Federal Court of Appeal | Cour d'appel fédérale

Date: 20190416

Docket: A-223-18

Citation: 2019 FCA 82

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

HEFFEL GALLERY LIMITED

Respondent

and

MUSÉE DES BEAUX-ARTS DE MONTRÉAL
ART GALLERY OF ONTARIO
ROYAL ONTARIO MUSEUM
VANCOUVER ART GALLERY
REMAI MODERN
WINNIPEG ART GALLERY
THOMAS FISHER RARE BOOK LIBRARY AT THE UNIVERSITY OF TORONTO LIBRAIRIES
MUSÉE D'ART CONTEMPORAIN DE MONTRÉAL
BEAVERBROOK ART GALLERY

Interveners

Heard at Ottawa, Ontario, on February 7, 2019.

Judgment delivered at Ottawa, Ontario, on April 16, 2019.

REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	GLEASON J.A. RIVOALEN J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] In 1892, the French-born impressionist painter, Gustave Caillebotte, produced "*Iris bleus, jardin du Petit Gennevilliers*" (*Iris bleus* or the Painting), an oil on canvas, 21¾" x 18¼". Little did he know that some 127 years later, *Iris Bleus* would be at the heart of the present appeal.

[2] The facts surrounding *Iris bleus* are not in dispute and can be described as follows.

[3] On November 23, 2016, the Painting was sold by the Toronto-based Heffel Fine Art Auction House (Heffel or the respondent) to a commercial gallery based in London, England for the sum of $678,500 CAD. Prior to this auction sale, the Painting had been owned and held by a private Canadian collector for the past 60 years.

[4] The day after the auction sale, on November 24, 2016, Heffel applied to the Department of Canadian Heritage for a cultural property export permit in order to send the Painting to its purchaser in England.

[5] On December 19, 2016, a permit officer sent Heffel a written Notice of Refusal to issue the requested permit, following the recommendation of the Chief Curator of the Art Gallery of Greater Victoria, an expert examiner.

[6] On January 13, 2017, following the refusal of the permit officer, Heffel requested a review of that decision before the Canadian Cultural Property Export Review Board (the Board). This review proceeded before a seven-member panel of the Board, although the Federal Court erroneously refers to a three-member panel at paragraph 6 of its decision.

[7] On July 13, 2017, the Board rendered its decision and rejected Heffel's export permit application. It did so essentially for three reasons: *Iris bleus* was on the *Canadian Cultural Property Export Control List*, C.R.C., c. 448 (the Control List); it was of "outstanding significance" pursuant to paragraph 11(1)(*a*) of the *Cultural Property Export and Import Act*, R.S.C., 1985, c. C-51 (the Act); and, it was of such a degree of "national importance" that its export would significantly diminish the national heritage pursuant to paragraph 11(1)(*b*) of the Act.

[8] Heffel challenged the Board's decision by way of an application for judicial review before the Federal Court. By way of reasons dated June 12, 2018, Manson J. (the Federal Court) allowed Heffel's application for judicial review on the basis that the Board's interpretation of "national importance" pursuant to paragraph 11(1)(*b*) was unreasonable because it was overly broad and that its determination that the Painting was of "national importance" was also unreasonable. The Federal Court therefore quashed the Board's decision and remitted it to a differently constituted panel of the Board for reconsideration. It is that decision of the Federal Court that the Attorney General of Canada appeals before our Court.

[9] The present appeal turns on the issue of the proper application of the standard of review. It is undisputed that the applicable standard of review is reasonableness as the Federal Court itself acknowledged. For the foregoing reasons, I am of the view that the Federal Court erred in failing to properly apply the standard of reasonableness. The Board's interpretation of its home statute was entitled to deference, and the Federal Court's failure to defer to the Board's decision was a function of its disguised correctness review. I would therefore allow the appeal with costs, set aside the judgment of the Federal Court, dismiss the application for judicial review and restore the decision of the Board.

