

## REVIEW BOARD DECISION

October 15, 2024

### REQUEST FOR REVIEW OF AN APPLICATION FOR CULTURAL PROPERTY EXPORT PERMIT

Application No.: 0428-24-06-04-002  
*The Settler's Log House, 1859, by Cornelius Krieghoff*

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#### INTRODUCTION

1. On June 3, 2024, Cowley Abbott (the Applicant) applied<sup>1</sup> to the Canada Border Services Agency (CBSA) for a permit to export the work *The Settler's Log House, 1859*, oil on canvas (the Object), by Cornelius Krieghoff (Krieghoff).
2. On June 6, 2024, a permit officer employed by the CBSA sent to the Applicant a written notice of refusal with respect to the Object.<sup>2</sup> The refusal was based on the advice of a representative of the Musée national des beaux-arts du Québec (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 June 19, 2024, the Applicant requested a review of its application for an export permit<sup>3</sup> (the Request for Review) by the Canadian Cultural Property Export Review Board (the Review Board).
4. On June 19 and June 27, 2024, and in response to a request by the Review Board, the Applicant filed written statements in support of its Request for Review (Written Statements) and advised the Review Board that it would not require an oral hearing.
5. Eight members of the Review Board met on September 13, 2024 to consider the Request for Review. The Request for Review proceeded based on the written submissions alone.
6. For the reasons that follow, the Review Board finds that the Object is included in the *Canadian Cultural Property Export Control List* (the Control List), is of outstanding significance by reason of its close association with Canadian history, its close association with national life, its aesthetic qualities, and value in the study of 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 four months ending **February 15, 2025**, during which it will not direct that an export permit be issued in respect of the Object.

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<sup>1</sup> Application #0428-24-06-04-002.

<sup>2</sup> Subsection 13(1) of the *Cultural Property Export and Import Act* (the Act).

<sup>3</sup> 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.”<sup>4</sup>
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.<sup>5</sup>
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.<sup>6</sup>
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.<sup>7</sup>

#### THE APPLICANT'S SUBMISSIONS

11. The Object, *The Settler's Log House* is an oil on canvas, executed by Cornelius Krieghoff (1815-1872) in 1859. It measures 61 x 91.4 cm. It is signed, dated 1859 and inscribed 'Quebec' in the lower right corner.

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<sup>4</sup> Subsection 20(a) of the Act.

<sup>5</sup> Subsection 29(3) of the Act.

<sup>6</sup> Subsection 29(5) of the Act.

<sup>7</sup> Subsection 29(4) of the Act.

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12. The Applicant states that the Object is included in the Control List under Group V, Objects of Fine Art, Section 2(b).<sup>8</sup>
13. The Applicant submits that the Object is of outstanding significance by reason of its aesthetic qualities and suggests that the Object “has association with Canadian history and national life”<sup>9</sup> however, “it is not of particular value to the study of the arts. Therefore, the Object is not of such national importance that its loss to Canada would significantly diminish the national heritage”.<sup>10</sup>
14. The Applicant further suggests that “the Object’s association with Canadian history and national life is typical for Krieghoff’s body of work, which is largely comprised of images illustrating habitant life in Canada, as well as local First Nations’ culture.”<sup>11</sup>
15. The Applicant notes that Krieghoff painted a series of settler’s log houses in winter between 1856 and 1863, observing that a “remarkably similar variant of the Object is the “Settler’s Log House”, an 1856 canvas of the same period [is] in the Thomson collection of the Art Gallery of Ontario (AGO).” The Applicants adds that “the 1999 catalogue of the Krieghoff exhibition organized by the Art Gallery of Ontario reproduce[d] eleven variant compositions in the McCord Museum, National Gallery, the Art Gallery of Ontario and Thomson collections alone”.<sup>12</sup> They also submit that the majority of Canadian institutions across the country hold multiple works of art by Krieghoff, and Krieghoff works are in several institutions in the United States.
16. The Applicant further submits that “the Object possesses significant aesthetic qualities [...] the Object displays rich detail, colour and descriptive tone”, but that it “does not boast unique significance in its value to the study of the arts and sciences when one considers the robust representation of Krieghoff’s body of work in the collections of public institutions across Canada.”<sup>13</sup>
17. With respect to a fair offer of purchase, the Applicant submits that the Object was exhibited in Toronto and Winnipeg during its spring auction previews. The auction during which the Object was offered “was proactively promoted to Canada’s

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<sup>8</sup> Applicant’s cultural property export permit application, Part II, at p. 2.

