

# REVIEW OF THE *CULTURAL PROPERTY EXPORT AND IMPORT ACT*

## DISCUSSION DOCUMENT FOR CONSULTATIONS

### Introduction – The importance of Cultural Property

Movable cultural property is the term used by UNESCO and others to encompass the range of objects and documents that, together with built heritage, constitute the tangible evidence of our individual and collective experience. They are the messengers used by public institutions, such as museums, to communicate our history. Aspects of natural history that are also defined by UNESCO as cultural property, such as fossils or minerals, tell even older stories about nature's legacy. Cultural property can have individual or collective meaning and value and, in some instances, it can tell the story of a nation.

Cultural objects face a range of threats. In some cases, the threat is natural deterioration, which can be prevented or at least slowed down by proper storage and handling. In other instances, the heritage of a people is threatened by intentional theft, looting or destruction of cultural property, ironically, often because of the importance or significance of that property. Worldwide, the illicit traffic of art and other cultural objects is estimated by Interpol to be second in dollar value only to the international drug trade, and the heritage of numerous countries has been decimated by looting.

The Government of Canada has introduced a range of measures to help ensure the preservation of the objects that are most meaningful to Canada's heritage, and to facilitate access by Canadians to those objects in public institutions. It has also joined the global effort to fight international illicit traffic in cultural property. Toward both ends, in 1978 Canada joined the UNESCO 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* following the passage of the legislation that would implement our obligations under the *Convention*, the ***Cultural Property Export and Import Act***. In 1999, Canada became a State Party to the 1954 UNESCO *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, and in 2005 joined the two Protocols to the *Convention*. The *Act* also plays a role in implementing Canada's obligations under those important international agreements.

The *Cultural Property Export and Import Act* is now almost 30 years old. The Department of Canadian Heritage is reviewing the legislation to ensure that it remains as effective as possible in the protection of Canadian and international heritage.

## ***The Cultural Property Export and Import Act***

The *Cultural Property Export and Import Act* entered into force in 1977. Through the *Act*, the Government of Canada protects movable cultural heritage by:

- ❖ ensuring that nationally significant heritage material is preserved in Canadian public collections and made accessible to the public; and
- ❖ collaborating with other countries in the fight against illicit traffic in cultural property.

The *Act* established a range of instruments to achieve these public policy objectives:

- ❖ **Tax incentives** to encourage the donation and sale of nationally significant cultural property to designated Canadian cultural institutions and public authorities such as municipal governments or Aboriginal band councils. In order to be designated, institutions and public authorities must meet a range of criteria that demonstrate their ability to preserve the objects in question, and make them accessible to the public. The tax benefits are available to donors of cultural property that has been certified as being of outstanding significance and national importance by the **Canadian Cultural Property Export Review Board**, which was established under the *Act*.
- ❖ **Export control** through a system of permits for the permanent or temporary export of an identified range of cultural objects. This export control was designed, not to prohibit the export of cultural property from Canada, but to create the conditions that would give Canadian institutions the opportunity to acquire nationally significant objects that are threatened with export. The Canadian Cultural Property Export Review Board considers appeals in cases where export permits have been refused, and determines what constitutes a “fair cash offer” in instances of disagreement between an exporter and potential purchasing institution for objects that have been denied an export permit.
- ❖ **Import control** prohibiting the import to Canada of cultural property illegally exported from a country with which Canada has a cultural property agreement, such as the 1970 UNESCO Convention. When such cultural property is intercepted by Canada, the *Act* contains mechanisms to facilitate return of the property to its country of origin. To further strengthen its provisions against international illicit traffic in cultural property, in 2005 the *Act* was amended to prohibit the illegal export by Canadians of cultural property (regardless of whether it is subsequently imported to Canada) from occupied territories of States that are parties to the Second Protocol to the 1954 Hague *Convention for the Protection of Cultural Property in the Event of Armed Conflict*.

The *Act* also provides that the Minister may offer **financial assistance** to designated institutions and public authorities to support their acquisition of nationally significant cultural property that has either been refused an export permit, or that becomes available for purchase abroad.

The Movable Cultural Property Program has been established to implement the provisions of the *Act*.

### **A unique Canadian approach....**

The underlying philosophy of the *Act*, which seeks to balance the rights of individual owners of cultural property with the public interest in ensuring that significant heritage is safeguarded for the benefit of all citizens of the country, has been cited as the reason for Canada's success in protecting movable cultural property.

