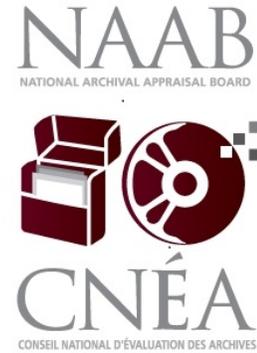


Challenging CCPERB: A Response to CCPERB's *Communication to Archival Stakeholders*



An Executive Summary:

After adopting a new *Guide for Monetary Appraisals* in November 2020, the Canadian Cultural Property Export Review Board (CCPERB) published a document entitled a *Communication to Archival Stakeholders* to respond to submissions made by the archival community regarding its draft *Guide* of July 2020. The Board argued that “*there were a number of recommendations...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), jurisprudence binding on CCPERB, and requirements of administrative law*”. The document identifies the recommendations that CCPERB cannot accept, and further explains “why with reference to statutory provisions, jurisprudence and requirements of administrative law.”

With these statements in mind, the reader anticipated CCPERB's explanations to provide credible and relevant legal justifications for changing its requirements for the monetary appraisal of archival fonds after more than 40 years of precedents. A review of CCPERB's *Communication* document unfortunately fails to demonstrate how the Act, the jurisprudence and the requirements of administrative law compelled the Board to narrow its interpretation of the definition of “Fair Market Value”.

As a result of the new *Guide for Monetary Appraisals*, only cultural property currently exchanged on commercial markets can be recognized as having a “monetary value”. Though donations of archival fonds to designated heritage institutions may qualify as having outstanding significance, such donations are rejected by CCPERB because their value is expressed in the framework of institutional markets. The *Communication to Archival Stakeholders* remains the key document outlining CCPERB's reasons for largely rejecting appraisal reports of cultural property, such as archival fonds, that are not totally based on recent comparative sales of similar material.

This document examines CCPERB's *Communication to Archival Stakeholders* with a view to understanding the foundations of CCPERB's review and provides a critical analysis of the document. The decision to narrow their interpretation of fair market value will affect all designated archival and heritage institutions by restricting their ability to allow potential donors some benefits for donating archival fonds. This will particularly impact Indigenous peoples and minorities, who are less represented in our collective documentary memory.

The three main problems of CCPERB's arguments can be understood around the following issues:

1. *The confusion of "fair market value" as an equivalent of "market value."*

CCPERB does not acknowledge that "market value" is only one possible component of "fair market value". It is misleading to suggest they are equivalent.

2. *The requirement that all types of cultural property should be supported only by comparisons with recent market prices.*

In reviewing the definition of "fair market value" in 1973, Justice Cattanach clearly states that "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..." This suggests that the definition should be flexible and adapted to various types of objects as indicated in his use of the conditional "*might reasonably be expected to bring*" and the phrase "*in the normal method applicable to the asset in question in the ordinary course of business...*"

3. *The assertion that past appraisals can no longer be used as precedents.*

All Canadian courts still consider precedents as a sound basis upon which they can refer to judge the facts presented in any trial. Why should an administrative tribunal be justified in declaring all its past decisions as invalid to establish future opinions of similar cultural property?

Archival fonds are unique organic aggregations of records created by individuals, families and organizations in the course of their activities. These fonds are sought by archival and other heritage institutions for their research potential for all types of users interested by various aspects of the Canadian experience. CCPERB's insistence on prior market evidence limits the appraisal of archival donations to collectible objects sold on public markets, as opposed to institutional markets. Discrete items or small groupings of archival records may be offered for sale on public markets from time to time, but do not correspond to the "value expressed in dollars" of substantial archival fonds.

To recognize research value only as a contributing factor "in determining outstanding significance" and not as a factor in determining its fair market value is evidence of CCPERB's misunderstanding of the *raison d'être* of archival and other heritage institutions acquiring archives.

BACKGROUND

The document entitled *Communication to Archival Stakeholders – Guide for Monetary Appraisals*¹, dated December 2020, was the response of the Canadian Cultural Property Export Review Board (CCPERB) to the many submissions from the archival community to their draft *Guide for Monetary Appraisals* of July 31, 2020. In this document CCPERB attempts to explain why the final version of the guide, adopted in November 2020, rejects the recommendations of the archival community, citing as their reasons the provisions of the Cultural Property Export and Import Act, jurisprudence binding on CCPERB, and requirements of administrative law.

