

# CANADIAN CULTURAL PROPERTY EXPORT REVIEW BOARD

## Communication to Archival Stakeholders – Guide for Monetary Appraisals

December 2020

### 1. Introduction

In this document the Canadian Cultural Property Export Review Board (CCPERB) responds to submissions made by the archival community to CCPERB's draft Guide for Monetary Appraisals dated July 31, 2020, and circulated to the stakeholder community during the summer and fall of 2020.

It was evident to CCPERB that the submissions of the professionals and institutions who commented on the draft guide reflected extensive experience with applications for certification and for monetary appraisals. CCPERB carefully considered each submission and each recommendation contained therein. CCPERB discussed those submissions and recommendations at length and, where possible, CCPERB amended the draft guide taking into account the submissions and recommendations. CCPERB approved and adopted the revised draft guide at its meeting on November 10, 2020. The November 2020 guide should be consulted by applicants and appraisers going forward.

There were a number of recommendations that were common among the submissions made by the archival community that CCPERB was unable to integrate due to restrictions and limitations imposed upon CCPERB by the provisions of the *Cultural Property Export and Import Act* (the Act)<sup>1</sup>, jurisprudence binding on CCPERB, and requirements of administrative law. In order to explain why CCPERB cannot accept those recommendations, this document will first contextualize the rationale for CCPERB's review of its policies and procedures relating to monetary appraisals, then review the statutory scheme of the Act that governs the certification of cultural property, and summarize the relevant requirements of administrative law. The document will conclude with a summary of the principal recommendations of the archival community, identify the recommendations that CCPERB cannot accept, and explain why with reference to statutory provisions, jurisprudence and requirements of administrative law.

### 2. Renewing policies and procedures

In 2019, Parliament responded to a Federal Court decision by amending subsection 32(1) of the Act and the corresponding provisions of the *Income Tax Act*<sup>2</sup> concerning CCPERB's jurisdiction to certify cultural property. These legislative changes, among other reasons, caused CCPERB to review its policies and practices relating to the certification of cultural property.

The creation of the Guide for Monetary Appraisals is part of CCPERB's comprehensive review and renewal of its policies and practices relating both to the certification of cultural property and to the

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<sup>1</sup> RSC 1985, c C-51.

<sup>2</sup> RSC 1985, c 1 (5<sup>th</sup> Supp).

review of applications for export permits. The changes to these policies and practices introduced in the Guide for Monetary Appraisals are not solely administrative, but are also intended to address specific recurring issues that CCPERB encountered in making determinations of fair market value in the context of applications for certification of certain types of cultural property including archival fonds.

As noted throughout this document, in applications for certification of cultural property CCPERB cannot apply one valuation methodology for one type of cultural property, and a different valuation methodology for another type of cultural property, particularly where the valuation methodology is incompatible with the statutory structure of the Act.

### 3. Statutory structure

Subsections 32(1) of the Act provides CCPERB with jurisdiction to certify cultural property. Subsection 32 (1) provides as follows:

*For the purposes of subparagraph 39(1)(a)(i.1), paragraph 110.1(1)(c), the definition total cultural gifts in subsection 118.1(1) and subsection 118.1(10) of the Income Tax Act, where a person disposes of or proposes to dispose of an object to an institution or a public authority designated under subsection (2), the person, institution or public authority may request, by notice in writing given to the Review Board, a determination by the Review Board as to whether the object meets the criterion set out in paragraph 29(3)(b) and a determination by the Review Board of the fair market value of the object.*

Paragraph 29 (3)(b) of the Act refers to the criteria of outstanding significance set out in paragraph 11(1)(b) of the Act. Pursuant to these statutory provisions, CCPERB has jurisdiction to consider an application for certification of an object if an institution or public authority designated by the Minister of Canadian Heritage requests a determination of whether the object meets the requirements of outstanding significance and a person has disposed of or proposes to dispose of the object to such an institution or authority.