With respect to export control, for example, the *Act's* provisions balance heritage protection with the rights of Canadians to participate in a legal international market in cultural material. Nothing is prohibited from export, but the *Act* attempts to create a "level playing field" for Canada's cultural institutions to compete with foreign collectors and institutions, allowing them to consider acquiring material in order to preserve it for Canadians. Some argue that a more restrictive approach to export control would only drive activity underground, fuelling a black market, and eliminating any opportunity for public institutions to acquire important material on behalf of the Canadian public.

The *Act* is also characterized by a highly collaborative approach: a number of federal government departments and agencies, Canada's cultural and academic communities, the commercial sector, and individual Canadians all play a role in protecting heritage under the *Act*.

By automatically barring the import of any material illegally exported from any country with which Canada has a cultural property agreement, Canada implements the 1970 UNESCO Convention in a more comprehensive manner than many other States that are Parties to that important international agreement.

In contrast to Canada, many other countries take an approach that either favours protectionism, the banning of cultural exports altogether, or defers to market interests by exerting little or no import or export control over domestic or foreign cultural material.

Results achieved in Canada over the past 25 years have demonstrated that the basic structure of the *Act* and its overall public policy objectives are sound. A Summative Evaluation of all aspects of the Movable Cultural Property Program was undertaken in 2005, and concluded that the needs that gave rise to the *Act* still exist, namely that:

- there is a continuing need for federal government intervention to encourage the preservation in Canada of its heritage in movable cultural property; and

- there is a continuing need to deter and prevent the illegal international trade in cultural property.

The tax incentive provisions of the *Act* result in the transfer of nationally significant cultural property from private hands to public institutions. On average, objects whose total worth is more than \$100 million are certified by the Board for donation or sale to institutions annually. The export control provisions, combined with financial assistance through the Movable Cultural Property grants program have, since 1977, resulted in the retention in Canada, or recovery from abroad, of more than 600 national treasures and collections which would otherwise have been lost to Canada and Canadians. In many instances, the process that has led to significant material being acquired by Canadian collections has demonstrated how the various provisions of the *Act* (export control, grants and tax incentives) have worked together to result in successful outcomes.

The *Act* has also reinforced Canada's role internationally as a leader in heritage preservation and the fight against international illicit traffic in cultural property. The *Act* has led to the return of illegally exported antiquities to countries such as Mexico, Peru, Bolivia, Colombia, Egypt and Syria.

### **The need for review**

While certain amendments have been made to the *Act* since 1977, there has never been a comprehensive legislative review. A number of factors suggest that such a review would be timely. Since the *Act's* introduction in 1977, there have been new developments in administrative law and new instruments, such as the 1982 *Charter of Rights and Freedoms*, have been introduced. Further, the 2005 Summative Evaluation of the Movable Cultural Property Program identified weaknesses in the implementation of export and import controls under the *Act*. While some of these can be addressed through administrative change, others would require amendments to the legislation.

As with any legislation, the experience gained through implementation has also revealed areas where additional clarity and detail would enhance the effectiveness of the *Act*, increase Canadians' understanding of their rights, obligations and options under its provisions, and ensure the ability of government to manage risk and ensure accountability in administering the legislation.

With this in mind, the present review of the *Cultural Property Export and Import Act* has five basic objectives:

- ❖ identify areas where provisions and language could be simplified or clarified;
- ❖ identify risk to the Government or gaps in accountability;
- ❖ strengthen implementation of Canada's existing treaty obligations;
- ❖ identify provisions that could be updated or modernized; and
- ❖ increase efficiency and effectiveness.

In most cases, amendments to the *Act* that could be undertaken to simplify and clarify its provisions, or to update them to be consistent with the *Charter*, would not affect how the *Act* works. Certain other changes could be introduced to increase efficiency and effectiveness in the way that the *Act's* provisions are implemented within the Government.

Other possible changes could have policy implications or could substantively alter how the *Act* works to protect heritage, and the impact that the *Act* has on Canadians. The Government is therefore seeking the views of Canadians on a number of issues and options that fall into this category.

## EXPORT CONTROL

### **Section 7.(a) – automatic issuance of an export permit for cultural property imported to Canada within the past 35 years**

#### *How this provision currently works:*

Any object that is included in the Canadian Cultural Property Export Control List (by virtue of its age, value, etc.) requires an export permit to leave Canada for any period of time, whether temporarily or permanently, regardless of the circumstances. If an object that requires a permit for permanent export entered Canada less than 35 years before its proposed export, the export permit *must* be issued automatically, and *cannot* be refused. The basis for this provision is the idea that a cultural object must be in Canada for a particular period of time in order to become significant to our heritage.