At its November 10, 2020 meeting, CCPERB also decided to reject most of the appraisals of archival fonds, submitted between the fall of 2019 and early 2020, that were not supported by sales comparisons on active markets, even after recognizing the submissions as cultural properties of outstanding significance².

The *Guide for Monetary Appraisals* ends forty years of past precedents being accepted by CCPERB, which previously considered the difficulty of appraising cultural property created without a price tag (or commercial considerations). The use of past precedents and the holistic approach to monetary appraisal of archives have been useful in assessing the probable market value for cultural properties, that lie outside the scope of the more active art and rare book markets.

The result of CCPERB's comprehensive review and renewal of its policies and practices is a *Guide for Monetary Appraisals* that:

- reinterprets the meaning of “fair market value” for all cultural property to make it an equivalent of “market value”.
- declares that all types of cultural property, whatever the differences of their nature, must be supported by comparisons only with recent market prices; and
- asserts that past appraisals can no longer be used as precedents.

As a result, CCPERB, the body created by Parliament “to ensure Canada's cultural property is protected, preserved, and made accessible to the public”, now excludes the donors of archival fonds from the benefits intended by the law. NAAB believes the Canadian Cultural Property Export Review Board is misguided in reaching its conclusions, is misinterpreting the definition of “fair market value” and does not use the

¹ See <https://ccperb-cceebc.gc.ca/en/resources/principles-policies.html>

² At subsequent meetings, a few submissions of archival fonds were certified, not because of the appraisal report that the Board declared lacking sales evidence, but because the members certified archival applications with art related records. Surprisingly, the Board determined the fair market value to be nearly or exactly the same amount as the one assigned by the appraisers.

jurisprudence properly. Its use of recent developments in administrative law contradicts the principles of fair justice.

Overall, NAAB believes that Parliament intended to confer the benefits described by the Cultural Property Export and Import Act, (RSC 1985, c C-51) to all Canadian taxpayers gifting cultural property of outstanding significance to designated public institutions.

This document reviews CCPERB's *Communication to Archival Stakeholders*, which was written in response to submissions from the archival community in support of its policy review and highlights key issues surrounding its explanations. CCPERB's *Communication* (or portions of its contents) was also circulated to institutions whose applications were deferred. CCPERB's conclusion essentially denies the donors of "archival fonds" the benefits of the legislation without valid reasons. As a result, Canada's documentary heritage institutions are deprived of a sufficient incentive to encourage early and more prompt donations of cultural property of outstanding significance for research on a variety of aspects of Canadian history.³

For ease of understanding, this document follows the structure of CCPERB's *Communication to Archival Stakeholders*.

2. Renewing policies and procedures

The Review Mandate

CCPERB does not clearly explain how and why it was mandated to renew its policies and procedures. It explains that Parliament responded to a Federal Court decision to amend "subsection 32(1) of the Act and the corresponding provisions of the Income Tax Act concerning CCPERB's jurisdiction to certify cultural property." It is not clear how or why this well-defined and specific amendment mandated CCPERB to undertake a comprehensive "review [of] its policies and practices relating to the certification of cultural property." (p.1)

Consistency of methodology

Without referring to any section of the legislation to explain its conclusion, the last paragraph of this section determines that: "*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.* (p.2) In other words, by requiring

³ For instance, the certification of at least one archival donation recognized as worthy of inclusion on the International Register of the UNESCO Memory of the World programme was delayed until sales comparisons could be found.

consistency of methodology, CCPERB is in effect stating that any cultural property not assessed like a work of art cannot be certified as a cultural property.

Given the differences between the various categories of cultural properties covered by the act, this is an odd statement since it is not supported by any article of the law or jurisprudence, and certainly not by the price fixing methodologies of the real world. Why should any specific type of cultural property not be appraised according to its nature, specific characteristics, uses, and its usual market? It is also surprising that the results of a method referring to prices achieved on monetary markets be considered a methodology, rather than simply a reference.

In limiting its appraisal methodology to comparing references to recent prices for similar objects, CCPERB's new *Guide for Monetary Appraisals* ends forty years of understanding of the meaning of "fair market value", as it has been understood since the adoption of the act. This new approach wrongly equates the concept of "fair market value" with "market value". Furthermore, it leaves no possibility to accept cultural property appraisals for which there are no, or very few, sales precedents like archival fonds. This affects especially those that have a large digital component (which is increasingly more common).