If CCPERB determines that the cultural property meets the requirements of outstanding significance, it then determines the property's fair market value. In view of subsection 33(1) of the Act, after CCPERB has determined the fair market value and the property has been irrevocably disposed of to a designated institution or public authority, CCPERB is required to issue to the donor of the property a cultural property income tax certificate attesting to the fact that the object meets the requirements of outstanding significance set out in the Act and attesting to the object's fair market value. The certificate must be in such a form as the Minister of National Revenue may specify.

Parliament constrained CCPERB's jurisdiction to certify cultural property by the wording of the provisions of the Act. In establishing the value of cultural property to be set out on a cultural property income tax certificate, CCPERB must determine the property's fair market value. The Act does not permit the Review Board to determine any value other than fair market value.

Parliament used the term “object” in subsection 32(1) to refer to all types of cultural property that may be certified by CCPERB. Parliament did not provide special provisions or exceptions from the requirements of the Act for the valuation of different types of cultural property. The Act therefore requires that CCPERB make valuation determinations based on fair market value for all types of cultural property, whether the property be, e.g., archival fonds, fine art, decorative art, insects, meteorites, or military artefacts. If Parliament had desired that CCPERB could make different valuation determinations for different types of cultural property, it would have expressly so provided in the wording of the Act.

#### 4. Evolution of requirements of administrative law

In making decisions required by the Act, CCPERB is bound by the requirements of administrative law. Administrative law is not static. It has evolved through the jurisprudence over many years. Since the Act was enacted in 1977 there have been many court decisions that have refined, and in a number of instances changed, those requirements. One of the most significant developments in administrative law is the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov (Vavilov)*<sup>3</sup>.

One of the requirements of administrative law is the duty of fairness. The duty of fairness includes procedural fairness. In circumstances in which an administrative tribunal is required to provide written reasons for a decision, the reasons must explain how and why it made the decision and must provide justification for the decision in a transparent and intelligible manner<sup>4</sup>.

Subsection 33.1(1) of the Act provides that a person, who has disposed of an object that CCPERB has certified and in respect of which it has made a redetermination decision of fair market value, is entitled to appeal that decision to the Tax Court of Canada. Accordingly, CCPERB is required by administrative law to provide written reasons for its redetermination decisions. CCPERB’s written reasons must justify the decision being made, explaining how and why CCPERB made the decision.

To enable CCPERB to provide adequate written reasons for a redetermination decision, it must have adequate market evidence in the appraisal(s) furnished in support of the cultural property that is the subject of the decision. This market information is required to enable CCPERB to justify its decision in its written reasons.

As an administrative tribunal, CCPERB can only act within the scope of the jurisdiction delegated to it by the Act. The Guide for Monetary Appraisals will help to support decision-making that is procedurally fair, rational, logical and justifiable within CCPERB’s jurisdiction and the facts relating to each application for certification.

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<sup>3</sup> 2019 SCC 65.

<sup>4</sup> *Ibid*, at paras 77 and 79.

## 5. Consultation

In recent years, CCPERB has become increasingly concerned about accepting appraisals that are based primarily or exclusively on a methodology of relying on previous appraisals of cultural property submitted for certification under the Act or previous fair market value determinations made by CCPERB under the Act. Such appraisals have been furnished in support of applications for certification of fine art, archival fonds, and other types of cultural property. CCPERB has been rejecting appraisals based on previous appraisals or previous determinations for other types of cultural property, but reluctantly continued to accept such appraisals for archival cultural property.

Recognizing the need for consistency in the treatment of appraisals of all types of cultural property, commencing in the fall of 2019 and continuing through the fall of 2020, CCPERB engaged in discussions with national and international organizations to gain insight into practices relating to the valuation of archival cultural property. This included meetings with representatives of Library and Archives Canada, the Canadian Council of Archives (CCA), and the National Archival Appraisal Board (NAAB). CCPERB also consulted with Arts Council England, The National Archives (UK), the National Library of Australia, the Australia Department of Communication and the Arts, the United States Internal Revenue Service, the Harry Ransom Center, and the Antiquarian Booksellers of America. Concurrently, CCPERB began to revise its existing guidelines for monetary appraisals. In revising its guidelines, CCPERB sought to make the application process as efficient, easy and fair as possible and to ensure that CCPERB would be able to make decisions in accordance with the requirements of the Act and administrative law. Above all, CCPERB sought to ensure that all types of cultural property of outstanding significance is certified under the Act to the extent that the law would permit.

