

**Establishing the Artists' Resale Right in Canada
Bill C-11—Copyright**

Position of the Contemporary Art Galleries Association

November 2011

The Artists' Resale Right in Canada

Context

CARFAC (Canadian Artist Representation / Front des artistes canadiens) and the RAAV (Regroupement des artistes en arts visuels du Québec) have lobbied heavily to persuade the government to include the artists' resale right in the copyright legislation, Bill C-11 (formerly C-32). The artists' resale right is protected in various countries, including member countries of the European Union. These two groups acted without consulting two major stakeholders who would be directly affected by this measure: art dealers and auction houses.

The artists' groups believe that this measure could enable artists to earn additional income and thus improve their quality of life.

In fact, research clearly shows that this is not what happens.

Private galleries affected

The artists' resale right gives artists a percentage of revenue from the sale of their work on the secondary market. It is essentially a tax applied to the public resale of a work of art so that the artist can earn a royalty. The resale right applies only to sales made by professional dealers and auction houses.

As a result, businesses that sell a work on the secondary market (galleries and auction houses) would be required to pay a 5% tax on the sale amount, whether the sale resulted in a profit or a loss. This tax would be administered by a collection agency whose fees would be deducted from the amount collected.

CARFAC and the RAAV seem to severely underestimate the important role of private galleries in the resale market. While auction houses are a major participant and have a much higher profile, as the results of their sales are public, private galleries conduct most transactions—66% according to a 1999 study. It is therefore vital to gauge the real impacts of the artists' resale right in Canada on the still very fragile art market.

The artists' resale right around the world

The artists' resale right is currently recognized in 59 countries, including the nations of the European Union, which makes it a condition of entry. The United States (except California) and Asian countries have yet to establish this right. They are the two largest foreign markets for the Canadian art world, the first being the largest importer of Canadian art and the second being the fastest-growing market in recent years, expanding 530% between 2004 and 2010.

The European Union countries had until 2006 to enact legislation granting the artists' resale right to living artists. The United Kingdom was more reluctant and waited until the deadline before establishing the right, after publishing a number of studies on the issue. Since these are the most authoritative and recent studies, they are the main source of the information in this brief.

The European Union also set January 2010 as the date the artists' resale right law would start to apply to deceased artists. The Netherlands, Austria, Ireland and the UK all took advantage of this extended deadline; the latter even managed to extend it until January 2012.

The many effects of the artists' resale right

A number of factors should be considered before establishing the artists' resale right in Canada, and the recent studies from the UK reveal several potential problems. CARFAC and the RAAV are proposing that CARCC (Canadian Artists Representation Copyright Collective), an organization founded and managed by CARFAC, take on the role of collection agency. We should begin by asking why these associations are so quickly positioning themselves like this. In addition to the legitimate and laudable goal of helping provide additional income to the artists they represent, the various experiences in Europe and elsewhere clearly show the financial benefits that can flow from this role.

It is important to understand the role and functioning of such an agency, as well as the power conferred on it, which should not be underestimated.

Mandate and costs of the collection agency

CARFAC and the RAAV propose to implement the measure as it is currently applied in the European Union nations. Thus, a 5% tax on the public resale of a work of art would be administered by a collection agency. This agency would be *technically* responsible for carrying out the necessary research to identify, verify and locate the artist eligible for the royalty or the artist's estate. The administrative costs involved in the agency's work would be deducted from the amount initially collected, and the remaining sum would be transferred to the artist. When the collection agency cannot locate the artist, the funds would remain in its coffers.

The collection agencies play an extremely important role. Since, under the reciprocity principle, countries that establish the resale right must also apply the royalty to sales of art from other countries that have enacted this measure, an exhaustive list of artists with the resale right must be created and constantly updated. All these tasks are long and difficult. A number of errors can occur (as in the UK, for example). In all cases, art dealers and auction houses were ultimately held responsible, since it is up to them to check whether the collection agency is making mistakes. Even though it charges high administrative fees on each transaction, the collection agency is not held responsible for errors, even when it is at fault.