3. Statutory structure

-Fair Market Value

CCPERB refers to its jurisdiction to certify cultural property and asserts that: "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." (p.2) NAAB agrees that fair market value is the only value that must prevail, but the definition of fair market value must be understood in a manner consistent with the wording of the definition CCPERB is using. Because most of the cases cited in the CCPERB's *Communication* document concern cultural property for which there are sales transactions, it is assumed that these transactions represent an active monetary market. Since archival institutions constitute the typical market for archival fonds, the "fair market value" should be determined in accordance with the goals and objectives of archival institutions acquiring archival fonds, thereby attributing value to the significance and research potential of the records donated as opposed to sales/transactional prices which are rarely public for archival fonds.

CCPERB does not acknowledge that "market value" is only one possible component of "fair market value". It is misleading to suggest that it is equivalent. CCPERB's *Communication* gives the impression that, without comparable sales data for unique cultural property, it is impossible to assign a monetary value to a cultural property. In the absence of an active public market for archival materials, NAAB has developed an approach based on the work and the conclusions of a panel of experts to determine the

fair market value of archival fonds. This practice was initially discussed and agreed upon, in consultation with the Department of National Revenue (now called Canada Revenue Agency) for donations in kind and has been in place for over forty years. It is not clear why CCPERB has now decided to disregard this methodology to determine the fair market value of donations of archival fonds. Although, it is rare for large archival fonds to be offered in the present Canadian market for manuscripts and personal or corporate papers, certainly there have been examples of such sales, especially in the case of literary papers.

In its correspondence with the institutions who had submitted applications for certification since the fall of 2019, CCPERB's response is particularly misleading in suggesting that without sales comparisons they are unable to accept the assigned fair market value even when the archival material has been recognized as being of 'outstanding significance'. Does this mean that without sales comparisons, the value of the gift will be zero? In other words, that no "fair market value" will be accepted for an archival cultural property they have certified. NAAB argues that this contravenes the intention of the legislation with which CCPERB is obliged to comply.

-Object

CCPERB argues that "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."

NAAB agrees that the term "object" refers to "all types of cultural property that may be certified by CCPERB" but disagrees with CCPERB's argument that the same method of valuation should be used to determine fair market value for all types of cultural property.

Given that CCPERB has worked collegially with all stakeholders for the last forty years, it is misleading to argue that "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." CCPERB has already demonstrated that it can and has, allowed different valuation approaches and precedents for archival material from the beginning.

4. Evolution of requirements of administrative law

CCPERB argues that the "duty of fairness", including "procedural fairness", must be interpreted as a requirement of administrative law "to provide written reasons for a decision", as indicated by a recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov (Vavilov)*." It further asserts that, because "CCPERB is required by administrative law to provide written reasons for its redetermination decisions", it must "provide adequate written reasons for a

redetermination decision”. This is interpreted as a need to have “adequate market evidence in the appraisal(s) furnished in support of the cultural property that is the subject of the decision.”⁴

It is difficult to believe that CCPERB needs “market evidence” when the law requires “fair market value”. The legislator has used the term “fair market value”, not “market value” for obvious reasons which are consistent with the varied appraisal methods for the diversity of objects included in the concept of cultural property. CCPERB enumerates a few different types in the section 4.2 of the law but makes no restrictions in the section concerning certification of cultural property.

Furthermore, can we not assume that, during all these 40 years of deliberation, with minutes taken to support their decisions (including appropriate reasons and expert testimony in the form of written appraisals), that CCPERB has sufficient documentation to provide written reasons in the case of appeal to the Tax Court?

5. Consultation

Previous Appraisals

“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.” It is not clear why CCPERB will no longer accept previous monetary appraisals or previous CCPERB determinations as components of a potential methodology. While it is rarely used as the sole approach to estimate Fair Market Value, the use of previous appraisals not only provides consistency for evaluating accruals of archival funds, but also creates a necessary knowledge foundation for future appraisals in the same way that precedents form the basis for monetary value of many objects for sale. It also conveys more equity, fairness and transparency in appraisals of similar types of donations by various appraisers.