II. Legislative framework

[10] For the purpose of the present appeal, the following overview of the legislative framework of the Act is apposite prior to turning to the analysis of the issues on appeal.

[11] In 1977, Parliament enacted the Act implementing the UNESCO *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 24 April 1972). 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 cultural organisations.

[12] The Act achieves its objectives first and foremost through the Control List which pursuant to section 4 of the Act is established by the Governor in Council. The Control List sets forth objects or classes of objects, the export of which the Governor in Council deems necessary

to control in order to preserve the national heritage in Canada. In order to be included on the Control List, an object must be at least fifty years old and its creator (assuming the object was created by a natural person) must be deceased (the Act, subsection 4(3)). The Control List covers a wide array of objects organized by groups. Specifically, objects of fine art, including paintings, are listed in Group V of the Control List.

[13] Subject to limited exceptions, when a permit officer receives an application for an export permit, the permit officer must determine if the object is included in the Control List (the Act, subsection 8(1)). In the event it is not, the permit officer must issue an export permit in respect of the object (the Act, subsection 8(2)). However, in the event the permit officer determines that the object is or might be on the Control List, the permit officer must refer the application to an expert examiner (the Act, subsection 8(3)).

[14] The expert examiner is required to determine whether the object in question is included in the Control List. If so, the expert examiner is required to further determine (i) 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; and (ii) whether the object is of such a degree of "national importance" that its loss to Canada would significantly diminish the national heritage (the Act, subsection 11(1)). This two-part test is colloquially called the "OS/NI framework". Subsection 11(1), more particularly paragraph 11(1)(b), is the provision at issue in this appeal. For convenience, the provision is set out below and reads as follows:

Where object included in Control List	**Objet appartenant à la nomenclature**
11 (1) Where an expert examiner determines that an object that is the subject of an application for an export permit that has been referred to him is included in the Control List, the expert examiner shall forthwith further determine	**11 (1)** Après constat de l'appartenance à la nomenclature de l'objet soumis à son examen, l'expert-vérificateur apprécie sans délai si cet objet :
(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	**a)** présente un intérêt exceptionnel en raison soit de son rapport étroit avec l'histoire du Canada ou la société canadienne, soit de son esthétique, soit de son utilité pour l'étude des arts ou des sciences;
(b) whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.	**b)** revêt une importance nationale telle que sa perte appauvrirait gravement le patrimoine national.

[15] If the expert examiner is not satisfied that the object at issue meets both the "outstanding significance" and the "national importance" criteria, the expert examiner must advise the permit officer to issue an export permit (the Act, subsection 11(2)). If, as in the present case, the expert examiner is satisfied that an object meets both criteria, the expert examiner must advise the permit officer not to issue an export permit and must provide reasons (the Act, subsection 11(3)). The permit officer thereafter must send the export permit applicant a Notice of Refusal, which includes the reasons of the expert examiner for the refusal (the Act, subsection 13(1)).

[16] When an application for an export permit is refused, the applicant may request a review of the application by the Board (the Act, subsection 29(1)). The Board, in addition to the Chairperson and one member who are chosen from the general public, includes (a) members who are or have been officers, members or employees of art galleries, museums, archives, libraries or other collecting institutions in Canada; as well as (b) members who are or have been dealers in or collectors of art, antiques or other objects that form part of the national heritage (the Act, subsection 18(2)). A member from category (a) and (b) must both be present in order for quorum to be constituted (the Act, subsection 18(4)).

[17] In undertaking its review of an application for an export permit, the Board is required to determine whether the object at issue is included on the Control List and whether it meets the requirements of "outstanding significance" and "national importance" (the Act, subsection 29(3)). If all criteria are met, the Board may establish a delay period of two to six months in duration during which an export permit will not be issued. However, the Board may only establish a delay period if it 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; otherwise, the Board is required to direct that an export permit be issued immediately (the Act, subsection 29(5)).