As written, the existing provision of the legislation applies to Canadian objects that have returned to the country in the last 35 years as well as to objects that are not Canadian in origin.

#### *Considerations:*

The intention of the *Act's* export control mechanism is to support the retention in Canada of only that cultural property which is of outstanding significance and national importance. The objective of this provision is to facilitate the export of objects that do not meet those criteria. It has been suggested that the *Act* be changed so that the “35-year rule” would not apply to Canadian objects that have been returned to the country. Such objects would, in that case, not automatically receive an export permit.

Questions have also been raised as to whether 35 years is still an appropriate period of time for objects to become significant to Canada's heritage, given the increased mobility of modern society. A similar provision in British cultural property legislation requires material to have been in that country for at least 50 years before its export can be refused.

Objects temporarily imported on loan to a public institution, such as a museum, automatically receive export permits to leave Canada at the end of the loan period under a separate provision of the *Act*, so any changes to the “35-year” provision would not affect this type of temporary loan. The “35-year” provision also does not affect temporary exports from Canada: under a separate provision of the *Act* any material being exported temporarily from Canada for up to five years receives a temporary export permit automatically.

## Questions:

1. *If something originated in Canada and subsequently is returned to the country, does it need to be back in the country for a particular period of time before it could be determined to be of outstanding significance and national importance?*
  2. *If this provision is changed to allow for refusal of export permits for Canadian objects, would auction houses and others who import material for the purposes of sale here become reluctant to bring such material back to Canada?*
  3. *Could such a change lead to fewer opportunities for Canadians to purchase objects?*
  4. *Should permits continue to be automatically issued when Canadian material is returned to Canada on a temporary basis solely for the purposes of sale? If so, should a specific time limit for such a “temporary” circumstance be specified?*
  5. *With particular reference to objects that do not originate in Canada, is the current provision that objects that have been imported to Canada within the past 35 years automatically receive an export permit appropriate? Should the period be longer, e.g., 50 years? Should it be shorter?*
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## Section 30.(4) Issuance of permit after expiry of delay period

### *How this provision currently works:*

When an export permit for cultural property has been refused, an exporter may appeal the refusal to the Canadian Cultural Property Export Review Board. If the Board upholds the refusal on the basis of the “outstanding significance and national importance” of the object, the Board creates a delay period of between two and six months, during which time the permit remains refused. During the delay period, Canadian institutions and public authorities have the opportunity to offer to purchase the object so that it may remain in Canada. Upon expiry of the delay period, if the object has not been purchased, the permit must be issued to the exporter upon request.

### *Considerations:*

The legislation does not impose a time limit within which an exporter must request the export permit after the expiry of the delay period. It is possible that such a request could occur many years later. Over an extended period, the context within which the significance of an object is evaluated may change; its market value may alter; the capacity of institutions to purchase it may increase.

On the other hand, the delay period creates a specific opportunity for institutions to acquire objects and, even after the delay period expires, institutions could still make an offer to purchase the object in question. From the exporter's perspective, significant time may have passed between the original application for an export permit and the expiry of the delay period. In that time, the circumstances of export could have changed and would need to be re-negotiated (such as missing an auction date and having to wait until the next such opportunity). In such cases, it is not always possible for exporters to request their permits (for use within the current 90-day limit after it is issued) within a short period of time following expiry of the delay period.

***Question:***

***6. Should exporters be required to request permits within a certain period of time following expiry of the delay period? If so, what length of time would be fair and reasonable before a new application should become necessary?***

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**Section 30.(5) Issuance of permit after a determination of “fair cash offer” for material that is subject to a delay period**

***How this provision currently works:***

In cases where the Canadian Cultural Property Export Review Board has created a delay period, a Canadian institution or public authority may make an offer to purchase the object during the delay period. In instances where such an offer is not accepted, the exporter or an institution seeking to purchase the object can request that the Board determine an amount that would be a “fair cash offer” for the object. The Board's determination acts as a form of binding arbitration in such situations. Once the amount has been determined by the Board, exporters need not accept an offer to purchase for a *lesser amount*, but if they refuse new offers *at or above the amount*, the permit remains refused for a period of two years. After two years, a new application for an export permit may be submitted. If, on the other hand, no offer at or above the amount determined by the Board is made, and the delay period expires, the exporter will receive an export permit upon request.

