identity (*House of Commons Debates*, 30th Parl, 1st Sess, Vol III (7 February 1975), Second Reading of Bill C-33 [*Debates*] at 3024-3040).

[26] Equally, Mr. Faulkner stressed the importance of limiting the intrusion into property rights and the freedom of trade. He wished to "emphasize the necessity for limiting control to a minimum", that "a workable system of export control must confine itself to limited, well-defined categories" and only deal with objects "of the first order of importance". He stated that the *Act* should "not attempt to set up too fine a screen which, in addition to creating high administrative costs, would catch objects of minor importance. This would create unnecessary delays in the trade, to the detriment of normal business." (*Debates* at 3024-3040).

[27] The stricter interpretation of the *Act* suggested by Mr. Faulkner accords with the presumed legislative intent to not interfere with property rights, in particular, the freedom of the property owner to use and dispose of property as he or she sees fit, without hindrance or control (*Sullivan* at 503).

[28] There is no question that Canada is a diverse country with a multitude of cultural traditions. I also accept that the Board is entitled to deference when interpreting its home statute and that the Applicant must not only show that its competing interpretation of the *Act* is reasonable, but also that the Board's interpretation was unreasonable (*McLean v British Columbia (Securities Commission),* 2013 SCC 67 at para 41).

[29] However, to apply the provisions of the *Act* to any object that allows for exposure to or study of the cultural traditions of Canadians, where "cultural traditions" incorporates the multiculturalism of Canada, and therefore the cultural heritage of peoples from around the world,

without proper consideration of the express wording of subsection 11(1) of the *Act*, is unreasonably broad.

[30] Such an interpretation could unreasonably capture any work that has outstanding aesthetic qualities or value for study, but no direct connection to Canada or national importance such that its loss would significantly diminish the national heritage. There must be a connection with Canadian heritage that is more direct than the fact that Canada is multicultural and Canadians may wish to study the traditions of any one of the many countries from which their ancestors may have come. Parliament has chosen words that require a direct connection with the cultural heritage that is particular to Canada, to not adopt the broad definition of cultural property found in the *Convention*, and to separate the analysis of aesthetic qualities and value for study from the analysis of national importance. All of this is in accordance with Parliament's stated and presumed intention to restrict the scope of the *Act* in order to limit the interference with property rights.

[31] I find that the Board's interpretation of paragraph 11(1)(b) of the *Act* did not fall within the range of possible outcomes which were defensible in respect of the facts and the law and therefore it was unreasonable.

(2) Was the Board's determination that the Painting was of "national importance" unreasonable?

[32] The Respondent submits that the Board reasonably found that the preservation of the Painting in Canada was required to ensure access to the work by Canadians, and that there was

an association to an Impressionist work that was currently in the National Gallery of Canada. The Board also referred to the opinions of the Applicant's experts but disagreed with the Applicant on the probative value and weight of that evidence.

[33] The Board gave the following reasons for finding that the loss of the Painting to Canada would significantly diminish the national heritage:

- it was in the inventory of the commercial dealer Ambroise Vollard of Paris, France, who was one of the most important dealers in French contemporary art at the beginning of the 20th century, including the work of French Impressionists;
- Gustave Caillebotte's work has been reassessed over the last 20 years and there is now substantial interest in it;
- the Painting is only the second work of Caillebotte's known to be in Canadian collections. It is a unique work of art and is the only work representative of the series of work depicting flowers and having symbolic significance that were created by the artist late in his life;
- in view of the rarity of works by Caillebotte in Canada and the stature of the artist in French Impressionism, there is no doubt that the Painting will be of considerable interest and importance for research in Canada with respect to French Impressionism; and
- with respect to the Canadian context, one of the greatest masterpieces of the National Gallery of Canada is the painting *Iris*, 1890, by Vincent Van Gogh, which was made just two years before the Painting. It also depicts a blue iris in a garden from a similar perspective to that of the Painting.

[34] The Applicant's experts on this issue were Laurier Lacroix and Carol Lowrey. Dr. Lacroix is professor emeritus of art history and museum studies at the Université du Québec in Montréal. He has devoted most of his professional life to the study of painters from Québec and has undertaken a great deal of research on Canadian artists influenced by the French Impressionist movement. Dr. Lowrey is a Canadian-born art historian and curator based in New York City. She is a graduate of the University of Toronto (MA, MLS) and the City University of New York (PhD) and has written numerous articles, books and exhibition catalogues devoted to

aspects of 19th and early 20th century Canadian and American art. She has focused on the tradition of Impressionism as it developed in North America.

