

## Statement on Bill C-32

Submitted to:

House of Commons Legislative Committee on Bill C-32

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From

The National Gallery of Canada

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## **Introduction**

The National Gallery of Canada has a collection of over 60,000 objects from across art history, which it lends extensively. It also presents at least 10 original exhibitions each year in Ottawa and another 25 exhibitions annually at museums across the country and internationally.

In association with this high volume of loans and exhibition activity the Gallery makes heavy use of reproductions of original works of art, both from its own collections and other public and private collections. Images are typically used in association with research and scholarly publications programs (on-line databases, articles, books, magazines and e-publications) and designed products such as banners, posters, leaflets, interpretive support, marketing campaigns, and sales merchandise. It also distributes reproductions of the Gallery's own collection to external users in association with projects organized by others, primarily non-profit and educational users.

In all of these aspects the Gallery is fully compliant with and respectful of artists' property right as protected by the Canadian Copyright Act and maintains thousands of active licenses, in a range of formats, from creators and copyright collectives as appropriate.

The Gallery is also the largest buyer of Canadian contemporary art in the world, although it collects in other disciplines as well. In the past two years alone the Gallery acquired over 400 original works by Canadian artists including sculpture, paintings, works on paper, film, video, photography, and site-specific installation works.

As both a user and distributor of reproductions and a collector of original works of art on an extraordinary scale in the Canadian visual arts field, the National Gallery wishes to lend its voice and field experience to discussions on the matter of Bill C-32 and proposed amendments to the Copyright Act.

In particular, the Gallery would like to comment on the exhibition right provision in Section 3 (1)(g) of the Act and to respond to the proposal presented to this parliamentary committee on February 8, 2011 by the Regroupement des artistes en arts visuels du Quebec (RAAV) and the Canadian Artists Representation/Le Front des artistes Canadiens (CARFAC) to remove the current effective date of June 7, 1988. The Gallery cautions strongly against the CARFAC/RAAV proposal. This section of the legislation is fraught with difficulty and any changes to this section require comprehensive discussion with the non-profit Museum community who would bear the costs of such change.

## **Copyright for Public Exhibition**

Informally known as “exhibition right”, copyright as applied to public exhibition is a particularly difficult area of the current legislation and many practical aspects related to its implementation remain unresolved today – some 22 years after its experimental introduction into the Copyright Act under Bill C-42 in 1988. Canada remains the only country in the world to have public exhibition right within its copyright act, requiring licenses to display original art in its public museums, even if these artworks have already been purchased outright.

Original expectations of developing a meaningful alternate revenue system based on public exhibition display for artists have not been and are unlikely to be achieved; the real use-value of art purchased for public collections is coming under increasingly serious scrutiny by executives for large collections with purchasing mandates; and importantly, the possibility of conflicting legal jurisdiction and overlapping between the Copyright Act and the Status of the Artist Act and the possibility of resulting liability has been the subject of lengthy study by the National Gallery of Canada.

In this context the Gallery respectfully requests an opportunity to appear before the parliamentary committee to provide an update on some of these points. Some key issues are outlined below.

- 1) Current application of public exhibition right:** The Copyright Act [Section 3 (1)(g)] requires art museums who present works produced after June 7, 1988, to obtain a license from artists (or their estates, legal representatives or a copyright collective legally designated by the artist) for the purpose of using these works in public exhibition. Non-binding recommended copyright and exhibition right fee schedules have been drafted by the artists’ collectives CARFAC and RAAV to provide some suggested guidance – although it is noted that CARFAC and RAAV are not copyright collectives. These CARFAC/RAAV schedules are voluntarily used by some museums as a basis for negotiating with artists, while the NGC uses its own customized fee schedule or establishes fee structures directly with copyright collectives with authority to speak for their memberships (CARCC, SODRAC and others). Some confusion remains for smaller, less frequent users, regarding what is compulsory, what is negotiable etc. Larger museums are now starting to follow the National Gallery’s lead and are interested in formulating their own exhibition fee schedules suited to their needs. The requirement for a license is non-specific in the Act and suggests that exhibition right applies to all works, whether or not they are already owned by the user.
  