***Considerations:***

Delay periods may be extended to give the Board the time to complete its determination of the amount that would be a “fair cash offer.” At present, if the delay period *has already expired* when the Board determines a “fair cash offer,” there is no time limit placed on institutions within which they must make an offer before the exporter is allowed to request the permit. This uncertainty can be a disadvantage to exporters: the



Board has made its determination but it is unclear how long exporters must wait to see whether an offer will be made before they can obtain an export permit. Institutions also lack certainty as to how much time they have to make an offer or risk the object being exported. In some cases, institutions must seek internal approvals, or undertake fundraising, before they can make an offer.

***Question:***

***7. In order to ensure fairness both to exporters and institutions when a determination of “fair cash offer” has been made following the expiry of a delay period, should a time limit be established, requiring institutions to make an offer within that period? If so, how much time should institutions have, following the determination of “fair cash offer,” to make an offer? Should there be varying time limits, depending on the value of the “fair cash offer”, in order to allow institutions sufficient time to raise the required funds?***

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## **CERTIFICATION OF CULTURAL PROPERTY FOR TAX PURPOSES BY THE CANADIAN CULTURAL PROPERTY EXPORT REVIEW BOARD**

### **Section 32.(1) – Eligibility of objects for certification, certification of proposed gifts, time limit on applications for certification**

#### ***How this provision currently works:***

Under the *Act*, institutions or public authorities may apply to the Canadian Cultural Property Export Review Board for the certification of cultural property for income tax purposes. Certification involves a determination of whether the object is of “outstanding significance and national importance” and, if it is, a determination of its fair market value. Certification results in a tax benefit for individuals or corporations that donate or sell the object to a designated cultural institution or public authority in Canada. There is no provision setting out a time limit following the sale or donation within which an application for certification may be made. Certification may also be sought for an item that may be donated in the future (a “proposed gift”) although, in such cases, the tax benefit is only received after the proposed donation has actually taken place.

#### ***Consideration – Provenance:***

Currently, any item of cultural property donated or sold to designated institutions, or that is proposed for donation or sale, may be the subject of an application for certification. In order to be certified, the only requirement is that the object be of “outstanding significance and national importance.”

This provision allows a tax benefit to be awarded for donation or sale of an object regardless of its “provenance” (past history of ownership) and the Board cannot refuse to certify an object for tax purposes based on the lack of clear legal provenance, or based on questions surrounding the object’s provenance. This can result in taxpayers unintentionally, through the tax incentive system of the *Act*, supporting the acquisition of material that may have been looted or illicitly excavated in Canada or abroad.

Objects without a clear provenance may also have been misappropriated during past armed conflict (such as by Nazi forces during World War II, or looting that took place during the recent conflict in Iraq). Support by Canada, through the tax system, for acquisition of such material is contrary to Canada’s responsibilities under a number of international treaties. It indirectly implicates the government and taxpayers in supporting the international illicit traffic of cultural property.

Institutions are increasingly vigilant in adopting policies against the acquisition of “unprovenanced” material, and some private collectors practice a high level of due diligence in ensuring the provenance of material they collect. But this is not always the case. Even institutions with such policies may feel pressured to make an exception and accept donations of material without a clear, demonstrated licit provenance.

Some institutions and collectors also feel that acquiring such material is the only way it will be preserved, even if auction houses or dealers refuse, for client confidentiality reasons, to provide information about an object's past.

Unless the objects are proven to have been stolen or illegally imported, acquisitions of objects without a clear provenance are not illegal, and the lack of a clear provenance is not, in itself, proof of any illicit activity in an object's past. For some objects excavated centuries ago and circulated in private hands ever since, it would be difficult or impossible to document their full history. In some instances, therefore, it might be reasonable to expect only the object's recent history to be established, such as from the years preceding World War II to the present, or since 1970 (the year UNESCO adopted an international convention to fight illicit traffic in cultural property).

***Question:***

***8. Should the Act restrict the certification of items whose legal provenance cannot be established? If not, should such a restriction be limited to the need to establish a clear provenance for a particular period of time preceding the donation or sale? What would be a reasonable period?***

***Consideration – Proposed Donations:***

Following the Board's certification of an object that is *proposed* for donation, the donor is under no obligation to complete the donation. There have been instances where donors have withdrawn proposed donations following the Board's determination of fair market value.