Consultation with national and international organizations

CCPERB states that, *“Recognizing the need for consistency in the treatment of appraisals of all types of cultural property...”* but does not indicate their authority for this requirement. This follows with a list of organizations contacted in the context of their consultations, before reiterating their objective “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.”

⁴ In the few cases, when CCPERB made a redetermination of some of the deferred applications, based on the art expertise of the Board, they did not provide any sales comparables to indicate how they arrived at their FMV.

CCPERB rightly indicates that they have engaged in discussions with national and international organizations about practices relating to the valuation of archival cultural property. However, it offers no explanation of the nature or content of these consultations, yet it seems to imply that these consultations had some influence on its decision to revise the existing guidelines. The notes and/or summaries from these consultations should be made available to validate any conclusions and justifications put forward by CCPERB.

Suspension of archival submissions since November 2019

From the end of December 2019 to April 2020, CCPERB suspended consideration of all archival submissions presented before launching their consultation without any warning to the community, the designated institutions, or donors. A CCPERB Communication, dated March 6, 2020, had confirmed that all submissions sent before the new guidelines would be examined under the terms in effect before the consultation. On its website, CCPERB indicated that “CCPERB will accept applications for the certification of cultural property prepared using the former guidelines until April 8, 2020, the deadline for applications to be considered at CCPERB’s June 2020 meeting. After April 8th, 2020, applications for certification of cultural property should conform with the updated information available on the new website.”

However, at its November 2020 meeting, CCPERB chose to impose the new guidelines retroactively even though appraisers had carried out their appraisals under the former guidelines, without the knowledge that applications would be deferred pending the finalization of the new *Guide*. Some donors and many institutions had incurred considerable expenses in preparation for their donation before it was submitted for appraisal; many also incurred themselves the costs of private appraisals, confident that the current rules and procedure would prevail.

6. Submissions from the Archival Community

On September 9, 2020, NAAB circulated a survey to the archival community about CCPERB’s proposed Guide. It incorporated a summary of the survey’s findings in its brief to CCPERB. Consequently, CCPERB formulated its response to those institutions whose applications were deferred, following the comments provided by the archival community’s response to the Guide. The next section is based on the CCPERB’s response to the main comments.

The guide is heavily predisposed to the appraisal of single or smaller objects such as fine art objects and artefacts.

In spite of CCPERB’s claim that it “made revisions intended to clarify the guide’s applicability to all forms of cultural property”, the new *Guide* insists that “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.”⁵

The term “market data” used by CCPERB is the equivalent of “active commercial market data” and it does not take into account the fact that the market for “archival fonds” mainly consists of archival institutions and other CCPERB’s designated heritage institutions holding archival fonds. As mentioned in NAAB’s brief, “Private collectors are not active in this marketplace as the physical extent of an archival fonds, coupled with the preservation issues and the long-term obligation both to preservation and to research access are daunting. The marketplace is an institutional one.”

The market for archival fonds is indeed quite different from the various marketplaces that sustain the activities of collectors who accumulate old documents gathered under a common theme (individuals, autographs, types of documents etc.). These marketplaces regularly offer items for sale, in small quantities, by specialized dealers or through auctions, in person or on internet. Most definitions of archival fonds resemble the succinct explanation proposed by the Glossary of Terms of the Committee on Descriptive Standards of the International Council on Archives which states that archival fonds are:

*The whole of the records, regardless of form or medium, organically created and/or accumulated and used by a particular person, family, or corporate body in the course of that creator’s activities and functions.*⁶

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

Although CCPERB states that the expression “Fair Market Value” is not defined in the act, it refers to “an established body of jurisprudence that has considered the meaning of fair market value both in the context of the Act and other legislation.” It quotes the usual legal references, widely used by their predecessors to interpret the meaning of the concept in the context of the legislation. However, it restricts its interpretation to only one of its possible components and confuses the meaning of “fair market value” with that of “market value.”

⁵ CCPERB’s *Communication* document, pp. 5-6

⁶ International Council on Archives – Committee on Descriptive Standards, “Glossary of Terms Associated with the General Rules,” General International Standard Archival Description ISAD(G) (Ottawa: International Council on Archives, Second Edition, 1999). See the Multilingual Archival Terminology of the International Council on Archives at https://www.ica.org/sites/default/files/CBPS_2000_Guidelines_ISAD%28G%29_Second-edition_EN.pdf.