[18] Upon notification by the Board of a delay period, the Minister of Canadian Heritage and Multiculturalism advises institutions and public authorities of the object and the fact that a delay period has been established for them to make a fair offer to purchase the object (the Act, subsection 29(7)). Either the applicant for a permit or an institution or public authority that makes an offer to purchase the object can request that the Board determine the amount of a fair

cash offer to purchase (the Act, subsection 30(1)). If the applicant rejects a fair cash offer, no export permit will be issued during a period of two years commencing as of the date the Notice of Refusal was sent (the Act, section 16).

[19] The above sets forth a description of the Act as it relates to the operation of the export control mechanisms. It should be noted that in addition to these mechanisms, the Act operates in conjunction with provisions of the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.) to provide incentives to taxpayers to dispose of cultural property to institutions and public authorities. In order to qualify for these incentives, the object must be certified by the Board. Currently, the Board applies the same OS/NI framework that it applies in determining whether to issue an export permit – *i.e.*, whether the object is of "outstanding significance" and whether the object is of such a degree of "national importance" that its loss to Canada would significantly diminish the national heritage (the Act, paragraphs 29(3)(*b*), 29(3)(*c*) and subsection 32(1)).

III. Standard of Review

[20] On appeal from a judicial review decision of the Federal Court, this Court must first determine whether the Federal Court identified the right standard of review and secondly whether it applied it correctly. In other words, this requires this Court to "step into the shoes" of the Federal Court and focus on the administrative decision, in this case the decision of the Board, and determine whether, in reviewing it, the Federal Court identified the appropriate standard of review and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-46 approving this approach as set out in *Canada Revenue Agency v. Telfer*, 2009 FCA 23, 386 N.R. 212 at para. 18).

IV. Issues

[21] It is undisputed that the Federal Court properly identified the applicable standard of review – *i.e.*, reasonableness. This appeal accordingly raises the issue of whether the Federal Court erred in its application of the reasonableness standard of review.

[22] Before considering this issue, as part of this appeal, this Court heard from 9 museums and galleries across Canada that were granted intervener status, namely: the Musée des Beaux-Arts de Montréal, the Art Gallery of Ontario, the Royal Ontario Museum, the Vancouver Art Gallery, the Remai Modern, The Winnipeg Art Gallery, the Thomas Fisher Rare Book Library at the University of Toronto Librairies, the Musée d'Art contemporain de Montréal and the Beaverbrook Art Gallery.

[23] It should be noted that as part of their motion requesting intervener status, the interveners also sought an order allowing them to adduce fresh evidence on appeal. This request was deferred to the panel of the Court hearing the case on its merits. Upon hearing submissions of the interveners and the parties on the motion to adduce fresh evidence, this Court remained unconvinced that the circumstances of this case justified the exercise of its discretion. The motion was accordingly dismissed and no new evidence was allowed to be filed on appeal.

V. Analysis

A. *The Board's Decision*

(1) The Board's interpretation of "outstanding significance" at paragraph 11(1)(*a*) of the Act

[24] First, the Board agreed with the expert examiner and the respondent, and determined that the Painting was included in Group V at paragraph 4(*b*) of the Control List (the Act, subsection 29(3)). Specifically, foreign paintings with no direct connection to Canada are controlled through Group V at paragraph 4(*b*).

[25] Having made this determination, the Board then further determined that *Iris bleus* was of "outstanding significance" due to its aesthetic qualities, as expressly set out in paragraph 11(1)(*a*) of the Act. The Board also emphasized that, apart from *Iris bleus*, there is only one other work of art by Gustave Caillebotte that could be identified in a Canadian collection. The Board further underscored the importance of Gustave Caillebotte's work by referencing the fact that the Metropolitan Museum of Art in New York, "one of the great art museums in the world", is the owner of only one Gustave Caillebotte piece, which was acquired in 2014. Observing that the opportunities to view and study the work of Gustave Caillebotte in Canada remain very limited, the Board was of the view that the Iris bleus further met the criteria of "outstanding significance" for its value in the study of the arts (Board's decision at para. 33):

> … Given the stature of the artist as one of the leading artists of French Impressionism, the importance of French Impressionism to understanding the history of art and to art practice today (including in Canada), and the fact that the Object is representative of works from late in the artist's career, the Review Board

> determines that the Object meets the criteria of outstanding significance for its value in the study of the arts.

