

# Canada

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## **A. Protection of cultural property**

### **1. What are the key characteristics of your country's regulations on cultural heritage and national patrimony?**

The main piece of legislation on national patrimony and cultural heritage is the Cultural Property Export and Import Act (CPEIA) and its accompanying regulations, the Canadian Cultural Property Export Control List and the Cultural Property Export Regulations.

The CPEIA deals with exporting cultural objects from Canada and importing cultural objects illegally exported from other countries into Canada. The CPEIA establishes a 'Control List', covering seven categories of objects:

- objects recovered from the soil or waters of Canada (mineralogy, palaeontology, archaeology);
- objects of ethnographic material culture;
- military objects;
- objects of applied and decorative art;
- objects of fine art;
- scientific or technological objects; and
- textual records, graphic records and sound recordings.

Each group has varying fair market value minimums in order to qualify for the Control List. The CPEIA gives the Governor in Council the discretion to include in the Control List any object that it deems necessary to control in order to preserve the national heritage of Canada.

Objects less than 50 years old or created by a living person are excluded from the Control List.

If the object is determined to be of cultural significance, the applicant can appeal to the Canadian Cultural Property Export Review Board (CCPERB). Even if the CCPERB agrees with the expert examiner, where it is unlikely a Canadian institution would be interested in obtaining the object, the permit will be issued. Otherwise, if CCPERB believes an institution (such as a museum) or a public authority would offer to purchase the object, it can set a two-to six-month delay period during which CCPERB may receive and review purchase offers. CCPERB can act as valuator if the applicant and the institution do not agree on a price. At the expiry of the delay period and if there is no purchase, the permit application will be granted.

The CPEIA also authorises CCPERB to approve objects as cultural property for income tax purposes.

In accordance with the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols (the 'Convention'), the CPEIA adopts the general prohibition that no person knowingly export or otherwise remove cultural property as defined in subparagraph (a) of Article 1 of the Convention from an occupied territory of a State Party to the Second Protocol, unless the export or removal conforms with the applicable laws of that territory or is necessary for the property's protection or preservation. The CPEIA deems any offence under it committed outside Canada to have been committed in Canada.

The CPEIA also prohibits the import into Canada of any foreign cultural property that has been illegally exported from a reciprocating country. Reciprocating countries include parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and any other country party to a relevant bilateral treaty with Canada.

Offences against the CPEIA carry a maximum CAD 25,000 penalty and five years' imprisonment. Officers and directors of corporations may be liable regardless of whether the corporation for which they act has been prosecuted or convicted.

While the CPEIA covers indigenous art that meets its cultural property requirements, various provincial legislation also deals with indigenous objects.

Some provinces and territories have legislation prohibiting the removal from that province of objects designated by the provincial government as heritage property or historical resources.

Canada is a party to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict as well as its Protocols as of 11 December 1998 when it acceded.

## **2. Under your national law, which criteria must be met in order to classify goods as cultural property?**

See question A.1 above. Cultural property as such is not defined but property that the Governor in Council (the 'Government') includes in the Control List is property that the Government deems necessary to control in order to preserve the national heritage of Canada.

Objects less than 50 years old or created by a living person are excluded from the Control List.

An object or collection may be deemed of outstanding significance by reason of any one or more of the following criteria:

- a close association with Canadian history;
- a close association with national life;
- aesthetic qualities;
- value in the study of the arts; and
- value in the study of the sciences.

In addition, as set out in the response to question A.1 above, certain property designated by a foreign government as foreign cultural property may be prohibited from import where illegally obtained or originating from war zones.

**3. What are the legal consequences arising from classifying an asset as cultural property? Does the classification of a private asset as cultural property affect the right of ownership?**

See question A.1 above. The consequences are that the export of such property can be controlled as set out above. In addition, certification as cultural property as being of outstanding significance and national importance will allow determination of fair market value for tax purposes and certain other tax benefits when the property is donated. Placement on the control list as cultural property does not affect the right of ownership.

**4. Which authorities in your country define cultural property and who advises these authorities?**

This authority is delegated to the CCPERB, which is an independent, quasi-judicial decision-making body that reports to Parliament through the Minister of Canadian Heritage. The CCPERB is made up of members of the public, representatives of universities, museums, art galleries and representatives from dealers and collectors. In addition, the CCPERB draws upon outside experts in the art field from universities and museums and other relevant institutions. Under the CPEIA, the CCPERB has a mandate to:

- certify cultural property as being of outstanding significance and national importance;
- establish export delays to provide designated organisations with an opportunity to acquire significant cultural property threatened with permanent export; and
- determine fair cash offers to purchase cultural property for refused export permits.