<sup>9</sup> Applicant’s written statement, dated June 18, 2024, at p. 2.

<sup>10</sup> Applicant’s written statement, dated June 18, 2024, at p. 4.

<sup>11</sup> Applicant’s written statement, dated June 18, 2024, at p. 2.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

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institutions”<sup>14</sup> and collectors, “providing a very high level of exposure of the Object to those with an interest in the work of Krieghoff”.<sup>15</sup>

18. However, the Applicant further states that despite this exposure and promotion, the Object sold for its reserve price, below its pre-sale auction estimate, “indicating clearly that there was virtually no demand for the artwork [the Object] beyond a single bid by the buyer”. Furthermore, “[n]o public institution bid on the canvas or even expressed interest in the artwork leading to the auction”.<sup>16</sup>

#### THE EXPERT EXAMINER'S REASONS FOR REFUSAL

19. In his reasons for refusal, the Expert Examiner indicated that the Object is of outstanding significance and national importance. The Expert Examiner stated that the Object is [TRANSLATION] “exceptional in Kreighoff's [sic] body of work” and “[he is] extremely skeptical about the idea of letting a painting by this artist, of this value, leave”.<sup>17</sup>

#### ANALYSIS

##### Whether the Object is included in the Control List

20. 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.
21. The Applicant admits that the Object is included in the Control List under Group V, Objects of Fine Art, subsection 2(b). Subsection 2(b) applies to paintings or sculptures made within or outside the territory that is now Canada by a person who at any time

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<sup>14</sup> Applicant's written statement, dated June 18, 2024, at p.3.

<sup>15</sup> *Ibid.*

<sup>16</sup> Applicant's written statement, dated June 18, 2024, at p. 4.

<sup>17</sup> Expert Examiner's justification, dated June 5, 2024, Cultural Property Export Permit Application, Part II at p. 2.

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ordinarily resided in the territory that is now Canada, and that have a fair market value in Canada of more than \$15,000.00 CAN.<sup>18</sup>

22. The Review Board agrees that the Object is a painting that was made more than 50 years ago within or outside the territory that is now Canada by a person who is no longer living and who ordinarily resided in the territory that is now Canada. It is well documented that Krieghoff spent a long period of his adult life in Canada.<sup>19</sup> The Review Board also agrees that the Object's fair market value, as specified by the Applicant in its export permit application, exceeds \$15,000.00 CAN.
23. The Review Board therefore concludes that the Object is included in the Control List under Group V, Objects of Fine Art, subsection 2(b).

**Whether the Object is of outstanding significance**

24. 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.<sup>20</sup>
25. The Review Board determines the Object is of outstanding significance by reason of its close association with Canadian history, close association with national life, aesthetic qualities, and value in the study of arts.
26. With respect to the Object's close association with Canadian history, the Review Board agrees with the Applicant's suggestion that the Object has significant connection to Canada's history, in particular in its representation of Quebec and its people. The Object can be understood as part of the historical record of this period in Quebec, as it depicts habitant life from this time period and place.
27. With respect to the Object's close association with national life, the Review Board agrees with the Applicant's suggestion that the Object is closely associated with Canada's national life, particularly Quebec's national life.

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<sup>18</sup> Control List, section 4.

<sup>19</sup> See Marius Barbeau, *Cornelius Krieghoff, Pioneer Painter of North America*, Toronto: MacMillan Company of Canada, 1934

<sup>20</sup> Paragraphs 29(3)(b) and 11(1)(a) of the Act.