[26] The Board's reasons also addressed other considerations. For instance, the Board acknowledged in its decision that it was aware that its interpretation under section 11 of the Act would also affect requests for certification under section 32, and that a given interpretation could potentially limit the number of objects eligible for certification (Board's decision at paras. 25 and 30). While these comments were made in the context of the discussion on "outstanding significance" under paragraph 11(1)(*a*) and are not dispositive of this appeal, it can be inferred that these considerations affected the Board's interpretation of subsection 11(1) in general and its application to the Painting.

(2) The Board's interpretation of "national importance" at paragraph 11(1)(*b*) of the Act

[27] The final aspect of the Board's analysis was to determine pursuant to paragraph 11(1)(*b*) whether the Painting was of such a degree of "national importance" that its loss to Canada would significantly diminish the "national heritage". This aspect of the Board's decision regarding paragraph 11(1)(*b*) was the only one at issue on judicial review before the Federal Court. In this appeal, we are thus solely concerned with the Board's interpretation of paragraph 11(1)(*b*) of the Act.

[28] In this regard, the seven members of the Board formed the view that a given object can meet the degree of "national importance" even if the object or the creator has no direct connection with Canadian history or Canada. The Board stated the following at paragraph 40:

> 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. …

[29] In reaching its conclusion, the Board relied expressly on the *Guide to Exporting Cultural Property from Canada* of the Department of Canadian Heritage which lists a number of factors that the Board can consider in determining the "national importance" of an object (Published June 2015, online: https://www.canada.ca/content/dam/pch/documents/services/movable-cultural-property/export_permit_application_guide-eng.pdf at p. 27):

> 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.

[30] The Board thus concluded, unanimously, that the loss of *Iris bleus* would significantly diminish the national heritage:

> [46] In view of the provenance of the Object, the condition of the Object, the rarity of works of the artist in Canadian collections, the research value of the Object, and the fact that the Object is a highly desirable example of Impressionist landscape painting, the Review Board determines that the loss of the Object to Canada would significantly diminish the national heritage.

[31] Having reached this conclusion, the Board also considered whether an institution or public authority in Canada might make a fair offer to purchase *Iris bleus* within six months. Given the outstanding significance of the Painting, the rarity of Gustave Caillebotte's work in Canada, and the artist's important place in the French Impressionism movement, the Board determined that there would be considerable interest in acquiring *Iris bleus*. The Board also noted the expert examiner's evidence that three Canadian curators of European art had indicated that they would like to see the Painting remain in Canada and that their institutions would be able to purchase it. As provided for by the Act, the Board therefore established a delay period of six months during which it would not direct that an export permit be issued (Board's decision at paras. 50, 51 and 59).

(3) The reasonableness of the Board's interpretation of paragraph 11(1)(*b*) of the Act

[32] Upon reading the Board's decision with the degree of deference required on judicial review, I consider that the Board's interpretation of paragraph 11(1)(*b*) of the Act was reasonable.

[33] It is important to recall that paragraph 11(1)(*b*) requires an assessment of the extent and impact of the loss to Canada if a work is "of such a degree of national importance that its loss to Canada would significantly diminish the national heritage" [Emphasis added]. The key words in paragraph 11(1)(*b*) – *i.e.*, "national importance" and "national heritage", are not defined in the Act. On their face, these elements as worded do not confine the Board to specific factors in its assessment. Rather, the terms "national importance" and "national heritage" allow for a broad range of options based on the Board's expertise (*Schmidt v. Canada (Attorney General*),

2018 FCA 55, [2018] F.C.J. No. 315 (QL) [*Schmidt*]). The provision at issue also sets forth broad qualifiers – *i.e.*, "of such a degree" and "significantly", which further signifies Parliament's intention to confer upon the Board broad discretion to assess and determine whether or not a given object is of "national importance". To this end, the Board is composed of members appointed for their expertise in the specialized context of cultural property, cultural heritage and cultural institutions.