- Understanding the definition of “fair market value”

CCPERB rightly indicates that the definition used from its beginnings to define “fair market value” is a simplified version from a basic explanation provided by Justice Cattanach in *Henderson Estate v. Canada (Minister of National Revenue) (Henderson)* in 1973.⁷ Contrary to the current CCPERB’s comprehension of the definition, NAAB always understood from the definition that (1) Fair Market Value always was an estimation, a judgment written to apply to a conditional situation replicating an hypothetical transaction (*the highest price an asset might reasonably be expected to bring*) and (2) that such transaction was to be carried out by using “*the normal method applicable to the asset in question in the ordinary course of business*”.

From this, NAAB maintains its interpretation that the conditional “might reasonably be expected to bring” used by Justice Cattanach and the conditional “would bring” of the simplified language used by CCPERB must both apply to all types of markets in need of the estimation of a monetary value. The expression “would bring” is significant and differs substantially from “has brought”. Using the expression “would bring” makes it conceivable to determine a value in dollars, even when it is not possible to compare with recent monetary transactions.

Since its beginnings, CCPERB has applied this interpretation of the definition when certifying the donations of archival fonds or collections in the same spirit as the Department of Revenue in their acceptance of archival fonds as donations in kind. (See Lac Beauport’s discussions)

- Limitation of CCPERB’s interpretation to marketable cultural property

Most of the court cases used in the CCPERB’s Communication document apply to public sales of cultural property. It is not surprising that the language of the courts’ decisions reflects that language. None of the cases contradicts the application of NAAB’s

⁷Justice Cattanach wrote « 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.” Justice Cattanach, quoted in the CCPERB’s Communication document.

interpretation of the definition of “Fair Market Value” to a gift in kind rarely offered on the open commercial market.⁸

In proposing the definition of “Fair Market Value” in 1973, Justice Cattnach certainly meant to adapt the appraisal to various types of objects covered by using the conditional and the phrase “in the normal method applicable to the asset in question in the ordinary course of business...” when stating

.... “That common understanding [of the expression “fair market value”] 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.”

The phrase “*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*” is certainly not meant to restrict the market to the commercial marketplaces, but also include all other relevant markets, meant as “the section of the population who buy or consume (goods and services), and so influence price, supply and demand.” For the past 40 years, the predecessors of the current CCPERB certainly took note of and accepted that *the market for “archival fonds”* was not, for the most part, an open public commercial market, but mainly an institutional market.

- Examination as a part of the appraisal methodology

CCPERB’s comments, about the Nash case, confirms the view always maintained by NAAB that “*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.*” (Communication doc. p.7)

The “Henderson” definition of fair market value is further described as “a two-step approach⁹ in applying the 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. NAAB’s practice has always been founded on the examination of the donated material and accurately identifying it, understanding it and determining the various

⁸ The only exception deals with the prototype of a flying machine. See the Aikman v. Canada (Aikman) case on page 12 of the Communication document and on page 9 of this document.

⁹ See CCPERB’s Communication document, p.7.

markets in which some types of records of the archival fonds could be sold if examples of sales of similar records can be found.

The *Aikman v. Canada (Aikman)* decision, cited by CCPERB, pertained to the cost (US\$3,075,000) to manufacture a prototype of a Cyclo-Crane for which CCPERB defended its decision to use the evaluation (US\$200,000) proposed by an expert (an amount suggested by an officer of one of the forestry companies which had participated in the early funding of the prototype project). Although the cost method was always proposed by CCPERB as one of the two options upon which an appraisal could be based, the appeal court agreed with CCPERB in this instance, that the use of the costs of manufacturing the object was not a reasonable measure of its fair market value. While this case does not concern archival fonds or records, NAAB would entirely agree with the CCPERB decision because the creation or the manufacture of a cultural object rarely provides any indication of monetary value. The cost method was always used for certain types of records using costs more in line with the objectives of the heritage institution responsible for preserving the records and making them available for exhibition and for research. As CCPERB's previous *Guide* explained:

The cost approach compares the item being appraised with the cost to acquire, by purchase or production (e.g. by commission), a substitute that is comparable in all respects, in the market and fashion in which it would customarily be acquired.¹⁰

NAAB panels would typically use that approach for audiovisual or photographic fonds, as a basic reference value, in establishing a fair market value in conjunction with reasonable costs incurred by an acquiring institution to ensure the production of long-lasting archival quality copies of the material, to fulfill the preservation mandate of the institution.

