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Heffel Gallery Limited : The National Importance of Foreign Art in Canada

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On April 16, 2019, the Federal Court of Appeal issued a judgment resolving a deadlock that had been plaguing the Canadian art community since June 12, 2018.

Since June 2018, the Canadian Cultural Property Export Review Board (the "Board") has had to take into consideration the Federal Court's findings in *Heffel Gallery Limited v. Canada (Attorney General)*.[1] As a result of this judgment, the eligibility of foreign artwork was facilitated with respect to the issuance of permits to export cultural property[2] but compromised with respect to the issuance of income tax certificates.[3] It was thus easier to obtain a permit to export artwork abroad and more difficult for donors to Canadian museums to benefit from income tax deductions

In contrast to the way the Board had been operating, this trial judgment interpreted the "national importance" criterion very restrictively. As a result, the applicability of the *Cultural Property Export and Import Act*[4] (the "Act") was limited to works with a direct connection to Canada. Outstanding objects that were not produced in Canada or by a Canadian artist could no longer benefit from the protections afforded by the Act when exported[5] or qualify for income tax certificates.

In a unanimous decision, the Federal Court of Appeal[6] overturned the trial judgment by finding that a work by an international artist can meet the level of national importance required under the Act. In this regard, the Federal Court of Appeal found that the "national importance" criterion allows for a determination of the effect that exporting the object would have on the country.[7] As a result, a work or its creator does not need to have a direct link to Canada to be eligible for tax deductions and the application of the export control mechanism.

The Trial Judgment

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The piece *"Iris bleus, jardin du Petit Gennevilliers"*[8] ("*Iris bleus*") by impressionist painter Gustave Caillebotte is at the heart of this dispute. In November 2016, the Heffel Gallery held an auction in which a London-based commercial gallery acquired the painting. In order to deliver *Iris bleus* to its buyer, the Heffel Gallery had to apply to the Board[9] for an export permit. The expert examiner in the case refused the application, and, subsequently, the Board's review panel did the same.[10]

Following these refusals, an application was made to the Federal Court for judicial review, in which it had to rule on the meaning of the national importance criterion as it appears in the *Canadian Cultural Property Export Control List*[11] (the "Control List"). Following to their analysis, the Court deemed the Board's interpretation of the national importance criterion to be too broad.[12] Although it recognized the plurality of Canadian culture, the Federal Court found that the objects covered by the "national importance" criterion must have a direct connection to Canada.[13] Pursuant to this interpretation, the Court adopted a position expressly favouring the property rights of owners of cultural property as well as economic liberalism in the art market.[14]

The trial judgment had unfortunate consequences, most notably, the fact that numerous institutions had to suspend or even cancel new acquisitions[15] because certain generous donors could no longer receive tax certificates.[16]

The Federal Court of Appeal Judgment

In its reasons for judgment, the Federal Court of Appeal first reiterates the broad outlines of the applicable legislative framework and its primary objective. In 1977, Parliament enacted the *Cultural Property Import and Export Act*[17] in order to protect Canada's national heritage. In adopting said law, Parliament was complying with its international commitments to UNESCO to combat the trafficking of cultural objects.[18]

The control list system established by Parliament (the "Control List") sets out a number of conditions that must be met in order for an object's export to be controlled under the Act.[19] If the object is not included in the Control List, an export permit may be issued. If it is, an expert examiner determines whether the object "(a) 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) is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage".[20]

According to the Federal Court of Appeal, the trial judge erred in refusing to defer to the Board's decision. In other words, when interpreting its own incorporating legislation, the Board is "better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute."[21] » This error is significant because Parliament had granted broad powers to the Board when assessing an object according to the "national importance" criterion. More specifically, these powers recognize the expertise of the members appointed to the Board based on their specialization in the fields of cultural property, cultural heritage and cultural institutions.[22]

Conclusion

Canada's cultural institutions were undoubtedly relieved by this jurisprudential outcome. By recognizing that a work can be of national importance without necessarily being Canadian, this decision crystallizes the experts' interpretation of the Act and the resulting practices that were predominant in the cultural community prior to the trial judgment. Donors who own exceptional works by foreign artists can once again donate them to Canadian institutions' collections and benefit from tax incentives in return. The Federal Court of Appeal concludes by reiterating the purpose of the existing legislative framework, namely to "prevent many Canadian institutions from being

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‘culturally ghettoised’ in allowing them to acquire works of art with a view of preserving cultural heritage for future generations.”[23]

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1. 2018 CF 605.
2. *Cultural Property Export and Import Act*, R.S.C. 1985, c. C-51, ss. 7-16
3. *Id.*, ss. 32 and 33. The income tax certificate is the mechanism of the *Cultural Property Export and Import Act* (the “***Loi***”) that allows those who donate works to Canadian institutions to benefit from the tax deductions provided for in the *Income Tax Act*.
4. Supra note 2.
5. Under the terms of the *Cultural Property Export and Import Act*, institutions may exercise a priority right of purchase that delays the export of any work considered exceptional and of national importance for up to six months.
6. *Canada (Attorney General) v. Heffel Gallery Limited, 2019 FCA 82*
7. *Id.*, para. 37.
8. 1982, oil on canvas, 21 ¾ x 18 ¼ inches.
9. *Cultural Property Export and Import Act*, supra note 2, ss. 8(3) and 40.
10. *Heffel Gallery Limited v. Canada (Attorney General), supra note 1, para. 8.*
11. C.R.C., c. 448.
12. *Heffel Gallery Limited v. Canada (Attorney General), supra note 1, para. 12.*
13. *Id.*, para. 20-21.
14. *Id.*, para. 26-27.
15. On this subject, see Catherine LALONDE, “Des dons qui échappent aux musées,” *Le Devoir*, December 19, 2018.
16. *Cultural Property Export and Import Act*, supra note 2, ss. 32 and 33.
17. Supra note 2.
18. In order to comply with their commitment under the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970, 823 UNTS 231 (entered into force April 24, 1972), signatory countries were required to adopt legislation ensuring cross-border control of cultural property.
19. The object must be included in one of the well-defined categories of the *Control List*, be at least 50 years old and, in the case of a natural person’s work, its creator must be deceased. In addition, where the object is not of Canadian origin, it must have been in Canada for at least 35 years.
20. *Cultural Property Export and Import Act*, supra note 2, s. 11(1), emphasis added.
21. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, cited in *Attorney General of Canada v. Heffel Gallery Limited*, supra note 6, para. 52.
22. *Canada (Attorney General) v. Heffel Gallery Limited*, supra note 6, para. 33.
23. *Id.*, para. 57

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