[35] Dr. Lacroix submitted in his expert report that:

- the Painting was relatively insignificant;
- the Painting was never exhibited in Canada and it was not reproduced until 1978, long after the period of Canadian Impressionism was over;
- the Painting had no influence on Canadian Impressionist painters;
- the Painting had no influence on the Canadian public nor upon the artistic practices of Canadian artists; and
- there was no reasonable basis to conclude that the export of the Painting from Canada would negatively affect the national heritage in any way.

[36] Dr. Lowrey submitted in her expert report that:

- there was no evidence that the Painting, or Caillebotte's oeuvre in general, inspired the stylistic evolution of any of the artists associated with the Canadian Impressionist tradition;
- there was no evidence that Canadian artists were in contact with Caillebotte;
- the Painting was not exhibited during the years that Impressionism flourished in Canada, having remained abroad until entering a private collection in 1960;
- the Painting has no direct connection to the history of the Canadian Impressionist tradition;
- the export of the Painting would not impact our interpretation of Impressionism as practiced by Canadian artists, nor would it have a deleterious effect on our national heritage.

[37] The Board acknowledged the opinion of these experts, that is, that the Painting has no connection to Canadian Impressionism, that the Painting had no influence on the Canadian public or artistic practices of Canadian artists and that the Painting had no connection to Canadian artists engaged in Impressionism.

[38] These are precisely the types of factors the Board should have considered in its analysis under paragraph 11(1)(b) of the *Act*. The Board unreasonably focused only on the Painting's provenance, rarity, research value and desirability under paragraph 11(1)(a). As outlined above, to analyse only these factors and not the object's connection to Canada renders paragraph 11(1)(b) meaningless and overly broadens the scope of the *Act*, contrary to the intention of Parliament.

[39] There was no reasonable basis for the Board to have concluded that the Painting was of such a degree of national importance that its loss to Canada would significantly diminish the national heritage. The artist and subject matter were not Canadian and the Painting has no connection to the Canadian public or Canadian Impressionism. Essentially, the Board's unreasonable interpretation of paragraph 11(1)(b) of the *Act* caused it to make an unreasonable determination of whether the Painting met the requirements of that provision.

[40] The Board's finding on this issue was unreasonable.

B. *Did the Board breach procedural fairness by forbidding the Applicant from cross-examining the Expert Examiner?*

[41] The Applicant submits that the Board breached procedural fairness by denying it the opportunity to cross-examine the Expert Examiner. The opportunity to cross-examine is fundamental to a party's ability to present their position and answer the case against them, particularly where a tribunal conducts an adjudicative hearing affecting property rights and the

facts are complex and in dispute. Here, the Expert Examiner was essentially an adverse party and the entirety of the case the Applicant had to meet was found in her evidence.

[42] The content of procedural fairness is contextual and in this case the context favours a procedure far removed from the "trappings" of a court process. The Board provided substantial information about the process in advance of the hearing. At the hearing, it gave the Applicant ample opportunity to respond to the Expert Examiner's opinion and present its own evidence.

[43] Here, the factors affecting the content of the duty of fairness, as outlined by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28, do not weigh in favour of a higher degree of procedural protection than that which was provided by the Board.

[44] The Applicant had no legitimate expectation that it would be allowed to cross-examine the Expert Examiner. As well, a determination of whether an object is of "outstanding significance" and "national importance" is subjective and the Board is entitled to some deference with respect to the choice of procedure it chose to follow in making that determination. Indeed, Parliament granted the Board with broad discretion to make its own rules for the conduct of its proceedings (section 24 of the *Act*) and to dispose of matters as informally and expeditiously as the circumstances of fairness will permit (section 28 of the *Act*).

[45] While I accept that the Board's decision-making process contained many features that suggest it was adjudicative in nature - the decision was final, impacted the Applicant's rights and

was based on findings of fact and a determination of whether certain legal standards were met - I find that the Board's procedure satisfied the rules of natural justice. Leading up to the hearing, the Board outlined the process that would be provided. The Applicant was provided with the Expert Examiner's written statements in advance. It then responded to those statements with thorough submissions, expert reports and a subsequent rebuttal. At the oral hearing, it was provided with additional time to make its case and additional time to respond to the Expert Examiner's oral submissions.