Nevertheless, the fact remains that, in the Nash case, CCPERB has agreed to use the conclusions of an expert, rather than sales precedents, to provide an acceptable appraisal of a property when, presumably, no sales comparisons existed for the built artefact.

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.

¹⁰ Canadian Cultural Property Export Review Board. Application Guide and Supplementary Information. September 2010. p.45 ; see also the discussion on page 9 of this text.

NAAB agrees with CCPERB that “the fact that cultural property may be of outstanding significance due to its unique historical or research value is not evidence of market value.” It also agrees that “A determination of fair market value must reference market evidence”, if market is interpreted as the real institutional market for archival fonds, not necessarily the commercial market, as CCPERB seems to imply when requiring “data required to determine the object’s fair market value.” The fact that a cultural property has been acquired, through a donation agreement, by a designated institution means that this institution has agreed that it possesses enough value and merits to warrant all the costs incurred to be preserved on a long-term basis and made available for research. Therefore, in determining fair market value, CCPERB must consider the specific mandate and expertise of the acquiring designated institutions.

None of the cases, except one, cited in the jurisprudence brought forward in CCPERB’s Communication involve instances of unique objects with no sales precedents like archival fonds¹¹. In the justifications for narrowing their interpretation of the definition of Fair Market Value to previous sales of comparable objects, CCPERB does not reference the appraisal of unique archival fonds not previously offered in a commercial market, as done in the past by CCPERB. Can we assume that no court cases have challenged the larger interpretation of the definition of Fair Market Value, as the legislation and the then Department of National Revenue intended in 1977, before the Act came into effect?

Requiring the existence of an active market as a basic component of an appraisal methodology may satisfy the appraisal of cultural objects for which such a public market exists but, for various realistic reasons, it falls short of making possible the determination of a fair value for types of cultural property that are not usually traded publicly. By requiring a public “market value” for the determination of “Fair Market Value”, CCPERB unnecessarily creates an impossibility to determine the value of an object never commercially traded before and contradicts the Board’s intention to discharge a duty of fairness. NAAB has effectively operated in the best interest of the Canadian society over the past 40 years, with a generally accepted understanding that the emphasis in the interpretation of the meaning of “Fair Market Value” must be put on the word “fair”, with synonyms like “just”, “reasonable”, “adequate” and reflecting the need to “estimate”, “judge”, “evaluate” rather than “replicate” or “invent” public monetary markets that typically exists for other types of cultural property in Canada or anywhere in the world.

In the phrase “a willing buyer and a willing seller” in the definition of “Fair Market Value”, the “willing buyer” agreeing to the transaction of an archival fonds is usually a designated archival or heritage institution with a mission to acquire, preserve and make available significant archival records for a variety of research interests. The mandate of these institutions does not pertain to any kind of old records found at garage sales or on collectors’ market, like autographs, photography, etc., but exclusively concerns

¹¹ In the Nash case, it obtained a favourable judgment based on the appraisal of an expert for the production of a prototype, without references to sales comparison.

meaningful ensembles of records, which meet strict criteria with the objectives of preserving Canada's memory of our past, not the fluctuations of collectors' market.

These records are only acquired after a judicious archival procedure, concluded by the return of the non-archival material to the donor. The recipient institution accepts ownership and commits to incurring an enduring professional, and often legal duty, of stewardship: to the creator/donor of the fonds and to future generations. Once acquired, these archival fonds remain in the acquiring institution; they are not the object of any further exchanges or transactions with individuals or other institutions.

This is why appraising the Fair Market Value of archival records conforms to a two-step process, similar to the one articulated by the Federal Court of Appeal and cited in the lower courts' summary of the Henderson definition of fair market value.¹² Therefore, a Fair Market Value is determined for a donation in the same manner that "a willing buyer and a willing seller" would present during their arguments in justifying their offer, "in the normal method in the ordinary course of business": the "willing buyer" would always acknowledge the qualities of a unique object (archival fonds) by the characteristics that attract its interest (significance, uniqueness, research potential, originality, integrity, rarity, etc.) and "the willing seller" would always ensure that the object possesses as many of the qualities that meet the mandate of the acquiring institution. This understanding of "Fair Market Value" allows for the assignment of "value in dollars" to all the components of significant archival fonds, including their digital records, whether they are subject to speculative markets or not.