At its meeting in December 2019, CCPERB decided to place on hold applications for certification of cultural property supported by appraisals based on a valuation methodology that relied primarily on prior appraisals, on prior CCPERB fair market valuation determinations, or on historical research value, pending finalization of the revisions to its guidelines for monetary appraisal. In December 2019, CCPERB posted a draft of its Guide for Monetary Appraisals on its website and commenced a process of consulting on the draft guide with applicants and other stakeholders.

From February to April 2020, CCPERB solicited comments on its draft guide from approximately 20 Canadian specialists active in the field of cultural property appraisal, including rare book dealers, members of the Canadian Chapter of the International Society of Appraisers, members of the Art Dealers Association of Canada Appraisal Committee, and independent appraisers. In addition, it scheduled an in-person meeting with NAAB at the end of March 2020 to discuss the draft guide and to explain the rationale for the changes in practice that the guide contemplated. Unfortunately, due to the COVID-19 pandemic, that meeting was cancelled.

In order to advance matters, in June and July CCPERB revised its draft Guide for Monetary Appraisals based on the input that it had received by that time, and circulated the revised draft, dated July 31, 2020, to archival organizations and stakeholders, and to any other organization or individual who requested a copy of the July 2020 draft. In addition, CCPERB solicited input and comment from those

stakeholders who had provided comments on the December 2019 draft, from applicants whose applications for certification had been placed on hold pending finalization of the guide, and from associations and other stakeholders that represented archival institutions, archivists, and appraisers of archival fonds. In August 2020, NAAB also shared the revised draft guide on a listserv that reached the archival community more broadly and conducted a survey on the content of the revised draft guide.

In September through early November 2020, as well as receiving NAAB's survey results and NAAB's submissions and recommendations, CCPERB received comments from individuals, institutions and other organizations including the Canadian Association of Research Libraries, the Association of Canadian Archivists (ACA), Bibliothèque et Archives nationales du Québec, the Canadian Historical Association, the University of Toronto, the Art Gallery of Ontario, the Council of Provincial and Territorial Archivists, the Canadian Council of Archives (CCA), the current and a former Librarian and Archivist of Canada, as well as other individual archivists and appraisers. In addition, and upon request, CCPERB and its Secretariat also convened meetings with representatives of NAAB, CCA, ACA, the University of Toronto, and Queen's University in order to receive direct feedback.

As indicated above, CCPERB carefully reviewed all comments and recommendations received. At its meeting on November 10, 2020, CCPERB finalized and approved the Guide for Monetary Appraisals.

## 6. Submissions from the Archival Community

CCPERB acknowledges the thoughtful and constructive comments received throughout the consultation. The feedback reflected a depth of expertise and experience across a number of disciplines, in particular from those individuals and organizations specializing in archival cultural property.

CCPERB received a number of comments and recommendations that were common among the submissions from the archival community. These are summarized below. In addition, CCPERB explains why it is unable to accept and implement a number of these comments and recommendations. The italicized passages are quotations from comments and recommendations received from the archival community.

- *The guide is heavily predisposed to single or smaller objects such as fine art objects and artefacts.*

CCPERB has taken this view into consideration in the current version of the guide, and made revisions intended to clarify the guide's applicability to all forms of cultural property. CCPERB's determinations of the fair market value of certified cultural property are not founded on policies set out in the guide itself, but rather are founded on the provisions of the Act. As noted above, the guide reflects the statutory language of the Act, which uses the term

“object(s)” to refer to all forms of cultural property disposed of, or proposed to be disposed of, to an institution or a public authority designated under the Act.