[34] In challenging the reasonableness of the Board's decision in the present case, the respondent refers this Court to *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2010] F.C.J. No. 948 (QL) [*Almon*] and submits that it serves as a precedent for concluding that the Board's decision was in fact unreasonable. The decision in *Almon* is of no assistance to the respondent. In *Almon*, which concerns a decision of the Canadian International Trade Tribunal, the provision at play was a "mandatory recipe that the Tribunal [had to] follow when considering remedies", more particularly subsection 30.15(3) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47 (Almon at paras. 38-39). Here, in contrast, subsection 11(1)(*b*) of the Act does not prescribe a closed list of factors; it is an "open-ended provision", not a "mandatory recipe" to be followed by the administrative decision maker – *i.e.*, the Board.

[35] In support of the Board's interpretation, regard may also be given to subsection 4(2) of the Act, which allows the Governor in Council to include in the Control List, "regardless of their places of origin, any objects or classes of objects…the export of which the Governor in Council deems it necessary to control in order to preserve the national heritage in Canada" [Emphasis

added]. I agree with the respondent that objects on the Control List are not *de facto* deemed to form part of the national heritage by the Act. However, they are by virtue of being on the Control List deemed to be necessary to control in order to preserve the national heritage. It follows that objects in each class, including the classes that do not require a Canadian connection, potentially form part of the national heritage. The broad language used in paragraph 11(1)(*b*) confirms such a conclusion.

[36] On this point, the respondent asserts that if the Control List determined "national heritage", there would be no need for the Board's expertise under paragraph 11(1)(*b*). This assertion overlooks the determinative role of the Board in measuring and assessing the impact of losing a given object on the Control List. Indeed, the Board must consider whether the object is of "such a degree of national importance that its loss to Canada would significantly diminish the national heritage". In other words, the degree of importance of the object remains a question for the Board's expert members to assess on a case-by-case basis.

[37] The respondent's contention that the Board conflated the "outstanding significance" (paragraph 11(1)(*a*)) and "national importance" (paragraph 11(1)(*b*)) criteria by "effectively read[ing] out the legislative criteria of "national importance"" is likewise unfounded (respondent's memorandum of fact and law at para. 64). The "outstanding significance" requirement at paragraph 11(1)(*a*) measures essentially whether an object is significant because of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences. By contrast, the "national importance" requirement at paragraph 11(1)(*b*) measures the extent of the effect of the removal of the object from Canada –

i.e., the importance of the object to Canada. For example, a painting may meet the "outstanding significance" requirement at paragraph 11(1)(*a*) because of its beauty (aesthetic qualities) but not the "national importance" requirement where, for instance, there are many similar other pieces of art in Canada by the same artist that are in better condition. While certain considerations may overlap with respect to "outstanding significance" and "national importance", I cannot agree with the respondent that this overlap renders paragraph 11(1)(*b*) "mere surplusage" which in turn makes the Board's decision unreasonable (respondent's memorandum of fact and law at para. 63).

[38] Finally, the parties made oral submissions regarding the legislative history of the Act in order to defend (in the case of the appellant) or to attack (in the case of the respondent) the reasonableness of the Board's decision.

