

Monetary Appraisal of Archival Fonds¹



Canadian Council of Archives
Conseil canadien des archives

Issues:

The Canadian Cultural Property Export Review Board (CCPERB) recently issued a revised *Guide for Monetary Appraisals*, accompanied by a “Communication to Archival Stakeholders” (dated December 2020). These impose several changes to the methodology used to justify the appraised Fair Market Value of archival fonds:

- 1) Monetary appraisals for all categories of cultural property must be based on actual recent sales comparisons (within 5 years) or, in exceptional circumstances, a cost approach.
- 2) Past appraisals done by the National Archival Appraisal Board (NAAB) can no longer be used as precedents.
- 3) Past appraisal certifications by CCPERB can no longer be used as precedents.

The *Guide* offers no direction on the monetary appraisal of digital records, which are now an integral part of most modern archival fonds.

The revised CCPERB *Guide* was issued after many thoughtful submissions to CCPERB by the National Archival Appraisal Board (NAAB), experienced appraisers, and leading archivists - professionals who have a vested interest in the recognition of the importance and significance of archival records at the national level. CCPERB chose not to incorporate any of the recommendations from these submissions, and instead adopted a narrow, legalistic approach that will have a negative effect on efforts to broaden diversity, equity and inclusivity within Canada’s documentary heritage.

In light of CCPERB’s willful lack of understanding regarding the nature of the market for substantial archival fonds, NAAB has concluded that it can no longer conduct appraisals of archival fonds for applications being submitted to CCPERB.

The Impact

Without an appraisal of fair market value, justified in accordance with CCPERB's new requirements, CCPERB will not determine the value for tax purposes. As a result:

- 1) Donors of archival fonds will no longer be able to receive the tax benefit from having CCPERB certify the outstanding significance and monetary value of their donation.
- 2) Hindering current efforts by Canada’s archives and libraries to ensure that Indigenous peoples and all minorities are represented in our collective documented memory.
- 3) Influential Canadians and corporate entities, in all fields of endeavour, will no longer have the same incentive to donate their records to a designated Canadian institution. Collections may therefore be sold internationally to libraries, archives and museums, potentially resulting in the loss of evidential integrity, access and use for Canadians.

¹ An archival fonds consists of that body of documents in all documentary media, created and received by an individual, family or corporate entity in the course of their activities. A fonds includes many items but it is an integral whole.

Background

National Archival Appraisal Board: NAAB was established in the early 1970s by archives as an appraisal service to institutions with archival holdings. It evolved from discussions between the Department of National Revenue (now Canada Revenue Agency) and the Public Archives of Canada (PAC; now Library and Archives Canada or LAC). The Department of National Revenue recognized that archival fonds have a fair market value and were open to considering receipts for its donation. In developing a methodology to determine Fair Market Value, the PAC and National Revenue agreed on a structure that would have a dealer, a researcher and an archivist examine and assess the value of the records. This ensured that a consensus of the value drew upon the marketplace, cultural perspectives, and future research potential. The archival community was a strong supporter of advancing the *Canadian Cultural Property Export and Import Act* in 1977, and the relationship between CCPERB, NAAB and the archival community over the decades has been a collegial one as all parties involved recognized the importance of maintaining the integrity of the process while balancing the legitimate interests of donors and the tax system. Our documentary heritage and our knowledge of all facets of Canadian society is richer for this collaboration.

The Market: The market for archival fonds is unique and does not follow the model of the commercial market for most other movable cultural property. The physical extent of an archival fonds, coupled with the long-term obligation both to preservation and to research access are daunting, resulting in the market being comprised of institutions, rather than individuals. The institutional market is competitive as universities vie to build unique research resources and government archives strive to document all aspects of our complex and diverse society. Since publicly-funded institutions competing on price for a fonds would be severely criticized, they compete on other aspects of a purchase or donation agreement, making permanent commitments to professionally preserving and managing the unique record of the donor's/seller's contribution to Canada. From an institutional perspective, the real market price is the total cost of ownership. This would reflect the standard government approach to costing the acquisition of other capital assets, such as buildings and weapons systems.

For many public figures and corporations, selling archival records of national significance to international buyers would incur public opprobrium. A key function of the archival record derives from its enduring value as *evidence*, whether legal, research or cultural. This requires continuous documented custody with direct transfer from the creator to professionally managed custody to ensure that the record has not been altered and maintains its authenticity and integrity. The Canadian market for archival fonds is limited and most transactions are confidential under legislated or institutional privacy policies. To find sales comparisons in any five-year period for major fonds is difficult, usually impossible. In addition, without inside knowledge of all the factors at play, available information may be potentially misleading.

Digital Records: In the 21st Century, digital records are an increasingly vital part of daily and official life, recognized by the courts as evidence of actions and transactions. They are acquired by institutions as integral components of a fonds for their essential research and evidential values. Again, CCPERB requires "active public market evidence" to justify the appraised value.