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28. With respect to the Object's aesthetic qualities, the Review Board finds that the Object has significant aesthetic qualities. Krieghoff was a leading painter of early Canadiana and genre scenes. This work shows a masterful skill and organization of the picture plane, of painterly approach, and takes a nuanced approach to colour and atmospheric mood.
29. With respect to the Object's value for the study of the arts, the Applicant disputes that the Object has value in the study of the arts, in part because Krieghoff painted similar scenes of the same subject matter. The Review Board recognizes that Krieghoff had an expansive body of work, with many genre scenes of Quebec life. However, the Review Board finds that this particular work is exemplary from the period and within Krieghoff's body of work. This finding is supported by both the Expert Examiner, who noted in their report that the Object is "exceptional in the corpus of [the artist]", and the auction listing, available on the Applicant's website, which includes comments on the remarkable anecdotal image and the rarity of the canvas.
30. The Applicant has also argued that there are other and similar log cabin works by the artist in the collections of Canadian institutions, further reducing the Object's value in the study of the arts. However, the auction listing itself observes that the Object is more complex than those works, with details such as the outbuilding.
31. The Review Board notes that the availability of multiple versions of a work of art does not diminish its value in the study of the arts, but rather increases it, as it provides an opportunity for comparison, analysis and further study. Krieghoff's body of work has been the subject of just this type of comparative analysis.<sup>21</sup>

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<sup>21</sup> See for example: Moffat, Elizabeth A, Sandra Webster-Cook, and Marie-Claude Corbell, "The Painting Materials and Techniques of Cornelius Krieghoff," *Journal of the Canadian Association for Conservation* 32 (2007): 34-47; Stevenson, RK, EA Moffatt, MC Corbeil, and A Poirier, "Pb and Sr Isotopes and the provenance of the painting materials of Cornelius Krieghoff in the 19<sup>th</sup> Century Canada," *Archaeometry* 58, no 4 (2016): 673-687. These two studies demonstrate how having several paintings provides a variety of research possibilities: in this case these studies compared and were able to analyze the painting, and the materials used by the artist. Or see Rygiel, J, "Reproducing Textiles for the Krieghoff room at the Canadian Museum of Civilization", *Material Culture Review* (1991). This article examined the study of the artist paintings, and then a modern recreation of the historical textiles depicted in his genre paintings.

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32. Furthermore, the similar subject matter depicted in Krieghoff's work suggests the importance of these types of genre scenes in studying art history and in this period of Canadian art history in particular.
33. The Review Board thus concludes that the Object is of outstanding significance by reason of its close association with Canadian history, close association with national life, aesthetic qualities, and value in the study of arts.

#### **Whether the Object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage**

34. 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.<sup>22</sup>
35. 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.<sup>23</sup>
36. 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",<sup>24</sup> 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.<sup>25</sup>
37. 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

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<sup>22</sup> Paragraphs 29(3)(c) and 11(1)(b) of the Act.

<sup>23</sup> *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.

<sup>24</sup> *House of Commons Debates*, (7 February 1975) at p. 3026.

<sup>25</sup> *Ibid.*

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importance is however a separate analysis involving different considerations than the determination of outstanding significance.<sup>26</sup>

38. 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.<sup>27</sup>
39. As indicated above, the Applicant submits that while the Object “is of outstanding significance by reason of its aesthetic qualities, it is not of particular value to the study of the arts. Therefore, the Object is not of such national importance that its loss to Canada would significantly diminish the national heritage and should be granted immediate export status”.<sup>28</sup>
40. The Review Board does not agree with the Applicant’s submission that the Object is not of such a degree of national importance that its loss to Canada would not significantly diminish the national heritage. The Review Board finds that the Object is of national importance due to its rarity, research value and contextual associations.
41. The Review Board recognizes that eleven variant compositions of settlers’ log houses in winter were made by Krieghoff between 1856 and 1863, and that these are held in Canadian institutions such as the McCord Museum, the National Gallery of Canada, the Art Gallery of Ontario and Thomson collections.
42. While there may be several variants of settlers’ log houses by Krieghoff within Canadian collections, the Review Board finds that the Object is rare by reason of its exceptionality within the artist’s body of work, and its composition. As already noted, the Object has added elements that are not in other settlers’ log house variants, such as the outbuilding.
43. The Review Board is also of the view that the existence of similar settlers’ log house paintings points to the relevance of this theme in both the artist’s body of work and in

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<sup>26</sup> *Heffel*, at para 37.