- 2) Use-value of artworks purchased for public collections:** The requirement for an art museum to obtain licences for installation of artworks it has already purchased, often at very high purchase prices, is coming under increasing scrutiny now that the exhibition right has been in effect for two decades. Serious questions around the utility of purchasing art are emerging, when the use of these objects for display and reproduction requires subsequent negotiation and possible payment. The affordability of the fee structures recommended by CARFAC /RAAV for works in museum

collections is leading museums to question the manageability of the system. This may unintentionally affect the real revenue stream for artists, which is the sale of their works to major collections. The comparatively high costs for purchase, specialized storage, display, security, insurance, documentation, research, publication, packing and transit, all borne by the art museum, are unique to the fine arts field and must be kept in mind.

- 3) **CARFAC/RAAV proposal to remove the effective date of June 7, 1988.** Art museums have made acquisition and purchase decisions in relation to the 1988 effective date for copyright in public exhibition and cannot retroactively cope with the financial liability this change would represent. The capacity for the non-profit art community to support significant exhibition right fees is already very low and as a result most art museums have negotiated licenses to display the works they purchased at the time of acquisition.
- 4) **Legal complexities.** Fee structures for exhibition and copyright have been negotiated directly with artists/copyright holders to date and have included, in many cases, long-term, low-cost exhibition licenses and free educational uses. CARFAC/RAAV are now seeking to establish binding minimum fee schedules on behalf of all Canadian living artists, under the purview of the Status of the Artist Act (SAA).

CARFAC/RAAV are authorized to negotiate on behalf of Canadian living artists under SAA – the question of whether or not they are entitled to deal with copyright issues in this context is less clear. This would, if permitted to proceed, be precedent setting for Canadian art museums.

Negotiations under the Status of the Artist Act had begun in 2003 between the National Gallery and CARFAC/RAAV, who were authorized under the SAA to represent all living Canadian Artists on matters of professional services and advocacy. The Gallery and CARFAC/RAAV sought to develop standardized practices related to the engagement of artists' professional services in matters of on-site installation work, lectures, public appearances, commissioned work and other services as per the intention of the SAA.

Additionally, CARFAC/RAAV seek to use the SAA as an alternate theatre for binding copyright negotiations on minimum copyright fee schedules. Gallery concerns over the authority of CARFAC/RAAV to legally represent living Canadian artists in this area, have led to a breakdown in negotiations. The Gallery is seeking clarification for the benefit of all parties about potential liability to copyright holders and to resolve the potentially conflicting jurisdictions of the Copyright Act and the SAA.

**The Gallery feels that the negotiations of a first scale agreement with CARFAC/RAAV under SAA would be very beneficial for all artists involved, and nationwide. The delays in concluding this scale agreement are caused by one factor: differing opinions on whether copyrights should be part of the SAA regulatory process. For the Gallery such an interpretation of the SAA provisions**

**only serve to cause overlaps and further delays in allowing the SAA to attain its obvious primary objectives. We feel that the best way to solve this ambiguity efficiently is to clarify the Copyright Act by simply stating that copyrights, being property rights, are the exclusive jurisdiction of Bill C-32 and of the processes set forth in that law, to the specific exclusion of SAA.**

- 5) **Revenue for artists:** There are three current revenue streams for Canadian artists, generated by their work:
- a) **Sale of their work.** This is the largest and most significant revenue stream. The NGC supports this actively by purchasing art for the national collection, in many cases establishing credibility, demand and market prices. It should be noted that where museums were at one time the primary buyer of Canadian contemporary art this is no longer the case and a viable private commercial market now exists. Museums that cannot purchase nevertheless continue to play an important role in building public recognition, providing exposure and critical review. At the NGC purchase prices for Canadian art range from \$1,000 - \$750,000 per work and most purchases fall in the range of \$10,000 – \$50,000. In the last two years over 400 works were acquired from over 100 artists.
  - b) **Copyright revenues:** In the past five years, Gallery spending has varied from year to year and can range up to \$150,000 across all copyright license payments. Some years reproduction rights account for the majority of these expenses and other years exhibition rights do. Exhibition and reproduction fees are for works in the permanent collections as well as works borrowed from the artist or other collections. The amount spent can vary widely depending on the program and number of artists presented, but with each passing year as many as 100-200 new Canadian contemporary artworks are acquired for which a licence for public exhibition of the original artwork will subsequently be required.
    - i) ***Exhibition rights*** are based on a sliding scale with variable rates depending on many factors. The administration requirements for tracking and managing licences for a large, active collection, is extremely heavy and growing rapidly. Long term, low cost licenses are essential to keeping this operationally feasible.
    - ii) ***Reproduction rights:*** A long standing practice of paying creators for reproductions of their works in commercial applications exists and is well supported. Using images for other purposes, from interpretive to marketing and research are vital to our mandate to further knowledge, understanding and enjoyment of the Gallery's projects and these uses are routinely and directly negotiated with artists or copyright holders. Most art museums will seek free use of reproductions of works they already own, or reasonable rates that will not make the acquisition of the original artwork in question unusable for the above described purposes. The currently proposed "Fair dealing" exemption in Bill C-32 for educational applications is extremely important to the Gallery and very welcome in this context. Its impact on smaller museums and galleries will be equally important.
  - c) **Professional services** (lectures, installations, media appearances, tours, commissions, performances, etc). This represents a potential revenue stream with museum wide support and