The collection agency's difficult research work is also very costly. Moreover, administrative costs are significant and vary between 10% and 40% of the amount collected, excluding the cost of setting up the agency. The amounts in question vary between 23.30€ and 26.50€, or between C\$36 and C\$42. If the cost of setting up the agency is included, the average administrative fee comes to 53.60€, or C\$84; the average royalty passed on to artists is about C\$150 per sale. In the UK, 112 artists earned less than 40€ (C\$64.75) while 316 (equal to 29% of all those who received royalties) took in less than 100€ (or C\$161.87).

In the UK, before the artists' resale right was established, it was estimated that dealers and auction houses would assume administrative costs of less than one pound (about C\$1.60) per transaction. Recently published statistics show that the actual costs are about 26.50€ per transaction (about C\$43) and approximately 23.30€ (C\$38) for auction houses. These costs include the time spent finding artists eligible for the royalty and identifying potential mistakes made by the collection agency.

Effects on Canada's secondary market and artists

The secondary market is a small share of the global art market. While the primary market allows new artists to emerge, works sold on the secondary market reflect a greater demand for a particular artist. Consequently, the artists' resale right especially benefits artists whose careers are already well established on the primary market and who already earn significant income from their work.

Public resale of a work on the secondary market is also the main way of enhancing an artist's standing. Once the market sees that the artist's work is considered valuable, the value of more recent work on the primary market increases accordingly. The primary and secondary markets are thus closely linked. One of the main fears in the UK was that, once the artists' resale right was established, more works would be resold privately, thus avoiding the royalty, blocking public recognition of the artist's improved standing and eventually hurting artists on the primary market. Private sales also prevent the government from collecting taxes on the transaction, and dealers would be reduced to playing the role of intermediary and collecting only consulting fees. While no statistics are available to prove this assertion, all the dealers surveyed in the various UK studies reported a change in practices.

In addition, for several years now, art is increasingly being resold outside of Europe at large international fairs, including those in New York and Basel, where the artists' resale right does not apply.

Sellers on the primary market usually take a commission of about 50%. Such a high rate is necessary because these dealers take risks: they deploy significant resources to promote the emergence of new artists. The commission for dealers in the secondary market, however, is between 10% and 20%, as they must remain competitive with auction houses that take between 15% and 20%. A 5% tax on top of these amounts is therefore particularly significant for dealers.

While it is relatively easy to apply the tax to the purchaser in auction houses, as the amount is simply added to the various other costs involved, it is much more complicated to implement in transactions involving private galleries. The evidence provided by UK dealers clearly shows that they often end up taking on these costs after negotiations with the client. If dealers acquire a work at an auction house, pay the 5% royalty at the time of purchase and end up assuming that cost again on resale, they will have paid the royalty twice, thus reducing their commission to nearly zero. This is a major deterrent to dealers, who, remember, account for nearly 66% of participants in the Canadian secondary market.

Effects on artists and the primary market

Establishing the artists' resale right would also have a direct impact on the primary market. Research on its impact on the UK art market reveals that it causes a significant drop in art sales on the primary market. Collectors are less inclined to support the careers of emerging artists because they are aware that they will have to pay a tax on resale, even if the work is sold at a loss. The studies clearly show a trend toward abandoning emerging artists for established artists whose standing is more secure.

The artists' resale right would also apply to the resale of art purchased by dealers who wish to encourage the work of one of their artists and expect to sell it eventually. At the time of sale, the dealer, like any buyer, must pay the royalty on the sale price, even if it never left the gallery and has lost some of its initial value.

The direct impact on artists

While the main objective of artists' associations is to improve the quality of life of the least wealthy among them, studies show that the actual results fall short of that objective.

For example, in France, where the artists' resale right was established in 1920, statistics show that 70% of the royalties collected are distributed to only seven artists (or their estates).

The situation in the UK is relatively similar: 20 living artists have received 40% of the total royalties collected, and in fact 10% of artists have received 80% of all royalties collected.

Of course, these statistics concern only the royalties paid on sales of living artists' work, since the resale right does not yet apply to the deceased. The imbalance should be even more obvious once the figures for royalties on deceased artists' works are included since their sale prices are generally much higher than those of works on the primary market and of living artists.

