

REVIEW BOARD DECISION

July 20, 2022

REQUEST TO EXTEND TIME TO FILE REQUEST FOR REVIEW OF REFUSED APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0495-22-05-04-002 *Under the Well of the Great Wave Off Kanagawa*, by Katsushika Hokusai

INTRODUCTION

1. On April 28, 2022, Heffel Gallery Limited (the Applicant) sold a print of Katsushika Hokusai's *Under the Well of the Great Wave Off Kanagawa* (the Object) to a resident of Portugal¹. It then applied to the Canada Border Services Agency (the CBSA) for an export permit to export the Object.
2. On May 13, 2022, a permit officer employed by the CBSA sent to the Applicant a written notice of refusal (the Notice of Refusal). The refusal was based on the advice of a representative of the Royal Ontario Museum, an expert examiner, who determined that the Object is on the *Canadian Cultural Property Export 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 14, 2022, the Applicant requested a review (the Request for Review) by the Canadian Cultural Property Export Review Board (the Review Board) of the refused application for an export permit. Accompanying the request was correspondence by the Applicant's counsel in which she noted the 30-day deadline in s. 29(1) of the Act and acknowledged that the Request for Review was filed 1 day late. Counsel requested that the Review Board either extend the filing deadline or provide the opportunity to make submissions in that regard.
4. On June 17, 2022, the Secretariat to the Review Board requested from the Applicant written submissions on the Review Board's authority to extend the deadline for initiating a review of a refused application for an export permit. On June 30, 2022, the Applicant filed those submissions (the Request to Extend Time).
5. This decision addresses the merits of the Request to Extend Time.

ISSUES

6. The Request to Extend Time raises two issues:

¹ Affidavit of David Heffel, para. 2.

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- (a) Whether the Review Board has the authority to extend the 30-day filing deadline stipulated in subs. 29(1) of the Act, and if so,
- (b) Whether, in the particular circumstances of this matter, the Review Board should exercise that discretion to extend time.

APPLICANT'S POSITION

- 7. The Applicant submits that the question of whether the Review Board can extend time is a question of statutory interpretation.
- 8. The Applicant contends that the power to extend time would be consistent with the scheme of the Act and Parliament's intent. The Applicant points to the Review Board's rule-making powers in s. 24 of the Act which it says reflects Parliament's intent to give the Review Board significant procedural flexibility in interpreting the scope of the rules it may adopt, as well as to s. 28 of the Act which requires the Review Board to dispose of matters as informally and expeditiously as possible, without sacrificing fairness. This, the Applicant contends, illustrates Parliament's intent that fairness should determine the Review Board's approach.
- 9. The Applicant further submits that the Act's silence with respect to extending time is not determinative.
- 10. The Applicant refers to a Supreme Court of British Columbia case² in which the court considered whether it could extend a deadline in the B.C. *Motor Vehicle Act* which gave drivers served with a notice of driving prohibition only 7 days to apply to the Superintendent of Motor Vehicles for review of that prohibition. The court found that while no powers to extend time could be found in the legislation, for reasons of fairness the Superintendent had to have the authority to extend the deadline beyond seven days. In coming to that conclusion, the court rejected the notion that conferring this discretion would be an unwarranted amendment to clear, unequivocal statutory provisions. Rather, it found that the legislature clearly wished to give drivers a meaningful opportunity to make representations to relieve against the impact of a licence suspension, and that such a short delay without the possibility of extension would be inconsistent with that intention.

² *Segers v. British Columbia (Superintendent) of Motor Vehicles*, 1999 CanLII 5561 (BCSC).

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11. Should the Review Board find that it has the discretion to extend the filing deadline, the Applicant submits that it should do so in the circumstances, given the very short delay and its continued intent to seek review. The Applicant further submits that it should not be penalized for its counsel's inadvertence.