The objective of the guide is the same for individual objects such as a tapestry, or for diverse groupings of objects such as an archival fonds: the guide outlines specific approaches and general strategies to ensure applicants cite market data and provide a reasoned justification upon which CCPERB can make a determination of fair market value, as required under the Act. The difficulty to appraise unique forms of cultural property does not absolve CCPERB of the Act’s requirement that the Board make a fair market value determination for certified cultural property.

- *Neither the concept of ‘fair market value’ nor how to establish it are defined in the legislation or in regulation.*

Although the term “fair market value” is not defined in the Act, there is an established body of jurisprudence that has considered the meaning of fair market value both in the context of the Act and other legislation. This body of jurisprudence has its origins in the decision of the Federal Court in *Henderson Estate v. Canada (Minister of National Revenue) (Henderson)*.<sup>5</sup> That case concerned the definition of fair market value in the *Dominion Succession Duty Act*.<sup>6</sup> In that case, Justice Cattanach had the following to say about fair market value:

*The statute does not define the expression “fair market value”, but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm’s length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand.*<sup>7</sup>

Justice Cattanach’s approach to defining fair market value in *Henderson* has been confirmed by the Federal Court of Appeal in a number of decisions. In *Nash v. Canada (Nash)*, the Federal

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<sup>5</sup> [1973] FCJ No 800, 73 DTC 5471.

<sup>6</sup> RSC 1952, c 89.

<sup>7</sup> *Supra* note 5 at para 21.

Court of Appeal cited the lower courts' summary of the *Henderson* definition of fair market value:

*The meat of that definition (Henderson) is the highest price reasonably expected if an asset is sold in the normal method in the ordinary course of business in a market without undue stress composed of willing buyers and sellers.*<sup>8</sup>

In *Nash*, the Federal Court of Appeal applied the *Henderson* definition of fair market value in determining the fair market value of groups of limited edition prints that were purchased by the respondent taxpayers and donated to charities and universities. In doing so, the court explained that, typically, the determination of fair market value of certain property depends at least in part on evidence of comparable transactions involving the same or similar property. However, it added that to give effect to the *Henderson* definition, it is necessary to ensure that the suggested comparisons are sound. The court therefore proposed a two-step approach in applying the *Henderson* definition of fair market value. The first step is to accurately identify the asset whose fair market value is to be ascertained. The second step is to determine the market in which the asset is normally sold in the ordinary course of business.

The Federal Court of Appeal has endorsed the *Henderson* definition of fair market value in cases involving the provisions of the Act. In *Aikman v. Canada (Aikman)*, the appellant appealed from a determination by the CCPERB of the fair market value of cultural property under section 32 of the Act.<sup>9</sup> The court applied the *Henderson* definition of fair market value and concluded that the evidence did not support a fair market value higher than the amount assigned by the Board. The decision of the Tax Court of Canada was appealed to the Federal Court of Appeal. The Federal Court of Appeal dismissed the appeal, in effect endorsing the approach to fair market value adopted by the Tax Court of Canada.<sup>10</sup>

In *Canada v Malette (Malette)*, the Federal Court of Appeal rejected the appellant's contention that Parliament intended to enhance the tax incentives in the Act that are tied to an object's fair market value by making a value determination other than in accordance with accepted valuation principles and methodology.<sup>11</sup>

The Board is bound by the definition of fair market value adopted by the Federal Court and the Federal Court of Appeal in *Henderson* and *Nash* and endorsed by the Federal Court of Appeal in relation to the Act in *Aikman* and *Malette*.

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<sup>8</sup> 2005 FCA 386 at para 12.

<sup>9</sup> [2000] TCJ no 7.2

<sup>10</sup> 2002 FCA 114.

<sup>11</sup> 2004 FCA 187.