[39] Upon reviewing the legislative history of the Act on record, I cannot agree with the respondent that it supports the unreasonableness of the Board's interpretation. The respondent particularly submits that Secretary of State James Hugh Faulkner, who introduced Bill C-33, which became the Act, emphasized during the debate the importance of limiting control and focusing on objects of the "first order of importance" (respondent's memorandum of fact and law at para. 62; *House of Commons Debates*, 30th Legis., 1st sess., Vol. 3, 7 February 1975, p. 3026). This does not however support the respondent's contention that a given object must necessarily have a connection to Canada. This is not the manner in which the Act limits the amount of objects subject to control. Rather, the Act achieves this objective by requiring that: the object must be more than 50 years old and the creator must be deceased; imported objects must have

been in Canada for at least 35 years; the object must be captured by one of the well-defined categories on the Control List; the object must be of "outstanding significance"; and the object must be of "such a degree" of national importance that its loss "significantly decreases" the national heritage. Indeed, objects are excluded from control throughout the entire scheme of the Act. This control is imposed without reference to any requirement that the object have a direct connection with Canada. It was thus reasonable for the Board to determine that an object can meet the degree of "national importance" at paragraph 11(1)(*b*) of the Act even if the said object or its creator have no direct connection to Canada.

(4) Reasonableness of the Board's determination that *Iris bleus* was of "national importance"

[40] Having concluded that the Board's interpretation of paragraph 11(1)(*b*) was reasonable, it must further be considered whether the Board's determination that *Iris bleus* meets the "national importance" requirement under paragraph 11(1)(*b*) was likewise reasonable.

[41] From the outset, in reaching the conclusion that the Painting at issue is of "national importance", the Board did not merely rely on the fact enunciated in the *Guide to Exporting Cultural Property from Canada – i.e.,* that Canada is a diverse country. The Board was more nuanced than the respondent contends. It discussed "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." (Board's decision at para. 38). More specifically, the Board made the following findings rooted in its factual appreciation:

- *Iris bleus* came from the inventory of an important dealer (Ambroise Vollard of Paris, France) who figured amongst the most important dealers of French contemporary art in the 20th century, including the work of French Impressionists (para. 41);
- Interest in the work of Gustave Caillebotte was rediscovered in the mid-1960s and his work has been reassessed over the last 20 years (para. 42);
- *Iris bleus* is only the second work of Gustave Caillebote in Canada. It is a unique work of art and the only work representative of the series depicting flowers and having symbolic significance that were created by the artist late in his life (para. 43);
- Given its rarity, *Iris bleus* will be of considerable interest and importance for research in Canada with respect to French impressionism (para. 44).

[42] The Board also referred to the existence of Vincent Van Gogh's Iris (1890), which is held at the National Gallery of Canada. The respondent alleges that allowing the Board to consider such a factor means that "[t]he Act would have a sweeping application to all manner of cultural objects and would render meaningless the inquiry mandated by [paragraph] 11(1)(b)" (respondent's memorandum of fact and law at para. 80). To accept this contention requires a fragmented reading of the Board's decision which has to be viewed as a whole. Indeed, the consideration of Van Gogh's Iris was but one of a myriad of factors considered by the Board in determining that the loss of the *Iris bleus* would significantly diminish the national heritage.

[43] In doing so, it was open to the Board to discount the parts of the respondent's evidence that were premised on a connection to Canada and to consider more broadly factors mentioned in the *Guide to Exporting Cultural Property from Canada*. The factors considered by the Board speak to the degree of value and importance of the object as well as its importance in the Canadian context (*i.e.*, the lack of other Gustave Caillebotte paintings in Canada and the presence of similar works by other artists in Canada). As mentioned above, given that no factors

are laid out in the legislation, the ones relied upon by the Board in order to identify the impact of *Iris bleus'* departure from Canada were reasonable.

[44] In summary, I am of the view that the Board's decision is reasonable as it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47). The Federal Court thus erred in concluding that the Board's interpretation was unreasonable on the basis that it was too broad.

B. *The Federal Court erred in its application of the reasonableness standard of review*

[45] Given that the standard of review in this case is reasonableness, the Federal Court was accordingly required to abide by the well-established governing principle in its application: deference.

[46] In this regard, it bears emphasis that the matter for review pertains to the Board's interpretation of paragraph 11(1)(*b*) of its home statute. As such, the starting point for judicial review is the Board's entitlement to deference. The Supreme Court of Canada in *Williams Lake Indian Band v. Canada (Aboriginal Affaires and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 82 at paragraph 36 recently reiterated what is required in applying a deferential standard:

> To accord this deference, a reviewing court must "stay close to the reasons given by the [T]ribunal" and pay them "respectful attention": *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 49; *Dunsmuir*, at para. 48. The Tribunal's reasons provide the basis for determining why it reached the decision it did and whether that decision is within the range of outcomes

> "defensible in respect of the facts and law": *Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paras. 14-16; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 89-90; *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766, at paras. 121-22. The reviewing court must start from the Tribunal's decision and ask whether it is justified based on the authorities. Other decisions of the Tribunal may also inform the reasonableness analysis: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 ("*A.T.A.*"), at para. 56; see also *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at paras. 6 (Abella J.) and 75 (Rothstein and Moldaver JJ., dissenting).

[47] Likewise, the Supreme Court of Canada has reiterated that when reviewing an administrative decision maker's statutory interpretation, the "modern approach to judicial review" acknowledges that the exercise of that "interpretative discretion is part of an administrative decision maker's "expertise"." (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paras. 31-33).

[48] It follows that in the present case, the Federal Court was required to defer to the Board who is best placed to provide an interpretation reflecting its statutory mandate and the context in which it operates. To put it another way, the Board, as the administrative decision maker, holds the "upper hand" with regard to the interpretation of its home statute. In the words of the Supreme Court of Canada, "under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist." (*McLean* at para. 40 [Emphasis in the original]).

[49] Although the Federal Court acknowledged that the "Board is entitled to deference when interpreting its home statute and that the [a]pplicant [the respondent] must not only show that its

competing interpretation of the *Act* is reasonable, but also that the Board's interpretation was unreasonable" (Federal Court's reasons at para. 28 [Emphasis in the original]), it proceeded with its own analysis from its own perspective and consequently engaged in a disguised correctness review. Instead of assessing whether the Board's interpretation fell within a range of acceptability or defensibility, the Federal Court, guided by the principles enunciated in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 (QL), undertook its own independent analysis of "national importance" and provided its own statutory interpretation of paragraph 11(1)(*b*) of the Act.

[50] In proceeding in this manner, from the outset of its analysis, the Federal Court committed a reviewable error by adopting its interpretation of paragraph 11(1)(*b*) and measuring it against the Board's interpretation, deeming the Board's interpretation unreasonable because it did not conform to its preferred interpretation. The Federal Court thus effectively succumbed to the temptation which our Court cautioned against in *Delios v. Canada (Attorney General)*, 2015 FCA 117, [2015] F.C.J. No. 549 (QL) at paragraph 28:

> Under the reasonableness standard, we do not develop our own view of the matter and then apply it to the administrator's decision, finding any inconsistency to be unreasonable. In other words, as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did, finding any inconsistency to be unreasonable. That is nothing more than the court developing, asserting and enforcing its own view of the matter – correctness review.

[51] By way of illustration, the Federal Court began its analysis by concluding from the outset that paragraph 11(1)(*b*) suggested that "the object must have a direct connection to Canada" (Federal Court's reasons at para. 19) and that "[a]t a minimum, the object must have a significant

impact on Canadian culture" (Federal Court's reasons at para. 19). This correctness review is precisely what led the Federal Court to disagree with the Board's interpretation of paragraph 11(1)(*b*):

> [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*. [Emphasis in the original]

[52] It again bears emphasis that at the heart of reasonableness review is the notion that there may be multiple legitimate outcomes, "even where they are not the court's preferred solution" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 [*Canada 2018*] at para. 55). Part of the justification for reasonableness review is the recognition that administrative decision makers operate in a policy laden environment and that policy may impact their decisions. With regard to statutory interpretation, reasonableness acknowledges that the administrative decision maker is "better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute" (*Canada 2018* at para. 55).