ANALYSIS

12. The Applicant rightly acknowledges that subs. 29(1) of the Act requires a request for review to be filed within 30 days after the date on which the notice of refusal is sent. In this matter, the Notice of Refusal was sent on May 13, 2022, and the Request for Review was filed on June 14, 2022, one day late.
13. The Review Board agrees with the Applicant that the question of whether it has the authority to extend the filing deadline in subs. 29(1) is a matter of statutory interpretation. The Review Board must consider the text, context and purpose of the legislation.³ “[T]he words of [the] Act are to 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”.⁴
14. The Act seeks to preserve the national heritage in Canada through a system of export controls and tax incentives ultimately designed to encourage Canadians to donate or sell significant objects to Canadian cultural organizations. When an applicant wishes to export controlled cultural property, it must apply to the CBSA for an export permit. If the application is refused, the applicant may then request a review of the refused application by the Review Board, within 30 days of the date on which the CBSA sent the notice of refusal. If no request for review is filed, all is not lost; the applicant may re-apply for an export permit once two years have elapsed⁵. The text of subs. 29(1) of the Act does not give the Review Board the power to extend the 30-day filing deadline.
15. When the Review Board considers a request for review in export matters, the scope of that review is limited by the Act. Indeed, the Review Board may only consider

³ See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 121.

⁴ See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para 21, citing Elmer Driedger's work *Construction of Statutes* (2nd ed. 1983) at page 87.

⁵ Section 16 of the Act.

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whether (1) the object in question is on the Control List, (2) is of outstanding significance, (3) meets the degree of national importance set out in the Act, and depending on its determination on those points, it may (4) consider whether 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 its determination, and (5) impose an export delay of two to six months, if warranted. The Review Board does not have the discretion to consider any other aspects of the permit application or the CBSA's decision, such as whether the object was imported into Canada within 35 years preceding the permit application.⁶

16. Nevertheless, the Act does provide the Review Board with some discretion in certain circumstances. Subsections 29(2), 32(4), 32(6) and 32(8) require the Review Board to either consider a matter or render a decision within 4 months, unless the circumstances of a particular case require otherwise.
17. In addition, the Act explicitly confers on the Tax Court of Canada the discretion to extend time where an appeal from a Review Board redetermination in income tax matters is not filed within 90 days⁷.
18. The Review Board finds that had Parliament intended to give it the discretion to extend the deadline to initiate a request for review of a refused export permit application, it would have done so expressly as it did in the circumstances listed above.
19. The Review Board agrees that the Act provides it with significant procedural discretion as well as the power to make rules for the conduct of its proceedings under the Act. Section 28 of the Act indicates that the Review Board must "dispose of any matter before it as informally and expeditiously as, in its opinion, the circumstances and considerations of fairness will permit". Moreover, s. 24 of the Act gives the Review Board the discretion to "make rules not inconsistent with th[e] Act for the conduct of its proceedings and the performance of its duties and functions...".

⁶ See the Review Board's decision dated May 20, 2022, in *Two Horses* by Kadhim Hayder (Application No.: 0495-22-03-04-001), and its decision dated December 29, 2021, in *Chemin entre des murs à Avallon* by Félix Vallotton (Application No.: 0495-20-10-01-006).

⁷ Subsection 33.2(1) of the Act.

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20. However, the Review Board finds that ss. 24 and 28 of the Act do not provide a basis for the authority to extend time to initiate a proceeding. Those provisions simply formalize the Review Board's power to control its own process. They are designed to allow the Review Board to make rules related to practice and procedure to facilitate the fair and timely resolution of the matters properly before it. In other words, they speak of rules and procedure once a request is properly before the Review Board and should not be construed as giving the Review Board the authority to confer on an applicant a substantive right to initiate a proceeding where the request falls outside the statutory time limit imposed by Parliament.