<sup>27</sup> *Heffel*, at paras. 37 and 43.

<sup>28</sup> Applicant’s written statement, dated June 18, 2024, at p. 4.

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genre painting of the period – thus making this particular work, with its variation in composition, an important object amongst those similar works.

44. Moreover, as previously outlined, the Review Board has determined that the Object has research value not only within the study of the artist's body of work, but also within Canadian art history as a whole. Krieghoff and his body of work have been the subject of significant study in Canada. Further, his work within the canon of art history is exemplary within early Canadiana genre scene painting.
45. It is the Review Board's view that the loss of the Object to Canada would significantly diminish the ability to study the development of this genre of painting, as well as Krieghoff's body of work.
46. The Review Board also finds that the Object has significant contextual associations which contribute to an understanding of Canada's cultural heritage. The Object depicts habitant life in early Quebec settler-colonial history. Further, visual culture, such as paintings serve as important historical documents that can be used to understand Canada's complex colonial history.<sup>29</sup>
47. It is the Review Board's view that loss of the Object to Canada would significantly diminish the ability to research and understand genre painting in the canon of art history, early Canadiana landscape painting, and Quebec's settler-colonial history.

**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**

48. 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.<sup>30</sup>

<sup>29</sup> For a discussion of how cultural symbols have shaped Canada see: Daniel Francis, *National Dreams: Myth, Memory & Canadian History*, 1997. For a discussion of the relationship between landscapes as symbol see: WJT Mitchell, *Landscape and Power*, University of Chicago Press, 2002. For a discussion of the ways in which landscape was imagined in early Canada see: Marilyn McKay, *Picturing the Land: Narrating Territories in Canadian Landscape 1500-1950*, McGill-Queens University Press, 2011.

<sup>30</sup> Subsection 29(5) of the Act.

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49. 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.
50. The Applicant has described how the Object has been actively promoted before the auction sale (auction previews, printed auction catalogue, online exposure, and advertising of the auction by radio), and submitted that despite this exposure and promotion, the Object sold for its reserve price, below its pre-sale auction estimate, indicating that there was no demand for the Object beyond a single buyer.
51. The Review Board accepts the Applicant’s submission that the Object did not attract interest during the auction period. However, the Review Board notes that at the time the Object was up for auction, certain funding opportunities were not available to institutions to allow them to bid on the Object. Under section 35 of the Act, the Minister of Canadian Heritage may only make certain grants and loans available to purchase an object *after* an export permit has been refused under the Act.
52. The Review Board is of the view that institutions in Canada might well be interested in actively collecting and exhibiting works by Krieghoff given his importance within Canadian art history, were funding opportunities available.
53. In light of these circumstances, the Review Board is of the view that an institution or public authority in Canada 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**

54. 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.

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55. The Review Board establishes a delay period of four months, ending February 15, 2025, during which it will not direct that an export permit be issued in respect of the Object.
56. In establishing a four-month delay period, the Review Board took into consideration the active exposure and promotion of the Object before the auction sale and is of the view that a delay period of less than six months is sufficient to provide institutions and public authorities with time to consider the possibility of making an offer to purchase the Object and potentially acquire the funds to do so.

#### CONCLUSION

57. 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 four months ending **February 15, 2025**, during which it will not direct that an export permit be issued in respect of the Object.

#### For the Review Board

Joanne Stober, Chair  
Daniel Chouinard  
Tzu-I Chung  
Monte Clark  
Laurie Dalton  
Patricia Feheley  
Jo-Ann Kane  
Susan Mackenzie