**5. Has your country ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and regarding the illegal export of cultural objects and artwork, what are the main characteristics of the national implementation?**

Canada is a party to the 1970 UNESCO Convention. On 23 March 1978, Canada deposited its instrument of acceptance. The CPEIA is the enabling legislation.

As set out above, in accordance with the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, the CPEIA adopts the general prohibition that no person knowingly export or otherwise remove cultural property as defined in subparagraph (a) of Article 1 of the Convention from an occupied territory of a State Party to the Second Protocol, unless the export or removal conforms with the applicable laws of that territory or is necessary for the property's protection or preservation. The CPEIA deems any offence under it committed outside Canada to have been committed in Canada.

The CPEIA also prohibits the import into Canada of any foreign cultural property that has been illegally exported from a reciprocating country. Reciprocating countries include parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and any other country party to a relevant bilateral treaty with Canada.

**6. Has your country ratified the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, and what are the main features of the national implementation?**

Canada is not a party to the 1995 UNIDROIT Convention.

**7. Has your country ratified any other international conventions or bilateral agreements relating to the export of cultural objects?**

Canada is a party to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, as well as its Protocols as of 11 December 1998 when it acceded.

**B. Restrictions on the export of cultural property and artwork**

**1. What are your country's export restrictions regarding cultural property and artwork?**

See, generally, question A.1 above. Property on the Control List requires an export permit from Canada Border Services Agency. The cultural property is placed on the Control List if it meets all of the following conditions:

- it is more than 50 years old;
- it was made by a person no longer living (if applicable); and
- it meets criteria established in the Canadian Cultural Property Export Control List.

The Control List criteria are detailed and establish categories (as set out in the answer to question A.1 and minimum age and value thresholds).

Canada Border Services will refuse an export permit for an object on the Control List if it concludes (on the advice of an expert) that an object or collection may be deemed of outstanding significance by reason of any one or more of the following criteria:

- a close association with Canadian history;
- a close association with national life;
- aesthetic qualities;
- value in the study of the arts; or
- value in the study of the sciences,
- and that the object or collection is of national importance. An object or collection may be deemed of national importance if its loss to Canada would significantly diminish the national heritage.

**1.1 Under which conditions is export permission granted?**

If an application for an export permit is refused by the Canada Border Services Agency on the advice of an expert examiner, the permit applicant may request a review by the CCPERB.

The CCPERB is responsible for reviewing refused export permits at the request of permit applicants. Refused permits will be reviewed at the next scheduled meeting.

The CCPERB may uphold the refusal and establish an export delay of two to six months if it determines that:

- the property in question is subject to export control (ie, is on the Control List);
- the property meets the criteria of outstanding significance and national importance as set out in the CPEIA; and
- a designated organisation might come forward with an offer to purchase the property.

In December 2016, Heffel Fine Art Auction House ('Heffel') applied for an export permit for the 1892 French painting '*Iris bleu, jardin du Petit Gennevilliers*', by Gustave Caillebotte. After review by an expert examiner, the Canada Border Services Agency refused to issue the permit. Heffel requested a review of the refusal by the CCPERB, but the Board upheld the refusal and set a delay period of six months in July 2017. Heffel then sought a judicial review of the Board's decision and related issues in Federal Court.

As the department responsible for the administration of the *legislation*, Canadian Heritage worked closely with the Department of Justice throughout the judicial review process. On 12 June 2018, the Federal Court ruled that Board used an unreasonable interpretation of 'national importance' in its determination and that its decision that the Caillebotte was of 'national importance' to Canada was also unreasonable. The Court quashed the Board's decision and referred the matter back to the Board for reconsideration.

The Attorney General appealed the Federal Court decision. In its decision of 16 April 2019, the Federal Court of Appeal overturned the Federal Court ruling and restored the Board's original decision. The interpretation of national importance remains unchanged.

**1.2 Which authority grants such export permission and who advises this authority?**

The CCPERB. See question A.1 above.

**1.3 What does the proceeding look like, who are the parties to the proceeding and what is the duration of the proceeding?**

The CCPERB holds a hearing to determine whether the refusal to issue an export permit is justified, but the CCPERB can only delay the export from two to six months unless there is a Canadian buyer.

**1.4 Are there any monetary thresholds (*de minimis*)?**

Yes, the various categories of works on the Control List have their own thresholds. In general, works by Canadians or made in Canada or which have a Canadian theme are subject to lower monetary thresholds and thus fewer exemptions. The categories are numerous and the amounts varied. Some representative samples are reproduced below. In all cases it is recommended that the regulations be checked.