21. In coming to this conclusion, the Review Board finds support from a line of cases wherein the courts have held that the right to appeal is a statutory one where time limitations are mandatory unless the statute provides the reviewing body with the authority to extend time. This jurisprudence, acknowledged by the Applicant, was set out by the B.C. Court of Appeal in *MacNeil v. British Columbia (Superintendent of Motor Vehicles)*⁸:

[42] The view that a right to appeal is statutory and that compliance with the preconditions to appeal is necessary to vest jurisdiction in an appellate or review body is reflected in a substantial body of case law. Examples of appellate cases adopting this approach where the issue involved complying with timelines include: *Mallet v. New Brunswick (Minister of Social Development)* (2011), 2011 CanLII 28374 (NB CA), 374 N.B.R. (2d) 170 (C.A.); *LeClair v. Manitoba (Residential Care, Director)* (1999), 1999 CanLII 18761 (MB CA), 33 C.P.C. (4th) 1, [1999] 9 W.W.R. 583 (Man. C.A.); and *Houston v. Saskatchewan Teachers' Federation*, 2009 SKCA 70, 331 Sask. R. 157.

[43] In *Mallet*, the New Brunswick Court of Appeal considered s. 59(1) of the Family Services Act, S.N.B. 1980, c. F-2.2, which provides that "any order or decision made under this Part may be appealed within thirty days" (emphasis added). The Court concluded that the Act does not contemplate an extension of time and there was no jurisdiction to grant one.

⁸ 2012 BCCA 360.

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[44] In LeClair, the Manitoba Court of Appeal considered s. 13(7) of the Social Services Administration Act, C.C.S.M., c. S165, which provides that a person “may [appeal] within 10 days” to the Court of Queen’s Bench. The Court held that the right of appeal had been lost; the time limitation was mandatory and the statute did not provide for an extension of time.

[45] In Houston, the Teachers’ Federation Act, 2006, S.S. 2006, c. T-7.1, s. 34, provided that a person “may appeal to the Court of Appeal within 30 days”. The Saskatchewan Court of Appeal held that the statute is clear; it says an appeal must be brought within thirty days and makes no provision for an extension of time. Further, it held that the Court of Appeal Act, 2000, S.S. 2000, c. C-42.1, which confers authority to extend a general appeal period, did not apply as it conflicted with the stricter limit in the Teachers’ Federation Act.

22. The Review Board finds further support from a 2012 decision by the Federal Court of Appeal⁹ in which the court found that a 30-day deadline set out in the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*¹⁰ was strict and could not be extended without express statutory authority to do so.
23. The Review Board acknowledges that the *Segers* case cited by the Applicant goes against this line of case law. However, that is a lower court decision that is distinguishable from the matter before the Review Board.
24. *Segers* was founded on case law developed in the human rights context where the courts found that human rights tribunals have a kind of “fairness” or equitable jurisdiction in the fulfilment of their statutory duties because of the very nature of their legislation¹¹. It is doubtful that the Act confers that same equitable jurisdiction on the Review Board in the course of its duties to control the export of cultural property and administer tax incentives. Furthermore, the Review Board finds that unlike the 7-day

⁹ *Clare v. Canada (Attorney General)*, 2013 FCA 265.

¹⁰ SOR/2000-187.

¹¹ See *Zutter v. British Columbia (Council of Human Rights)*, 1995 CanLII 1234 (BC CA), *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, and *Grillas v. Minister of Manpower and Immigration*, 1971 CanLII 3 (SCC).

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deadline discussed in *Segers*, the 30-day timeline in the Act provides an applicant with a meaningful opportunity to request a review of a refused export permit, consistent with Parliament's intent.

CONCLUSION

25. Despite the unfortunate circumstances of this matter, the Review Board finds for the reasons stated above that it does not have the authority to extend the 30-day deadline in subs. 29(1) of the Act for the initiation of a request for review of a refused export application.

26. As such, there is no need to consider the second issue, nor the merits of the Request for Review.

For the Review Board

Sharilyn J. Ingram, Chair
Glen A. Bloom
Tzu-I Chung
Laurie Dalton
Patricia Feheley
Jo-Ann Kane
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