Canadian Cultural Property Export Review Board: The Board was established by the Cultural Property Export and Import Act (1977) and it has as one of its responsibilities the certification of cultural property of outstanding significance for tax purposes. This includes the certification of its fair market value. This

concept is not defined in the legislation but CCPERB references the existence of an “established body of jurisprudence” on the issue though we have not found any case which has dealt with the market for archival funds. We recognize that CCPERB must focus on fair market value but we question the interpretation of the definition CCPERB uses, their understanding of the market and their criteria for the appraisal of archival funds.

Definitions of fair market value differ. CCEPERB defines it as: “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, both knowledgeable, informed, and prudent who are acting independently of each other.”

The Canada Revenue Agency offers a different version of this definition, beginning “Usually the highest dollar value you can get for your property...”² This is true to the concept of Fair Market VALUE.

Value is a broader concept than price and, in a transaction, tangible and quantifiable consideration (i.e., consideration in the legal sense: something of value) beyond price adds to the value provided. Every aspect of managing and preserving archival funds - from administering rights such as copyright, to creating inventories, to digitization and promotion of holdings - can be quantified to constitute the financial value generated for the donated property. All of these factors are significant in this distinct but active market and CCPERB should both recognize and accommodate them into its policies relating to archival materials.

Unlike most other regulatory agencies or quasi-judicial bodies which respect and build upon their previous decisions, CCPERB now disallows appraisals based on the work of their predecessors. Their rationale is that information about previous decisions is deemed protected under the Income Tax Act. They do not consider how it may be possible to make this information available to appraisers and their Board members in a relevant but anonymized form.

The recent decisions by CCPERB regarding applications they deferred from 2019 and 2020 has confirmed NAAB’s experience over the past few years: that CCPERB has shifted away from past practice that included a recognition that appraisal of archival funds is a shared challenge, and it has moved to an absolute demand for recent relevant market evidence.

In seeking to fulfill its “duty of fairness” CCPERB achieves a result that is unfair to archival donors and contrary to the clear intent of the Act. For the sake of future consistency and admittedly inconsistent with past practice, CCPERB has dismissed any possibility of interpreting their limited valuation methodology in a manner that accommodates the real nature of the market for significant archival funds. For forty years, in a collaborative spirit, CCPERB and NAAB found solutions and achieved the goal of the Act. This spirit, unfortunately, has ceased to exist.

NAAB Position (March 2021): Given this narrow legalistic approach, requiring recent public sales comparisons and without being able to draw on previous appraisals or CCPERB decisions, NAAB has concluded that it can no longer, with any measure of professional integrity, conduct appraisals for submissions to CCPERB according to long established methodologies.

² <https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/personal-income/line-127-capital-gains/definitions-capital-gains.html> (accessed 20 March, 2021)

Independent appraisers will experience the same insurmountable challenge under CCPERB's new *Guide for Monetary Appraisals*.

ACTION:

The professional appraisal of donated archival fonds for submissions to CCPERB is now a matter of urgent concern for archival institutions, their donors, and all concerned about the integrity and inclusivity of Canada's documentary heritage. We note that:

- a) The Act functioned well for over four decades.
- b) Given the number of recent nationally significant donations deferred by CCPERB, this is now urgent.
- c) CCPERB and the Canada Revenue Agency use different definitions of "Fair Market Value" with the former emphasizing 'price' and the latter, 'value'.
- d) The methodology and factors for appraising "Fair Market Value" are not defined in legislation or regulation. The methodology developed and refined by NAAB has served Canada well for more than 40 years.
- e) Acquisitions of archival fonds involve valuable tangible and quantifiable long-term institutional commitments regarding professional preservation and services.
- f) CCPERB's new requirements are issued as a "GUIDE", not as a regulation.
- g) CCPERB's requirements for appraisals should be consistent with the reality of the active institutionally-driven market for archival fonds
- h) CCPERB consists of a Chair plus 9 members. There are currently 5 vacancies on the Board with the terms of 2 other members expiring in May, 2021.

ACCORDINGLY, WE RECOMMEND THAT:

1. The Minister of Canadian Heritage nominate for appointment to CCPERB two senior archivists who have experience in both in monetary appraisal and in negotiating the acquisition of significant multi-media archival fonds.
2. CCPERB urgently enter into meaningful consultation with the archival community and its stakeholders
 - a) to learn the scope and dynamics of the Canadian market for archival fonds and
 - b) to appreciate all consideration of value that are integral components of an agreement to acquire an archival fonds and
 - c) to develop a professionally acceptable methodology for the appraisal of archival fonds, including documentary heritage in all media
 - d) to develop a viable path forward to ensure that donors of archival fonds can enjoy the full benefits envisioned in the Act. This could include legislative amendments.
3. For those submissions prepared using former guidelines, CCPERB makes the determinations of the fair market values using the guidelines in place at the time of submission. (CCPERB Communiqué 6 March, 2020)



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