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

It is difficult to understand why a Board, with the status of a quasi-tribunal in Canada, systematically refuses to consider value precedents or previous appraisals in carrying out its duties in a State governed by the rule of law inspired by the British tradition.

- The precedents

NAAB appreciates the due diligence required of CCPERB for the verification of appraisal of archival fonds, that for the most part are complex groupings of records without public sales comparatives of similar groupings of original records. If it were possible, including references to sales comparisons from an active commercial market for similar objects in all cases, would also be preferred by NAAB. However, NAAB would not have been created if that had been possible, because individual experts could have done that work by referencing data banks of current sales, as is often the case with donations comprising only single items such as works of arts, photographs, books, single manuscripts, artefacts, etc.

¹² See below, p.9.

NAAB also understands the difficulties of reviewing the appraisal of archival records on the basis of extensive descriptions, with only 20 images of documents required for the application. The diversity of records found in any typical archival fonds can hardly be represented within these limits, which inadequately reflect the whole of the fonds, and cannot facilitate an adequate examination to support a monetary appraisal.

NAAB's panels always examine a large and diverse representation of the archival fonds, as required to gain sufficient knowledge of the entire contents, in the same manner a potential "willing buyer" would do. NAAB's panels usually employ the comparative appraisals' method only when no appropriate sales comparisons are possible, or as a complement to other approaches to determine or verify values for groupings of records for which no sales or cost comparison are available. NAAB panels always try to capture the main archival values of interest to the acquiring institution (significance, research potential, coverage, and uniqueness, etc) and the panel determines its expression in dollars only after assessing the relevant characteristics. During this assessment, a NAAB panel will establish determine a price that the acquiring institution would be expected to agree to, if paying cash for the purchase of an archival fonds, as prescribed by the very definition proposed by CCPERB.

For this method to work, a number of conditions must be accepted by CCPERB and NAAB. First, are the nature and characteristics of the archival fonds, as the object of appraisal, as indicated in the legislation.¹³ The size, the nature and significance of the contents, as well as the management of access and preservation requirements, make exact comparisons a very complex exercise, thus explaining the reluctance of collectors to acquire them and to leave them to archival institutions.

- A long term market

In questioning the use of previous monetary appraisals, or previous CCPERB determinations as components of a potential methodology, CCPERB argues that "Market conditions also change over time."¹⁴ However, NAAB cautions that the monetary value of archival records is not subject to the short-term fluctuations of a very active market, like that of works of art and some other types of artefacts. Archival fonds are acquired by archival institutions as a cultural investment and responsibility, not as an asset to be resold for income. In this spirit, comparisons with previous appraisals are perfectly justified and, contrary to CCPERB's presumption [or interpretation], contribute to the fairness of the appraisals, over time and across the various regions of the country.

¹³ The definition and nature of "archival fonds" is discussed on page 6-7.

¹⁴ CCPERB's *Communication* document, p.9

- The duty to determine a value

The law requires CCPERB to determine a value for the donations it certifies as cultural property. But, after recognizing an archival fonds as having outstanding significance, (therefore acknowledging its intrinsic quality), it responds to institutions that, without previous sales comparisons, it cannot accept the appraised monetary value -- because it requires sales comparisons, as though all cultural properties were to be dealt with as marketable commodities. This approach implies that CCPERB's duties are limited to establishing monetary value only for cultural property destined for sales on monetary markets.¹⁵

Following the same distorted justification, CCPERB also argues that appraisals relying on prior appraisals are not acceptable because "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." (p.9) It is obvious that CCPERB uses a logic that may work well for single object appraisals, but that CCPERB and NAAB need to better communicate to eventually reach an understanding of the complexities in determining Fair Market Value for large and diverse archival fonds.

- CCPERB's prior decisions

CCPERB alleges that its reluctance to accept references to previous appraisals, or previous CCPERB determinations as components of a potential methodology, is rationalized by stating that "Doing so is prohibited under the Income Tax Act."

All government organizations mandated to make decisions involving confidential information find ways and policies to provide controlled access to such information by their staff, in the context of their mandate. CCPERB states that "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."¹⁶

No one is suggesting that the members of CCPERB have access to the income tax information of citizens to fulfill their duty. However, CCPERB members should have full access to the records of their own organization to assist them in the decision-making process which indirectly benefit donors. It is reasonable to assume that CCPERB would have an information system allowing its members to refer to their previous decisions.