The language used in defining fair market value in *Henderson* has been simplified and widely adopted in other jurisprudence and by Canada Revenue Agency and the Review Board. This widely accepted definition is as follows:

*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.*

- *Research values and historical values need to be recognized in determining fair market value – archival fonds support the output of masters theses and doctoral dissertations; creation of secondary sources and creative works; film and television productions; and research and development in all fields of enquiry – these endeavours all have a positive economic impact and can be quantified in monetary terms.*

CCPERB recognizes the unique value of archival cultural property as an essential source of new and sustained knowledge, as a wellspring of creativity and potential innovation, and as vital documentary evidence contributing to civic accountability and social justice.

Historical and research values are not exclusive to archival cultural property. They are factors inherent in the vast majority of cultural property for which certification by CCPERB is sought. Explicitly, the Act makes these values central to CCPERB's determination of the cultural property's outstanding significance. Specific criteria in this regard includes consideration of the cultural property's close association with Canadian history, its close association with national life, its value in the study of the arts, or its value in the study of the sciences. These criteria are embedded in the Act.

However, the fact that cultural property may be of outstanding significance due to its unique historical or research value is not evidence of market value. A determination of fair market value must reference market evidence. Based on that evidence, an accompanying justification may then address factors that are unique to the cultural property as a means of extrapolating fair market value. In the absence of such evidence and justification, CCPERB may be able to determine that an object is of outstanding significance, but may lack the data required to determine the object's fair market value.

CCPERB has no jurisdiction to determine a value for archival cultural property, or any other type of cultural property, based on any valuation other than fair market value. The fact that an object has historical or research value—even where the historical or research value is undeniable—may have no bearing on what the cultural property would command on the open market. Guidance on this point can be obtained from the decision of the Tax Court of Canada in *Aikman*. The Court had the following to say about the relationship between historical interest and fair market value:



*It was also argued that since the Board had determined that the [prototype flying machine] is of outstanding significance and national importance, this in itself should be reflected in its fair market value. At first blush this would appear to be a plausible argument, but on reflection it does not bear close scrutiny. The fact that something is of unique historical interest, or has been accepted by the Board as being of outstanding significance or national importance, really has no particular bearing on what a knowledgeable purchaser would pay for it, nor does it create a market where none exists.<sup>12</sup>*

Again, CCPERB is committed to providing guidance and support to applicants where the cultural property poses unique challenges in the context of an application for certification. However, CCPERB remains bound by the statutory language of the Act, and the relevant jurisprudence and requirements of administrative law.

- *It is not clear why CCPERB will not accept previous appraisals or previous CCPERB determinations as components of a potential methodology.*

Increasingly, appraisals of archival cultural property have relied on prior appraisals submitted to CCPERB in order to estimate fair market value. Typically these appraisals make reference to prior appraisals, but do not specify the value estimated in the prior appraisals, the valuation methodology used in the prior appraisals, or how the values in the prior appraisals are used in estimating the value of the cultural property under consideration. Also, there is typically no explanation, or only a cursory explanation, provided for how the prior archival cultural property is comparable with the cultural property being appraised.

In addition, these appraisals typically do not take into account whether the amounts estimated in the prior appraisals were, in fact, the amounts ultimately determined by CCPERB as fair market value. Market conditions also change over time, and any consideration of previous appraisals therefore would need to include an analysis that reflects the market fluctuations in the intervening period. Consequently, these appraisals do not provide an adequate factual underpinning to enable CCPERB to rely on past appraisals to make a determination of market value for the cultural property at hand.

Furthermore, it is possible, and indeed it may be likely, that the prior appraisals propose a value based on historical or research value. As noted above, such a value is central to CCPERB's determination of the cultural property's outstanding significance, but is not market evidence required to inform a fair market value determination. CCPERB therefore cannot rely on prior appraisals as reliable indicators of the cultural property's fair market value.

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<sup>12</sup> *Supra* note 9 at para 113.

It is also common practice for appraisers to include a statement in their appraisal report indicating that it is not intended for use by others and should not be relied upon or used by any third party unrelated to the immediate purpose of the appraisal.