There are several perspectives on this issue:

- ❖ From a *donor's perspective*, the ability to explore certification before committing to a donation may be a useful option in estate or income tax planning. For first-time potential donors it may also establish sufficient confidence in the certification process to allow them to commit to making a donation of cultural property to a public institution.
- ❖ *Canadian institutions* are increasingly adopting policies against making certification applications for proposed donations. This is because certification of proposed gifts can lead to significant expense for an institution without a guaranteed donation at the end of the process.
- ❖ Some *appraisers* are beginning to restrict their work to material that has already been donated or sold, to ensure the accuracy of their estimate of fair market value. If there is a significant time lapse between the appraisal and the actual donation of the object, changes may occur to the object and/or the conditions in the marketplace that render the appraised value invalid at the time of donation. This

provision can also unintentionally give rise to speculation, where a potential donor decides only to purchase an item for quick subsequent donation to an institution based on the outcome of the Board's deliberations.

- ❖ From the *perspective of government*, public funds are expended in processing applications and in their consideration by the Board, whether or not the donation eventually takes place.

***Question:***

***9. Should the Act continue to allow for the certification of proposed donations of cultural property?***

***Consideration – Time between Donation/Sale and Certification:***

Once an object has been certified by the Board, the resulting tax benefit can be applied to tax returns only within a limited period of time from the date of the sale or donation of the object (the year of donation and five years thereafter). However, there is no limit on the time that may elapse between a donation and an application for certification. The Board is required to certify the estimated value of the object at the time of its donation or sale, even though several years may have elapsed.

In contrast, under the *Income Tax Act*, applications for tax certification of ecological gifts of land must be made within three years of the donation. In order to ensure that the certification (and therefore aspects of an application such as appraisals of fair market value) may be considered with an accurate view of the conditions that were present at the time of the donation, it has been suggested that a limit be established in the *Cultural Property Export and Import Act* on the time within which an application for certification may be made following a donation.

***Question:***

***10. Should there be a time limit within which applications for certification must be made following a donation or sale of cultural property? If so, what period of time would be reasonable and fair to donors, appraisers and institutions? Should the Act mirror the limit on certification of ecological gifts (three years following donation)?***

## **Section 32. (5) – Redetermination**

### ***How this provision currently works:***

Under the *Act*, when the Canadian Cultural Property Export Review Board is asked to certify cultural property for income tax purposes, the Board must determine whether the object is of “outstanding significance and national importance.” If the object meets those criteria, the Board must then determine its fair market value, based on professional appraisals that are provided as part of the certification application. At present, if applicants are dissatisfied with the fair market value determination made by the Board, they may request that the Board reconsider its conclusion through a process of “redetermination.” The Board also has the authority to undertake a redetermination on its own initiative, should new information become available that could affect the fair market value of the object in question.

### ***Considerations:***

The *Act* allows for the Board to reconsider its original decision about the fair market value of an object, but not its original determination that an object is of “outstanding significance and national importance,” even in cases where new information becomes available. For example, new information could suggest that the object was not authentic in some way, such as being made by someone other than the artist to whom it was attributed at the time of certification, or that what was thought to be an antiquity is actually a modern reproduction.

A redetermination of fair market value by the Board affects only the level of tax benefit to be received, but reconsideration of the Board’s determination that an object is of “outstanding significance and national importance” could, if the original decision were reversed, result in the complete elimination of a tax benefit. Because of this, it is unlikely that a donor/seller would request a redetermination of significance/importance. On the other hand, in order to ensure the integrity of the tax system and prevent its abuse, if new information comes to light, the ability of the Board to revisit its decision could be an important safeguard in the public interest.

### ***Question:***

***11. Do you think that the Canadian Cultural Property Export Review Board should have the authority to reconsider its determination that an object is of “outstanding significance and national importance” if new information becomes available that suggests the object was not what it was portrayed to be? If so, should there be limits on the nature of the issues that could trigger a reconsideration? Should there be a time limit?***

## **Conclusion**

In its analysis of the various options discussed above, the Department is committed to considering the perspectives of all stakeholders and the Canadian public, in order to maintain fairness and balance in this important legislation.

We would appreciate receiving your views on these issues, and invite you to share any additional concerns or suggestions you have that would improve protection of Canada's cultural heritage under the *Cultural Property Export and Import Act*. The full text of the Act is posted on-line at <http://laws.justice.gc.ca/en/c-51/text.html>.