For instance, for works of fine arts the thresholds are as follows:

- in the case of drawing or print, has a fair market value in Canada of more than CAD 5,000 or, if made outside Canada by non-Canadian and without a Canadian theme, CAD 15,000;
- in the case of a painting or sculpture, has a fair market value in Canada of more than CAD 15,000 or if made outside Canada by a non-Canadian and without a Canadian theme, CAD 30,000; and
- in the case of works of fine art in media other than those listed above or works of art in multi-media, has a fair market value in Canada of more than CAD 5,000 or if made outside Canada by a non-Canadian and without a Canadian theme CAD 20,000;
- articles of applied decorative art such as glassware, ceramics, textiles and jewellery made in Canada and over 100 years old with a fair market value of over CAD 1,000;
- furniture made in Canada and over 100 years old with a fair market value over CAD 4,000.

**1.5 Does the circumstance of the artist still being alive or the time of creation of the artwork matter?**

Yes, there is no export control for living artists.

**2. Is the state obliged to buy out the artwork for which an export permission was denied?**

No, but the government has a fund to help subsidise in part the purchase of cultural property of outstanding significance and national importance to prevent its export. However, if no purchaser is found, permission to export will be given.

**3. Are there any exceptions to these regulations (eg, temporary export for exhibitions, conservation or private reasons of the owner)?**

Yes, export is permitted for exhibitions and for other prescribed purposes for limited time, less than five years.

**C. Consequences in case of violation of export restrictions; restitution and repatriation of illegally exported cultural property**

**1. What are the legal consequences in case of breach of export restrictions?**

See question A.1 above. Offences against the CPEIA carry a maximum CAD 25,000 penalty and five years' imprisonment. Officers and directors of corporations may be liable regardless of whether the corporation for which they act has been prosecuted or convicted.

**2. Give a description of the regulations and practices in your country relating to the restitution and repatriation of illegally exported cultural property**

See also question C.4 below. There is no protection against restitution claims for the buyer who has violated the foreign export restrictions and has committed an offence against section 40 of the CPEIA. There is no protection against restitution claims for the buyer who has

violated the illegal import restrictions and has committed an offence against section 43.

**3. Under which conditions does your country assist foreign countries seeking repatriation of cultural property/artwork?**

See also question C.4 below. The federal government has not published any policy regarding assistance to states seeking restitution of cultural objects. Such assistance is provided under section 37 of the CPEIA as implementing the 1970 UNESCO Convention, section 7(b) (ii) requiring party states to:

‘take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.’

The procedure outlined in the CPEIA is that upon written request from a reciprocating state to the Minister of Heritage, the federal Attorney General may institute an action to recover property illegally exported from that reciprocating state after 1977, when the CPEIA came into force. If the court is satisfied that the property was illegally imported and that any compensation owed to the person in possession in Canada has been paid, the court can order the recovery of the property or make any other order to ensure the safe return of the property to the reciprocating state. The court can also order appropriate safe-keeping measures for the property and the Minister will issue an export permit to any person authorised by the reciprocating state to accompany the property in transit.

**4. Does a buyer enjoy protection against restitution claims for violation of foreign export restrictions?**

There is no protection against restitution claims for the buyer who has violated the foreign export restrictions and has committed an offence against section 40 of the CPEIA. There is no protection against restitution claims for the buyer who has violated the illegal import restrictions and has committed an offence against section 43.

The CPEIA provides for compensation only to persons in possession of property that is the subject of a restitution claim where that person (individual, institution or public authority) can demonstrate that it was a bona fide purchaser for value of the property and had no knowledge at the time the property was purchased that the property had been illegally exported from the reciprocating state. In those circumstances, the court can determine fair compensation to be paid to the individual by the reciprocating state.

The federal government has not published any policy regarding assistance to states seeking restitution of cultural objects. Such assistance is provided under section 37 of the CPEIA as implementing the 1970 UNESCO Convention, section 7(b) (ii) requiring party states to:

‘take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.’

The procedure outlined in the CPEIA is that upon written request from a reciprocating state to the Minister of Heritage (the 'Minister'), the federal Attorney General may institute an action to recover property illegally exported from that reciprocating state after 1977, when the CPEIA came into force. If the court is satisfied that the property was illegally imported and that any compensation owed to the person in possession in Canada has been paid, the court can order the recovery of the property or make any other order to ensure the safe return of the property to the reciprocating state. The court can also order appropriate safe-keeping measures for the property and the Minister will issue an export permit to any person authorised by the reciprocating state to accompany the property in transit.

**5. Which regulations exist for the protection of the purchaser against title claims?**

A person cannot pass on better title than that person has. If an item has been stolen, the person in possession does not have title and cannot pass along title when selling it to someone else. If the thief is prosecuted and convicted, the property in the goods goes back to the original owner. Similarly, if the person selling is not the owner and not selling with the owner's authority to do so, the purchaser will not acquire good title.

Under the Criminal Code, an offender may have to pay restitution to an innocent purchaser of property stolen by the offender and since returned to the original owner.