If CCPERB were to use one of its prior determinations of fair market value in determining the fair market value of cultural property in the context of a new application, administrative law would require CCPERB to disclose its prior determination and justify the use of such determination in its redetermination decision. However, CCPERB is not able to either disclose or cite past fair market value determinations in new applications. Doing so is prohibited under the *Income Tax Act*<sup>13</sup>. Section 241 of the *Income Tax Act* prohibits CCPERB from disclosing information regarding its prior fair market value determinations in reasons for decisions. The information that CCPERB receives in the context of applications for certification is collected on behalf of the Minister of National Revenue. As such, the information provided by applicants in the context of certification, including the supporting appraisals, is “taxpayer information” as defined in section 241. Subsection 239(2.2) of the *Income Tax Act* provides that it is an offence to contravene section 241, and provides for sanctions for contravention of that section.

In short, by law CCPERB cannot use the protected information of one taxpayer in providing its reasons for a decision in an application concerning cultural property of another taxpayer.

- *Appraisers carry out searches of sales data from various dealers and auction houses if applicable and available, but typically there are few or no established open public markets for certain archival materials because of the lack of interest by the collectors’ market, daunted by the size of whole archival fonds.*

Many archival stakeholders indicated that there is no market for archival cultural property in Canada, or at a minimum there is no market for entire fonds. Supply and demand are key determinants in establishing fair market value of cultural property, and both factors can increase or diminish over time. Currently, archival cultural property of outstanding significance may be particularly desirable in a Canadian institutional setting, but otherwise may not have a market beyond our borders. Likewise, where an international market exists for Canadian archival cultural property, it typically focuses on a limited number of high-profile creators and any financial data may be subject to privacy restrictions.

CCPERB acknowledges that in the decades since the *Act* was enacted, the Canadian institutional market for archival cultural property has changed substantially. The *Act* was enacted at a time when Canadian archival institutions had the budgetary means to sustain a market for some Canadian archival material. In the intervening years, acquisition budgets

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<sup>13</sup> *Supra* note 2.

have diminished or disappeared, leading institutions to rely on other incentives, including the tax incentives inherent in the certification of cultural property, to encourage donations.

Though the market for Canadian archival cultural property has changed, the relevant provisions of the Act have not. Similarly, the conventions of the monetary appraisal of archival cultural property developed in the 1970s have persisted, while the accumulated jurisprudence binding on CCPERB has evolved considerably over that same period.

In the absence of legislative amendments, CCPERB must apply the existing language of the Act and the definition of fair market value as established at law, and it must do so equally for all applicants, regardless of the specific type of cultural property identified in the application for certification. As stated above, CCPERB acknowledges that there will be exceptions to the form and content of appraisals, given the diversity of cultural property covered by the Act; however, the nature of CCPERB's determinations always is bound by the language of the Act itself, where fair market value governs CCPERB's determinations of monetary value.

On a practical note, while the guide recommends that appraisers cite market evidence within five years of the date of the cultural property's disposition, it does not limit this evidence to five years. The guide acknowledges that, where there is difficulty in identifying recent comparable sales, the appraiser may refer to sales that took place over a longer period of time.

CCPERB also recognizes that a comparison of market evidence for individual objects against other individual objects typically involves a more direct calculation and justification. With archival cultural property in mind, there may be some relevant market data for certain of the objects within an archival fonds that can be cited in order to extrapolate in a reasoned justification an estimated value for a diverse grouping of material within the fonds. The integrity of the entire fonds is understood, but in the absence of comparable market data at the fonds level, CCPERB encourages appraisers to propose a value for groupings or tiers of objects, such as common groups of records, documentary art, or photographs contained within a fonds, based on available market data and a sound reasoned justification.

- *Suggesting that the cost method should only be used in "exceptional" cases will negatively affect the appraisal of many types of archival records, such as photographs, film and moving images.*

CCPERB often receives applications for certification of cultural property such as photographs, film, and moving images in a non-archival context, together with supporting market evidence. The fact that these or other objects form an integral part of an archival fonds or collection is not a barrier to using relevant market information for these materials, and extrapolating an estimated fair market value based on the appraiser's reasoned justification.