The CGAC's position

As a result, the Contemporary Art Galleries Association strongly opposes the inclusion of the artists' resale right in Bill C-11. It is clear that such a measure has negative effects on the art market, and we believe that the Canadian market is not strong enough to bear this burden.

The commercial galleries we represent are all small businesses with no more than five employees who work with passion in an extremely difficult market. The establishment of an artists' resale right would only further weaken a sector that is barely surviving as it is.

The dealers we represent play a special role in the lives and work of their artists. They have very close relationships with the artists they represent, and the very essence of their work is to help improve these artists' quality of life. Art sales eventually enable artists to earn a living from their work, and gallery owners are the main players in this market.

We are firmly convinced that the government's role is to help maintain and support a healthy and active market. It is important to promote the value and role of businesses that have a real impact in this sector and not to create obstacles in the fragile visual arts economy.

Summary of the situation in six countries that have established the artists' resale right (1998)

Table 1 Key features of royalty systems in six countries: 1998

Country	Belgium	Denmark	Finland	France	Germany	California
Size of the art market (Euro)	77 million	50.3 million	12.3 million	2,843 million	485 million	5,540.1 million (Total USA)
Proportion of EU sales	0.8%	0.5%	0.1%	31%	5%	Not applicable
Nature and duration of Droit de Suite	Inalienable, life + 70 years	Inalienable, life + 70 years	Inalienable, life + 70 years	Inalienable, life + 70 years	Inalienable, life + 70 years	Inalienable, life + 20 years
Heirs	All heirs	Family only	Family only	Family only	All heirs	All heirs
Works of art covered	Original paintings, sculpture drawings and engravings	Original works of fine art, photos, lithographs, prints, applied art	Works of fine art	Original works of graphic and plastic arts	Original works of fine art	Original paintings, sculpture, drawings, glass art
Sales in scope	Auction sales	Dealer and auction sales	Dealer and auction sales	Auction sales	Dealer and auction sales	All public and private sales by Californian residents
Base	Gross price – no deductions	Price including auction fee minus VAT	Price less VAT	Gross price – no deductions	Gross price – no deductions	Gross price
%	4%	5%	5%	3%	5%	5%
Minimum (Euro)	1,240	268	252	15	51	2,181

Country	Belgium	Denmark	Finland	France	Germany	California
Proportion of all art sales which incur Droit-de-Suite	9% of total sales (20% of auction sales)	16% of total art sales (5% of dealer sales, 30% of auction sales)	8%	3% of all sales (7% of auction sales)	9%	
Proportion of EU sales of Droit-de-Suite eligible items	4%	5%	1%	42%	25%	Not applicable
Value of Droit-de-Suite eligible items sold (Euro)	6.8 million	8.3 million	1.8 million	76.2 million	44.7 million	
Number of Droit-de-Suite eligible items sold	2,750	2,507	1,053	9,000	8,000	
Amount collected in 1998	0.3 million	0.4 million	0.4 million	2.3 million	2.2 million	Unavailable
Central collection	No	Yes	Yes	Yes	Yes	No
Rights to information	Partial	Partial	Full	Partial	Full	None
Administrative costs	15%	15%	25%	20%	10%	n/a

Contacts

The following people are available if you would like further information:

Émilie Grandmont Bérubé

Director and Owner, Galerie Trois Points

Treasurer, Board of Directors, Contemporary Art Galleries Association

Chair, Artists' Resale Right Committee, Contemporary Art Galleries Association

Office: 514-866-8008

Cell: 514-476-0231

Email: egb@galerietroispoints.qc.ca

Rhéal-Olivier Lanthier

Director and Owner, Galerie Art-Mûr

President, Board of Directors, Contemporary Art Galleries Association

Office: 514-933-0711

Cell: 514-799-5826

Email: rlanthier@artmur.com

Contemporary Art Galleries Association

372 Sainte-Catherine St. West, Suite 318

Montreal, Quebec H3B 1A2

514-798-5010

info@agac.qc.ca