¹⁵ See initial NAAB brief.

¹⁶ Ibidem

It is difficult to believe, as its document claims¹⁷, that the members of CCPERB are committing an offence, under section 241 of the Income Tax Act, by fulfilling their duty, assuming they and their secretariat staff have the adequate security clearances.

CCPERB also infers that “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.¹⁸ Why should that statement be a restriction to the use of precedents, when the statement is made in the context of appraisers citing precedents to help CCPERB’s work in pointing to previous appraisals? It is difficult to understand why CCPERB considers the statement of confidentiality within NAAB’s reports as a restriction, since the same reports specifically include a statement that the report is produced for CCPERB.

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.

CCPERB argues that “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.”¹⁹

The point was made earlier that Justice Cattanach’s explanation of Fair Market Value included the phrase “in the normal method applicable to the asset in question in the ordinary course of business.”²⁰ As indicated previously, CCPERB uses a narrow definition of Fair Market Value that is contrary to the intention of the original lawmakers.²¹ Once that misunderstanding is removed, there is no need to change the law.

At the time the legislation was adopted, archival institutions with an acquisitions budget were not able to buy everything that was offered and widely used the provisions of the act to convince would-be donors to consider making their donation.

¹⁷ « 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. CCPERB’s Communication document, p.10.

¹⁸ Ibidem.

¹⁹ Ibid, p.11.

²⁰ See above, p.8

²¹ Ibidem.

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.

The cost method has been used widely by NAAB appraisers because it was recommended by CCPERB’s former Guide as an acceptable basis of appraisal for documents for which “a substitute that is comparable in all respects, in the market and fashion in which it would customarily be acquired.” NAAB agrees with the CCPERB comment that the Fair Market Value of “photographs, film, and moving images” is not necessarily reflected by the cost of reproduction. However, reproduction costs must be understood as a component of the cost of preservation; it is used only as a basis to help determine the value of the donation; after analysis of the contents and significance of the records, the basic value of reproduction is often multiplied or divided to match the expectation of fair value that an archival institution would attribute to it, in order to secure its acquisition.

NAAB agrees with the ruling of the Tax Court of Canada in Aikman quoted in CCPERB’s Communication because it refers to an object that is a prototype, and therefore a replica. It may be an object of historical interest for inclusion as context in a museum, but certainly does not constitute an authentic historic document like those found in an archival fonds.

NAAB does not argue that the cost of reproduction was the equivalent of its Fair Market Value, but, as CCPERB argued in their earlier Guide, it could be used as a reference to estimate the price an institution would agree to pay to ensure its preservation.

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

This percentage was quoted informally by CCPERB, when asked by NAAB. We are grateful for the analysis of the proportion of applications submitted during the past two years. However, we are aware also that some archival institutions have decided to no longer submit applications to CCPERB in recent years because of the difficulties in having them approved. This may well account for the fewer number of applications. Simply put, the process has become too complicated and has discouraged institutions from investing the time and resources required to submit an application.

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 meeting with representatives from NAAB, intended for the end of March 2020, was cancelled due to the COVID-19 pandemic. A first meeting between CCPERB and representatives of NAAB’s electronic records committee was held virtually on 23

February 2021, with the intention of more meetings to explore the issues raised in the list of questions submitted by the Committee. These questions were developed to shape the discussion and to help CCPERB in their consideration of digital records as a valid component of archival fonds and therefore contributing to its Fair Market Value.

It is obvious that the problem of appraising archival fonds with only sales example for archives will be exacerbated by the rise of electronic records in the future. Now is the time for CCPERB to find a clear path forward on recognizing a strategy for recognizing the monetary value of research and cultural objects.

NAAB is also on the cusp of establishing usable benchmarks for archival values through the development of standards of practice. CCPERB should be seeking guidance from its historical partners, not alienating the heritage sector by disregarding the feedback from the practitioners in the field and the advice of established cultural sector experts. The preservation of our significant archival documentary heritage depends on it.

We must not hinder current efforts by Canada's archives and libraries to ensure that Indigenous peoples and all minorities are represented in our collective documented memory. At the same time, we must ensure that influential Canadians and corporate entities, in all fields of endeavour, can benefit from the same incentives to donate their records to a designated Canadian institution.