one in which CARFAC/RAAV and the NGC could, together, provide valuable leadership. The National Gallery has always paid artists professional rates for their working time and welcomes the opportunity to formalize these practices into standard contracts within the context of its Status of the Artist Act negotiations. CARFAC/RAAV are legally authorized to negotiate these issues on behalf of Canadian artists. While only federal institutions are currently required to comply with the Status of the Artist Act, similar legislation is reportedly imminent at the Provincial government level in several provinces. The scale agreement between the NGC and CARFAC/RAAV, when achieved under SAA, will serve as effective precedent in advancing the professional status of Canadian artists and begin to define normal practices, both formal and informal, nationwide.

- 6) **5 -year Review Provision:** The proposed 5 year review provision of Bill C-32 is welcome and we would strongly suggest that *Exhibition Right* is reviewed at the earliest opportunity. Consultations should include major collecting institutions such as the National Gallery of Canada, the Vancouver Art Gallery, the Musee d'art contemporain de Montreal, the Art Gallery of Ontario, and the Montreal Museum of Fine Arts.

## **Conclusion**

The Gallery is deeply committed to advancing the economic status of artists in Canada and feels this can be best accomplished through continued purchasing of their work by museum collections – and the formalization of fair, standard terms of professional engagement under the Status of the Artist Act.

It should be noted that the Gallery has participated in some of the earlier consultations on the C-32 amendments in 2009 and 2010 held within the Heritage department. The general thrust of Bill C-32 is supported by the Gallery - in particular the broadening of the exceptions known as fair dealing in Section 29, to include Education.

The modernization of the Act to include numerous important changes that recognize the challenges of the internet and the need for enhanced technological controls are timely and essential. The Gallery is confident that committee members, government officials and colleagues specializing in these sub-sectors will bring the necessary wisdom to your consultations.

Our submission of this brief to the legislative committee is prompted by the recent CARFAC/RAAV proposals for changes to Bill C-32 as well as lack of clarity in legal jurisdiction over copyright matters that we are encountering in negotiations under the Status of the Artist Act.

We respectfully make the following recommendations:

- I. **The CARFAC/RAAV proposal to remove the effective date of June 7, 1988 for the exhibition right [Section 3 (1)(g)] should not be supported.**
- II. **Resolve a current, allegedly apparent and paralyzing overlap between the SAA and the Copyright Act by clarifying any possible ambiguity related to this.** This can be done by adding a simple provision to C-32 saying that all matters relating to Copyrights should be regulated by the provisions and related processes of the Copyright Act, to the exclusion of any SAA application.
- III. **Consider removing the Exhibition Right provision from the Copyright Act.** Clarification on matters of jurisdiction over the setting of exhibition right fees will be essential going forward. If this has not already been clarified as proposed in Recommendation (II) above, consideration might be given to removing Section 3(1)(g) entirely from the Copyright Act. Exhibition Right is not implemented in any other country, has very low revenue potential for artists given its dependence on the non-profit sector, and imposes a disproportionately heavy administrative burden on art museums. The right to borrow unsold artworks directly from artists' studios or galleries (one of the original motivations behind Exhibition Right many years ago) can be accommodated through negotiation of payment for these services under SAA.
- IV. **Leave the balance of artists copyright issues pertaining to procurement of licenses for reproductions, as currently outlined in Bill C-32.**

We would welcome the opportunity to provide further information or elaboration where helpful, in writing or in person. The Gallery thanks the legislative committee for Bill C-32 for the opportunity to present these perspectives.