[46] In the circumstances, I am satisfied that the Applicant was afforded procedural fairness.

C. *Did Board member Katherine Lochnan's participation in the hearing raise a reasonable apprehension of bias?*

[47] The Applicant submits that Ms. Lochnan's participation in the hearing gives rise to a reasonable apprehension of bias. She had been employed by the AGO for approximately 47 years and at the time of hearing she was, or had recently retired as, Senior Curator of International Exhibitions for the AGO. At the hearing, the Expert Examiner stated that the AGO had expressed interest in purchasing the Painting. At that point, Ms. Lochnan should have disclosed her relationship with the AGO to provide the Applicant with the opportunity to seek her recusal. This problem was exacerbated when the AGO made an offer to purchase the Painting during the delay period imposed by the Board.

[48] The Applicant has the onus of proving bias and the grounds for an apprehension of bias must be substantial because the allegation challenges the integrity of a tribunal and the members

who participated in a decision. The Court must consider all of the circumstances, including the presumption of integrity of statutory decision-makers, the nature of administrative tribunals and the nature of a particular proceeding.

[49] Here, subsections 18(2) and (4) of the *Act* not only contemplate that former or current officers or employees of art institutions may be on the Board, they require at least one of those individuals to be present in order for a quorum to be constituted:

Review Board	**Commission**
Review Board Established	**Création de la Commission**
Members	**Commissaires**
18 (2) The Chairperson and one other member shall be chosen generally from among residents of Canada, and	18 (2) Les commissaires sont choisis parmi les résidents. En outre, à l'exclusion de deux d'entre eux, dont le président, ils sont choisis :
(a) up to four other members shall be chosen from among residents of Canada who are or have been officers, members or employees of art galleries, museums, archives, libraries or other collecting institutions in Canada; and	a) jusqu'à concurrence de quatre, parmi les personnes qui sont ou ont été des dirigeants ou membres du personnel de musées, archives, bibliothèques ou autres établissements qui constituent des collections sis au Canada;
(b) up to four other members shall be chosen from among residents of Canada who are or have been dealers in or collectors of art, antiques or other objects that form part of the national heritage.	b) jusqu'à concurrence de quatre, parmi les personnes qui sont ou ont été des marchands ou collectionneurs d'objets d'art, d'antiquités ou d'autres objets faisant partie du patrimoine national.
Quorum	**Quorum**
(4) Three members, at least one of whom is a person described in paragraph (2)(a) and one of whom is a person described in paragraph (2)(b), constitute a quorum of the Review Board.	(4) Le quorum est de trois membres, dont au moins un de chacune des deux catégories établies par les alinéas (2)a) et b).
[Emphasis added]	[soulignement ajouté]

[50] Clearly, Parliament intended for the Board to benefit from the expertise of individuals from art institutions. Moreover, there is nothing in the *Act* to suggest it is a problem for those individuals to sit on the Board when the Board makes decisions that could benefit those very institutions. Rather, paragraph 29(5)(a) requires a determination of whether a Canadian art institution might make a fair offer to purchase an object, and individuals from those art institutions are well-situated to make such a determination. To ground an apprehension of bias, something more is required than the mere connection between a Board member and an art institution that is contemplated by the statute.

[51] Here, there is simply no evidence to suggest that Ms. Lochnan was biased beyond her former relationship with the AGO. Nothing in the transcript of the proceedings or in the record before the Board is capable of founding the apprehension of bias alleged, nor is there evidence of any personal involvement on her part with respect to the Painting while she was at the AGO.

JUDGMENT IN T-1235-17

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the decision of the Board is quashed. The matter is referred back to a differently constituted Board for reconsideration based on my reasons and decision.
2. The application is otherwise dismissed.
3. Costs to the Applicant.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1235-17
STYLE OF CAUSE:	HEFFEL GALLERY LIMITED v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 30, 2018
JUDGMENT AND REASONS:	MANSON J.
DATED:	JUNE 12, 2018

APPEARANCES:

Mr. Rees Ms. Mouris	FOR THE APPLICANT
Ms. Goudarzi	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Conway Baxter Wilson LLP/s.r.l. Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT