

Annual Report

2018-2019

Canadian Cultural Property Export
Review Board



Canadian Cultural Property
Export Review Board

Commission canadienne d'examen
des exportations de biens culturels

Canada

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Letter to the Minister from the Chair of the Canadian Cultural Property Export Review Board



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The Honourable Steven Guilbeault
Minister of Canadian Heritage
15 Eddy Street
Gatineau, QC K1A 0M5

Dear Minister,

It is an honour to present the annual report of the operations of the Canadian Cultural Property Export Review Board (CCPERB) for the fiscal year 2018-19.

In 2018-19, CCPERB reviewed 454 certification applications, representing 477 objects or collections acquired by 85 diverse organizations all across Canada. While the majority of certified cultural property was in the category of fine art, CCPERB also reviewed a wide assortment of other extraordinary objects, including objects of applied and decorative art, archival materials, and scientific specimens. Our determinations regarding certification for these objects ensure that they will be preserved and made accessible in public Canadian collections.

CCPERB also considered 5 requests to review refused applications for export permits for a range of cultural property in 2018-19. Among these were a letter written by a passenger on board the RMS Titanic, paintings by members of the Group of Seven, and other objects of value. CCPERB carefully considered whether each of these objects met the criteria for outstanding significance and national importance defined in the *Cultural Property Export and Import Act* and, where it was warranted, established export delay periods not exceeding six months. The rigour applied by CCPERB in these deliberations reflects the important role the tribunal plays in the cycle of acquisition, preservation, exchange, and access to cultural property in Canadian museums, galleries, libraries, and archives.

This fiscal year was especially notable for the heightened public interest in Canadian cultural property and the role of CCPERB both in the export control regime and in the certification of cultural property for income tax purposes. Canadians were sensitized to the importance of a transparent and accountable system of export controls, in part due to the attention given to CCPERB's decision to delay the export of Gustave Caillebotte's 1892 painting, *Iris bleus, jardin du Petit Gennevilliers*.

The tribunal's decision prompted a court challenge by the exporter, and in June 2018 the Federal Court of Canada decision prompted CCPERB to issue a Practice Notice to provide guidance to applicants on the interpretation of "national importance". The Federal Court of Appeal rendered a decision shortly after the end of the fiscal year, in April 2019, stating it would set aside the judgment of the Federal Court, dismiss the application for judicial review and restore the decision of the Board. In keeping with this decision, CCPERB rescinded the Practice Notice.

In the meantime, the Government of Canada acted to clarify the application of "national importance". Budget 2019 introduced amendments to the *Cultural Property Export and Import Act* and to the *Income Tax Act* in order to remove "national importance" as a factor in CCPERB's certification decisions, but to retain this factor for decisions on requests for review of applications for export permits. The amendments, which will come into force during the 2019-2020 fiscal year, are designed to maintain the incentives for cultural property owners to donate to Canadian collecting institutions, which is at the heart of the legislative intent of the *Cultural Property Export and Import Act*.

Finally, this fiscal year was significant for the Board membership, as it marked the end of Katharine A. Lochnan's term (May 2015 - May 2018), and the beginning of the tenure of both Madeleine Forcier (May 2018 - May 2021) and Dana Soonias (June 2018 - June 2021). The Secretariat to CCPERB also underwent a notable change with the retirement of Delphine Bishop, Executive Director of the Secretariat since 2014, and the beginning of the tenure of our new Executive Director, Mijin Kim. During the transition period, this role was served by Raynald Chartrand, Executive Director with the Administrative Tribunals Support Service of Canada, to whom CCPERB has expressed its sincere thanks for overseeing the continuity of Secretariat operations.

The momentous events of the past year have renewed the commitment of CCPERB Board Members and Secretariat staff to ensure Canada's cultural property is protected, preserved, and accessible to the public. On behalf of CCEPERB, I am proud to report on our operations and achievements for the fiscal year 2018-2019.

Sincerely,



Sharilyn J. Ingram, Chair

Report of the Canadian Cultural Property Export Review Board

Introduction

During 2018-2019, Canada's cultural property was the subject of much attention and debate, as high-profile examples of the sale and export of significant objects raised public awareness of our system of export control. Canada's museums, galleries, libraries, archives, and other collecting institutions contributed to the dialogue on the intent of the *Cultural Property Export and Import Act*, which was conceived to balance the rights of cultural property owners with the value of public access to objects of outstanding significance and national importance. Consequently, while the process of export control launched the national dialogue, it was a dialogue that emphasized the importance of CCPERB's certification process in building public collections.

The Canadian Cultural Property Export Review Board—an administrative tribunal that derives its mandate from the *Cultural Property Export and Import Act*—performs a vital function for individuals seeking review of their application for an export permit in cases where that permit has been refused by an expert examiner, as well as for cultural property donors and collecting institutions seeking to enhance public collections in an environment of shrinking acquisition budgets and a growing international market for Canadian cultural property.

The Cultural Property Export and Import Act

Enacted in 1977, the *Cultural Property Export and Import Act* (the Act) was Canada's response to the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. The Act establishes a system of controls for the export from Canada of cultural property, and supports the prevention of illicit international traffic in cultural property, in particular the import into Canada of cultural property illegally exported from foreign states. At the same time, the Act introduced a system of incentives designed to help preserve significant cultural property in Canada by offering tax incentives to donors or vendors who reach a disposition agreement with a designated museum, gallery, library, or archive.

The Minister of Canadian Heritage is accountable to Parliament for all operations under the Act and for overarching policy development. Specific elements of the legislation are administered or enforced by a number of federal entities, including:

- Department of Canadian Heritage
- Canada Border Services Agency
- Canada Revenue Agency
- Administrative Tribunals Support Service of Canada
- Canadian Cultural Property Export Review Board

The Canadian Cultural Property Export Review Board

The Canadian Cultural Property Export Review Board is an independent, quasi-judicial administrative tribunal established under the *Cultural Property Export and Import Act*. CCPERB's duties, identified in section 20 of the Act, are to:

- Review applications for refused cultural property export permits.
- Determine the amount of a fair cash offer for an institution or a public authority to purchase cultural property that is subject to an export delay.
- Certify cultural property for income tax purposes.

CCPERB reports to Parliament through the Minister of Canadian Heritage, but operates at arm's length from its portfolio department so as to ensure the autonomy of its decision-making powers.

Membership

CCPERB members are appointed by the Governor in Council on the recommendation of the Minister of Canadian Heritage following an open, transparent, and merit-based selection process. Members are generally appointed for three-year terms.

Under section 18 of the *Cultural Property Export and Import Act*, CCPERB membership is established as follows:

- A chairperson and one other member chosen generally from among residents of Canada.
- Up to four other residents of Canada who are or have been officers, members, or employees of art museums, galleries, libraries, archives, or other collecting institutions in Canada.
- Up to four other 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.

Under the Act, decisions must be made by no fewer than three members, at least one of whom was appointed under the institutional category, and at least one of whom was appointed under the dealer/collector category.

The table on the following pages identifies members with active terms during 2018-2019.

Board Members 2018-2019

CATEGORY	BOARD MEMBERS IN 2018-2019	TERM DURATION
Public at large	Sharilyn J. Ingram Chair Retired academic and museum professional Grimsby, ON	December 2016 - December 2019
	Glen A. Bloom Retired partner at Osler, Hoskin & Harcourt LLP Ottawa, ON	February 2017 – February 2020
Collecting institutions	Laurie Dalton Director/curator, Acadia University Art Gallery, Adjunct professor, Dept. of History and Classics, Acadia University Wolfville, NS	January 2018 – January 2021
	Katharine A. Lochnan Senior Curator, International Exhibitions Art Gallery of Ontario Toronto, ON	May 2015 – May 2018
	Theresa Rowat Director, The Archive of the Jesuits in Canada Montréal, QC	February 2018 – February 2021
	Paul Whitney Library and policy consultant, writer, book and art collector Vancouver, BC	January 2018 – January 2021
	Dana Soonias Indigenous Art and Gallery Executive	June 2018 – June 2021

Dealers/collectors	Monte Clark Owner/Director, Monte Clark Gallery Vancouver, BC	February 2018 – February 2021
	Patricia Feheley Director, Feheley Fine Arts Toronto, ON	May 2018 – May 2021
	Madeleine Forcier Director, Graff Gallery Montréal, QC	May 2018 – May 2021
	Pierre-François Ouellette Director, Pierre-François Ouellette art contemporain Montréal, QC	January 2018 – January 2021

Secretariat

CCPERB is supported by a Secretariat within the Administrative Tribunals Support Service of Canada, a federal organization that provides support services and facilities to a range of federal administrative tribunals.

The responsibilities of the Secretariat to CCPERB include:

- Providing services to applicants by processing casefiles submitted to CCPERB, as well as communicating with applicants and other stakeholders, at the direction of CCPERB, to clarify rules, standards, and information required to support the decision-making process.
- Developing policies, guidelines, and communications, at the direction of CCPERB, to support consistency, transparency, and integrity in CCPERB operations, consistent with the policies and priorities of the Government of Canada.
- Providing administrative services to facilitate CCPERB meetings.

- Providing executive support to CCPERB and liaising with other Government of Canada organizations and officials.

Meetings

CCPERB meets four times per year. Meeting dates for 2018-2019 are listed below. Under the *Cultural Property Export and Import Act*, CCPERB must render a decision, either for certification or for the review of applications for an export permit, within four months after the date a request is received.

DATE	MEETING LOCATION
June 20-22, 2018	Ottawa
September 12-14, 2018	Ottawa
December 12-14, 2018	Ottawa
March 19-22, 2019	Ottawa

Certification for income tax purposes

The certification of cultural property is a process administered by CCPERB, through which cultural property of outstanding significance and national importance is certified for income tax purposes. In early 2019, the Government of Canada announced its intention to amend the *Cultural Property Export and Import Act* and the *Income Tax Act*, in order to remove the requirement that cultural property be of national importance to qualify for certification. These proposed legislative amendments will be implemented in fiscal year 2019-2020.

The certification process encourages the transfer of outstanding examples of Canada's artistic, historic, and scientific heritage from private hands to public collections. The Department of Canadian Heritage provides a designation to public institutions that demonstrate the ability to ensure the long-term preservation of cultural property. When a donor or vendor reaches a disposition agreement with a designated organization, that organization may apply for certification on behalf of the donor or vendor.

Certification involves a determination, based on the information provided by the applicant organization and the expertise of CCPERB members, of whether or not the cultural property ("the object") meets the following criteria under the *Cultural Property Export and Import Act*:

- 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
- The object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.

If CCPERB determines that the object meets the legislated criteria, it will also determine the object's fair market value for the purposes of issuing a Cultural Property Income Tax Certificate.

For a summary of application statistics for 2018-2019, please see the tables below. Note that CCPERB is not authorized to disclose information relating to certification applications, as this information is protected under Section 241 of the *Income Tax Act*.

Overview of applications for certification 2018-2019

	Number	Percentage
TOTAL APPLICATIONS REVIEWED BY CCPERB¹		
Total applications reviewed	454	
Total new applications	385	85%
Total holds (brought forward from a previous meeting)	56	12%
Total requests for redetermination	13	3%
Total applicant organizations	85	
TOTAL APPLICATIONS REVIEWED BY CCPERB PER PROVINCE²		
Alberta	26	6%
British Columbia	28	6%
Manitoba	7	2%
New Brunswick	31	7%
Newfoundland and Labrador	3	1%
Northwest Territories	0	0
Nova Scotia	6	1%
Nunavut	0	0
Ontario	153	34%
Prince Edward Island	4	1%
Quebec	173	38%
Saskatchewan	23	5%
Yukon	0	0
TOTAL	454	

¹ Excludes files seen more than once

² Excludes files seen more than once

Overview of applications for certification 2018-2019

Applications by cultural property group ³ (excludes files seen more than once during the fiscal year; note that applications may contain objects from more than one cultural property group)	Number	Percentage
Objects recovered from the soil or waters of Canada	1	0%
Objects of ethnographic material culture	3	1%
Military objects	0	0%
Objects of applied and decorative art	18	4%
Objects of fine art	393	82%
Scientific or technological objects	1	0%
Textual records, graphic records, and sound recordings	61	13%
Musical instruments	0	0%
TOTAL	477	

Certification Decisions by type	Number / Percentage	Total fair market value	Approximate federal forgone tax revenue ⁴
Approved at the proposed value ⁵	242 (53%)	\$ 19M	\$ 6M
Approved at a lower value	102 (23%)	\$ 23M	\$ 7M
Approved at a higher value	18 (4%)	\$ 5M	\$ 2M
Put on hold ⁶	66 (15%)	n/a	n/a
Refused ⁷	24 (5%)	n/a	n/a
Inadmissible ⁸	2 (0%)	n/a	n/a
TOTAL	454	\$ 47M	\$ 14M

³ Excludes files seen more than once.

⁴ The federal charitable tax credit rate is 15% on the first \$200 and 29% on the remaining amount. (Provincial tax credit rates vary by province.)

⁵ Where there are multiple proposed values, the average is taken as the fair market value.

⁶ If CCPERB needs additional information before making a decision, it will put the application on hold.

⁷ If CCPERB concludes that a given property does not meet the criteria of outstanding significance and national importance, it will refuse the application.

⁸ If CCPERB is not satisfied the donor was the owner of the object at the time of the donation, the Review Board has no jurisdiction to proceed with making a determination; consequently the application is deemed inadmissible.

Practice Notice

During a portion of the 2018-2019 fiscal year, CCPERB operated under a Practice Notice while the Federal Court of Appeal considered a Federal Court ruling on the concept of national importance as expressed in the *Cultural Property Export and Import Act*. In the interim, CCPERB provided applicants for certification of cultural property with the option to either:

- Request CCPERB to defer its decision in the application until after the Federal Court of Appeal renders its decision, or;
- Demonstrate that the object that is the subject of the application meets the interim test for national importance outlined in the Practice Notice.

Specifically, the Practice Notice indicated that CCPERB would consider the following factors in determining national importance:

- a) the extent to which the object has a connection to Canada or to Canadian heritage;
- b) the extent to which the object had an influence on the Canadian public, the practices of Canadian creators or Canadians working in a particular field of work or study; and
- c) the extent to which the object's connection to the cultural heritage is particular to Canada.

The Practice Notice was rescinded following the Federal Court of Appeal decision rendered in April 2019.

Fair market value

CCPERB makes determinations with respect to fair market value in the context of certification requests. If CCPERB determines that a given object meets the legislated criteria for outstanding significance and national importance, it must then determine its fair market value for income tax purposes.

CCPERB has adopted the following definition of fair market value endorsed by the Canada Revenue Agency:

"The highest price, expressed in terms of money, that a property would bring, in an open and unrestricted market, between a willing buyer and a willing seller who are both knowledgeable, informed, and prudent, and who are acting independently of each other."

All certification applicants must submit arm's-length monetary appraisal reports that provide a credible valuation of the object, based on relevant sales evidence and market conditions at the time of the object's sale or donation. This helps ensure that CCPERB has a firm foundation for determining fair market value.

Redeterminations

Donors or vendors who do not agree with a CCPERB determination of fair market value may request a redetermination within 12 months of the date of CCPERB's decision letter.

Donors or vendors who do not agree with a redetermination of fair market value may appeal the decision to the Tax Court of Canada within 90 days after the day on which the Cultural Property Income Tax Certificate is issued.

Finally, where donors or vendors are not satisfied that the review process has been conducted fairly, they may file an application for judicial review with the Federal Court of Canada.

In 2018-2019, no appeals of CCPERB decisions were filed with the Tax Court of Canada.

Export Review

Cultural Property Export Control List

The *Cultural Property Export and Import Act* establishes a system of controls designed to provide Canada with an opportunity to preserve significant cultural property that is facing permanent export. These export controls balance the rights of owners to take their property out of the country with the public interest in preserving the national heritage within Canada.

The *Canadian Cultural Property Export Control List* describes the categories of cultural property that are subject to export control:

- Group I** Objects recovered from the soil or waters of Canada
- Group II** Objects of ethnographic material culture
- Group III** Military objects
- Group IV** Objects of applied and decorative art
- Group V** Objects of fine art
- Group VI** Scientific or technological objects
- Group VII** Textual records, graphic records, and sound recordings
- Group VIII** Musical instruments

A permit is required to export any object included on the list unless it is less than 50 years old or its creator is still living.

Export control

The export control system is administered by the Department of Canadian Heritage in collaboration with the Canada Border Services Agency (CBSA) and a network of collecting institutions across Canada that have been designated by the Minister as expert examiners.

CCPERB's role within the export control system is limited and specific: if an application for an export permit is refused by the CBSA on the advice of an expert examiner, the permit applicant may then request CCPERB to review the application.

If CCPERB determines that the cultural property is subject to export control and meets the legislated criteria for outstanding significance and national importance, and 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 its determination, CCPERB will establish a temporary export delay period of two to six months. These temporary export delay periods provide Canadian institutions with an opportunity to acquire significant cultural property before it is lost to Canada.

When advised of CCPERB's decision to establish an export-delay period, the Minister of Canadian Heritage will advise designated institutions and public authorities so that they may consider purchasing the property. Financial assistance for institutions to acquire cultural property is available from the Department of Canadian Heritage in the form of a Movable Cultural Property grant.

If an owner decides to sell the cultural property to a designated Canadian organization, that organization can apply to CCPERB to have the object certified for income tax purposes. In this way, even though the owner might be able to achieve a higher selling price internationally, the additional tax benefits of certification provide an incentive to sell the property to an institution within Canada.

If the export delay period expires without a purchase offer, CCPERB will direct CBSA to issue an export permit immediately upon the request of the permit applicant.

Fair cash offers

If an applicant rejects an offer to purchase cultural property that is subject to an export-delay period, either the applicant or the organization wishing to purchase the object may call upon CCPERB to determine what would constitute a fair cash offer.

Fair-cash-offer determinations are intended to facilitate an exchange where negotiations have stalled, but property owners are under no obligation to accept any purchase offer. However, if the owner rejects an offer that is equal to or greater than the fair-cash-offer amount determined by CCPERB, then no export permit will be issued for a period of two years from the date of the original notice of refusal of an export permit. At the end of the two-year moratorium, the permit applicant may submit a new application.

In 2018-19, there were no requests for a fair-cash-offer determination.

Refused applications for export permits reviewed by CCPERB and outcomes 2018-2019

Permit application #	Cultural property	Notice of decision	Decision	Delay period	Outcome
110459	Group of Second World War Medals awarded to Lt. Col. David Vivian Currie: 1. Victoria Cross 2. 1939-1945 Star 3. France Germany Star 4. Defence medal 5. Canadian Volunteer Service medal and bar 6. War medal 1939-1945 7. 1953 Coronation medal 8. 1967 Centennial medal 9. 1977 Jubilee medal	February 5, 2018	Delay period established	6 months	Acquisition by the Canadian War Museum announced on May 1, 2018 with the assistance of a Movable Cultural Property grant.
110202	Le Corbusier Deux Figures Au Tronc D'Arbre, 1937 Signed Le Corbusier Oil on Canvas 130 x 162 cm	March 2, 2018	Delay period established	6 months	Delay period expired on September 2, 2018. Canada Border Services Agency directed to issue export permit.
0495-18-02-23-002	Three paintings, 1920-1922, by Lawren Harris; one painting, by Alexander Young (A.Y.) Jackson; one painting, circa 1918, by Arthur Lismer	July 20, 2018	Delay period established	6 months	Delay period expired on January 20, 2019. Canada Border Services Agency directed to issue export permit.

Refused applications for export permits reviewed by CCPERB and outcomes 2018-2019

Permit application #	Cultural property	Notice of decision	Decision	Delay period	Outcome
109857	Danae, n.d, oil on canvas, after Titian	October 5, 2018	No delay	None	Canada Border Services Agency directed to issue export permit.
0495-18-09-12-0002	Letter by George Wright on board RMS Titanic, 10 April 1912	January 25, 2019	Delay period established	3 months	Delay period expires April 25, 2019
0495-18-09-13-002	Patek Philippe watch ref. 1463 in rose fold	February 14, 2019	No delay	None	Canada Border Services Agency directed to issue export permit.
0495-18-09-13-003	Rolex watch ref. 1675, circa 1960	February 14, 2019	No delay	None	Canada Border Services Agency directed to issue export permit.

Contact the Secretariat

For questions about CCPERB operations or information contained in this Annual Report, please contact the Secretariat at:

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