Although CCPERB has accepted the cost of reproducing an object in estimating fair market value in the past, the Board will no longer accept that approach unless the appraiser can demonstrate that using that approach results in a reliable estimate of fair market value. This is made clear in the Guide for Monetary Appraisals.

The Tax Court of Canada in *Aikman* considered two appraisals that used the cost approach in estimating fair market value of a prototype of a unique flying machine. In concluding that the cost to reproduce the flying machine was not a reliable estimate of fair market value, the court stated:

*What it cost historically to produce a prototype, or what it might cost to reproduce it, might have nothing to do with what price the object would command on the open market. It might be much higher or much less. I am sure that the actual cost of reproducing Lindbergh's Spirit of St. Louis, or the plane that the Wright brothers flew in would be significantly less than what a wealthy collector or museum would pay for the originals of these aircraft. Conversely, the cost of reproducing an object might well be far in excess of the price it could fetch on the open market. For that reason, I do not regard replacement cost as a reliable guide to fair market value.<sup>14</sup>*

CCPERB is equally of the view that what it cost to reproduce a photograph or an audio-visual work may be significantly less or be far in excess of the price that those objects would command on the open market. In the large majority of cases, that cost would have no bearing on the object's fair market value.

Note that the guide does not preclude the use of the cost method where appropriate, as long as the accompanying reasoned justification demonstrates that using that method results in a reliable estimate of fair market value. This will likely be the exceptional case. It is the role of the appraiser to justify the valuation methodology as a reliable estimate of fair market value in respect of the specific type of cultural property being appraised.

- *In the past archival applications have constituted 20% to 25% of all applications submitted to CCPERB.*

This proportion of archival applications may have been the case many years ago. It has not however been the case in recent years. In order to provide an accurate estimate of the proportion of applications submitted to CCPERB for certification that relate to archival cultural property, CCPERB conducted an analysis of the number of applications that fall within the class of archival cultural property as compared with the total of applications for cultural property received by CCPERB over the last two years. The class of applications that include archival cultural property were 12% of the total number of applications received. Of that,

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<sup>14</sup> *Supra* note 9 at para 109.

almost 10% of the archival-class applications, or 1% of the total number of applications received, related to groups of rare books.

- *The guide makes no reference to digital records and yet more and more traditional paper-based records are being augmented, if not replaced, by born-digital records across all media.*

The Guide for Monetary Appraisals applies equally for all forms of cultural property. Digital records that are associated with physical objects can be certified as cultural property. As with other types of cultural property, market evidence and a reasoned justification must be provided in support of the appraised value of digital cultural property.

To date, there have been only limited circumstances in which appraisers have been able to demonstrate that there is a market in which digital objects trade and been able to provide market evidence to justify a fair market value estimate. In most instances, CCPERB has not been able to determine a fair market value in excess of zero for digital records. This is consistent with the practices in making comparable fair market value determinations of digital records in the United Kingdom, the United States and Australia.

A meeting with representatives from NAAB, intended for the end of March 2020, was cancelled due to the pandemic. This meeting was to begin a discussion on how fair market value for digital records might be estimated. CCPERB intends to enter into such a discussion with NAAB and other interested stakeholders now that it has finalized the Guide for Monetary Appraisals.

## 7. Conclusion

CCPERB is committed to ongoing engagement with archival stakeholders with a view to improving its policies and procedures, recognizing that the outcome of these improvements are equally applicable to all applicants and to all forms of cultural property. CCPERB does not regard the Guide for Monetary Appraisals—or any of the supporting materials it prepares to assist applicants—as an immutable document. CCPERB is open to hearing from stakeholders in order to continuously improve and clarify its processes where it is possible to do so under existing law. Thank you to the organizations and individuals who have submitted comments on the Guide to Monetary Appraisals to date.