In cases where the title to the item is voidable (and has not been voided), because of fraud or something else short of theft, the purchaser may be able to protect title against any claims so long as the purchaser can demonstrate that they were an innocent or good faith purchaser who gave value for the item and who had no notice of the problem with title to the item.

In this case, good faith is essential to demonstrate lack of knowledge or suspicion. Under the provincial sale of goods legislation, something is done in good faith if it is done honestly.

Good faith will be considered in the particular context on a case-by-case basis.

In case of fraud the contract is voidable or void *ab initio*. The injured party can cancel the contract and recover the property (if possible). The injured party may also be entitled to damages.

When someone alleges fraud they must prove actual fraud and show that the alleged fraudster made a false representation knowing the representation was false or not caring whether it was true or not, and by the false representation intended to deceive the person alleging fraud to act on that misrepresentation.

Every province has some form of consumer protection legislation protecting purchasers from being taken advantage of by suppliers. A basic remedy for vendors having engaged in unfair practice is the rescission of the agreement or damages where rescission is impossible.

In Canada it is a criminal offence to make a false document with the intention that the document should be used as genuine or that other people should act believing the document to be genuine and thereby to defraud the public or an individual of money. In addition to civil remedies, which may lie against the seller, criminal penalties may also lie against the original fraudster and the seller, if it is the same person or if the seller was privy to the fraud.



**6. Does a lender from abroad enjoy protection against seizure of items on loan to local exhibitors if the good fails to have proper export licence?**

Anti-seizure guarantees exist but they are a provincial matter. Alberta, British Columbia, Manitoba, Ontario and Quebec have legislation dealing with foreign cultural property immunity.

Under these pieces of legislation, when a work of art or cultural significance comes to the province pursuant to an agreement between the foreign owner and the provincial government or another cultural or educational and (in Alberta) research institution in the province for temporary exhibition or display, there can be no proceeding that would deprive the government or appropriate institution of control of the work, so long as the provincial government determines the work to be of cultural significance for display in the province.

There is no such legislation in the other provinces.

**7. What regulations exist concerning the import of cultural property that may have been exported illegally from its country of origin or that is the subject of claims?**

See questions A.1 and C.1 to C.5 above.

## **D Due diligence obligations**

**1. What general due diligence is required from the seller/buyer of artwork if the artwork is intended to be exported?**

Purchasers must be cautious about stolen, forged and illegally imported objects and confident that someone other than the seller does not have title to, or security over, the object.

See the answer to question C.5 above regarding protection against titles and the relevance of a purchaser's good faith.

With regard to the seller, suggested due diligence includes:

- obtaining a proper bill or warranty of sale from the seller in order to have legal rights clearly identified; and
- identifying the seller and getting a sense of their reputation by obtaining references and by making bankruptcy and personal property security searches.

With regard to the object, suggested due diligence includes:

- comparing the sale price to the object's fair market value;
- investigating whether the object has been reported stolen or lost;
- consulting the relevant police agencies, the International Foundation for Art Research, the Art Loss Register, or other appropriate organisations;
- determining the object's provenance and investigating any gaps in provenance. If there are gaps or no provenance, investigating the object's source and history to ensure that it has not been stolen or illegally exported from another jurisdiction, including objects looted from occupied territories or territories at war;

- determining whether the object is cultural property, either in Canada or another jurisdiction – especially if the object’s export is being considered;
- consulting provincial personal property security registers to determine if there are any security charges on the object;
- obtaining an appraisal and an independent legal opinion; and
- securing warranties from the seller for the object’s provenance and clear title.

**2. Are there any anti-money laundering regulations applicable in the art trade and at art auctions?**

Canada’s anti-money laundering and terrorist financing laws apply only to financial institutions and other persons that engage in specified activities. Buying or selling works of art is not in itself one of the specified activities that would make a person subject to these laws.

However, persons who, in the course of their business activities, buy or sell precious metals and stones, including jewellery, in amounts of CAD 10,000 or more are subject to these laws. Therefore, a dealer or an auction house may have certain obligations when they deal in works of art that contain precious metals or stones or that are jewellery.

Essentially, a dealer in precious metals, stones and jewellery must send a report to the designated financial intelligence agency of any receipt of CAD 10,000 or more in cash in single transaction. Two or more transactions occurring within a 24-hour period are aggregated for this purpose. The dealer will also have to obtain certain identifying information from the customer.

A dealer must also send a report to the agency if it has reasonable grounds to suspect that a transaction or attempted transaction, regardless of its amount, is related to a money-laundering or terrorist-financing offence. Customer information, to the extent that it can be obtained without signalling that a report will be made, must also be obtained.

Dealers that engage in transactions of CAD 10,000 or more (whether in cash or otherwise) are also expected to maintain a compliance programme that supports their reporting obligations.