[53] The Federal Court's failure to defer to the Board's interpretation in this case was a function of its disguised correctness review. This, in and of itself, constitutes a reviewable error and it is sufficient to allow the appeal. However, a few additional observations are in order.

[54] First, in engaging in its own statutory interpretation, the Federal Court relied on dictionary definitions to further bolster its textual interpretation that "[t]ogether, 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" (Federal Court's reasons at para. 20). This approach led the Federal Court to focus on the ordinary meaning of the words as a complete answer which led it to overlook the "authentic" meaning of the provision (*Schmidt* at paras. 27-28).

[55] The Federal Court also made reference to the *Convention for the Protection of Cultural Property in the Event of an Armed Conflict*, The Hague, 14 May, 1954, Can TS 1990 no. 52 (the Hague Convention) (Federal Court's reasons at para. 24). Yet, neither the appellant nor the respondent relied on international law before the Board and more significantly, Canada acceded to the Hague Convention in 1998 – *i.e.*, twenty years after the enactment of the Act and Canada only joined the First and Second Protocols in 2005. It is therefore difficult, in the circumstances, to conclude that the terms Parliament employed in the Act were based on the Hague Convention. To do so in order to support an alternate interpretation is questionable.

[56] The Federal Court repeatedly asserted Parliament's intention in enacting the Act was to avoid interfering with property rights. Relying on Secretary of State Faulkner's interventions during the debates on the Bill, the Federal Court was of the view that a narrower interpretation of subsection 11(1)(*b*) of the Act than the one provided by the Board was warranted (Federal Court's reasons at paras. 12, 26, and 27). In doing so, the Federal Court overlooked other provisions in the Act aimed at establishing a careful balance between property rights and the

preservation of cultural heritage for future generations. Indeed, Parliament at the time was well aware of the rights of individual owners of cultural property to participate in a legal international market. This intention is illustrated by the multiple requirements set forth in the Act aimed at limiting the control of cultural objects and therefore limiting the impact on property rights. For example, the Board must find that an object is of "outstanding significance" and of "national importance" and be satisfied that a Canadian institution or public authority might make an offer in order to establish a delay period (the Act, subsection 29(5)). The short delay contemplated by the Act allows a cultural institution the opportunity to make a fair offer to purchase the object. If no offer is made during the said period, the Board has no jurisdiction to refuse a permit and the export permit will issue. Hence, the delay is not unlimited and the impact on property rights remains circumscribed.

[57] Finally, the tax incentives provided for at section 32 of the Act, although not necessary to dispose of this appeal, are nonetheless relevant to understanding the overall scheme of the Act; the respondent agrees with this proposition (respondent's memorandum of fact and law at para. 44). Indeed, the tax incentives encourage individuals to donate or sell national cultural property to designated institutions, which, in turn, prevent many Canadian institutions from being "culturally ghettoised" in allowing them to acquire works of art with a view of preserving cultural heritage for future generations. The tax incentives thus play a vital role in the operation of the scheme of the Act as a whole and the Board was alive to it when it rendered its decision (Board's decision at paras. 25, 27, 30 and 52).

VI. Conclusion

[58] For all of the above reasons, I would accordingly allow the appeal, set aside the judgment of the Federal Court dated June 12, 2018 in file T-1235-17 (2018 FC 605), dismiss the application for judicial review and restore the decision of the Board dated July 13, 2017. I would grant costs to the appellant.

"Richard Boivin"
J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Elizabeth Kikuchi Sanam Goudarzi	FOR THE APPELLANT
Julie Mouris Thomas G. Conway	FOR THE RESPONDENT
François Le Moine Nicolas Plourde W. Grant Worden	FOR THE INTERVENERS

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPELLANT
CONWAY BAXTER WILSON LLP, s.r.l. Ottawa, Ontario	FOR THE RESPONDENT
SARRAZIN PLOURDE S.A. Montréal, Quebec	FOR THE INTERVENERS
TORYS LLP Toronto, Ontario	